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REGULATORY STUDIES CENTER

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Hearing on

**The APA at 65 – Is Reform Needed to
Create Jobs, Promote Economic Growth and Reduce Costs?**

Before the Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary

U.S. House of Representatives

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Chairman Coble, Ranking Member Cohen, and members of the subcommittee, thank you for inviting me to testify today on “The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?” I am Director of the George Washington University Regulatory Studies Center, Research Professor in the Trachtenberg School of Public Policy and Public Administration, and a public member of the recently reconstituted Administrative Conference of the United States (ACUS), where I serve on the committee on regulation.¹ From April 2007 to January 2009, I oversaw the 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), academia, the non-profit world, and consulting.

As a long-time student of regulation, I am delighted that this subcommittee is interested in evaluating and improving the procedures by which the U.S. government develops regulatory policy. 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.

Over the course of our history, concerns about the effect of regulations have occasionally reached a level of public discourse that led to meaningful efforts at regulatory reform (and even outright deregulation), and the first part of my testimony briefly reviews three such periods. It then evaluates the regulatory landscape today, and goes on to examine possible regulatory reform initiatives in the legislative branch and executive branch.

I. Previous Efforts at Regulatory Reform

This first part of my testimony briefly reviews three historic periods of regulatory reform, and the conditions that led to them: (A) the Administrative Procedure Act (APA) of 1946, (B) the economic deregulation and increased role for regulatory analysis that began in the mid-1970s,

¹ The George Washington University Regulatory Studies Center raises awareness of regulations’ effects with the goal of improving 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 or ACUS.

and (C) the statutory regulatory reform efforts of the mid-1990s. It concludes with a review of the pressures that have led to more regulation, despite these reforms (D).

A. The Administrative Procedure Act of 1946

Until the early part of the 20th century, courts interpreted the separation of powers implicit in Articles 1 through 3 of the U.S. Constitution as prohibiting the delegation of legislative powers to the executive. The Supreme Court expressed in 1892, “that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”² Yet, early cases did uphold delegations of legislative authority as long as the executive branch was merely “filling up the details.”³ And, in 1928, the Supreme Court moved away from a strict interpretation of the non-delegation doctrine when it found that a congressional delegation of power was constitutional because the statute included an “intelligible principle” to guide executive action.⁴ Seven years later, the Supreme Court returned to the question of delegation of legislative power when it ruled that the National Industrial Recovery Act (NIRA) was unconstitutional because it provided the President (and private industry associations) “virtually unfettered” decision making power.⁵

This decision led to extensive debate, culminating in the passage of the APA in 1946. According to one researcher, the APA reflected a “fierce compromise”:

The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation’s decision to permit extensive government, but to avoid dictatorship and central planning.⁶

The APA has guided executive branch rulemaking for 65 years, and is one of the most important pieces of legislation ever enacted. It established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. As long as an agency acts within the rulemaking authority delegated to it by Congress, and follows the procedures in the APA, recent courts have found few constitutional limits on executive branch agencies’ writing and enforcing regulations.

² Field v. Clark, 143 U.S. 649 (1892)

³ Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825)

⁴ J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)

⁵ Schechter Poultry Corp. v. United States, 39 295 U.S. 495 (1935)

⁶ George Shepard. *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*. 90 Nw. U. L. Rev. 1557 (1996)

