

Cato Handbook *for* Policymakers

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55. Toward a New and Improved Regulatory Apparatus

Congress should

- abandon wholesale efforts to jettison regulations that are already in place; and
- instead, pass legislation to improve the analysis of major federal regulations by removing the task of creating Regulatory Impact Analyses from the executive branch agencies that write the regulations and authorizing a new, independent agency to do the analyses.

Few people paying attention are pleased with the current state of regulatory oversight. On the one hand, progressives argue that the Office of Information and Regulatory Affairs (OIRA), the entity within the Office of Management and Budget (OMB) tasked with reviewing agency rules, stifles consumer and environmental protections and places too much emphasis on costs. Liberal entities also complain about the strictures of the regulatory oversight process, which they claim slow down necessary and sometimes urgent regulatory reforms and merely substitute one set of analyses for another.

Conservatives, on the other hand, protest that OIRA is little more than a political arm of the White House that is loath to push back on even egregious rules issued by cabinet agencies and has no ability to oversee independent agencies such as the Federal Communications Commission or Consumer Financial Protection Bureau. As a result, agencies merely go through the motions to ensure that their proposed regulations pass a cost-benefit test.

Currently, executive branch agencies that propose “economically significant” regulations (meaning those with an impact on the economy estimated

to be over \$100 million) must submit a Regulatory Impact Analysis to OIRA that demonstrates the estimated benefits exceed potential costs. The process of analyzing the costs and benefits for proposed regulations and acting on this information should be straightforward. But White House politics and the nation's entrenched regulatory apparatus have made it anything but.

The most egregious problem with the current system is that the entities performing the cost-benefit analysis are the agencies issuing the regulations, which creates an enormous conflict of interest. The economists at the Environmental Protection Agency understand full well that their task is to deliver a cost-benefit analysis that demonstrates the regulation being considered is efficacious—no matter what. Promotions, raises, professional plaudits, and the potential for future jobs all depend on the implementation of regulations.

Conservatives and libertarians who have worked at OIRA have lamented this problem and have proposed various ways to fix it. Some have argued for greater congressional oversight; others have suggested that OIRA, which is frequently rolled by the agencies themselves or by the White House in whatever bureaucratic tussle they engage in, be given more power.

The optimal solution to this decades-long problem of regulatory overreach is to create a new entity that would be tasked with doing the cost-benefit analysis of regulations issued by the executive branch agencies as well as all independent federal agencies. Creating such an entity would do much more good than continued unrealistic efforts to reform current regulatory policy.

Regulatory Rollback Is Hopeless and Unnecessary

Despite the acrimony among the Republicans who ran for president in 2016, there was actually a fair amount of agreement when it came to their policy proposals. For instance, nearly every candidate put together a major tax reform proposal, none of which differed much from one another save for the size of the revenue loss. For what it's worth, the candidate who proffered the biggest cut happened to be the one who gained the nomination.

The candidates also agreed on the need for some sort of regulatory "reform." The reform plans were usually as vague as the tax plans, but they typically consisted of a promise to do a comprehensive analysis of current regulations to determine whether they pass a cost-benefit test based

on a revised set of metrics. Those that do not pass muster would then be repealed.

The government has undoubtedly issued a plethora of regulations that would not have survived an objective comparison of their costs and benefits at the time they were issued. Agencies are adept at putting their thumbs on the scale to achieve their goals (which is invariably to issue more regulations). When that isn't sufficient, they do their best to avoid the scrutiny of cost-benefit analysis altogether. For instance, the Treasury Department recently gave its "emergency" regulations on corporate inversions to OMB's Office of Information and Regulatory Affairs, the office tasked with determining whether rules do indeed pass a cost-benefit test, a mere two hours before Treasury was to make its determination. Another trick that regulatory agencies use is to diminish the estimated cost impact of a regulation to the limits of reason to ensure that it ends up below the \$100 million threshold that triggers an automatic review by OMB.

However, the campaign promises to reform regulatory policy are not only as unrealistic as a \$10 trillion tax cut, but they would do little to reduce compliance costs and save economic resources. The unfortunate reality is that no economic gain will be achieved from reviewing and repealing rules that have been in force for any period of time. And the notion that any administration can—or should—wipe the slate of existing regulations is not only politically unrealistic, but unwanted.

The problem is that the costs to businesses from existing, flawed regulations have already been spent and cannot be recaptured, for the most part. Power plants have installed the coal scrubbers; gas stations have reinforced storage tanks; human resource departments have redone their software; and other agencies affected by other regulations have already made their investments in human or physical capital or whatever else it took to conform to the regulations. In most instances, a repeal saves them close to nothing.

Even if the original regulation did not make sense, repealing the edict usually makes little more sense. In some instances, repeal could disrupt the entire market, and not in a good way. For instance, if a regulation that required a costly investment to comply was repealed, new entrants could appear, unburdened with the need to make the costly investment themselves, and drive out the incumbents. In that case, nothing would be gained because the new entrants would have nearly the same operating costs as the incumbents they drove out, but we would lose whatever benefits resulted from the original regulation, such as lower emissions.

