

**S. 59—REGULATORY RIGHT-TO-KNOW ACT OF  
1999 AND CONGRESSIONAL OFFICE OF REGU-  
LATORY ANALYSIS LEGISLATION**

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**HEARING**

BEFORE THE  
COMMITTEE ON  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

**S. 59**

TO PROVIDE GOVERNMENTWIDE ACCOUNTING OF REGULATORY COSTS  
AND BENEFITS, AND FOR OTHER PURPOSES

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APRIL 22, 1999

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**THURSDAY, APRIL 22, 1999**

U.S. SENATE,  
COMMITTEE ON GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:51 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senator Thompson.

**OPENING STATEMENT OF CHAIRMAN THOMPSON**

Chairman THOMPSON. Let us get started. I appreciate your patience this morning. Last night, the leadership asked some of us to come together this morning for a little while, so we are running a little late this morning and I appreciate our first two gentlemen here agreeing to consolidate our panel. Maybe it will save a little bit of time.

We are considering two bills today to increase the accountability and transparency of the Federal regulatory process, the Regulatory Right-To-Know Act and a proposal for a Congressional Office of Regulatory Analysis Act. On January 19, I introduced the Regulatory Right-To-Know Act, S. 59, with Senator John Breaux, Senator Ted Stevens, and Senator Trent Lott. I am pleased that Senators Voinovich, Landrieu, Bond, Robb, and Hutchinson have joined us as cosponsors.

S. 59 would require the Office of Management and Budget to submit to Congress an annual report on the costs and benefits of regulatory programs. Its purpose is to, first, promote the public's right to know the costs and benefits of regulation; second, increase the government's accountability; and third, to improve the quality of Federal regulatory programs and rules.

S. 59 continues the efforts of my predecessors on this Committee. Regulatory accounting was part of the Roth-Glenn regulatory reform bill unanimously reported by the Committee in 1995, when Senator Roth was our Chairman. In 1996, when Ted Stevens became our Chairman, his 1-year regulatory accounting amendment on the Omnibus Appropriations Act passed unanimously. Senator Roth, as well as Senators Glenn and Levin, supported the Stevens amendment. I supported Senator Stevens' efforts when it was enacted again in 1997.

Last year, I sponsored a similar measure, which was cosponsored by Senators Lott, Breaux, Robb, and Shelby. It passed unanimously and OMB will submit its third regulatory accounting report in January of 2000.

There also is a broad bipartisan coalition in the House that supports regulatory accounting, and in March, they introduced a more detailed regulatory accounting bill with 17 Democrats and 14 Republican cosponsors.

S. 59 will continue the requirement that OMB report to Congress on the costs and benefits of regulatory programs. This legislation also adds the previous initiatives in several different respects.

I believe the public has the right to know the benefits and costs of regulatory programs. By any measure, regulation is a major part of the government's business, costing hundreds of billions of dollars each year. Sensible regulatory programs also provide important benefits to the public and ones that they expect and deserve. The government has an obligation to think carefully about regulatory priorities, but we are just breaking ground now on how to do that. I believe that giving the public the opportunity to look over the government's shoulder, in effect, will help improve the quality as well as accountability of regulatory programs.

The second issue the Committee will consider today is a proposal for a Congressional Office of Regulatory Analysis, known as CORA. Last Congress, Senators Shelby and Bond introduced S. 1675, to establish such a Congressional office. I want to work with them to refine this concept, and testimony today on S. 1675 can help us do that.

I think the CORA bill is about accountability. Congress has a responsibility to ensure that the laws it passes are implemented effectively, efficiently, and fairly by the Executive Branch. To ensure that, we need accurate and reliable information.

S. 1675 would create a Congressional Office of Regulatory Analysis to provide Congress an independent analysis of the costs and benefits of agency rules. It would help us understand the logic of agency regulatory analysis and regulatory outcome. It would help us to understand whether agencies are issuing regulations that follow the intent of the law.

S. 1675 also contains a provision for CORA to report on the costs and benefits of Federal regulations so that in that respect, S. 1675 overlaps with S. 59. S. 1675 also would transfer to CORA certain functions now assigned to the General Accounting Office and the Congressional Budget Office under the Congressional Review Act of 1995. This includes the requirement that GAO produce a checklist for major rules showing whether the agency complied with current procedural requirements, such as Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Act.

We have an excellent group of witnesses here today. We will hear from the administration, a State Senator, a small business owner, scholars, and a public interest group member and I look forward to hearing their testimony.

The full text of everyone's prepared statements that you might have will be entered into the record, so I would ask that you summarize your testimony, if you would.

I would like to recognize the first panel of witnesses. We are pleased to have with us today Don Arbuckle, the Acting Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget. He will be followed by the Hon. Steve Saland, a State Senator from New York and is here representing the National Conference of State Legislatures.