B. Regulatory reform and deregulation in the 1970s and 1980s

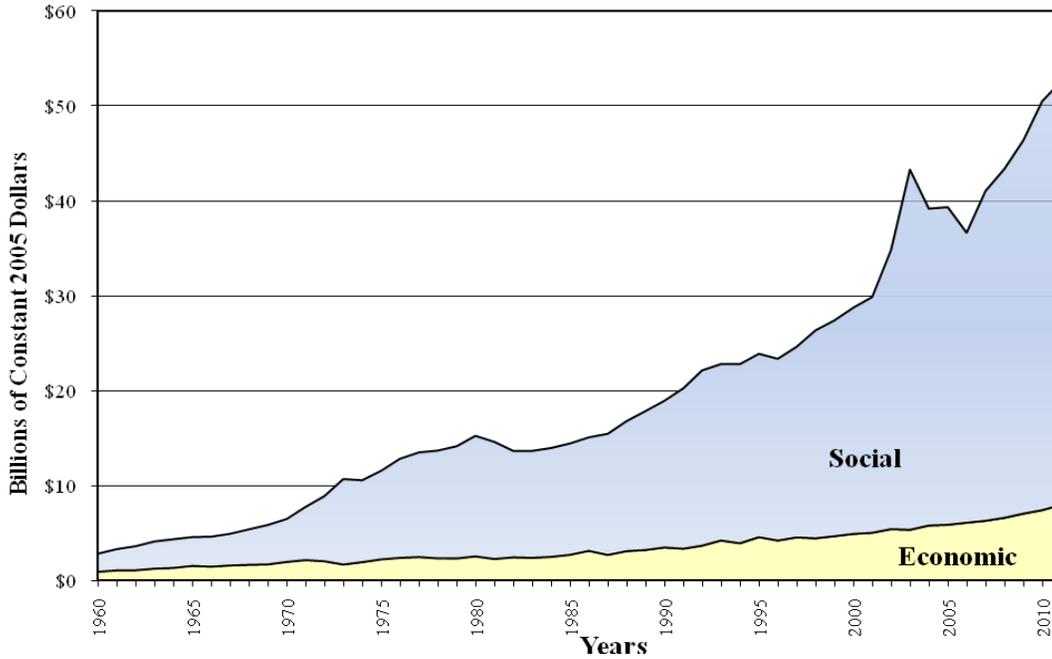
Inflation fears in the 1970s raised awareness of the costs and unintended consequences of regulation, leading to bipartisan support for deregulation in traditionally-regulated industries, such as airlines and trucking. Scholars at the time were in general agreement that regulation of private sector prices, 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.

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 newly proposed and issued 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.⁷ 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 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. Each subsequent president has continued and expanded OIRA’s central regulatory oversight role.

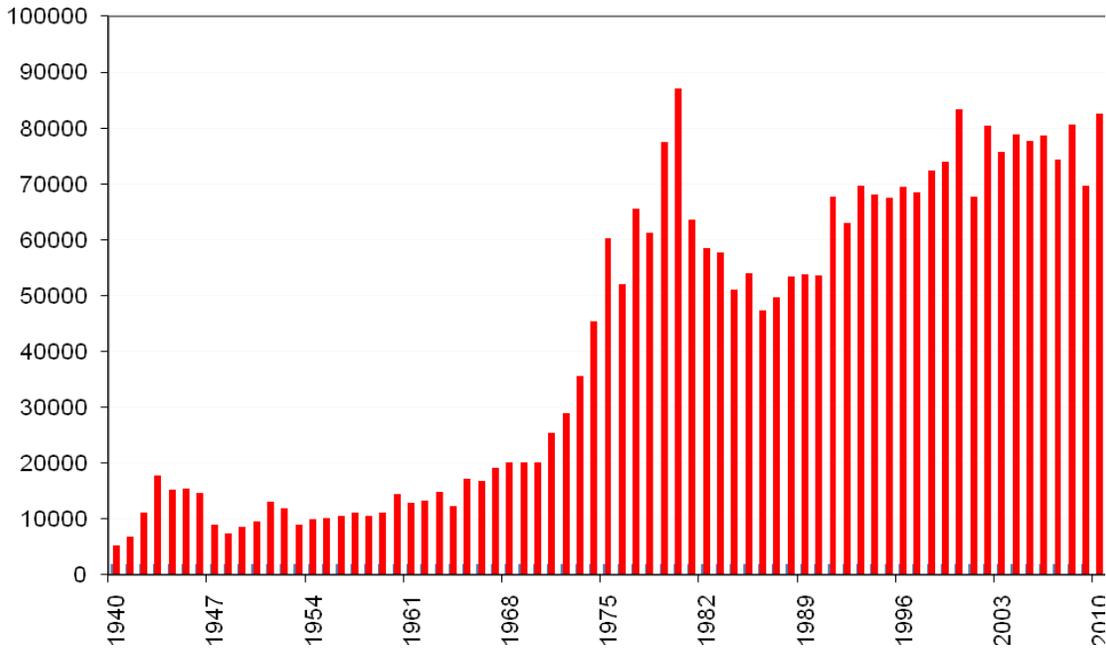
⁷ President Carter’s E.O. 12044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome. Exec. Order No. 12044, 43 Fed. Reg. 12,661 (Mar. 24, 1978).

