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AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES

Recommendations for Improving Regulatory Accountability and Transparency

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Executive Summary

This testimony identifies current and future regulatory reforms that could help improve the quality of regulatory analysis and the quality of regulatory decisionmaking. We review research from the AEI-Brookings Joint Center on regulatory impact analyses, and provide recommendations to the Office of Management and Budget and Congress on improving regulatory transparency and accountability. We believe that many of our recommendations could be implemented with bipartisan support.

The recommendations include: making regulatory impact analyses publicly available on the Internet; providing a regulatory impact summary table for each regulatory impact analysis that includes information on costs, benefits, technical information, and whether the regulation is likely to pass a benefit-cost test; establishing an agency or office outside the executive branch to independently assess the economic merits of existing and proposed federal rules; requiring that the head of a regulatory agency balance the benefits and costs of a proposed regulation; requiring that all regulatory agencies adhere to established principles of economic analysis when doing a regulatory impact analysis; and requiring that independent agencies perform regulatory impact analyses for key regulations.

Recommendations for Improving Regulatory Accountability and Transparency

Robert W. Hahn and Robert E. Litan

I. Introduction

We are pleased to appear before this subcommittee to provide our views on improving regulation and the regulatory process. We have studied and written about regulatory institutions for over two decades. Five years ago, we organized a cooperative effort between the American Enterprise Institute and the Brookings Institution to study regulation. The result was the AEI-Brookings Joint Center for Regulatory Studies.¹

A primary objective of the center is to hold lawmakers and regulators more accountable by providing thoughtful, objective analysis of existing regulatory programs and new regulatory proposals. The Joint Center has been at the forefront of outlining principles for improving regulation, enhancing economic welfare, and promoting regulatory accountability.²

Our testimony proceeds in four parts. First, we provide a brief overview of regulation. Second, we present some results from research undertaken at the Joint Center, which reviews the implications of economic analyses of regulation performed by the federal government. Third, in line with the focus of today's hearings, we offer some comments on the recent draft report on the costs and benefits of regulation from the President's Office of Management and Budget (OMB).³ Finally, we offer some suggestions for reforming

¹ All publications of the Joint Center can be found at www.aei.brookings.org.

² See Arrow et al. (1996).

³ We understand that the committee also is interested in addressing a study by Crain and Hopkins (2001). The study addresses the impact of regulation, and specifically regulatory costs, on small firms. We think this is an important area of inquiry. Theory would suggest the regulatory cost per worker could be higher for small firms than for large firms because of fixed costs associated with complying with regulation. The authors offer some empirical support for this finding. The study shows how compliance cost estimates vary across firms of different sizes, and in different industrial sectors, and across different types of regulation. See Tables 1, 5, 9A, 9B, 10A, and 10B.

regulation to improve both the quality of analysis and the quality of regulatory decisionmaking.

II. Regulation and Oversight

Although regulations often have no direct fiscal impact, they pose real costs to consumers as well as businesses. Regulations aimed at protecting health, safety, and the environment alone cost over \$200 billion annually or about 2% of GDP.⁴ Yet, the economic impacts of federal regulation receive much less scrutiny than the budget.⁵

To encourage the development of more effective and efficient regulations, all Presidents beginning with President Reagan have directed agencies to perform analyses of major regulations that show whether a regulation's benefits are likely to exceed the costs, and whether alternatives to that regulation can achieve the same goal for less money. They also have attempted to increase agency accountability for decisions by requiring that OMB review all major regulations. In recent years, Congress inserted accountability provisions and analytical requirements into laws such as the Safe Drinking Water Act Amendments of 1996, the Small Business Enforcement and Fairness Act of 1996, and the Unfunded Mandates Reform Act of 1995.^{6,7}

The most prominent and far-reaching of these regulatory reform efforts are President

⁴ See Arrow et al. (1996) and OMB (2002a). OMB estimates the total annual monetized costs of social regulations as between \$181 to 277 billion dollars. Cost figures are in 2001 dollars. See Table 11, OMB (2002a, 15037).

⁵ See Joint Economic Committee Study (1998).