Mr. Arbuckle, would you like to begin, please.

**TESTIMONY OF DONALD R. ARBUCKLE,<sup>1</sup> ACTING ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET**

Mr. ARBUCKLE. I would be happy to. Good morning, Mr. Chairman. It is a pleasure to be here. Thank you very much for permitting me to come up and testify on this legislation.

You invited us to testify on the Regulatory Right-To-Know Act of 1999, S. 59, and the Congressional Office of Regulatory Analysis Act, which as you point out was S. 1675 in the previous Congress. In addition, given recent Subcommittee action in the House on H.R. 1074, the counterpart to your bill, I hope that the Committee will consider it appropriate for me to at least mention this bill, as well.

Both the Committee and the administration have a common interest in making sure that government regulation is thoughtful and carefully analyzed before it is promulgated. At OIRA, we take this mission seriously. Every day, we are in discussion with agencies throughout the government probing the justifications and analyses behind their proposals.

For each of the past 2 years, we have summarized for the Congress and the public what is known about the costs and benefits of government regulation. We have done so under an appropriations rider that the administration supported providing for such an annual report. We believe that these reports have helped both to improve the quality of regulatory analysis and to make clear that we still have much more to do.

S. 59 would make permanent what Congress has passed as riders each of the past 3 years. Unfortunately, it would do so in ways that we think could delay or impede the process of improving regulation rather than advancing it. Make no mistake, we strongly support the general purposes of this legislation. It is our daily work. But with the Committee's permission, I would like to summarize very briefly why we hope the Committee, if it chooses to put this requirement into permanent legislation, will do so in a way that follows more closely the model Congress has already adopted in the riders.

First, both S. 59 and H.R. 1074, by requiring extensive procedures and detailed cost-benefit analyses of each government program and even program element, would, we believe, divert attention and resources from our current focus, which is making certain that agency decisions make sense. Some of the requirements of these bills are beyond the abilities and resources of the agencies who perform these analyses and of OMB. Some are beyond the current consensus in academia.

<sup>1</sup>The prepared statement of Mr. Arbuckle appears in the Appendix on page 55.

Second, the requirement of the bills that OIRA and OMB make policy recommendations concerning elimination and reform of government programs appears not to recognize or at least to minimize the fact that such proposals are already developed by the President's existing policy making procedures. The administration has a long record of suggesting changes in regulatory policies and procedures when appropriate, for example, in the Safe Drinking Water Act amendments, Food and Drug Administration modernization, and Food Quality Protection Act. All of these required extensive work throughout the Executive Branch and throughout the Congress. We are concerned about the creation of a separate and additional policy process as part of this report.

In general, then, we are concerned that the new requirements of S. 59 and/or H.R. 1074 reflect a belief that there is more information available than is the case, that this information can be produced by agencies or by OMB without significant diversion of resources, and that other responsibilities for OIRA can still be met. We are concerned that the new provisions will create unreasonable expectations which, in turn, will hinder rather than help resolve the many methodological and data collection difficulties inherent in this task.

Before completing my testimony, let me comment briefly on the Congressional Office of Regulatory Analysis Act, S. 1675. As is the tradition, the administration defers to Congress on matters of internal organization of the Legislative Branch. However, we believe it is important to clarify that we believe no Congressional office should be involved in the Executive Branch's development of new regulations prior to their formal publication.

Legislation which would directly involve Congress during the development of regulations would undermine the candid exchange of views within the Executive Branch and could jeopardize the careful rulemaking process established through the Administrative Procedure Act over the past 50 years. Congress has established a workable regulatory review process in which it oversees Executive Branch regulatory decisions after those decisions are made in accordance with established statutory administrative procedures and we believe that this process should be maintained.

That concludes my testimony, Mr. Chairman. Thank you, and I look forward to the opportunity to address any questions you may have.

Chairman THOMPSON. Thank you very much. Senator Saland.

**TESTIMONY OF HON. STEVE SALAND,<sup>1</sup> STATE SENATOR, NEW YORK, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES**

Mr. SALAND. Thank you, Mr. Chairman. Mr. Chairman, I am Senator Steve Saland, and as you noted earlier, a member of the New York State Senate, where I chair the Senate Children and Families Committee. I appear before you today on behalf of the National Conference of State Legislatures and the other six organizations of State and local elected officials that comprise the Big Seven.

<sup>1</sup>The prepared statement of Mr. Saland appears in the Appendix on page 63.



NCSL and the other Big Seven organizations support S. 59, the Regulatory Right-To-Know Act of 1999. You have my testimony in support of the legislation before you. I will summarize some of the key points raised in the testimony and address your request of commenting on related legislation that would establish a Congressional Office of Regulatory Affairs.

