

Toward a New and Improved Regulatory Apparatus

Could a new review agency improve federal regulation?

BY SAM BATKINS AND IKE BRANNON

No one in Washington, D.C. is particularly happy with the nation's current regulatory apparatus. Progressives argue that the Office of Information and Regulatory Affairs, the entity within the president's Office of Management and Budget tasked with reviewing agency rules, stifles consumer and environmental protections and places too much emphasis on costs. Conservatives, on the other hand, protest that OIRA is a feckless political arm of the White House, loathe to curtail egregious rules issued by cabinet agencies and exercising zero control over independent agencies.

Currently, when an executive agency proposes an "economically significant" regulation (meaning that its estimated effect on the economy would be \$100 million or greater), it must submit a regulatory impact analysis (RIA) to OIRA for review. The current administration's OIRA has returned for reconsideration precisely one regulation in its first four years, which suggests a lack of interest in regulatory oversight.

The process of analyzing the estimated costs and benefits of proposed regulations and acting on that information should be straightforward, but White House politics and the nation's entrenched regulatory apparatus have made it anything but. The most vocal proponents of rigorous benefit-cost analysis—the ranks of which include several former OIRA administrators—claim agency RIAs are often misleading and argue for a process that improves the quality of analysis. Left-leaning regulatory economists, however, are more inclined to give free rein to agencies and favor a more passive role for OIRA.

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Many denizens of the regulatory community favor some sort of overhaul of how we propose, analyze, and implement the thousands of rules issued by government agencies each year. Could Congress and the White House work together to create an improved regulatory process that is more transparent, produces objective analysis, and lessens the role of politics in the regulatory process? Several scholars and recent OIRA administrators have proposed three reform options to achieve just that, each of which takes a markedly different route to improving the current process:

- Expand Congress's regulatory role by requiring that it approve major rules issued by any government agency.
- Give OIRA explicit power to return regulations to all agencies, perhaps by codifying the existing executive orders on OIRA's role in regulatory review and inserting a judicial review element.
- Create a new entity, separate from OIRA and independent of the executive-branch agencies, that would be tasked with producing the RIAs for major regulations instead of allowing the agencies to produce that analysis.

None of those reform proposals is without flaws. But taken together, they make a compelling case that there is plenty of room for improvement.

Inaccurate Cost Estimates

There is little dispute from those who toil in the world of regulatory oversight that the current apparatus is in sore need of an overhaul. Those favoring reduced burdens, or at

least more transparency, point to the exploding costs of some recent regulations. From 2009 to 2012, regulators published regulations inflicting compliance costs of more than \$518 billion, which surpasses the combined annual gross domestic product of Norway and Portugal.

However, progressives do not see this as a *prima facie* argument for reform, at least not any changes that might slow the issuance of regulations. Many are more inclined to find fault with the very existence of the benefit-cost analysis apparatus. Georgetown law professor Lisa Heinzerling, who served as a senior administrator at the Environmental Protection Agency early in the Obama administration, decried the use of benefit-cost analysis as inappropriate for evaluating a plethora of agency activities. For instance, she criticizes the decision to analyze recently issued regulations intended to reduce prison rape, writing that “in the topsy-turvy world of cost-benefit analysis, the Department of Justice was compelled to treat rape as just another market exchange, coercion as a side note, and the elimination of prison rape as a good idea only if the economic numbers happened to come out that way.”

Rena Steinzor, the president of the left-leaning Center for Progressive Reform, seconded those concerns, lamenting that while benefit-cost analysis may be “billed as a non-ideological analytical tool, [it] today is in fact the opposite: questionable value judgments masked as technical calculations, all used as window-dressing to block rules that benefit the public but upset powerful industries.”

To some, benefit-cost analysis is a distracting means to an end, easily manipulated and rarely a hindrance to a final rule. For example, during its implementation of Dodd-Frank’s (non-germane) Conflict Minerals regulation, the Securities and Exchange Commission estimated costs between \$46 and \$71 million, while outside cost estimates were exponentially higher: the National Association of Manufacturers estimated compliance costs between \$9.4 billion and \$16 billion, and an independent study from Tulane University projected that the actual cost of the rule could reach \$8 billion.

