
ADMINISTRATIVE LAW & REGULATION

PROSPECTS FOR REGULATORY REFORM IN 2011

By Susan E. Dudley*

Though regulations affect every aspect of our lives, as a policy tool they rarely reach the attention of voters (and consequently of elected officials) because, unlike their spending cousins, their effects are often not visible. Like the direct government spending that is supported by taxes, regulations are designed to achieve social goals, but the costs of regulations are hidden in higher prices paid for goods and services and in opportunities foregone. Americans concerned about high taxes or the growing deficit would probably be surprised to know that, according to the federal government's Small Business Administration Office of Advocacy, each household paid, on average, \$15,586 in 2008 to comply with federal regulations.¹

Over the course of our history, concerns about the cumulative impact of regulations have occasionally reached a level of public discourse that led to meaningful efforts at regulatory reform (and even outright deregulation). There is evidence that we may be witnessing such a period today. This article begins with a brief review of previous efforts at regulatory reform, and then evaluates the regulatory landscape today (section II). It then examines possible regulatory reform initiatives in the legislative branch (section III) and executive branch (section IV).

I. Previous Efforts at Regulatory Reform

Two significant exceptions to the general apathy toward regulation were (1) the mid-1970s to mid-1980s, a period of bipartisan interest in economic deregulation and regulatory analysis, and (2) the regulatory reform elements of the 1995 "Contract with America."

A. Regulatory Reform and Deregulation in the 1970s and 1980s

Inflation fears in the 1970s raised awareness of the costs and unintended consequences of regulation, leading to bipartisan support for deregulation in traditionally-regulated industries, such as airlines and trucking. Scholars at the time were in general agreement that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers. Policy entrepreneurs in the Ford, Carter, and Reagan Administrations, in Congress, and at think tanks were able to link this knowledge to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices. This led to successful bipartisan efforts to remove unnecessary regulation in several previously-regulated industries, with resulting improvements in innovation and consumer welfare.

* Susan E. Dudley is director of the George Washington University Regulatory Studies Center and research professor in the Trachtenberg School of Public Policy and Public Administration. She served as administrator of the Office of Information and Regulatory Affairs from 2007 to 2009.

While the legislative and executive branches were eliminating economic regulations in the late 1970s, a new form of "social" regulation aimed at addressing environmental, health, and safety concerns was emerging. (Figures 1 and 2 below, which track the budgetary costs of running the federal regulatory agencies and the pages in the *Federal Register*, where proposed and final regulations are published, illustrate the dramatic increase in social regulatory activity during this period.) Concerns over the burden of these new regulations and other reporting requirements led President Carter (and Presidents Nixon and Ford before him) to create procedures for analyzing the impact of new regulations and minimizing their burdens.² They also led to the passage of two significant pieces of legislation in 1980. The Regulatory Flexibility Act (RFA) required agencies to analyze the impact of their regulatory actions on small entities and consider effective alternatives that minimize small entity impacts. The Paperwork Reduction Act (PRA) established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) to review and approve all new reporting requirements with an eye toward minimizing burdens associated with the government's collection of information.

When President Ronald Reagan took office in 1981, he continued to pare back economic regulations, and also gave the newly created OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs. The growth in federal regulatory activity leveled off for a brief period in the 1980s, but as inflation fears subsided and the economy improved, concerns over excessive regulation faded and regulatory activity began to increase again. Subsequent presidents have continued and expanded OIRA's central regulatory oversight role.

B. Regulatory Reform in the 104th Congress

In 1994, a Republican majority took control of both houses of Congress, running on a platform that included regulatory reform. By this time, the social regulations that had begun in the 1970s were the focus of concern. In contrast to the consensus on economic regulations, academics and policy makers did not generally support outright deregulation, but rather reforms to make regulations less burdensome and more cost-beneficial. The 104th Congress's ambitious agenda included efforts to codify regulatory impact analysis procedures similar to those required through executive order by Presidents Carter, Reagan, Bush, and Clinton, to require compensation for regulatory actions that reduced the value of property rights, to cap the costs of new regulations through a regulatory budget, and to give Congress more control and accountability over the content of new regulations.