For several years, NCSL has raised concerns about developments in the relations between the Federal and State Governments. A decade ago, State legislators were alarmed about unfunded Federal mandates. We worked hard with Members of this Committee and others in Congress to pass the Unfunded Mandates Reform Act. Our more recent concerns focus on preemption of State and local authority by the Federal Government and on the Federal regulatory process. We believe the combination of unfunded mandates, preemption, and an archaic regulatory process curtail innovation and responsiveness of State and local officials.

NCSL views the Regulatory Right-To-Know Act as part of a package of reforms that, when passed, will largely alleviate the problems we have identified with preemption and the regulatory process. This Congress held a hearing yesterday on the Regulatory Improvement Act, S. 746, that represents yet another part of this package. We look forward to working with you on the Federal Financial Assistance Management Act and ultimately on the bill that would help constrain the propensity of Congress to preempt State and local prerogatives.

The Regulatory Right-To-Know Act contains four important elements. The annual accounting statement will offer the power of information to State, local, and Federal officials concerned with the impact of agency decisions on State and local governments. It will give Congress an indispensable oversight tool to determine whether agencies have exceeded their statutory authority when promulgating rules.

The cost-benefit analyses required by S. 59 will make agency officials more accountable for the programs they are implementing. They give the public a much better sense of how much funding it takes to provide particular benefits.

The third element of S. 59 calls for the recommendations regarding inefficient or ineffective programs or program rules. This, we believe, will streamline the regulatory process and ease the cause of considerable tension and frustration for State and local officials.

Finally, we are supportive of the bill's notice and comment provision. This element makes the accounting report a dynamic document, giving State and local officials a chance to highlight their most pressing concerns about proposed Federal actions.

The National Conference of State Legislatures also believes that S. 59 could be strengthened by adding the objectives of S. 1675 from the 105th Congress. That legislation would create a Congressional Office of Regulatory Affairs. This would fall somewhat into line with the practices that State legislatures have adopted in order to enhance regulatory oversight.

The chart attached to my testimony gives you a general summary of some of the actions States have taken to enhance regulatory oversight. I believe you will see that we practice what we preach. Over the past 20 years, legislatures have significantly

broadened their program evaluation, rule review, program accountability, and fiscal analysis activities. Cost-benefit analyses and risk assessments are becoming more frequently used devices for program implementation.

There are a variety of approaches to be found among States. They range from advisory committees, such as in New York, to committees with veto power, as in Ohio, or both approval and veto power, as in Connecticut, or suspension authority, as is found in Illinois.

Each step we take together on the federalism front, whether the Unfunded Mandates Reform Act, curtailing preemption, or making the regulatory process more accountable, is a step toward strengthening the intergovernmental partnership and its responsiveness and credibility. It is not an abstract exercise. Rather, it is a critical element in assuring the public's confidence in our Federal system so finely crafted by our Founding Fathers.

I look forward to working with you in passing S. 59 and the other components of our federalism agenda. Thank you for this opportunity to appear before you today, and I will be glad to respond to your questions, Mr. Chairman.

Chairman THOMPSON. Thank you very much. I appreciate your being with us here today and giving us additional insight as to how it works at the State level.

Senator, I would ask you first, how does creating a Regulatory Right-To-Know Act and a Congressional Office of Regulatory Analysis fit with what State legislatures are already doing in the world of regulatory oversight? You mentioned that briefly, some of them. Could you elaborate on that a little bit and give us a little bit better feel as to how? It sounds like the States may be a little bit advanced of where we are in some respects.

Mr. SALAND. Certainly. Thank you, Mr. Chairman. As you have heard, I am sure, the States, according to one of our great Supreme Court justices, often are viewed as the laboratories, and certainly your home State is probably the granddaddy of regulatory reform and many of the States are indebted to the particular reforms that Tennessee has led the way on.

Let me talk generally about the spectrum, if you will, Mr. Chairman. We in New York, as I mentioned in my testimony, are more in the nature of an advisory system whereby we have a bipartisan regulatory commission. We call it an ARRC, our Administrative Regulations Review Commission. They review regulations and make recommendations. They also are responsible for really initiating reform legislation with respect to regulations.

The system works pretty well. We have found that, in speaking with the Commission staff, they are satisfied that the administration is generally responsive to those things that they highlight.

There are, however, other States that certainly are far more proactive, States such as I mentioned in my testimony, like the State of Connecticut. In Connecticut, they have the right to both, in effect, approve or disapprove of regulations. There are certain time periods within which they must act. The State of Illinois basically has the ability to suspend a rule for 180 days, within which time there must be review of that rule and, in effect, the tendering

of a replacement or an effort to deal with the issues raised by the legislature.

