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Cutting the Sludge

A Regulatory Reform Agenda

BY IKE BRANNON

Regulatory reform is an evergreen aspiration because, even when an administration that makes it a priority assumes office, it often hesitates when the outcomes of any reform begin to have political consequences.

The Trump administration has declared that the executive branch agencies and the administrative state they created are choking economic growth and must be pared back. Most people who work in regulatory policy can provide examples of how this is true and what might be done to change it. But so far, the White House has avoided getting into the particulars of how to reduce this regulatory "sludge."

Instead, it deferred to Elon Musk and his "DOGE" team of computer programmers, who (implausibly) promised to use their technology tools to discover redundant and unneeded regulations and promptly eliminate them, the Administrative Procedure Act be damned. The White House also announced an absurd and unworkable requirement that agencies jettison 10 existing rules for every new rule they adopt.

There are advantages to a broad, ill-defined approach to tackling the excessive regulatory state: It allows politicians to retreat if a particular outcome causes heartburn for the president, a cabinet secretary, or a committee chair. Even the most promising regulatory reform thus far—the pledge to subject all regulations emanating from independent agencies (including the Federal Reserve) to the formal rulemaking process and benefit–cost analysis—does not necessarily preclude political exigencies from allowing unproductive regulations to be introduced.

There are better ways to approach such reform. In the following pages, several prominent policy scholars with a deep familiarity of the regulatory process offer suggestions for an administration that earnestly wants to pare back the regulatory state in a productive way.

Stuart Shapiro recommends the administration change the Paperwork Reduction Act to reduce the cost of federally mandated data collection that plagues many firms. He also encourages a bipartisan effort to reduce regulatory restrictions that are unambiguously harmful to nearly everyone and can be easily explained to voters—and politicians. Tom Kniesner and Kip Viscusi extol the benefits of retroactive benefit–cost analysis of rules when empirical data can be discerned. A few nascent efforts by think tanks—such as the Mercatus Center—have attempted this, but to little effect; an agency might have a better outcome. Former OIRA administrator John Graham and Keith Belton discuss the problems that so-called regulatory gatekeepers—ostensibly in place to protect workers or the environment—cause in the process. Finally, former Department of Labor chief economist Ronald Bird proposes a reform to the Administrative Procedure Act that would more clearly define how an agency should do benefit–cost analysis and consider precisely who benefits and pays the costs, and who has standing in such an analysis.

If the Trump administration wants to reboot its efforts, or if a future administration wants to combat the regulatory sludge, these suggestions would be a good place to start.

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Two Key Steps to Get Rid of the Sludge

BY STUART SHAPIRO

Cass Sunstein has defined "sludge" as the friction created by the *unnecessary paperwork burdens* inhibiting access to government programs. Typically, the term has referred to both costs imposed by the government through regulations or other means, and costs that are imposed in order to access government benefits. The key word in Sunstein's definition of sludge is "unnecessary." Of course, the government can impose costs to achieve justifiable, legitimate policy aims, but so many of those costs can seem necessary and yet easily become unnecessary burdens unjustified by social benefits.

The Trump administration has made reducing regulatory costs a priority. And while cartoonish efforts like his Executive Order 14192 command that agencies eliminate 10 regulations for every new regulation would (in the unlikely event it worked as intended) likely catch many necessary requirements along with unnecessary ones and compromise long agreed upon statutory goals, there are unnecessary burdens that are worthy targets of streamlining efforts. I hope that the administration will focus on this sludge.

In my view, there are two related steps that the administration could take to target sludge across the government. The first would be to reinvigorate and then use the Paperwork Reduction Act (PRA), and the second (which may be necessary to modernize the statute) would entail building a coalition against sludge that crosses ideological lines.

Paperwork Reduction Act / I wrote about the PRA in *Regulation* previously (Shapiro, 2020). Much of what I wrote still applies because there has been no meaningful reform of the act since my article's publication—or, for that matter, since the act was last revised in 1995. Congress passed the PRA in 1979 as a reaction to the increased regulatory burden that arose in the 1970s. Congress revised the statute twice, including a wholesale retooling in 1995.

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The PRA requires all federal agencies to seek approval from the Office of Information and Regulatory Affairs (OIRA) for any information collection or recordkeeping requirement that is imposed upon 10 or more people. The agencies must also seek public comment and estimate the burden on the public for every approval request. Approvals must be renewed every three years and the process for renewals mirrors the process for initial approvals. The PRA requires OIRA to annually report the total burden of government-imposed information collection requirements.