The EPA’s Utility Maximum Achievable Control Technology regulation for its recent Mercury and Air-Toxics Standard is another example of a questionable benefit-cost analysis. The agency pegged compliance costs at approximately \$10 billion, which makes it one of the agency’s costliest rulemakings. However, NERA Economic Consulting suggests that estimate is woefully low, finding that the rule would impose capital costs alone in excess of \$80 billion.

In short, there’s a plethora of evidence that the cost-benefit analyses done by the various regulatory agencies are more likely to hew to the narrow political interests of presidential appointees rather than reality. Changing the system to get better data—and hence better regulation—is long overdue.

Ways to Improve the Regulatory System

Given the widespread dissatisfaction with the regulatory apparatus, we interviewed several former OIRA administrators and

a current U.S. senator who has pursued a legislative solution to the current system. We asked them how they would improve regulatory oversight. Their responses suggest four different but not mutually exclusive options.

Increased congressional input | One idea that received significant support in the House of Representatives in the last session of Congress is the REINS Act (Regulations from the Executive in Need of Scrutiny—no one can torture acronyms as well as anonymous congressional staffers). REINS would require Congress to hold an up-or-down vote on all major regulations before final promulgation. Sen. John Barrasso (R-Wyo.), chair of the Republican Policy Committee and a rare member of Congress who has evinced an interest in regulatory issues, is a strong supporter of this approach, arguing that “if regulators are held accountable, they will be forced to use common sense.”

However, Democratic Senate leadership has opposed the REINS Act and the current president would likely veto it. C. Boyden Gray, a former counsel to the Reagan Task Force on Regulatory Relief and a senior member in the George H.W. Bush administration, succinctly summarized the political feasibility of the legislation by saying, “It’s not a bad idea, but it’s not going to happen.”

Some scholars believe that Congress is busy enough and is ill-equipped to deal with every new major federal regulation. John Morall, a scholar at the Mercatus Institute and a former deputy administrator of OIRA, is wary of more legislative oversight, observing: “It’s very difficult for Congress to de-emphasize the politics, and I’m not sure politics will help regulatory reform. It could backfire.”

Susan Dudley, a professor at George Washington University and a former acting administrator at OIRA, touted the idea of a modified REINS Act under which either Congress or state governors would need to ratify an unfunded mandate, which she suggests might be more politically digestible. Still, given the current political environment in Congress, it is unlikely the Obama administration and Congress will agree to even a watered-down version of the sort of regulatory reform envisioned by the REINS Act.

More muscular OIRA | Regulatory scholars seem united in the belief that OIRA should be given greater sway in evaluating the regulations proffered by independent agencies, which are currently not subject to the executive order regarding the need for a benefit-cost analysis for major regulations. These agencies—particularly the Federal Communications Commission and the Securities and Exchange Commission—are becoming more significant players in the economic firmament, and to exempt them from the exercise of benefit-cost analysis means that an increasing slice of government economic regulatory activity is dodging close scrutiny.

For example, the FCC’s final net neutrality order contains no mention of possible costs, or even a comprehensive market study demonstrating that the new regulations were needed. Similarly, the proposed Volcker rule prohibiting proprietary

trading contains no quantified benefit-cost analysis, even though the Department of Treasury jointly proposed the regulation. It did, as required by the Paperwork Reduction Act, admit that the rule would require businesses to spend more than 6.5 million hours of work to comply with the regulation. If that time costs \$16 per hour or more (a pittance in the financial services industry), the proposal should have triggered heightened analytical scrutiny (\$100 million in costs), but Treasury performed no benefit-cost analysis.