Chairman THOMPSON. At what stage do they come in? At what stage do they make that review, at what stage in the regulatory process?

Mr. SALAND. In some instances, they address existing rules, and in some instances, it is the ability to be part of the rule preparation process. One of the things that has occurred in many of our States is that we have seen, certainly over the course of the past 2 decades, a much more proactive response, both at the executive level and at the legislative level. We have found, and here, if I may cite my experience in New York, where our Governor, Governor Pataki, very proactively when he took office handed the reins over to the person who is currently his budget director, Bob King, a former State legislator. He and his staff went about very actively reviewing existing regulations and weeding out where, in fact, there was duplication, where, in fact, there was a cost-benefit relationship that bore no relationship to reality.

The long and the short of it, Mr. Chairman, is that in the entire spectrum, we have some 41 out of 50 States that engage in regulatory oversight. In that entire spectrum, there is little or nothing that you could not find by way of example of paths to travel down as you explore the interaction of legislative activity and the rule-making process.

I certainly think I could speak for the NCSL in saying, to the extent that you would like us to do so, we would be more than happy to share with you our experiences. I have attached to my testimony, in effect, a compendium of what those 41 States do, and also, although it is not attached to my testimony, the five States which I referred to by way of example, we can attach for your edification the particulars of how those States handle regulatory oversight.

Chairman THOMPSON. I appreciate that very much. I sure would.

Mr. Arbuckle, are you familiar with what is going on in the States generally in this regard?

Mr. ARBUCKLE. Well, we are familiar with a lot of the efforts. I cannot say that I have the depth of knowledge that Senator Saland has about this. We have tried very hard to reach out to States to make sure that there is this coordination that he talked about. As you can imagine, it is a huge endeavor. There are a lot of issues that have to be worked and that have different effects on different States, but we are definitely trying to do that and coordinate.

Chairman THOMPSON. I think this is a classic example of the laboratories that you are talking about, where, clearly, we are moving into somewhat uncharted territory here and no one has the precise answer as to, for example, when the legislative body should be involved in the process. I would certainly be interested in knowing what the experimentation has been at the State level.

Mr. Arbuckle, I understand that is one of your primary concerns with the CORA legislation as it has developed. I think what has happened is that as the legislation has developed, the legislative body has become more involved earlier in the process, at perhaps the notice of proposed rulemaking stage. You are suggesting that that is too much, too early, and that we should wait until when?

Mr. ARBUCKLE. Let me clarify that a little bit, Mr. Chairman. There are a lot of stages in a rulemaking process that takes place sometimes over a long period of time. The two most formal stages established by the Administrative Procedure Act are the publication of a notice of proposed rulemaking for public comment and then, following that, an analysis of the comments, and the publication of a final rule.

I think it would be perfectly appropriate for the Congress to be concerned and involved and interested in rulemaking as it develops at those two stages. The concerns that we have involved our ability to carry out the intra-Executive Branch process of deciding and analyzing what the regulation should do, without at that point having an intersection with the Congressional interests that have provided the statutory duties that we are acting off of.

Chairman THOMPSON. It sounds like you are saying two different things, or saying both ways. On the one hand, that it would be appropriate for there to be some Congressional involvement early on in the process, perhaps at the proposed rulemaking stage, but on the other hand, you would really rather not have them there. If there is a role at that stage, what would be, in your view, an appropriate role where it would not interfere? And you might, if you want to, get into a little bit of the detail of the nuts and bolts as to exactly how this works, perhaps, and some practical difficulties you see with it.

But if there is a proper role for Congress early on—and, of course, you understand the Congressional interest. We talk about under CRA, vetoing regulation and all of that. We can talk about how that has worked. I do not know that anything has been affected by the passage of that law.

Mr. ARBUCKLE. Yes.

Chairman THOMPSON. So now we are looking and seeing whether or not it would make sense to maybe get involved, have some technical expertise, just like CBO for budget matters, have some technical expertise for regulatory matters to get involved earlier in the process, not in order to disrupt or to kill, but in order to have some input in order that we might come out with better rules. So if there is an appropriate role at that first stage, what do you think that would be?

Mr. ARBUCKLE. First of all, let me say that, as you indicated, this is a groundbreaking type of conversation about changing the procedures that have been in place for a long, long time. We have had the same discussions within the Executive Branch about where the appropriate entry for an oversight body like OMB should be in the rulemaking process, a process established by law and covered by legal requirements.

Similar difficulties would arise, I think, across the two branches of government arising from Congressional interaction at the pre-decisional stage, a point at which agencies are trying to decide what exactly it is, they want to do, say, for a proposal. Once that decision making process took place, however, it seems to me it would be both appropriate and particularly useful to have the Congressional interests that produced the statutes involved in commenting on the rule and helping fashion the rule that would be developed through the comment process.