These efforts at comprehensive regulatory reform legislation in the 104th Congress were unsuccessful. Opponents of comprehensive reform at the time noted:

By overreaching on this issue, the Republicans were tagged as anti-environment (anti-clean air and water) and anti-safety (dirty meat) by the mainstream media and the electorate. Both the Administration and the Congressional Democrats benefited politically from their stand against extreme Republican reg reform initiatives.³

While comprehensive reform efforts failed to win a majority of votes, some targeted efforts became law, including:

- The Unfunded Mandates Reform Act (UMRA), which required executive branch agencies to estimate and try to minimize burdens on state, local, and tribal governments and private entities,
- The Small Business Regulatory Enforcement Fairness Act (SBREFA), which reinforced RFA requirements for small business impact analyses and provided for judicial review of agencies' determinations as to whether regulations would have "a significant economic impact on a substantial number of small entities,"
- The Congressional Review Act (CRA), contained in SBREFA, which required rule-issuing agencies to submit final regulations with supporting documentation to both houses of Congress, and established expedited procedures by which Congress could overturn regulations within a specified time

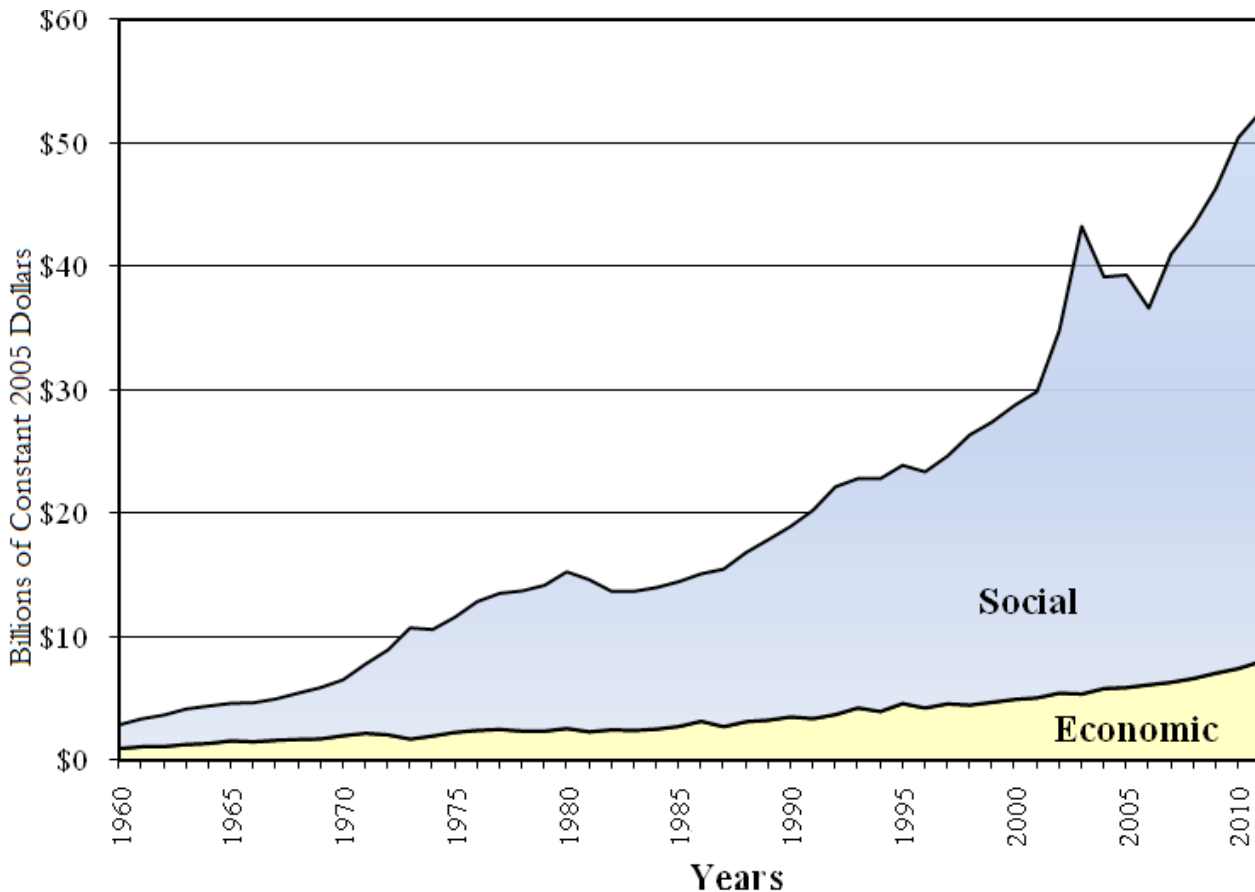
using a Joint Resolution of Disapproval,