⁶ Some examples of accountability mechanisms include regulatory oversight, peer review, judicial review, sunset provisions, regulatory budgets, and requirements to provide better information to Congress. Analytical requirements include mandates to balance costs and benefits, consider risk-risk tradeoffs, and evaluate the cost-effectiveness of different regulatory alternatives. See Hahn (2000).

Reagan's Executive Order 12,291 and President Clinton's Executive Order 12,866. Both require executive agencies to prepare a Regulatory Impact Analysis (RIA) for all major federal regulations.⁸ Agencies have prepared RIAs for almost twenty years in accordance with the executive orders and guidelines for economic analysis provided by OMB.⁹

III. What Do the Government's Economic Analyses of Regulations Tell Us?

The Joint Center has been engaged in conducting a systematic review of regulatory impact analysis since its inception. We wish to focus on three different efforts: one provides a comprehensive assessment of the costs and benefits of federal regulatory activities; a second examines the extent to which the costs and benefits of regulations are reported in the *Federal Register*; and a third assesses the quality of regulatory impact analyses.¹⁰

To assess net benefits of final regulations between 1981 and mid-1996 the Joint Center reviewed 106 RIAs. On the basis of the government's own numbers, these regulations are estimated to yield net benefits of close to \$2 trillion.¹¹ The analysis also shows that the government can significantly increase the net benefits of regulation. Less than half of final regulations pass a neutral economist's benefit-cost test. Net benefits could increase by

⁷ The Government Performance and Results Act (GPRA) of 1993 and the Paperwork Reduction Act of 1995 also set accountability requirements for agencies. For information on GPRA, see General Accounting Office (1996); for information on the Paperwork Reduction Act, see OMB (1995).

⁸ President Reagan coined the term *regulatory impact analysis* in Executive Order 12,291, see 3 C.F.R. 128 (1981). President Bush also used Executive Order 12,291. President Clinton's Executive Order 12,866 changed the term *regulatory impact analysis* to *assessment*, see 3 C.F.R. 638 (1993). Executive Order 12,866 maintains most of Reagan's requirements but places greater emphasis on distributional concerns. Executive Order 12,866 also directs agencies to show that the benefits of the regulation "justify" the costs, whereas Reagan's executive order required agencies to show that the benefits of the regulation "outweigh" the costs. See Exec. Order No. 12,291, 3 C.F.R. 128 (1981–1993); Exec. Order No. 12,866, 3 C.F.R. 638 (1993–2000), *reprinted in* 5 U.S.C. § 601 (1994).

⁹ See OMB (1996).

¹⁰ See Hahn (2001), Hahn (1999), and Hahn et al. (2000).

¹¹ See Table 3-4, Hahn (2001, 42). The net benefits estimate does not include two rules on stratospheric ozone that, according to the Environmental Protection Agency, have net benefits in the trillions of dollars. Those rules would have a large impact on the overall estimate of net benefits (taking the government numbers as given), but not on the fraction of rules that pass a benefit-cost test.

approximately \$300 billion in present value terms if agencies rejected such regulations.¹² Net benefits could also increase if agencies replaced existing regulations with more efficient alternatives, or if agencies substantially improved regulatory programs. While one could argue with the particular interpretation of the numbers provided in this study, we feel comfortable saying that a significant fraction of the government's final regulations would not pass an economist's benefit-cost test using the government's own numbers. That suggests that the executive orders requiring a careful weighing of costs and benefits have not been taken very seriously.¹³

A second strand of research examined how the government used the *Federal Register* to convey important information on the impacts of regulation.¹⁴ The *Federal Register* was selected because it is a key repository of information on regulation within the government.

Joint Center researchers examined seventy-two final rules promulgated by regulatory agencies from 1996 through February 10, 1998, that were subject to review by the OMB. Each rule was scored on pertinent information related to alternatives considered, costs, cost savings, benefits, and other essential economic information.¹⁵ Two important conclusions emerge from that analysis. First, *Federal Register* notices that present regulatory analysis currently exhibit a great deal of variation in the kind of information that is presented.¹⁶ Second, with some key changes in the requirements for including and presenting information, the content of those notices could be improved dramatically.