Chairman THOMPSON. That does not sound like much of a role in the first stage, though, at the proposed rulemaking stage. Do you think the analogy to the OMB and the budget process is a good one? I am not sure I understand exactly when they come into this, and I understand that is not part of your primary responsibility, but it just occurred to me. You mentioned OMB. Perhaps we could take a look at that and see what they are doing, how that has worked in terms of what they do and when they do it.

Mr. ARBUCKLE. Yes. Well, there, of course, is a long-established relationship between OMB and CBO in the creation of—

Chairman THOMPSON. I meant CBO, I am sorry.

Mr. ARBUCKLE. Yes, in the creation of the President's budget, which eventually leads to legislation that is passed by the Congress where the decision making is made final. It is a little bit different in the regulatory process in that the grant of Congressional authority has already been made and it is the Executive Branch's job, then, to fulfill that. That is why we are having a little difficulty here in deciding when further involvement by the Congress would be appropriate.

Chairman THOMPSON. We have had reports, as you pointed out, the last 3 years.

Mr. ARBUCKLE. I think 2 years, actually.

Chairman THOMPSON. Two years?

Mr. ARBUCKLE. And then we have a third one that will be due, Mr. Chairman, this February.

Chairman THOMPSON. What is it primarily—you kind of ticked it off, but what is the primary problem you see? I get the impression that you feel that it has worked pretty well and you have been able to do for those 2 years, and I assume the third, what has been asked of you. What is the primary problem as you see this legislation that our additional request would put on you?

Mr. ARBUCKLE. First of all, let me say again that we think that the reports that have come out of the appropriations rider have been extremely useful in providing you and the Congress and the public with a basic overview of all the regulatory activity that is going on in the Executive Branch.

The problem, as we see it, with S. 59 and S. 1074 is the accumulative level of detail. The Stevens Amendment that you originally referred to was approximately a dozen lines long, 17, something like that. The current amendment, the current rider that we will be operating off of expands that out, has a little bit more detail in it, and is more like 30 lines. Then this legislation is again quadruple that, and so on. It is that accumulation of detail more than any specific detail itself that causes us difficulty and makes us worry, particularly in a small office like ours with many responsibilities, about the resources we have available to meet these requirements.

Chairman THOMPSON. I noticed here, if I have it correctly, that under the Stevens Amendment, it required estimate of the total annual costs and benefits of programs, including rules and paperwork, in the aggregate, first of all. No problem there, right? I mean, that is part of your requirement now?

Mr. ARBUCKLE. Yes. We have done that.

Chairman THOMPSON. And by major rule?

Mr. ARBUCKLE. And we have done that by major rule for a limited time period.

Chairman THOMPSON. All right. I think what we add here is by agency and agency program and program element.

Mr. ARBUCKLE. Yes.

Chairman THOMPSON. And that is where you begin to get a problem?

Mr. ARBUCKLE. Yes. That is correct.

Chairman THOMPSON. Is it because the information is not available or because it would take too much time with your limited resources, or all of the above? I hope I am not giving you any new ideas.

Mr. ARBUCKLE. These are excellent answers to your question, sir. [Laughter.]

Chairman THOMPSON. Is there anything you would like to add to that?

Mr. ARBUCKLE. Let me comment a little bit about that. There are basically two types of information on regulations that we have available. One is estimates of programs that are already out there, that are already operating, that are already on the books, and the other is what cost-benefit analysis as we deal with it in our daily work entails, namely is looking at changes in programs or new programs and trying to predict the impacts that they are going to have, both the costs and benefits. So one is looking back to regulations that are already on the books. One is looking forward, and that is what agencies and we spend most of the time doing.

In adding detail about programs and program elements, we are concerned that the intent is to try to create more data that is not regularly being prepared by agencies, which is not to say that it might be valuable, but that is not normally being prepared on the regulatory programs that are already in place and which have been out there in some cases for many years and decades. The bills call for two separate types of information; there is not now a structure, as there is for looking forward, to looking back.

Chairman THOMPSON. Well, maybe there needs to be one.

Mr. ARBUCKLE. You know, that is a good idea. This is not an either/or situation.

Chairman THOMPSON. We are talking about hundreds of billions of dollars that these things are costing businesses and people, families.

Mr. ARBUCKLE. Yes.

Chairman THOMPSON. A little additional work and expense to some of these agencies or even to OMB does not give me that much pain in terms of a concept. It needs to make sense, but I think that is something that we ought to revisit.

Mr. ARBUCKLE. Could I comment on that, Mr. Chairman?

Chairman THOMPSON. Yes, go ahead.