- Amendments to the Paperwork Reduction Act, which reauthorized OIRA and required further reductions in paperwork burdens, and
- Title II, Section 645, of the 1996 Omnibus Consolidated Appropriations Act, which directed OMB to submit a report to Congress estimating the costs and benefits of major regulations. The 1999 Regulatory Right to Know Act made permanent this requirement for OMB to report to Congress annually.⁴

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12866⁵ (issued by President Clinton in 1993 and still in effect today) but rarely do more. While pursuant to SBREFA, courts have overturned regulations that fail to consider impacts on small business,⁶ agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."^{7,8}

Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace. Though resolutions of disapproval require only a simple majority in Congress

Figure 1: Budgetary Costs of Federal Regulation, adjusted for inflation



Source: Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center. Derived from the *Budget of the United States Government* and related documents, various fiscal years.

(and several have passed one house), 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.

OMB does report annually to Congress on the costs and benefits of major regulations, but a 2001 CRS report observed that OMB’s reports, “have been incomplete, and its benefits estimates have been questioned.”⁹ A 1999 GAO report evaluating OMB’s reports observed,

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.¹⁰

As Figures 1 and 2 illustrate, despite these efforts at reform, the growth in new regulations continues.

II. The Regulatory Landscape in 2011

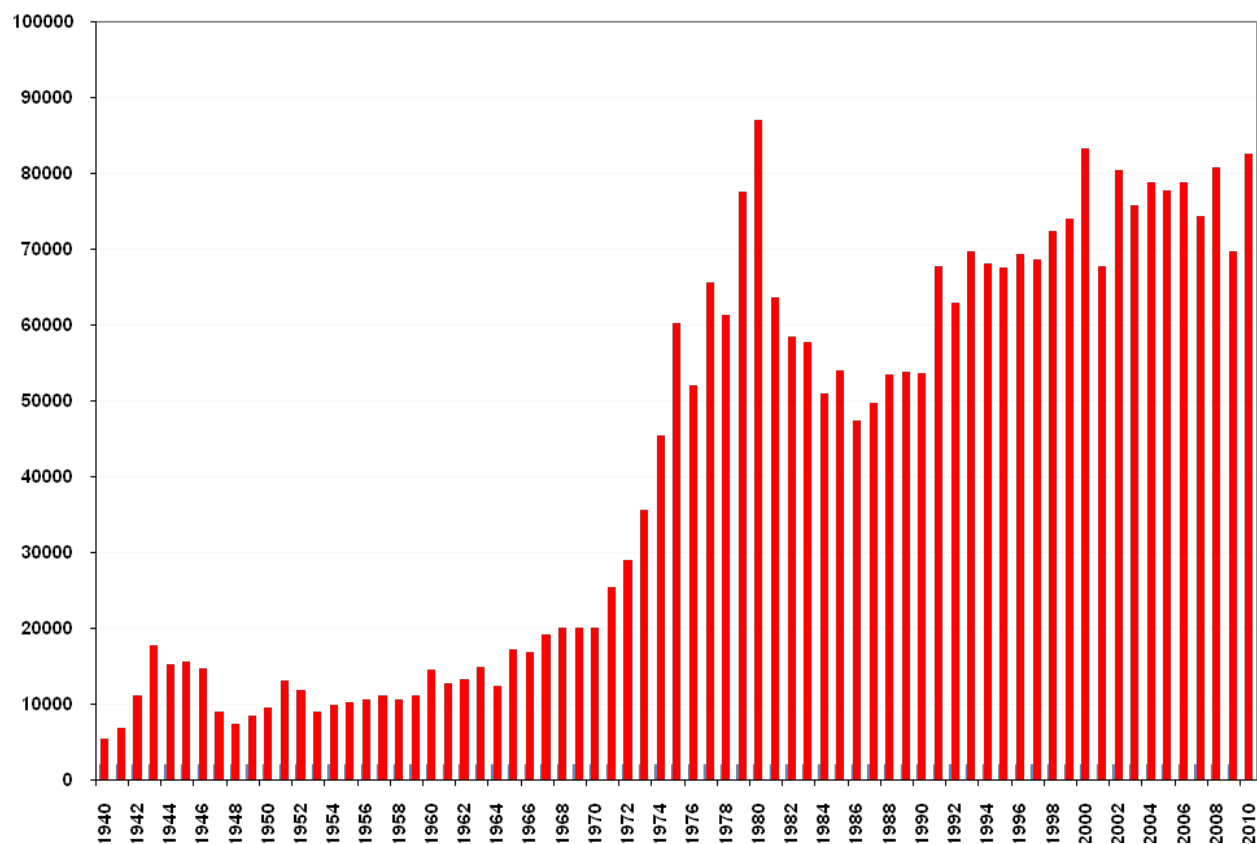
Like the periods that preceded past regulatory reform efforts, concerns over the burdens of regulations are once again on the minds of American citizens.¹¹ By any measure, regulations have been increasing over time. The pace of new