In the decades since the PRA passed, the burden of information collection requirements has greatly increased, although this is not entirely the fault of the act. Congress has passed many new statutes that impose information collection burdens (some necessary and some sludge) on the public. But the PRA itself has problems. The process for OIRA approval under the PRA is complex, time consuming, and burdensome for agencies. This has the combined effect of deterring agencies from potentially useful activities and reducing the approval process (including for sludge) to a pro forma box-checking process.

If the Trump administration wants to attack sludge, the PRA gives it an already existing statutory tool, but it is a tool that needs reform. Changes to the PRA that allow OIRA to focus its limited time on information collections that are truly sludge would have significant social benefits. Most of these reforms would need to be statutory, which means the Trump administration would need to champion reopening the act to revision and reform. For that effort to be successful, the administration would likely need a different political approach to Congress.

EPITAVI / GETTY IMAGES (PAPER STACK)

Sludge hurts everyone / The PRA passed largely because of supporfrom the business community, which was chafing at the regulatory requirements imposed by agencies like the Environmental Protection Agency and the Occupational Safety and Health Administration. In my own research, I have spoken to business owners who support the general cause of regulation but hate the paper-

work they must complete without any understanding of how it advances regulatory causes. In other words, they hate sludge.

This goes beyond business regulation. In recent years, pioneering work by Pamela Herd and Don Moynihan has highlighted that there are many governmental requirements imposed on people who have been deemed deserving of government benefits that do little to actually screen out ineligible recipients. For instance, the Trump-championed tax act passed in July 2025 added work requirements to the Medicaid program even though 97 percent of current recipients hold a job. For that 97 percent, those requirements merely entail filling out a form, a burden some will no doubt see as onerous enough that it will deter them from applying for Medicaid altogether—indeed, that is what the estimated budget savings assumes. In other words, this too is sludge.

The administration has supported these work requirements, so I realize a comprehensive war on sludge that helps individuals as well as businesses may be politically difficult to achieve in the short run. However, politics is still about coalition building, and I suspect that a PRA reform that meaningfully facilitates cutbacks in sludge for businesses and for beneficiaries of government programs is a winner. *R*

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Deregulation Based on Good Sludge

BY THOMAS J. KNIESNER AND W. KIP VISCUSI

The British playfully recite what they call "the Chinese Curse": "May you live in interesting times." The recent deregulatory push by the Trump administration certainly makes it an interesting time for those who practice and study the federal regulatory process and its outcomes in the United States.

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To expedite this effort, Trump's "DOGE" taskforce employed artificial intelligence (AI) to find deregulation targets and prepare the necessary administrative paperwork. Whether this effort proves effective and desirable depends on how the task is framed and the scope of what is being delegated.

The economic criteria that are appropriate for deregulation parallel the tests that should be applied before enacting regulations in the first place. To be desirable, the benefits of a regulation must exceed its costs, and ideally policies should maximize the spread between those benefits and costs. For new regulations, this assessment comes before any rules have been enacted, while for deregulation efforts the vantage point should consider the cost of ending the regulation versus the ongoing benefits of its demise. Even if the initial costs are significant, the ongoing savings may ultimately exceed the transition costs.

Rather than taking a comprehensive benefit–cost approach, the DOGE guidance adopted a cost-focused strategy, drawing on a variety of different cost analyses. Cost categories include compliance costs, displaced investments, decreased sales, and federal costs. Setting aside issues of possible overlaps across categories, a more fundamental concern is there are no mentions of benefits or possible measures of cost-effectiveness.

The potential targets of reform include the estimated 50 percent of all regulations that are not statutorily mandated or needed by any agency. The task for AI is to identify which regulations can potentially be eliminated and then prepare the necessary paperwork to do so. Omitted from the process is any reference to the preparation of a regulatory impact analysis (RIA) and overcoming the standard hurdles for regulatory actions. Eliminating regulations by fiat will not be successful because the Administrative Procedure Act requires that regulatory policies—whether enacting or repealing a regulation—not be arbitrary and capricious.