Mr. ARBUCKLE. I have been at OMB for almost 20 years in OIRA working on regulatory review and regulatory improvement. In all of the various administrations I have worked for, there have been efforts to do what we now call a look-back exercise, looking back at the regulations currently in effect.

Nobody disagrees that it can be done, although there are difficulties in doing it. The problem is institutionalizing it in a way that

keeps it going. In my experience, these have been exercises that have been tremendously labor intensive, that have involved the whole administration. That is what leads me to worry about the resource issue that I mentioned before for both ourselves and for the agencies.

Chairman THOMPSON. Well, we have got an additional problem here, too, I think, Mr. Arbuckle. We asked GAO to review OMB's first two regulatory accounting reports and they interviewed seven distinguished economists who are experts in cost-benefit analysis about your reports and they were generally critical of OMB's performance. OMB officials reviewed our final list of cost-benefit analysis experts and no objections to those were included.

So would you agree with their analysis? I guess you are maybe, you could argue, making your point here in terms of additional requirements because it seems to be a real problem with really adequately fulfilling what has already been given you. Do you agree with GAO's analysis or not?

Mr. ARBUCKLE. It is certainly the case that there have been critics of the reports, and I would agree that there is much more work that we can do. As you mentioned earlier, we are all in a sort of a groundbreaking stage here, even if we have been doing this through my career at OMB over the last 20 years.

There is in some cases, a lot of information available, but in many cases, very little information available. Trying to put that together is difficult—in effect, we need to do a cost-benefit analysis of that. Where do we want our agencies' resources and OMB's resources to be directed?

Chairman THOMPSON. I get the impression sometimes that part of the problem is that OMB does not want to give us any more information than it has to. At Jack Lew's confirmation hearing, I asked him if he would include the costs of tax paperwork in the upcoming regulatory accounting report and he said that he thought OMB would do that, and when OMB issued its draft regulatory accounting report in August 1998, OMB did include the massive cost of tax paperwork, which it estimated at \$140 billion annually. Then in OMB's final report, this number vanished into thin air.

Do you know what happened and why OMB cannot report on the cost of tax paperwork and other paperwork? I mean, I would think it would be a fairly easy task, since OMB already tracks the number of burden hours consumed by paperwork each year under the Paperwork Reduction Act. As I said, it had come up with a number in terms of the draft report, but then, as if we would forget that we had asked for it, that it had appeared before, when we got to the final report, it was gone. It leaves us with the impression that you just do not want to disclose any more than you have to. Do you know what happened to that?

Mr. ARBUCKLE. First of all, our intent is not to hide information from either you or the public. I do not think it is quite fair to say it disappeared into thin air. As I recall, in the final report, we did note the figure and referred to it in the final report, although not in as much detail as we had perhaps in the proposed report.

The Treasury Department and the IRS are engaged in a mammoth effort to try to reinvent their program and we felt that it was uncertain right now as to what the burden actually is and what the

appropriate method of measuring it should be. It is not as simple as it might seem. As you correctly point out, in the information collection budget, which we released some time ago, we point out how much burden Treasury imposes on the American public. But the Treasury Department is working very hard to try to create a methodology that more accurately measures that burden.

Chairman THOMPSON. I would challenge you to show where that \$140 billion estimate is in the final report. I do not think it is in there. If it is, show it to me and you will have my apology.

Mr. ARBUCKLE. I will be happy to follow up on that.

Chairman THOMPSON. Senator Saland, I appreciate your support of S. 59, the core proposal. I want to thank the National Conference of State Legislatures and all the "Big Seven" State and local government organizations for their letter of support of S. 59.<sup>1</sup>

Can you describe the significance of the Big Seven's consensus on this issue and where it fits in relation to the other issues that State and local government associations are advancing in Congress?

Mr. SALAND. It would be my pleasure, Mr. Chairman. Would you be kind enough to indulge me, if I might, if I could just revisit a couple of comments that I had made earlier—

Chairman THOMPSON. Yes, sir.

Mr. SALAND [continuing]. And unless it would be inappropriate, maybe make some comments. I do not want to turn this into a debate with Mr. Arbuckle's comments.

Chairman THOMPSON. No. We do that up here every once in a while.

Mr. SALAND. OK. First, let me say—

Chairman THOMPSON. I am sure it is different than the State Senate in New York, right?

Mr. SALAND. I never cease to be amazed.

Chairman THOMPSON. Everything is done by consensus. No, that is good. Interchange of ideas is good.

Mr. SALAND. Your experiences with your administration's Budget Office seem strangely parallel to that which we deal with our Division of the Budget.