regulatory activity spiked after the terrorist attacks of September 2001, and has been increasing again recently.

Over the first two years of President Obama’s term, executive branch agencies published 112 economically significant regulations (defined as having impacts of \$100 million or more per year). That averages out to fifty-six major regulations per year, which is almost twenty-five percent higher than President Clinton and President Bush, who each published an average of forty-five major regulations per year over their terms. When one includes the independent agencies (over which presidents exercise less direct oversight) the contrast is greater, with an average of eighty-four major regulations issued over the last two years, a thirty-five percent increase over the average of sixty-two per year in the Bush Administration and a fifty percent increase over the fifty-six per year average in the Clinton Administration.

President Obama’s December 2010 *Unified Agenda of Regulatory and Deregulatory Activities* does not presage a slow-down in activity. The Agenda lists 4,225 regulatory actions under development by federal regulatory agencies. That is 182 more entries than the previous year, representing a five percent increase in activity. The regulatory road ahead looks even more ambitious when one focuses on the largest regulations. The Agenda reveals a twenty percent increase in economically significant regulations, or forty more regulations with impacts of over \$100 million under development now than at this time last year. Of the 224 economically significant rules listed in the 2010 Agenda, forty-eight appear there for the first time. There

Figure 2: Federal Register Pages: 1940-2010



are 100 more economically significant regulations listed in last December's Agenda than there were in 1995 (the first year for which electronic data are available).¹²

Some of this activity is mandated by new legislative mandates, most notably the Wall Street Reform and Consumer Protection Act (Dodd-Frank), and the Patient Protection and Affordable Care Act (PPACA). Others, most notably EPA's regulation of greenhouse gases under the Clean Air Act, are based on new judicial interpretations of statutes enacted twenty or more years ago, and do not necessarily reflect the priorities of any recent (or past) Congress.

III. Legislative Efforts

Regulatory reform has once again risen to the attention of voters and elected officials, and the Republican Pledge to America promises to "Rein in the Red Tape Factory in Washington, DC." This section examines three categories of reforms that the 112th Congress might consider: (A) changes to regulatory procedures, (B) changes to the decision criteria for selecting regulatory approaches, (C) focusing on ineffective legislation and regulations.

A. Procedural Reforms

Possible reforms to the procedures by which regulations are promulgated include (1) requiring a congressional vote before major new regulations can become effective (the REINS Act), (2) establishing a "regulatory pay-go" procedure by which agencies would be required to remove an outdated regulation for every new regulation issued, (3) making procedural amendments to the Administrative Procedure Act (APA), (4) altering the rules for judicial review of agency actions, and (5) establishing a congressional office to review and evaluate agency regulations.

1. REINS

Representative Geoff Davis and eighty-six cosponsors introduced the REINS (Regulations from the Executive in Need of Scrutiny) Act as H.R. 10 in the 112th Congress on January 20, 2011 to "increase accountability for and transparency in the federal regulatory process."¹³

The REINS Act is patterned after the 1996 CRA, providing expedited procedures for evaluating and voting on major regulations, but 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."

Supporters hail the Act as a way to "force Members to take responsibility for the laws they pass, and to force Administrations to be accountable for the laws they create through regulation."¹⁴ Opponents argue that current procedures, where Congress delegates regulatory decision-making to agencies are "consistent with the Framers' intention,"¹⁵ and constrain agencies through (1) the statutes that delegated them power in the first place, (2) the APA public comment process, (3) executive branch review and oversight, (4) the threat of a resolution of disapproval under the CRA, and (5) judicial review.¹⁶ They also argue that expert agencies are in a better position to make complex regulatory decisions than political officials.¹⁷

Yet, many federal regulations being promulgated today depend on legislation passed decades ago by different congresses focused on different concerns. The REINS Act would ensure that major regulations based on authority delegated years ago could only be adopted with consent from the current Congress.¹⁸ Further, the Act may strengthen the President's ability to exercise his constitutional responsibility, by giving him greater control over independent agencies.¹⁹