President Obama did issue Executive Order 13579, asking independent agencies to conduct more rigorous benefit-cost analyses and formulate plans to rescind duplicative regulations. However, not one independent agency has submitted a final plan. Both Gray and Dudley believe the supposedly “untouchable” status of the independent agencies is a matter of politics, not settled law, and note that power over independent agencies could be asserted as a matter of law, even if Congress didn’t explicitly grant the president such power.

Senator Barrasso outlined six specific steps to reform and empower OIRA:

- OIRA needs to review not only executive branch regulations, but also those by independent agencies.
- Every significant rule should have a complete cost-benefit analysis independent from politics.
- OIRA needs greater transparency where those affected by a regulation have an opportunity to exchange views with their government.
- OIRA needs to “call a regulation a regulation” and make agency “guidance” extremely rare, forcing agencies to go through the formal regulatory process.
- OIRA needs to defend against duplicative or contrary rules across government.
- OIRA should continually find rules to eliminate and constantly check the effectiveness of rules.

Art Fraas, a former OIRA deputy administrator and visiting scholar at Resources for the Future, agreed that greater scrutiny is crucial, suggesting that “it is demonstrable that the agencies that are subject to the executive order now do more analysis than the independent agencies do.”

Perhaps the strongest case for extending OIRA’s power over independent agencies is that the market influence of these regulators has outpaced most cabinet-level agencies. The FCC now regulates the Internet, which facilitates close to 5 percent of the nation’s GDP, and its regulatory bill has grown larger in the last four years. Chairman Julius Genachowski has added more than 20 million paperwork burden hours and roughly \$2 billion in costs.

Dodd-Frank’s new world of financial regulations also begs for more analysis. There are more than 400 rules that need to be issued under the legislation and a majority of them will likely never be subject to the scrutiny of a comprehensive benefit-cost analysis. The role of independent agencies has outgrown the 1980s and regulatory oversight should evolve with those agencies.

Judicial review | Courts already have a role in evaluating federal regulations. To date, federal courts have struck down more than a dozen costly Obama-era regulations, though the role of the judiciary in monitoring regulation is prominent in every administration. When a federal court vacated the EPA’s Cross-State Air Pollution Rule last summer, it was the second time in as many administrations that the agency lost one of its cornerstone regulations.

However, courts rarely check the benefit-cost analysis of regulations. The executive orders all contain language absolving agencies from judicial review: “This order ... does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States.” The Unfunded Mandates Reform Act contains similar language.

Many regulatory scholars think the specter of automatic judicial oversight for major regulations would benefit the regulatory process and result in better analysis. Former OIRA administrator John Graham argued that “it would at least give the stakeholder community—for example, the business community, the state and local governments, the environmental activists, the consumer activists—some ability to leverage this operation in the event that [the regulators] are not taking seriously the cost-benefit requirements.”

Gray argued that an enhanced judicial review would breathe new life into the executive orders. He dismissed charges that review would burden the federal courts, noting that the D.C. Circuit does not have an overburdened case load. He argued it’s “entirely doable” and many judges are well-equipped to handle more administrative law cases.

While judicial review might be straightforward, it appears to be a non-starter with the current administration. The Regulatory Accountability Act, which passed the House with 19 Democratic supporters and unanimous Republican support, included several judicial review provisions, but the White House was less enthusiastic about the legislation. Prior to passage, the White House threatened a veto, arguing that such “procedural requirements on agencies ... would prevent them from performing their statutory responsibilities.”

Unlike a more assertive approach toward independent agencies, enhanced judicial review would likely require passage of the Regulatory Accountability Act or else codification of current executive orders with a judicial oversight component. Although there might be a rough consensus on the center-right regarding the desirability of the courts to weigh in on this particular imbroglio, the left is less than enthusiastic about the idea.

ACBO for regulatory analysis? | Perhaps the most popular idea among the group of scholars we interviewed is to replace the practice of having the agencies do their own benefit-cost analysis with the creation of a new agency dedicated to producing an independent review of major regulations. Like any new government agency, however, the devil is in the details. Would this new agency be a legislative-branch regulatory analysis agency similar to the Congressional Budget Office, or would it be an executive

branch agency performing cost-benefit analyses of major rules while OIRA plays the role of traffic cop?