I would like to, if I might, go back and just point out that with our States, generally, if I can do this in terms of generalities, from the proposal of regulation, on average, there is a 30- to 60-day period within which the appropriate committee, regulatory committee, is then able to act. What we have found, and I am sure your experience would be the same, is that the mere presence of this oversight authority generally has an effect on eliminating regulatory excesses and the proposing of unreasonable regulations. I would just merely submit that what would be the justification of not creating a system parallel to the system that you already have created for UMRA.

I am troubled by comments to the effect that the administration should be cooperative with the legislature, where appropriate. I am troubled by, in effect, picking and choosing what you should be held accountable for in terms of disclosure. You and I, although I certainly not at the level that you have attained, are required to

<sup>1</sup>The letter dated March 10, 1999 appears in the Appendix on page 53.



be responsive by way of representative government. There is a certain comfort level when one does not have to go through that process and there is a certain resistance to change regardless of what the process may be.

I would submit to you that there is little or no reason why one should assume that if this can be done in a piecemeal fashion, once the system is created, certainly with the resources at the fingertips of the administration, certainly with the technology that the administration and we all have at those very same fingertips, once the process is up and running, there is no reason why we can assume it is going to be that labor intensive nor that difficult.

Going back to your question, and I am sorry if I went astray here, certainly, what you are proposing is most harmonious with the Big Seven's approach to the issue of federalism. We believe this would be a very key component as part and parcel of the Big Seven's approach to federalism, and may I point out, and I am sure you are aware and perhaps some others may not, it is not that often that the Big Seven comes together and coalesces on a particular issue. This happens to be one of those issues.

Chairman THOMPSON. That is what I was thinking.

Mr. SALAND. We occasionally find ourselves at odds. We are speaking with unanimity and one voice on this particular issue. It is critical to us at all levels of local and State government that we have the ability to know, we have the ability to basically plan, we have the ability to understand the process that brought these regulations to us.

Chairman THOMPSON. Along those lines, I was interested in your view of the requirement for an analysis of the cumulative direct and indirect impacts of Federal rules on State and local government.

Mr. SALAND. It would certainly seem to me that that would be critical, absolutely critical to any package that you may ultimately enact, Senator. The reality is, is that the piecemeal approach really, I do not think, does a heck of a lot for anybody. If you are going to be selective, if you are going to effectively have the ability to pick and choose what you shall disclose, one can not know the overwhelming cost. You in your comments made reference to hundreds of billions of dollars. There are things that come back to us. If we do not know those costs, we have a problem.

I merely recite to you one of the problems which we have had to deal with in recent times, certainly most recently, the requirements for Federal standardization of licenses, certainly an onerous responsibility that we are going to have to contend with and no dollars coming with it. Nobody has basically factored in what that expense is, and while I realize that effectively is on hold, I am not quite sure when we will be required to be responsible.

Chairman THOMPSON. Do you have a constitutional requirement to balance your budget, the way we do in Tennessee?

Mr. SALAND. Yes, we certainly do. Sometimes, it is very artful, I must confess, but they are balanced.

Chairman THOMPSON. Thank you very much. We could spend a lot of time, all three of us, I am sure, discussing this. I want to thank both of you for coming.

I would like to follow up on some of the things the States are doing in a little bit more detail, if we could, and Mr. Arbuckle, I appreciate your thoughts. We do not want to overburden, and some of this, sometimes I get a little bit sensitive to whether or not we are, instead of really changing things, we are laying on another layer and then going to forget about it and move on. So I am not locked in concrete on the details of a lot of this stuff. I do really want to know how it works.

But when we decide how it works, then OMB needs to do its job and do what it is supposed to and be responsive to what we are trying to do up here, and that is the message that I would like for you to go away with.

Mr. ARBUCKLE. We will be happy to work with you, sir.

Chairman THOMPSON. I appreciate it. Thank you, gentlemen.

Mr. SALAND. Mr. Chairman, you made reference to a letter from the Big Seven.

Chairman THOMPSON. Yes.

Mr. SALAND. Am I correct in assuming that is the letter of March 10 and it is already part of the record?<sup>1</sup>

Chairman THOMPSON. I believe that is the one.

Mr. SALAND. Thank you.

Chairman THOMPSON. Thank you very much. I appreciate it.

I would like to turn now to our second and final panel. With us today is Arthur J. (Jim) Dyer, a small business owner from my home State of Tennessee. It is good to have you with us, a friend of mine.

He will be followed by Dr. Robert Litan from the Brookings Institution. Our third witness will be Dr. Murray Weidenbaum, the Chairman of the Center for the Study of American Business. Professor Sidney Shapiro from Indiana University's School of Policy and Environmental Affairs will then testify. The final witness today will be Gary Bass, Executive Director of OMB Watch.