Further insight into the extent to which the government's analyses of regulations

¹² See Hahn (2001, 4).

¹³ An alternative interpretation is that those numbers were carefully weighed and then dismissed for other reasons, for example, because they left out important aspects of the problem.

¹⁴ See Hahn (2000).

¹⁵ Once each *Federal Register* notice was reviewed, the data were entered into a database. Each notice was then reviewed a second time to check for accuracy.

provide an adequate basis for decisionmaking can be found in a Joint Center study of regulatory impact analyses.¹⁷ That study provides the most comprehensive evaluation of the quality of recent economic analyses that agencies conduct before finalizing major regulations.

Joint Center researchers constructed a dataset of final rules that includes analyses of forty-eight major health, safety, and environmental regulations from mid-1996 to mid-1999. That dataset provides detailed information on a variety of issues, including an agency's treatment of benefits, costs, net benefits, discounting, and uncertainty. The dataset was used to assess the quality of recent economic analyses and to determine the extent to which they are consistent with President Clinton's Executive Order 12,866 and the benefit-cost guidelines issued by the OMB.

The research revealed that economic analyses prepared by regulatory agencies typically do not provide enough information to make decisions that will maximize the efficiency of a rule. "The study of regulatory impact analyses shows that agencies only quantified net benefits—the dollar value of expected benefits minus expected costs—for 29 percent of the forty-eight rules...The agencies also did not adequately evaluate alternatives to the proposed regulation, another element of the Executive Order. Agencies failed to discuss alternatives for 27 percent of the rules and quantified the costs and benefits of alternatives for only 31 percent. In addition, the agencies often failed to present the results of their analysis clearly. Agencies provided executive summaries for only 56 percent of the rules."¹⁸

Taken together, this body of research illustrates four key points. First, many major

¹⁶ For example, there was little consideration of alternatives. For all seventy-two rules, thirty-one (43 percent) considered alternatives; only nineteen (26 percent) discussed specific alternatives; and eight (11 percent) quantified them. See Hahn (2000, 935).

¹⁷ See Hahn et al. (2000).

¹⁸ See Hahn et al. (2000, 861-862).

regulations are not likely to pass a standard benefit-cost test using the government's own numbers. Second, the quality of analyses is generally poor, though there is a great deal of variation in quality. Third, many analyses are not readily accessible to the general public. Finally, useful summaries of the analyses are not readily available to the general public.

IV. Recommendations for Improving the Recent OMB Draft Report on the Costs and Benefits of Regulation

This is the sixth report OMB has drafted on the costs and benefits of regulation. A recently released study from the AEI-Brookings Joint Center provides a comprehensive evaluation of the first five reports. The authors find that, “by and large, the reports represent a significant step forward in providing insights into the regulatory process...”¹⁹ This finding also holds true for the sixth report.

The draft report represents an improvement over previous reports in some ways; however, some improvements in last year's report are not in this year's report. Improvements over previous reports include expanding the time frame of analysis to ten years, aggregating costs and benefits for regulatory programs, and presenting OMB estimates separately from agency estimates.

While there has been progress, some useful innovations are not in this draft. Unlike last year, OMB does not list the antiterrorism regulations by agency, summarize the status of return and prompt letters, or provide information on turnaround time for reviewing rules.

We offer the following five recommendations for OMB related to this year's report:

1. OMB should publish available estimates of the costs and benefits of regulations from independent agencies. It should also request that independent agencies provide

¹⁹ The report, by Robert W. Hahn and Mary Beth Muething, is attached as appendix A.

annual assessments of the costs and benefits of each of their major regulations;²⁰

2. OMB should provide information on regulations aimed at addressing terrorist threats;

3. OMB should issue a scorecard assessing the extent to which regulatory analyses comply with its economic guidelines;²¹

4. OMB should provide more information about its regulatory oversight activities, including return letters, prompt letters, and turnaround time; and

5. OMB should list regulations and programs for reform and elimination.²²

²⁰ Executive Order 12,291 and Executive Order 12,866 do not apply to independent agencies. The recent Federal Communications Commission decision regulating the regional Bell operating companies demonstrates the lack of independent agency accountability. A divided FCC ruled that the Bells will no longer have to share their high-speed fiber lines with broadband competitors but would have to continue to share their local voice copper lines. See Hahn and Muething (2003) for a discussion of independent agency accountability.