While scholars defend the constitutionality of the Act,²⁰ no one denies that it will change legislators' behavior. How would legislators respond to the responsibility of voting on the fifty to one hundred major rules promulgated each year? Would inertia lead to inaction, and the effective disapproval of popular regulations? Or would joint resolutions of approval become routine, with members voting for new regulations with little consideration? Defenders of the Act believe that the expedited procedures will encourage bipartisan debate and minimize opportunities for a minority of members to derail resolutions supported by the majority. If resolutions of approval become routine, at least members would no longer be able to blame agencies and avoid responsibility for regulatory outcomes.²¹

REINS might also alter the incentives of agency staff and interested parties. Would agencies be more likely to chop a regulation into smaller actions to avoid the "major" designation, or might they bundle unpopular regulations with popular ones to compel an affirmative resolution? Would agency staff have incentives to negotiate deals with individual legislators and lobbyists, inserting special provisions in new regulations in exchange for an affirmative vote on a resolution of approval? How might that affect their willingness to alter proposed regulations in response to public comment, or the President's ability (through OIRA) to hold agencies accountable for selecting alternatives with broad net benefits? This fear is magnified by concerns that enactment of a resolution of approval would constitute a legislative action that would protect faults in the regulation from judicial review.

Cognizant of these potential perverse incentives, H.R. 10's drafters have included provisions that require agencies to justify their classifications of major and non-major, and to provide information on other related regulatory activities designed to implement the same statutory or regulatory objective. It also explicitly preserves challenges to federal rules in courts of law by clarifying that a joint resolution of approval "does not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule, and shall not form part of the record before the court in any judicial proceeding concerning a rule."²²

Supporters of the REINS Act recognize that it will make regulatory decisions more like legislative decisions, with the tradeoffs in transparency that involves, but they argue that, in the long run, increasing congressional accountability for regulations will better serve the American public.

2. Examination and Removal of Unnecessary Existing Regulations—A Regulatory Pay-Go

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. Section 610 of the RFA provides for periodic review of regulations for their impact on small businesses, but researchers have found that most agencies “comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the *Federal Register*.”²³

Senator Mark Warner is drafting legislation focused on altering regulatory agencies’ incentives to issue new regulations and examine the effectiveness of existing regulations. His legislation “would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add.”²⁴ Under his “regulatory pay-go system,” regulatory agencies, with oversight from OIRA and either the Congressional Budget Office (CBO) or the GAO, would catalogue existing regulations and develop estimates of their economic impacts. Then, before issuing a new regulation, agencies would be required to eliminate one outdated or duplicative regulation of the same approximate economic impact.

A regulatory pay-go shares similarities with a regulatory budget, a concept that attracted bipartisan interest in the 1970s and 1980s, but has not been championed in recent years. In 1980, President Carter’s *Economic Report of the President* discussed proposals “to develop a ‘regulatory budget,’ similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits.” The Report noted analytical problems with developing a regulatory budget, but concluded that “tools like the regulatory budget may have to be developed” if governments are to “recognize that regulation to meet social goals competes for scarce resources with other national objectives,” and set priorities to achieve the “greatest social benefits.”²⁵

The analytical problems identified with the regulatory budget are non-trivial, and would also apply to a regulatory pay-go. Since the late 1990s, OMB has been compiling agency estimates of the costs (and benefits) of major regulations with mixed results, as noted above. Estimating the opportunity costs of regulations is not as straightforward as estimating fiscal budget outlays, where past outlays are known and future outlays can generally be predicted with some accuracy. Some regulatory impacts will be harder to estimate than others. What are the costs associated with homeland security measures that reduce airline travelers’ privacy? What are the costs of regulations that prevent a promising, but yet unknown, product from coming on the market? Even regulations whose costs appear to be straightforward, such as corporate average fuel economy standards that restrict the fleet of vehicles produced, depend on assumptions about consumer preferences and behaviors that may not reflect American diversity. EPA and DOT recently estimated that these rules will have large negative costs (even if benefits were zero), because, according to their calculations, the fuel savings consumers will derive from driving more fuel-efficient vehicles will outweigh the increased purchase price. This analysis begs the question of why consumers are not demanding (and manufacturers providing) the fuel-efficient vehicles absent regulation, and ignores other attributes consumers value. It also raises a question of how negative costs would be treated under a regulatory pay-go system. Would agencies that estimate negative

costs associated with their rules be able to issue even more?