While it is a valid point that our government does too much to help entrenched businesses at the expense of businesses yet to be conceived, repealing a costly rule that has already been met and has a modicum of benefits amounts to sheer sabotage.

In 2011, OIRA administrator Cass Sunstein announced plans to have federal agencies do a rigorous analysis of rules that could be repealed in a cost-effective way. As a result, a handful of inconsequential regulations were set aside, the most famous of which was one that required spills from milk trucks to be treated as if they were hazardous waste. It was a welcome change to be sure, but it represented a minor cost savings for an event that happens infrequently. Sam Batkins, director of regulatory analysis for the American Action Forum, estimated that the savings from repealing that regulation would be less than \$1 million a year.

We can and should improve regulatory policy, and there are ways to do so without merely undoing the rules of the previous administration. The most important change would be to remove the agency proposing a regulation from doing the cost-benefit analysis used to determine its worthiness. The current system rests on an enormous conflict of interest, akin to letting a parent be the judge at a beauty pageant. A separate entity within the executive branch, funded with money clawed back from the agencies, should perform the cost-benefit analysis instead. While it is fair to ponder whether such an office could eventually be subject to regulatory capture itself, it would doubtless be better than the system in place now. The new entity—and not the agency issuing the regulation—should also determine whether a rule should be construed as “major” and thus subject to the cost-benefit analysis critique.

Potential Regulatory Reforms

A number of reforms of the regulatory process have been suggested in the last few years. One idea that received majority support in the House is the Regulations from the Executive in Need of Scrutiny (REINS) Act. The REINS Act would require Congress to hold an up-or-down vote on all major regulations before final promulgation. This proposal is the inverse of the Congressional Review Act currently in place, under which Congress must affirmatively vote to repeal a regulation after an agency issues a final rule.

Some scholars believe that Congress is ill-equipped to deal with every new federal regulation. John Morrall, a longtime OIRA veteran, is wary of more legislative oversight, fearing it would do nothing to make regulatory

analysis less political, but merely more explicit. Given the current political environment in Congress, it is unlikely the administration and Congress will agree to the sort of comprehensive regulatory reform envisioned by the REINS Act. Reforming OIRA, however, and instituting more procedural checks could garner sufficient bipartisan support.

OIRA 2.0

Leaders on Capitol Hill have advocated for a more powerful OIRA. For instance, Sen. John Barrasso (R-WY) has suggested six specific steps to reform the office:

1. OIRA needs to review not only executive branch regulations, but also those of independent agencies.
2. Every significant rule should have a complete cost-benefit analysis independent from politics, which could mean an analysis done by another entity.
3. OIRA needs greater transparency such that those affected by a regulation have an opportunity to exchange views with the government.
4. OIRA needs to “call a regulation a regulation” and make agency “guidance” extremely rare, forcing agencies to go through the formal process for every significant regulatory change it seeks.
5. OIRA needs to be proactive in seeking out and eliminating duplicative or contrary rules across government.
6. OIRA should continually seek rules to eliminate and constantly check the effectiveness of rules.

Perhaps the strongest case for extending OIRA’s power over independent agencies is that the market influence of these regulators, to some extent, has outpaced cabinet-level agencies. The Federal Communications Commission now regulates the Internet, which is close to 5 percent of the nation’s gross domestic product, and its regulatory bill has grown larger in the last four years.

The new world of financial regulations under the Dodd-Frank Act also begs for more analysis. The legislation spelled out more than [400 rules](#), and a majority of them will likely never monetize costs or be subjected to a comprehensive cost-benefit analysis. The role of independent agencies has outgrown the 1980s, and regulatory oversight should evolve with those agencies.

A Congressional Budget Office for Regulations

Perhaps the most popular idea for regulatory process reform is to create a new agency dedicated to independent review of major regulations. Such an agency would avoid the moral hazard problem engendered by having agencies doing their own cost-benefit analyses.

There is no reason that this agency would have to cost the government more money: OMB could simply claw back the money the agencies currently allocate to the task of economic analysis and use that to fund the new agency. Some have suggested that to save money and improve the scope of its work, some of the regulatory analysis could be handled by outside economists in a government version of an academic peer review.

Where this entity would be housed would matter and is worth debating. Some have suggested that this new agency be the regulatory equivalent of the Congressional Budget Office and placed within the legislative branch. Others would prefer that it be an executive branch agency. And others have suggested that it operate as an appendage to OIRA.

Former OIRA administrators do not like the idea of having the new entity housed inside the executive branch. They note that the current problem OIRA faces is that political considerations invariably trump economic reasoning and that proximity to the White House, both literally and figuratively, makes that more likely to occur. Presumably, a new entity would be subject to the same pressures if it were housed in an office within the OMB, as OIRA currently is.

Fiscal conservatives on Capitol Hill are cool to the idea of a Regulatory Budget Office. They doubt it could be done without costing more money than the current arrangement, and they would prefer a reform that gives them more oversight over the regulatory process. As a result, if this were to pass, political exigencies would probably require such an entity to be an entity of Congress akin to the Congressional Budget Office.