Eventually, regulatory agencies and the Office of Management and Budget (OMB) will have to justify regulatory actions, including deregulatory efforts. The payoff may not be the sweeping deregulation effort that is anticipated: Some may regard having to do a RIA as sludge, but it is "good sludge" that will lead to better regulation. While there has been some initial action on the RIA front, it is well behind the promised schedule. The Environmental Protection Agency's RIA supporting an endangerment finding regarding greenhouse gas emissions underwent judicial review, where it was upheld. The briefer Trump administration RIA seeking to overturn the endangerment finding and the associated climate change regulations surely also will receive judicial scrutiny, and it is not clear how it will play out.

Obstacles / The impetus to undertake sweeping deregulation

actions is not new. President Ronald Reagan launched a major deregulatory effort that targeted many expensive regulations. As part of this initiative, the Occupational Safety and Health Administration (OSHA) undertook a retrospective assessment of the controversial cotton dust standard, which limits worker exposure in textile operations. The textile industry challenged the regulation and eventually lost a Supreme Court case, *American Textile Manufacturers v. Donovan* (1981).

Earlier, regulatory oversight economists in the Carter White House, including Council of Economic Advisers chair Charles Schulze, had opposed the regulation because of a benefit–cost imbalance. Given this, making cotton dust a potential deregulation target seemed very promising. OSHA commissioned a RIA, for which one of us (Viscusi) prepared the benefit assessment for regulatory alternatives. From a benefit–cost standpoint, relaxing the standard would have been clearly desirable, but the more technologically advanced firms that had already complied with the regulation opposed any relaxation, which brought that deregulation initiative to a halt. The Trump administration's EPA effort to terminate the Energy Star program encountered similar opposition as both appliance manufacturers and retailers opposed the initiative.

Post-regulation evaluation / The most straightforward way for regulation to gain public support is for regulators to routinely monitor regulations post-implementation to empirically verify the intended net benefits. This would require making public the data behind the calculations of the costs and benefits, for analysis by researchers both inside and outside the government. A successful example comes from individual income tax policy, where most of the post-implementation outcomes research is done by academics with public data on income taxation's behavioral and economic well-being consequences. Publicly funded data gathering would be money well-spent in monitoring regulatory policy outcomes.

Takeaways / It is reasonable that the regulatory process should continue after a regulation is approved and implemented, and that part of the process could be considered "good sludge." Among other things, the regulatory evaluation procedure used should itself be cost-effective. We propose that both regulations and taxes be put on parallel policy paths where post-implementation evaluation is regularly done with publicly available data. *R*

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Regulatory Gatekeepers and Their Sludge

BY JOHN D. GRAHAM AND KEITH B. BELTON

Many new products and innovative activities in the US economy require a greenlight from the federal government before they may be commercialized. Uncle Sam's gatekeeper role has astonishing reach, encompassing the clearance of food additives, prescription drugs, medical devices, pesticides, radiation-emitting devices, engines, fuels, firearms, deep-well injection, carbon capture and storage, ocean floor sea mining, and electronic and digital devices. Some regulatory advocates want to create new gatekeepers for everything from artificial intelligence to self-driving cars.

One little-known provision in the regulatory arcana is that the Office of Management and Budget (OMB) is not allowed to review the work of these gatekeepers. Executive Order 12866 gives OMB authority to review rules of general applicability, but decisions regarding a specific product or project are off-limits.

Gatekeepers have noble purposes: They ensure the protection of privacy, public health, safety, and environmental quality. However, the bureaucratic "sludge" created by the gatekeepers has pernicious side effects: They can delay lifesaving and green innovations, shield old technologies and practices from competitors, and often discourage investments in entrepreneurs, which makes the US economy less productive.

Donald Trump should aim to eliminate the sludge created by these federal gatekeepers. Two examples illustrate the sad state of affairs that entrepreneurs face.

Presidents Barack Obama, Trump, and Joe Biden did not agree much on policy, but they all insisted that our country needs to rapidly expand the mining and processing of critical minerals needed for national defense, clean energy, industrial innovation, and even laptop computers. There has been just one lithium mine operating in the United States in the last two decades, despite there being plenty of lithium under US soil.

Today, there are dozens of developers seeking permits—and fighting lawsuits—to start new US lithium mines, sometimes with subsidies from Uncle Sam. The gatekeepers in the bowels of the Department of Interior claim there is no sludge in the

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Bureau of Land Management (BLM) that oversees this permitting process, and they like to tell the public that it takes "only" 2.5 years to obtain approval for a new lithium mine on federal land. However, that does not account for the baseline environmental monitoring and species-protection analyses that must receive formal approval from bureaucrats at the Fish and Wildlife Service, the Environmental Protection Agency (EPA), and the Army Corps of Engineers before the formal BLM review process begins. So, add many more years to this process.