²¹ This scorecard would cover all major regulations and differ from the regulatory impact summary table discussed below. The agency would fill out the regulatory impact summary table. OMB would issue the scorecard discussed here.

²² We will discuss these issues in more detail in our formal comments, which will be submitted to OMB.

V. Recommendations for How Congress Could Improve Regulation

A complete discussion of improving regulation is beyond the scope of this testimony.²³ Here, we wish to focus on a few key policies that will either promote economic welfare (broadly understood) or promote greater regulatory accountability. We believe these recommendations would receive bipartisan support. We also believe that proposals that are viewed as more far-reaching, such as requiring that a regulation pass a broadly defined benefit-cost test, are unlikely to be implemented in the near future because the political support will not be there.

Recommendation 1: Congress should require that agencies make each regulatory impact analysis and supporting documents available on the Internet before a proposed or final regulation can be issued.

Discussion: If the RIA is expected to inform the decision process, the analysis must precede the decisions themselves. Making such analyses widely available is an important first step in holding lawmakers and regulators more accountable for proposed and final regulations. Some agencies, such as the Department of Health and Human Services and, increasingly, the Environmental Protection Agency, are moving in that direction by eventually putting the regulatory impact analysis on the Internet.

Recommendation 2: Each regulatory impact analysis should include an executive summary with a standardized regulatory impact summary table that contains information on costs, benefits, technical information, and whether the regulation is likely to pass a benefit-cost test based on the best estimate of quantifiable benefits and costs.

Discussion: The executive summary, regulatory impact summary table, and the requirement of standardization would all promote greater regulatory accountability. The standardization and summary will make it easier for the public, interest groups, and academics to obtain information on the government's views of the benefits and costs of

regulation.

The information identified in the regulatory impact summary table is similar to that required by Executive Order 12,866, the Unfunded Mandates Reform Act, and the Regulatory Flexibility Act. Congress should simply consider passing an amendment requiring that the information be summarized and produced in the form suggested here. The cost would be trivial, and the benefits could be potentially quite large.

We present an example of a regulatory impact summary table in Table 1. That information should be standardized across agencies to enable Congress and stakeholders to make comparisons when setting regulatory priorities.

Recommendation 3: Congress should require that all regulatory agencies do a regulatory impact analysis for major regulations that adheres to established principles of economic analysis.

Discussion: Note that this recommendation does two things. It would extend the requirement of doing an RIA for major regulations to all federal regulatory agencies, including independent agencies.²⁴ It would also require that such analyses be based on sound economics.

It is clear from a careful review of regulatory impact analyses that agencies are currently not taking the guidelines imposed by the executive branch very seriously in carrying out regulatory analyses. To add political weight to those guidelines, Congress should consider adopting the kinds of principles contained in the OMB economic guidelines. It should also consider requiring that an agency, such as OMB, enforce those guidelines. Congress also could help to enforce those guidelines by holding hearings. An obvious

23 See, e.g., Breyer (1993) and Litan and Nordhaus (1983).

24 For a discussion of independent agency accountability, see Hahn and Muething (2003), at 17: “Regulations from independent agencies should receive the same level of scrutiny that is applied to regulations from executive agencies. If OMB is not allowed to review regulations from independent

question is how far Congress would be willing to go in providing methods for enforcement. One possible mechanism that deserves consideration is not allowing agencies to move forward on regulations unless an oversight agency, such as OMB, determines that the guidelines are met.²⁵

Recommendation 4: Congress should require all agencies to balance the benefits and costs of major regulations.²⁶

Discussion: While the Reagan and Clinton executive orders have encouraged agencies to consider the benefits and costs of regulations, executive orders do not have the authority of statutes. Executive orders are difficult to enforce in part because they are not judicially reviewable, and agencies cannot be sued for noncompliance. Congress should therefore require agencies by statute to comply with requirements similar to those in the executive orders and in the OMB's implementation guidance for the executive orders. Although some statutes already require agencies to balance the benefits and costs of regulation, these statutes apply to only a small number of major regulations and agencies often do not comply with the requirement. Other statutes either do not require benefit-cost analysis or actually restrict its use. The Clean Air Act, for example, precludes the consideration of costs for certain regulatory decisions. A congressional requirement to balance benefits and costs will increase the transparency of the regulatory process by forcing

agencies, then Congress should develop an alternative mechanism for review that is similar to the OMB oversight process.”