Despite these analytical difficulties, a regulatory pay-go has the potential to impose needed discipline on regulatory agencies, and generate a constructive debate on the real impacts of regulations. By focusing on the costs of regulations and allowing agencies to set priorities and make tradeoffs among regulatory programs, it might remove some of the contentiousness surrounding benefit-cost analysis. How it would affect agencies’ incentives for estimating costs is uncertain. In developing a baseline estimate of the costs of existing regulations, they may have incentives to overstate costs, particularly for regulations they may want to trade in exchange for new initiatives. Providing an entity outside of the executive branch (CBO or GAO) the resources and mandate to evaluate and critique agency estimates of regulatory costs could be critical to a regulatory pay-go’s success. While it will never be possible to estimate the real social costs of regulations with any precision, a regulatory pay-go should provide incentives for agencies, affected parties, academics, congressional entities, and non-governmental organizations to improve upon the rigor of regulatory impact estimates.

3. Procedural Changes to the APA

Congress passed the APA in 1946 as a result of concerns about the growing “fourth branch” of government. It reflected a compromise between a respect for the separation of powers implicit in the Constitution and the perceived need for bureaucratic expertise in developing administrative laws. Arguably one of the most important pieces of legislation ever enacted, the APA has remained largely unchanged for sixty-five years, despite significant transformation in the organization and scope of government regulatory agencies.

The House Judiciary Committee’s Subcommittee on Courts, Commercial and Administrative Law held hearings on the APA in February, at which all witnesses agreed on the need for amendments to align the procedures by which regulations are developed with the technology and policy issues of concern in the 21st century.²⁶

The APA describes two types of rulemaking—formal and informal. Most executive branch regulation is conducted through informal, or notice-and-comment, rulemaking. As long as an agency acts within the rulemaking authority delegated to it by Congress, and follows the procedures in the APA, courts have ruled that it is entitled to write and enforce regulations subject to an “arbitrary and capricious” standard of review.

Formal rulemaking is generally used by agencies responsible for economic regulation of industries, and is only required when a statute other than the APA specifically states that rulemaking is to be done “on the record.”²⁷ Formal rulemaking involves trial-like hearings, where rules of evidence apply, and parties may both subpoena and cross-examine witnesses. Decisions must address each of the findings presented and be supported by “substantial evidence.” Sections of the Occupational Safety and Health Act (OSHA) and Toxic Substances Control Act (TSCA) require a hybrid approach, in which the agencies propose rules and standards through notice and comment, but at the request of interested parties must hold a hearing.

To improve the empirical accuracy of factual determinations and the rigor of agencies’ justifications for the most significant

regulations they issue, legislators might consider amending the APA to (1) expand the use of formal rulemaking procedures, and/or (2) apply the substantial evidence test to informal rulemakings. Legal scholars argue that formal rulemaking procedures would be especially useful to ensure scientific integrity, and to address concerns that agencies sometimes do not take public comment seriously, but instead provide inadequate, perfunctory explanations for selecting one alternative over another, or for dismissing public concerns.²⁸ Critics are concerned that formal rulemaking procedures will slow down the issuance of new regulation, and impose unnecessary costs on regulating agencies,²⁹ but supporters offer examples of such rulemakings being completed expeditiously, and of notice-and-comment rulemakings that have taken more than a decade.³⁰

The substantial evidence standard 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.”³¹ It is arguably a more exacting standard than “arbitrary and capricious,” which grants considerable deference to agency expertise. Substituting a substantial evidence test could motivate agencies to develop and provide better scientific and technical data and analysis in support of regulations.³² Some argue that the substantial evidence test used as part of an informal (or even hybrid) regulatory proceeding would differ very little from an arbitrary and capricious test, however.^{33,34}

4. Provide for Judicial Review of Influential Information

The Information Quality Act (IQA) attempts to ensure the “quality, objectivity, utility, and integrity” of information disseminated to the public, and provides procedures by which affected parties can petition agencies to correct information that does not meet those standards. The IQA does not explicitly provide for judicial review of agency denials of requests for correction, and to date, courts have chosen not to try cases that have been brought. Congress may well consider amending the IQA to make agency decisions reviewable.³⁵