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.

Figure 2: Federal Register Pages: 1940-2010



C. Regulatory reform in the 104th Congress

In 1995, a Republican majority took control of both houses of Congress, having run 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.⁸

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

- The Unfunded Mandates Reform Act (UMRA) of 1995, 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) of 1996, 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) of 1996, 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,

⁸ 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.

- 1995 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.⁹

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12866¹⁰ (issued by President Clinton in 1993 and still in effect today), but rarely do more.¹¹ While, pursuant to SBREFA, courts have overturned regulations that fail to consider impacts on small business,¹² agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."^{13,14}

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 (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.

⁹ 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).

¹⁰ Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>.

¹¹ 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

¹² 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).

¹³ American Trucking Assns v. EPA 175 F.3d 1027, 1043 (D.C. Cir 1999)

¹⁴ 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).

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."¹⁵ A 1999 GAO report evaluating OMB's reports 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.¹⁶

D. Despite these efforts, regulations are increasing

As Figures 1 and 2 illustrate, despite these efforts at reform, the growth in new regulations continues. The executive and legislative requirements for analysis of new regulations appear to have been inadequate to counter the powerful motivations in favor of regulation. Politicians and policy officials face strong incentives to "do something," and passing legislation and issuing regulations demonstrate action. Whether the regulatory action ultimately produces the desired outcomes may be less important, partly because those effects are not immediately apparent, but also because action simply appears more constructive than inaction. There is no public relations advantage to doing nothing or to averting policy mistakes before they occur.

Often businesses are portrayed as the main opponents of regulation, but the evidence suggests otherwise. For decades, economists who study regulation have observed that regulation can provide competitive advantage, so it is often in the self-interest of regulated parties to support it. During my tenure at OIRA, I saw tobacco companies supporting legislation requiring that cigarettes receive Food and Drug Administration pre-marketing approval, food and toy companies wanting more regulation to ensure their products' safety, and energy companies supporting cap-and-trade for greenhouse gas emissions. Particularly when regulatory demands appeal to popular interests, politicians and policy officials find pursuing them hard to resist.¹⁷

Thus, legislators and regulators face strong incentives to issue new legislation and regulations, all with noble goals, while requirements to evaluate the outcomes of those policies (the benefits, costs, and unintended consequences) tend to take a back seat.

¹⁵ ROGELIO GARCIA, CONG. RESEARCH SERV., IB95035, FEDERAL REGULATORY REFORM: AN OVERVIEW (2001), available at <http://www.thecre.com/pdf/2002-crs.pdf>.

¹⁶ 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>.

¹⁷ Bruce Yandle, *Bootleggers and Baptists*, REGULATION, May/June 1983.

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.¹⁸ 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 56 major regulations per year, which is significantly higher than Presidents Clinton and Bush who each published an average of 45 regulations per year over their terms.¹⁹ When one includes the independent agencies (over which presidents exercise less direct oversight) the comparisons are similar, with an average of 84 major regulations issued over the last 2 years, a 35 percent increase over the average of 62 per year in the Bush Administration and a 50 percent increase over the 56 per year average in the Clinton Administration.²⁰

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 last year at this time, representing a 5 percent increase in activity. The regulatory road ahead looks even more ambitious when one focuses on the largest regulations. The *Agenda* reveals a 20 percent increase in economically significant regulations, or 40 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*, 48 appear there for the first time. There are 100 more economically significant regulations listed in this fall's *Agenda* than there were in 1995 (the first year for which electronic data are available).²¹

Some of this activity is required 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, including EPA's regulation of greenhouse gases under the Clean Air Act, are based on new judicial interpretations of statutes enacted 20 or more years ago, and do not necessarily reflect the priorities of any recent (or past) Congress.