One drawback to this plan is that a distinct office of regulatory oversight would not solve all the myriad problems with our current regulatory activities. Given the very nature of who goes into government, it is hard to see how we could keep the office from being captured by the agencies and their pro-regulatory agendas. However, the fact that the denizens of OIRA continue to display independent thinking decades after its creation does inspire some hope that it would be a long-term improvement over the current arrangement.

Lessons from History

No matter what a new administration does to reform the issuance of regulations, it is important to recognize that the regulatory battle will never end. Regulators regulate. It is why they joined the agency that employs them; how they get promotions, plaudits from interest groups, and interesting jobs in the future; and how they exert a modicum of power. Their bias will always be to issue new regulations, and even the most even-handed bureaucrat will have every incentive in the world to push forward on a regulation. We will always need independent entities to monitor our regulatory bureaucracy, both inside and outside of government.

Students of government and policy can learn a lot from studying the 1986 tax reform. Although it was not perfect, it created a tax code that removed many of the special interest deductions, exclusions, and credits that made the tax code maddeningly complicated and forced tax rates to be high in order to collect sufficient revenue to (less than wholly) fund our government. Since passing the 1986 reform, Congress has steadily picked apart the code; now we've reached the point at which our economy is saddled with a tax code less conducive to economic growth than it was before the 1986 reform.

The regulatory apparatus can never get us to such a copacetic state as the tax code's post-1986 honeymoon. Given the nature of our dynamic \$18 trillion economy, the government must constantly adjust the nation's regulatory framework as new businesses develop, old ones decline, and our citizens' priorities change. Not only will we never be able to achieve any sort of short-term regulatory nirvana, but also any procedural reforms Congress does manage to achieve are likely to be perpetually under attack from various special interests. Those special interests will fight vigorously to nudge, shove, or browbeat the regulatory bureaucracy to help move new and expanded regulations through the maw of government.

Thus, it is important to recognize that we will never be "done" with regulating. As our regulators do their business, the best we can hope for are regulators cognizant of their biases, an administration that's willing to remove some of the inherent biases in the regulatory framework when they become apparent, and a Congress that's eternally vigilant about regulatory overreach. Because each of these is difficult to attain, we should also do more to encourage a rigorous outside review of our agencies' regulatory activities—separate from the actions of industry. Sadly, this component is lacking at present. Trade associations and large corporations may find it worth their while to invest in the human capital necessary to

defend their business. And the environmental nonprofit sector has a wealth of resources available to spend on its agenda and a generation of men and women who see protecting the environment as a secular religion and well worth the sacrifice of pay and free time to achieve. But there is a paucity of scholars willing and able to study the regulatory actions of the government in an objective way.

Congress's detachment from most regulatory activity has resulted in a lack of the expertise that is needed to intelligently weigh in on most regulatory activities. This lacuna also makes it difficult for Congress to think cogently about what can and should be done to improve the regulatory apparatus. As a result, its rhetoric to that effect has usually been more fodder for the consumption of voters and donors than a precept for future action.

The Current Broken System

There are myriad problems with how the regulatory apparatus currently functions. Agencies invariably go dark before presidential reelection campaigns and then unleash a torrent of new regulations after the vote, regardless of the outcome. In 2016, the last year of Barack Obama's presidency, we saw an almost unprecedented pace of regulatory activities from the Department of Labor, with the Environmental Protection Agency not far behind. There were also an amazing number of regulations that are thought to cost just under \$100 million, the threshold at which they must undergo stricter scrutiny by OIRA.

Again, there is no silver bullet that can fix the problems that plague our regulatory apparatus. The basic constraint is that the federal government tends to attract people who believe that the government is the solution to the problems that ail the economy; and the economists who perform cost-benefit analyses in the government fully comprehend the incentives that incline them to justify any and all regulations that come their way. What's more, the political might that any White House can exert on an agency can behoove them to act with political expediency. In both Democratic and Republican administrations, that almost invariably entails doing more, not less.

An entirely new entity that performs cost-benefit analysis cannot change who goes into government or change the inherent incentives in place, but it can insulate those who perform this task from a modicum of political and agency pressure to conform. It might not amount to a complete and permanent fix of our regulatory environment, but it would be a dramatic

improvement over the status quo and a necessary (but not sufficient) ingredient in a process that would work better for taxpayers and consumers.

Suggested Readings

Batkins, Sam, and Ike Brannon. "Obama, Ryan, and the Future of Regulatory Reform." *Regulation* (Fall 2011).

———. "Examining the U.S. Regulatory Budget." *Regulation* (Winter 2012–2013).

———. "The Need for Retrospective Review of Regulations." *Regulation* (Summer 2013).

Brannon, Ike. "What Is a Life Worth?" *Regulation* (Winter 2004–2005).

Gordon, Richard L. "An EPA War on Coal?" *Regulation* (Spring 2013).

Viscusi, W. Kip. "Regulating the Regulators." *University of Chicago Law Review* 63, no. 4 (1996): Article 3.

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