Morall likes the idea of a new agency, so long as the White House's political actors remain on the outside: "I think there is no reason why you couldn't have OIRA and a CBO agency for regulatory analysis. The second agency would do the quality review of OIRA's work, but independent from the political process. This agency could provide advice and the actual estimates of the quality of the analysis by OIRA."

Graham sees a few technical and political obstacles: "It's perfectly sensible to think about either CBO expanding its role or having a congressional regulatory analysis operation. But I wouldn't see it as replacing the 'OMB role.' And even if you wanted it to, I don't think the president would let it."

All scholars seem to agree that any new agency must be independent from the regulators and the White House. Fraas suggested that if there were a "really good, critical third-party analysis, that would be great. I think that the agencies are going to argue that it really hamstrings their rulemaking capability because their ability to take action is going to be dependent on this third party producing an analysis—and that could take years."

The other concern, in an era of seemingly endless trillion-dollar deficits, is fiscal: does Congress want to spend more money on creating a "watchdog" to complement OIRA, which is already supposed to check regulators? Not surprisingly, fiscal conservatives on Capitol Hill are cool to the idea. Senator Barrasso told us that "more government is not the answer," and suggested that a regulatory "budget" might be more efficacious.

A bill, the "Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011" (with just two supporters), has been put in the hopper to establish a Congressional Office of Regulatory Analysis. This new agency would review all major rules and issue an annual report on federal regulation. Judging from the reactions of the regulatory community, the details matter when setting up this new agency. It must be independent enough to avoid capture by regulators and the White House, and it must not duplicate the role of OIRA. An agency that conducts objective analysis, instead of the regulatory agencies themselves, is a worthy idea. OIRA could then review this independent analysis, retaining its current role as the regulatory traffic cop.

Prospects for Reform in 2013?

None of the people we interviewed held out much hope for regulatory process reform in the second Obama administration. Senator Barrasso pointed out that the EPA had a number of significant regulations it had delayed until after the election, including greenhouse gas regulation for future stationary sources. Getting those regulations finalized is more important to the administration than trying to reform a system that would put more constraints on their activities.

Even modest attempts at regulatory reform appear unlikely. For example, simply codifying the president's own executive

orders on regulation and applying them to independent agencies is a non-starter, according to Gray. Graham concurred, noting that the White House has probably been exerting pressure on moderate Democrats to ignore regulatory reform.

However, Graham suggested that the Senate might be more amenable to some sort of regulatory reform in the next Congress:

I think that the Senate Democrats, who are more pro-business oriented, might be inclined to do regulatory reform. I think they've been discouraged by the White House from engaging in this activity, with probably [Virginia Democratic Senator Mark] Warner being the only exception that I know of right now. But after the election it is going to be clear that since Obama doesn't face reelection again, his influence over these Democratic senators will diminish. You're going to find more pro-business coalitions of Democratic and Republican senators willing to pass some type of regulatory reform legislation.

Senator Warner penned an op-ed in the *Washington Post* in 2010 advocating an aggressive regulatory budget that would have a "pay as you go" system, requiring federal agencies to identify and eliminate one existing regulation for each new regulation. However, the senator has yet to introduce legislation for this idea.

Baby Steps

While it's unrealistic to expect that the current presidential administration, which has been highly active in the regulatory arena, to support any substantive changes to the regulatory process, it is possible the current Congress will move to rein in regulatory decisionmaking.

For starters, people on both sides of the aisle find it discomfiting that independent agencies are not required to do benefit-cost analyses. It is also possible that members of Congress would try to address the opacity of the analyses that are currently generated by the agencies issuing the regulations, but it is hard to conceive of a lever that could produce improvements in this regard.

A true change to the process, rather than a tinkering around the edges, would require the acquiescence of the White House, and that's unlikely to happen over the next four years. However, if nothing is done to rein in rulemaking or make it more transparent, that could set the stage for a new president with a mandate to fix what clearly is broken. R

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