Nor does this include the time it takes to defend a BLM permit in court, where simple lawsuits take a year in federal district court and another year at a federal appeals court. And this all assumes the gatekeepers approve the mine, but they obviously must reject at least some mines to justify their existence.

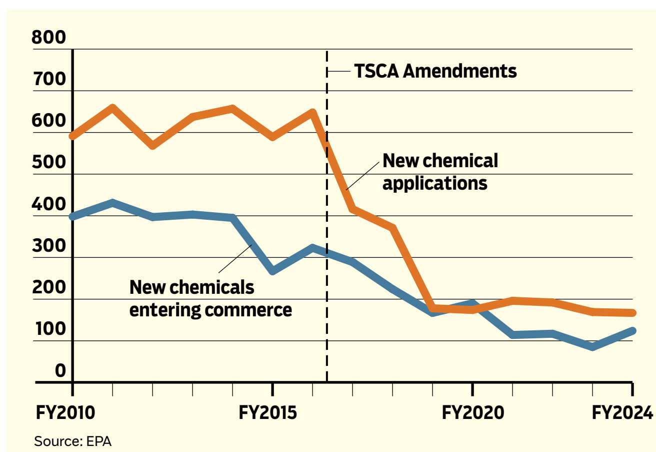
Other countries have much less sludge, including Australia, which is the top lithium producer in the world. And while Australia may be a close ally of the United States, its lithium supplies are not necessarily a suitable substitute for US supply: The Chinese own some of its biggest mines, leveraged by China's industrial policy.

There is also the challenge of introducing new industrial chemicals into commerce. For decades, the United States was the most attractive jurisdiction to introduce them: The market is vast, at one point the governmental review process was fast (90 days or less), and the burden was on the EPA to prove that there was a legitimate safety or environmental issue.

That all changed in 2016 when Congress amended the Toxic Substances Control Act (TSCA) to require the agency to make an affirmative risk determination for every new chemical prior to manufacturing. The statute had some flexibility to be reasonable, but the Biden EPA was—to say the least—strict. Nine years later, the rate of new chemical innovation has plummeted to all-time lows, and the average EPA review time has climbed from just over 90 days to 288 days. (See Figure 1.) In some cases, EPA reviews are taking years. The longer and more uncertain review process prevents chemical innovators from meeting customer demand. Because 80 percent of industrial chemical production is sold to downstream manufacturers as inputs, the decline in chemical innovation puts all of US manufacturing at a competitive disadvantage.

Figure 1

New Chemical Innovation is Down



Source: EPA

President Trump can make a difference on this kind of sludge, but he cannot do it with executive orders that are high on rhetoric and deadlines ("dashboards") without teeth. Each gatekeeper needs to be targeted with a Trump order that gets into the depths of the sludge, and OMB's authority needs to be expanded to oversee the work of the gatekeepers. A modest start would be to clarify that OMB authority includes process efficiencies associated with agency review of products or projects. *R*

The Administrative Procedure Act's Missing Element

BY RONALD BIRD

The federal Administrative Procedure Act (APA) of 1946 codified the procedures that all federal agencies must follow when issuing regulations. It remains the cornerstone of federal administrative law, laying out uniform requirements for notice-and-comment rulemaking, which entails a public notice of the proposed rule and reasons for it, solicitation of public comment, and public notice of the final decision with responses to substantive public comments. Despite these detailed steps, the APA left a critical procedural issue unresolved: What uniform standard should guide each agency's rule-making decisions? This omission has contributed to a continuing public distrust of the regulatory state and reflects an enduring tension between democratic accountability and technocratic control—one that originated in the Progressive Era of the late 19th century, grew during the New Deal, and persists today.

The APA was enacted in the wake of dramatic expansion of federal power to shape the economy and American society during the 1930s and World War II. The aim was to establish procedural constraints on a federal bureaucracy that was seen as difficult for the average citizen to comprehend. Citizens needed to know how to navigate Washington's bureaucracy to address their needs or obtain redress of grievances. Congress

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enacted the APA to correct this problem, but it stopped short of requiring that agency decisions align with explicit objective principles as a uniform standard. The APA requires agencies to solicit and respond to public comments, but it does not treat those comments as binding votes or measures of public will. Agencies are free to override public commenters if the agency concludes that doing so is reasonable.