5. Create a Congressional Regulatory Oversight Body

The Truth in Regulating Act of 2000³⁶ required the GAO independently to evaluate agencies’ regulatory impact analyses supporting final regulations, but this requirement was contingent upon the GAO receiving yearly appropriations of \$5,200,000. These funds have never been appropriated. If some of the other procedural changes are enacted, particularly the REINS Act or the Regulatory Pay-Go, Congress may want to have its own office of regulatory review to provide an independent evaluation of regulations’ impacts.³⁷

B. Decision Criteria

Potential options for improving upon the decisional criteria by which regulatory alternatives are evaluated include (1) codifying the decision requirements currently embodied in executive order and extending them to independent agencies, and (2) amending the RFA to require agencies to consider indirect effects of their regulations.

1. Codify Requirements for Regulatory Impact Analysis

All recent Presidents, both Democratic and Republican, have adopted sound decision criteria through executive order to guide regulatory decisions, and at least since 1980, there have been attempts to codify these executive requirements in statute.³⁸ The main advantages of creating a statutory obligation for meeting these regulatory impact analysis standards are to (1) apply them to independent agencies (which Administrations have been loath to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President) and (2) make compliance with them judicially reviewable.

The 112th Congress could consider legislation that simply adopts Executive Order 12,866 (first issued by President Clinton in 1993) or even President Obama’s recent Executive Order 13,563, which incorporates E.O. 12,866 by reference (see below).³⁹ Legislation might emphasize certain features that members have found lacking in regulatory analyses (such as impacts on employment, risk assessment, analysis of non-regulatory alternatives, etc.). It might also combine decisional criteria with procedural ones—for example, requiring that if certain decisional criteria are met, a rulemaking would follow a different procedural path (such as an advance notice of proposed rulemaking, or a formal hearing).

2. Indirect Impacts Under the RFA

The small business community has been frustrated that courts have interpreted the RFA’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 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.”⁴⁰ The small business community may encourage Congress to amend the RFA to explicitly include indirect impacts.

C. Oversight and Budget

Congressman Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, has promised an aggressive oversight agenda in the 112th Congress. He sent a letter to a wide range of interests (from the U.S. Chamber of Commerce to Resources for the Future) asking for their “assistance in identifying existing and proposed regulations that have negatively impacted job growth.”⁴¹

Expect appropriations committees to work to limit agencies’ abilities to implement new regulation through appropriations.⁴² For example, Congressman Steve King promised to attach “language to block funding for [the health care law’s] implementation and enforcement onto every appropriations bill or continuing resolution from this point forward.”⁴³

Congressman Barney Frank warns that “the Republicans will defund the [financial regulatory] agencies effectively not

because [of the deficit]—this is relatively small compared to what is spent at the Pentagon and elsewhere—but because they are philosophically opposed to this kind of regulation.”⁴⁴

* * *

In summary, Congress has several tools available to guide the decision criteria agencies use to develop regulations, to reform the procedures by which regulations are issued, and to take responsibility for the content of individual regulations promulgated pursuant to statutes. Members appear to be taking regulatory reform seriously and evaluating these tools.

IV. Executive Efforts

On January 18, 2011, President Obama penned an op-ed in the *Wall Street Journal*⁴⁵ outlining his approach to regulation and issued a new executive order on regulation. This may reveal a new appreciation for the effect regulations can have on economic well-being, and the importance of a balanced regulatory approach to putting America back on a path to prosperity.

Executive Order 13,563⁴⁶ on “Improving Regulation and Regulatory Review” reaffirms sound principles and practices that have been in effect since 1981.⁴⁷ It reinforces President Clinton’s Executive Order 12,866 and stresses 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 requires 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.

Some aspects of the new Order bear brief mention.

- Section 4 of the new Order reflects OIRA Administrator Cass Sunstein’s preference for flexible approaches that “nudge,” rather than command, desirable behavior, directing agencies to “identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.” This could lead to positive applications of behavioral science insights, and avoid some of the unintended consequences of command-and-control regulation. By retaining E.O. 12,866 and its requirement that agencies justify the need to regulate by a compelling public need including “material failures of private markets,”⁴⁸ the new Order has not endorsed a potentially dangerous application of behavioral science, namely to use consumer “irrationality” as sufficient reason to intervene in markets, a policy that could have encouraged regulators to substitute their judgments about private decisions for consumers’.⁴⁹
- Section (1)(b) of the new Order, which repeats key principles from the 1993 Order, appears to go further by substituting “must” for “should” and “shall.” For example, “each agency *must*, . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify).” (emphasis added)
- In directing agencies “to use the best available techniques to quantify anticipated present and future benefits and

costs as accurately as possible,” section 1(c) says they “may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” “Human dignity” is a phrase not found in E.O. 12866, and likely means different things to different people. For example, many might find human dignity in the freedom to make one’s own choices, rather than having those choices predetermined by government regulation.