²⁵ For a study on agency's compliance with OMB's economic guidelines, see GAO (1998), finding that “5 of the 20 analyses did not discuss alternatives to the proposed regulatory action, 6 did not assign dollar values to benefits, and 1 did not assign dollar values to costs—all of which are practices recommended by the guidance... Finally, only 1 of the 20 analyses received an independent peer review.” GAO (1998, 3). Congress may also want to consider taking similar steps related to improving information quality. See OMB (2002b), which provides an explanation of what agencies should be doing to ensure information quality. These guidelines can be expected to improve the quality of information submitted to OMB by a regulatory agency to the extent that they promote independent, external, expert peer review of an agency's data and reproducibility of significant agency information. See OMB (2002b, 8459, 8460).

²⁶ We would actually go further and suggest that Congress require that all new regulations costing more than \$100 million annually pass a broadly defined benefit-cost test. See Crandall et al. (1997, 12).

agencies to provide high-quality analyses that the courts could review in the event of significant controversy.²⁷

Recommendation 5: Congress should create a congressional office of regulatory analysis (CORA) or a separate agency outside of the executive branch to independently assess important regulatory activity occurring at *all* federal regulatory agencies.²⁸

Discussion: The 106th Congress passed important regulatory reform legislation, the Truth in Regulating Act, which was signed into law by President Clinton in October 2000. The TIRA established a three-year pilot project at GAO, which was supposed to begin in early 2001. The cost of the pilot project was budgeted at \$5.2 million per year.²⁹ We thought that was an incredible bargain, given the upside potential associated with this investment.³⁰

Requiring that a separate agency outside the executive assess important regulation is sound for three reasons. First, because it is likely to serve as an independent check on the analysis done in the executive branch by OMB and the agencies. Second, it will help to make the regulatory process more transparent. Third, Congress can use the independent analysis to help improve regulation and the regulatory process. Fourth, CORA could help provide a more complete picture of the regulatory process if given appropriate statutory authority.

OMB's Office of Information and Regulatory Affairs (OIRA) faces inherent limits in the scope of its review of individual regulatory proposals. OIRA is headed by a political appointee chosen by the same administration that appoints the heads of the regulatory agencies. There is likely, therefore, to be some implicit understanding that the head of OIRA

²⁷ If a balancing requirement is seen as problematic, then Congress should consider passing an amendment that does not preclude agency heads from explicitly considering costs and benefits in regulatory decisionmaking.

²⁸ See Hahn and Litan (1999) for a discussion of how the agency should be related to the Congressional Budget Office and the General Accounting Office. For the importance of addressing regulation at both independent and executive agencies, see, e.g., Hahn and Sunstein (2002).

²⁹ "There are authorized to be appropriated to the General Accounting Office to carry out this Act \$5,200,000 for each of fiscal years 2000 through 2002." Truth in Regulating Act of 2000 (P.L. 106-312, § 5).

³⁰ Potential benefits include higher quality assessments of the likely impacts of specific regulations as well as identification of opportunities for effective reform.

is not to press the agencies excessively hard because he or she is on the same team as the agency heads. Even if the head of OIRA were given authority to challenge regulations, the basis for those challenges is not often made public and the scope of those challenges is likely to be limited.

The constraints on the OMB are manifested in its annual report, in which it has, so far, simply accepted the benefits and cost estimates compiled by the agencies instead of providing any of its own assessments. CORA would not face those constraints but instead would be able to provide its independent analysis, much as CBO has done in the budget arena.