¹⁸ Frank Newport, *Americans Leery of Too Much Gov't Regulation of Business*, GALLUP, Feb. 2, 2010, available at <http://www.gallup.com/poll/125468/Americans-Leery-Govt-Regulation-Business.aspx>.

¹⁹ Analysis of the published economically significant final regulations tracked by the General Services Administration's Regulatory Information Services Center at www.reginfo.gov.

²⁰ Analysis of major regulations by month in the GAO database, available at www.gao.gov/fedrules.

²¹ Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, <http://www.reginfo.gov/public/do/eAgendaMain> (last visited Feb. 23, 2011).

III. Legislative Efforts

This part of my testimony examines possible reforms and weighs their likely effects. I consider reforms in three categories: (A) changes to regulatory procedures, (B) changes to the decision criteria for selecting regulatory approaches, and (C) use of oversight, budget, and legislative authority to affect individual regulations.

A. Procedural reforms²²

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 can write and enforce regulations subject to an “arbitrary and capricious” standard of review.

Formal rulemaking is generally used only by agencies responsible for economic regulation of industries, and only when a statute other than the APA specifically states that rulemaking is to be done “on the record.”²³ 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, (2) apply the substantial evidence, or (3) provide for judicial review of data and analysis relied on in 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.²⁴ Critics are concerned that formal rulemaking

²² The Administrative Conference of the United States has conducted studies and provided recommendations on procedural issues that the Committee may find useful, including: 77-1 Congressional Control of Regulation: Legislative Vetoes; 74-4 Judicial Review of Informal Rulemaking; 85-1 Legislative Preclusion of Cost-Benefit Analysis; and 90-7 Responses to Congressional Demands for Information [60 Fed. Reg. 56312 (Nov 8, 1995)].

²³ *United States v. Fla. E. Coast Ry.*, 410 U.S. 224 (1973).

²⁴ JEFF ROSEN, AM. BAR ASS’N, FORMAL AND HYBRID RULEMAKING: TIME FOR A REVIVAL (2010), available at <http://new.abanet.org/calendar/6th-annual-administrative-law-and-regulatory-practice-institute/Documents/Jeff%20Rosen%20PowerPoint.pdf>.

procedures will slow down the issuance of new regulation, and impose unnecessary costs on regulating agencies,²⁵ but supporters offer examples of such rulemakings being completed expeditiously, and of notice-and-comment rulemakings that have taken more than a decade.²⁶

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.”²⁷ 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.²⁸ 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.^{29,30}

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 consider amending the IQA to make agency decisions reviewable.³¹

²⁵ *Hearing on Executive Order 13422*, 72 *Fed. Reg.* 2763 (January 23, 2007), *President Bush’s recent amendments to Executive Order 12866, Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007) (testimony of Peter L. Strauss, Betts Professor of Law, Columbia Law School), available at

http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/strauss_testimony.pdf.

²⁶ ROSEN, *supra* note 23.

²⁷ *Mareno v. Apfel*, 1999 U.S. Dist. LEXIS 8575 (S.D. Ala. Apr. 8, 1999) (“more than a scintilla but less than preponderance”).

²⁸ EE Bachrach, *Case for a Substantial Evidence Amendment to the Informal Rulemaking Provision of the Federal Food, Drug, and Cosmetic Act*, 55 *Food & Drug L.J.* 293 (2000).

²⁹ *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984) (Scalia, J., writing for the majority) (“In review of rules of general applicability made after ‘notice and comment’ rule-making, [substantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness.”), available at <http://openjurist.org/745/f2d/677/association-v-board>.

³⁰ Matthew J. McGrath, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 *GEO. WASH. L. REV.* 541 (1986).