- Section 5 refers to the President’s March 2009 Memorandum on “Scientific Integrity” and calls on agencies to “ensure the objectivity of any scientific and technological information and processes used to support the agency’s regulatory actions.”

The Order will likely strengthen OIRA, and its staff of about 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 the benefits of regulations justify their costs, it is institutionally more interested in impacts on society broadly and less susceptible to special interest pressures than line agencies, and provides what President Obama has called “a dispassionate and analytical ‘second opinion’ on agency actions.”⁵⁰

There are indications that OIRA is already playing a greater role than it appeared to earlier in the Administration. During the first year of the Obama Administration, the average length of OIRA review, which may be a reasonable proxy for the rigor of that review, was significantly less than the averages in previous Administrations. Economically significant regulations were reviewed in an average of thirty-three days, compared to forty-three to forty-five days in the Bush and Clinton Administrations. Since November 2010, however, OIRA appears to be taking longer for interagency reviews—an average of fifty-three days for economically significant regulations, perhaps indicating that its “dispassionate and analytical ‘second opinion’” is more appreciated by the White House.⁵¹

One disappointment in the new Executive Order is that it does not bring the so-called independent agencies under the OIRA review rubric, nor does it subject them to the Order’s analytical and transparency requirements. Thus, most financial regulation (including those issued by the new Consumer Financial Protection Agency) will continue to be exempt from OIRA’s scrutiny, and not constrained by the sound principles and procedures outlined by the President.

V. Conclusion

For over a century, legislators have delegated authority to executive branch agencies, and the volume and reach of regulation has grown. Like government spending programs, funded by taxes and deficits, regulations are designed to achieve social goals. However, there is no regulatory equivalent to the fiscal budget—no transparent accounting of spending priorities proposed by the President and appropriated by Congress. Americans are often unaware of regulations’ impacts because their costs are hidden in higher prices paid for goods and services and in opportunities foregone. From time to time, concerns

about the cumulative impact of regulations have reached a level that led to meaningful regulatory reform. Bipartisan efforts in Congress and the executive branch brought about the economic deregulation of the 1970s and 1980s. That same period witnessed a growth in social regulations, however, and Presidents of both parties have tried to maintain control by establishing procedures for analyzing and reviewing regulations. Legislators have also attempted to impose discipline on the regulatory process through procedural reforms and oversight, but these efforts appear not to have slowed the modern regulatory state.

Like the periods that preceded past regulatory reform efforts, regulatory concerns have once again gained the attention of American voters and elected officials. Legislators are examining options for changing the procedures by which regulations are promulgated and the decision criteria for selecting regulatory alternatives. They plan to use oversight and budget authority to focus on regulations. The President has also signaled a renewed interest in scrutinizing new regulations and removing “outdated regulations that stifle job creation and make our economy less competitive.” With interest in reducing regulatory barriers to growth and investment in both the legislative and executive branches, perhaps 2011 will be the year where we see constructive regulatory reform.

Endnotes

- 1 NICOLE CRAIN & MARK CRAIN, U.S. SMALL BUS. ADMIN., *THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS* (2010) (“The annual cost of federal regulations in the United States increased to more than \$1.75 trillion in 2008.”), available at <http://archive.sba.gov/advo/research/rs371.pdf>.
- 2 President Carter’s E.O. 12,044 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. 12,044, 43 Fed. Reg. 12,661 (Mar. 24, 1978).
- 3 White House Memorandum to Erskine Bowles from John Hilley and Sally Katzen, “Regulatory Reform” (Feb. 12, 1997), available at http://www.clintonlibrary.gov/_previous/KAGAN%20DPC/DPC%2051-57/3324_DOMESTIC%20POLICY%20COUNCIL%20BOXES%2051-57.pdf.
- 4 The 104th Congress also passed amendments to the Safe Drinking Water Act, directing the Environmental Protection Agency to set standards based on a balancing of costs and benefits. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996).
- 5 Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), available at <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>.
- 6 *Nw. Mining Ass’n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998); *S. Fishing Ass’n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998).
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