The omission of an explicit decision standard in the APA and its reliance on a vague "reasonableness" standard reflects an intellectual pedigree rooted in the 19th century Progressive Movement and its leading proponent, Woodrow Wilson. Wilson was skeptical of democratic government based on universal suffrage. In his 1887 *Political Science Quarterly* article "The Study of Administration," he envisioned government as a science managed by trained experts insulated from popular passions and legislative bargaining. His ideal was, in effect, a government ruled by a beneficent elite. Today, the 21st century populist critique of the administrative state perceives a bureaucratic state that governs through regulations reflecting the elite's self-interests and values and does not represent the interests and values of the people whom they govern.

This contemporary critique of the modern American administrative state is an implicit benefit–cost analysis that mirrors the one that Thomas Jefferson expressed in the Declaration of Independence: "The costs of colonial loyalty to the established British governing order exceed the benefits."

After the APA's passage, economists and policy analysts recognized the need for a transparent and uniform standard to guide regulatory decisions. They advocated for a more rational, quantitative approach to regulation based on maximizing net benefits to society by applying the tools of benefit–cost analysis. Ronald Reagan's Executive Order 12291 mandated that agencies conduct benefit–cost analyses and adopt the most efficient regulatory alternative. Bill Clinton's EO 12866 preserved the approach that regulations must provide benefits that justify their costs and proceed from a clear statement of public need. The Office of Information and Regulatory Affairs established under Reagan continues to exist, but its ability to constrain needless or inefficient agency rules depends on political will within the Executive Branch and is often thwarted.

Executive orders requiring economic benefit–cost analysis lack legal force, and citizens whose liberty has been constrained or who suffer economic damage do not have legal remedy if their harm is the result of flawed agency analysis. Courts do not consider benefit–cost issues, even if an agency conducted such an analysis under EO 12866. Requiring benefit–cost analysis as a legal standard in the APA would allow courts to review rules that fail to achieve positive net benefits or that are based on wrongly calculated costs or benefits.

While benefit–cost analysis is not perfect, it does offer a consistent framework for comparing regulatory alternatives and estimating effects on social welfare. It can reveal tradeoffs otherwise hidden and align regulatory outcomes more closely with the choices that democratic legislatures or well-functioning competitive markets would make. Requiring benefit–cost analysis by statute will force agencies to justify regulatory decisions in terms that the public can understand: What will it cost, who will it affect, and do the benefits outweigh the costs? Citizens adversely affected would have judicial standing to challenge incorrect data, methods, and calculations.

Incorporating benefit–cost analysis into the APA would require more than simply instructing agencies to do it. Statutory language should address critical issues of how to properly conduct these analyses. An example is the issue of "standing": Whose costs and whose benefits shall be counted in cost and benefit calculations? This is one of several technical issues that should be addressed within the statute to facilitate judicial review.

The "standing" issue was revealed when federal agencies introduced into EO 12866 benefit–cost analyses the concept of the social cost of carbon (SCC). It is the value of a reduction in climate change damages (e.g., sea level rise, etc.) resulting from an annual elimination of one ton of carbon dioxide (CO_2) emissions by US citizens. (See p. 36.) Multiplying this number by the tons of CO_2 that regulators estimate would be eliminated under a proposed regulation calculates the benefits of the regulation. However, analysts can use two different SCCs: "Global SCC" estimates the value worldwide from each ton of CO_2 eliminated by regulations whose costs are borne only by US citizens. "Domestic SCC" estimates the value to US citizens exclusively of such eliminations. The global SCC is about seven times greater than the domestic SCC, which means that applying the global SCC value will justify a regulation seven times more costly to US citizens than if the domestic SCC benefit measure were applied. The agencies proposing the regulations adopted the global SCC measure, effectively awarding benefits to foreigners who contributed nothing to the costs being paid only by US citizens. This choice justified more expansive regulation than would have been justified by the alternative. The question of whose costs and whose benefits should have standing in an APA mandated benefit–cost analysis will need to be addressed in the statute itself to make it enforceable by judicial review.

Reform of the APA to include a benefit–cost decision mandate would require careful congressional construction, and it would face opposition from those who view regulation as a vehicle for moral goals that transcend contemporary social and economic values. Those broader moral goals may be worthwhile, but they should be pursued openly through legislation, not hidden under administrative rule-making decisions. *R*