³¹ For different perspectives on this issue, see James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 *KAN. J. L. & PUB. POL’Y* 521 (2003), available at <http://www.law.ku.edu/publications/journal/pdf/v12n3/conrad.pdf>; Sidney A. Shapiro, RENA STEINZOR & MARGARET CLUNE, *CTR. FOR PROGRESSIVE REFORM, OSSIFYING OSSIFICATION: WHY THE INFORMATION QUALITY ACT SHOULD NOT PROVIDE FOR JUDICIAL REVIEW* (2006), available at http://www.progressivereform.org/articles/CPR_IQA_601.pdf.

Several procedural reforms under consideration in the 112th Congress bear brief mention. H.R. 10, the REINS (Regulations from the Executive In Need of Scrutiny) Act,³² 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.” If passed, it would allow both legislators³³ and the president³⁴ to take more responsibility for the content of major new regulations, but may alter agency incentives in unintended ways.³⁵

Senator Mark Warner has said he intends to propose legislation focused on altering regulatory agencies’ incentives to issue new regulations and examine the effectiveness of existing regulations.³⁶ His legislation “would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add.”³⁷ This “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

³² Regulations from the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. § 2 (2011).

³³ Jonathan Adler, The Federalist Soc’y for Regulatory & Pub. Policy Studies, The Regulations from the Executive in Need of Scrutiny (REINS) Act, http://www.fed-soc.org/publications/pubID.2074/pub_detail.asp (2011).

³⁴ In testimony before the House Judiciary Committee, David McIntosh observed, “If the President disapproves of a rule, he can veto its authorizing resolution; if he endorses it, he can allow it to take effect. Either way, the President is forced to take ownership of the independent agency’s action and will be held accountable by the people for his choice.” *The REINS Act: Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of David McIntosh, Member of Congress, Retired), available at <http://judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf>.

³⁵ *The REINS Act: Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Sally Katzen), available at <http://judiciary.house.gov/hearings/pdf/Katzen01242011.pdf>.

³⁶ See SUSAN DUDLEY, THE GEORGE WASHINGTON UNIV. REGULATORY STUDIES CTR., REGULATORY PAY-GO (2011), available at http://www.regulatorystudies.gwu.edu/images/commentary/20110207_dudley_regulatory_pay-go.pdf

³⁷ Mark Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639_pf.html.

that regulation to meet social goals competes for scarce resources with other national objectives,” and set priorities to achieve the “greatest social benefits.”³⁸

B. Decision criteria³⁹

Congress may want to improve upon the decisional criteria by which regulatory alternatives are evaluated, either by codifying the decision requirements currently embodied in executive order and extending them to independent agencies, or by expanding the coverage of existing statutes, such as UMRA, and the RFA. Congress will need to decide whether these cross-cutting decisional criteria would supersede or be subordinate to the decision criteria expressed in individual statutes, such as Section 109 of the Clean Air Act, which has been interpreted as precluding the consideration of any factors other than human health in the setting of national ambient air quality standards.

The executive branch has taken the lead on decisional criteria for analyzing and developing new regulations. All recent presidents, both Democratic and Republican, have adopted sound decisional criteria through executive order to guide regulatory decisions, and at least since 1980, there have been attempts to codify these executive requirements in statute.⁴⁰ 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 12866 (first issued by President Clinton in 1993) or even President Obama’s recent Executive Order 13563, which incorporates E.O. 12866 by reference (see below). 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 (such as effects above a threshold), a rulemaking would follow a different procedural path (such as an advance notice of proposed rulemaking, or a formal hearing).

³⁸ Chairman of the Council of Econ. Advisers, 1980 Economic Report of the President [hereinafter 1980 Economic Report], at 125 (1980), *available at* http://fraser.stlouisfed.org/publications/ERP/page/4569/download/46077/4569_ERP.pdf.

³⁹ The Administrative Conference of the United States has conducted studies and provided recommendations on applications of 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).

⁴⁰ See 1980 Economic Report, *supra* note 37, at 123.