CORA could help provide a more complete picture of the regulatory process, especially in areas that OMB has not examined carefully. For example, we only have a very incomplete understanding of the benefits and costs of regulatory activities at independent agencies.³¹ Our understanding of the impacts of smaller regulations and regulatory guidance is also quite limited, although these may be used as substitutes for larger regulations that would fall under OMB review.³²

Finally, CORA could help Congress implement its recent legislation, such as the Small Business Regulatory Enforcement Fairness Act. CORA could also aid Congress in periodically assessing the need to modify its own regulatory statutes. As it is now, if and when Congress chooses to do so, it will have to rely on the agency's own estimates of the impacts of a rule and on any other data that interested parties may or may not have submitted in the rulemaking record. Significantly, Congress now has no *credible, independent source of information* upon which to base such decisions. That is analogous to the pre-CBO

³¹ See Hahn and Muething, at 17.

³² Hahn (2001) and Furchtgott-Roth (1996) find that regulatory agencies provide very little information on the economic impacts of a large number of regulatory activities in which they are engaged.

Congress, which had to make budget and appropriations decisions based solely on the information developed by the executive branch. If Congress and the White House are serious about regulatory reform, they must cooperate to enforce the regulatory impact analysis requirement. Successful enforcement requires high-level political support, statutory language requiring all agencies to adhere to established principles of economic analysis, and rigorous review of agency analyses by an independent entity. If lawmakers are willing to exert the political muscle, real reforms that enhance regulatory accountability and transparency could be achieved.

Table 1

Regulatory Impact Summary	
I. BACKGROUND ON RULE AND AGENCY	
AGENCY AND DEPARTMENT/OFFICE NAME	
CONTACT PERSON	TELEPHONE NUMBER
TITLE OF THE RULE	
RIN NUMBER	DOCKET NUMBER
TYPE OF RULEMAKING (FINAL/INTERIM/PROPOSED/NOTICE)	TYPE OF RULE (REGULATORY/BUDGET IMPACT)
STATUTORY AUTHORITY FOR THE RULE	RULEMAKING IMPETUS
BRIEF DESCRIPTION OF THE RULE	
II. OVERALL IMPACT	
<p>1. Will the rule have an impact on the economy of \$100 million or more? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>2. Best estimate of the present value of quantifiable benefits of the rule. \$ _____</p> <p>3. Best estimate of the present value of quantifiable costs of the rule.¹¹⁶ \$ _____</p> <p>4. Do the quantifiable benefits exceed the quantifiable costs? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>5. Report the dollar year of costs and benefits. _____</p> <p>6. Report the discount rate used in the calculations for costs and benefits. _____ If more than one discount rate was used in calculations, please explain why.</p> <p>7. Discuss level of confidence in the benefit-cost estimates and key uncertainties. Include a range for costs and benefits. _____ _____ _____ _____</p> <p>8. Identify benefits or costs that were not quantified. _____ _____ _____ _____ _____</p>	

III. COSTS AND BENEFITS			
Estimated Incremental Costs			
1. Costs and breakdown of quantifiable costs by type.			
	Annual	Years in Which Costs Occur	Present Value
Total Costs	_____	_____	_____
Compliance Costs	_____	_____	_____
Administrative Costs	_____	_____	_____
Federal Budget Costs	_____	_____	_____
Local/State Budget Costs	_____	_____	_____
Other Costs	_____	_____	_____
Notes: _____			

2. Give a brief description of who will bear the costs. _____			

Estimated Incremental Benefits			
1. Benefits and breakdown of quantifiable benefits by type.			
	Annual	Years in Which Benefits Occur	Present Value
Total Benefits	_____	_____	_____
Health Benefits	_____	_____	_____
Pollution Benefits	_____	_____	_____
Other Benefits	_____	_____	_____
Notes: _____			

2. Give a brief description of who will benefit. _____			

IV. ALTERNATIVES TO THE REGULATION
1. List and briefly describe the alternatives to the rule that were considered and why they were rejected, including a summary of costs and benefits of those alternatives. If no alternatives were considered, explain why not.

Source: Table 4, Hahn and Sunstein (2002, 1519).

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