Both UMRA (Title II) and the RFA contain analytical requirements, similar to those in Executive Order 12866, that call for understanding the likely effects (positive and negative) of new regulations before they are implemented. However, researchers have found they are less effective than originally expected. UMRA covers a limited number of major regulations (the CRS found that seventy-two percent of the economically significant rules covered by the Executive Order are not covered by UMRA)⁴¹ and, because its requirements are merely informational, appear to have limited effect on agency decisions.⁴² 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 and may encourage Congress to amend the RFA to explicitly include indirect impacts. 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.⁴³

C. Oversight, budget, and legislation

Only Congress can address aspects of legislation that hinder APA procedures (such as requirements that agencies issue interim final regulations that limit public comment) or preclude reliance on sound decisional criteria (such as statutory language that can be interpreted to prevent agencies from considering important factors). Congress can also influence agency action through oversight of individual regulatory actions and through funding provisions in appropriations bills. This Subcommittee may find it valuable to use its oversight authority to evaluate how well agencies are following the requirements of the APA.

As Congress considers options 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, it may want to consider giving a non-executive branch agency responsibility for reviewing regulations. A congressional office focused on regulations would have several benefits,⁴⁴ including providing an independent check on the analysis and decisions of regulatory agencies and OMB. As GAO

⁴¹ US CONG RESEARCH SERVICE, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES, Robert Jay Dilger and Richard S. Beth, 7-5700, R40957. (August 2010), *available at*: http://assets.opencrs.com/rpts/R40957_20100813.pdf

⁴² See SUSAN DUDLEY, THE GEORGE WASHINGTON UNIV. REGULATORY STUDIES CTR., UNFUNDED MANDATES (2011), *available at* http://www.regulatorystudies.gwu.edu/images/commentary/20110216_dudley_umra.pdf

⁴³ *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.

⁴⁴ 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

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.”⁴⁵

A Congressional office would be able to devote resources to areas OMB cannot, 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. This would be particularly important if Congress enacts some of the other procedural and decisional changes under discussion.

IV. Executive Efforts

On January 18, 2011, President Obama penned an op ed in the Wall Street Journal⁴⁶ outlining his approach to regulation, and issued a new executive order on regulation. Executive Order 13563⁴⁷ on “Improving Regulation and Regulatory Review” reaffirms sound principles and practices that have been in effect since 1981.⁴⁸ It reinforces President Clinton’s Executive Order 12866, 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. 12866 and its requirement that agencies justify the decision to regulate by a compelling public need

⁴⁵ 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>.

⁴⁶ Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, available at http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html?mod=WSJ_hp_LEFTT opStories#articleTabs%3Darticle.

⁴⁷ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁴⁸ 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>.

including “material failures of private markets,”⁴⁹ 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’.⁵⁰

- 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, the office in OMB that oversees and coordinates all significant executive branch regulations. The staff of about 50 career civil servants operates 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 the 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.”⁵¹

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

⁴⁹ Exec. Order No. 12866, 58 Fed. Reg. 51,735, § 1(a) (Oct. 4, 1993).

⁵⁰ See BRIAN MANNIX, THE GEORGE WASHINGTON UNIV. REGULATORY STUDIES CTR., THE TROUBLING PROSPECT OF “BEHAVIORAL” REGULATION (2010), *available at* <http://www.regulatorystudies.gwu.edu/images/commentary/20100419-mannix-behavioralists.pdf>.

⁵¹ 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.

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 33 days, compared to 43 to 45 days, respectively, in the Bush and Clinton Administrations. Since November 2010, however, OIRA appears to be taking longer for interagency reviews – an average of 53 days for economically significant regulations, perhaps indicating that its “dispassionate and analytical ‘second opinion’” is more appreciated by the White House.⁵²

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 at the same time have continued to delegate new legislative authority to regulatory agencies. The net effect is the expanding modern regulatory state illustrated in Figures 1 and 2.

I appreciate this committee’s interest in regulatory reform, and welcome opportunities to discuss the likely effects of changes to both administrative procedures and decision rules used to develop new regulations and evaluate existing ones.

⁵² Statistics can be calculated using the search tools on the GSA website, www.reginfo.gov.