I want to thank all of our witnesses today for being with us here on this second panel. These are important issues that we are confronting and we appreciate all of you for taking the time to give us your input on them.

We will keep the record open, incidentally, for 1 week for Members of the Committee to submit written questions and any additional statements for the record.

Mr. Dyer, welcome. It is good to see you again. Would you like to start off with any comments you might have.

**TESTIMONY OF ARTHUR J. DYER,<sup>2</sup> PRESIDENT, METAL PRODUCTS COMPANY, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS**

Mr. DYER. Thank you. I appreciate the invitation to be here, Mr. Chairman. I am Arthur J. Dyer, the President of Metal Products Company, a small manufacturing company in McMinnville, Tennessee. We are a family-owned business, about 50 years old, and today we have almost 100 employees.

<sup>1</sup>The letter referred to appears in the Appendix on page 53.

<sup>2</sup>The prepared statement of Mr. Dyer appears in the Appendix on page 82.

I am representing the National Association of Manufacturers today. The NAM is the largest industrial trade group in the United States and has over 14,000 member companies with approximately 10,000 small manufacturers like Metal Products Company. The NAM represents 85 percent of the U.S. manufactured goods and the members represent also 18 million employees. The NAM's mission is to improve the living standards of the American worker by shaping a regulatory and legislative environment conducive to U.S. economic growth.

NAM supports both the Regulatory Right-To-Know Act and the establishment of a Congressional Office of Regulatory Analysis. Both will contribute to improving the regulatory process and the efficiency of the regulations themselves. We believe that neither will hurt public safety, public health, or the environment.

American manufacturers today cannot simply raise prices to improve our bottom line. Given the competition of the global economy, we have to look for ways to lower costs constantly. Regulations, even good ones, add costs. These regulation burdens have accurately been called hidden taxes, and like any tax, the American taxpayer should have a right to know that the money is being spent wisely.

My employees and I must constantly look for ways to improve our productivity on the shop floor and lower costs, but I would be a fool to sit in my office and dictate how a man should run his machine on a shop floor. I need to go out and listen to that fellow because he is closer to the problem than I am. I do not see why government cannot do the same thing.

I am not anti-government or anti-regulation. My employees are important to me. Their children go to the same schools as my children. They are on the same ball team. I have employees that go to my church and live on my street. It is important to me that they are safe in their work environment and I appreciate how regulations have improved worker safety.

I am not anti-environment, either. We live on the banks of the Barren Fork River that flows through McMinnville. My children canoe and fish and swim in that river. I do not want to see it polluted. But I do think that we should concentrate on making sure that the regulatory burden is worthwhile and that we accurately prioritize our regulatory goals.

I believe that the legislation that you are proposing would go a long way in doing that. S. 59, with the public notice and comment provisions, would allow experts outside the peer review process to comment on the methodology and perhaps offer better ways to analyze the cost-benefit analysis. CORA would serve as a natural and, I think, complimentary counterbalance to OIRA and the OMB and I think it would be important to have a different view when you are analyzing the net benefit of these regulations.

I also think it would be important for CORA to be able to propose alternate ways of achieving the regulatory goals. I think that there are many ways to do something, and just like in our business, we cannot do things the same way that we have always done them. We have to keep looking at new ideas and go back and look at what we have done for years and maybe see if it is still appro-

appropriate. I do not see why it would not be appropriate for government to look at old regulations and see if they are really useful anymore.

In summation, I believe that American business people truly want to do what is right for their employees, their customers, and their country. The Congressional Office of Regulatory Analysis and the Regulatory Right-To-Know Act would provide all Americans, from Members of this Committee down to my employees and me, an opportunity to have a more open and honest debate based on more objective information about how regulatory agencies reach their decisions. We all want to do what is right, but in today's competitive global environment, we simply cannot afford to waste time and money on the wrong regulatory solutions.

I would be happy to answer any questions you may have.

Chairman THOMPSON. Thank you very much. Dr. Litan.

**TESTIMONY OF ROBERT E. LITAN,<sup>1</sup> PH.D., DIRECTOR OF ECONOMIC STUDIES AT THE BROOKINGS INSTITUTION AND CO-DIRECTOR OF THE AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES**

Mr. LITAN. Thank you. I appreciate being here again today. I am especially grateful that you invited me here to be reunited with my college debate partner, Professor Shapiro, whom I have not seen in 30 years. We are still debating after all these years, and it turns out we are now on the opposite side.

I will get right to the bottom line. Both of these bills are good legislation and they should be passed, although in our written testimony, we have some suggestions for modification.

The case for S. 59 is simple. Congress and the public deserve to know on a regular basis, the same annual basis on which the budget is prepared, the estimated impacts of Federal regulatory activity, in total, by agency, and by major program. OMB has been doing most of this, as we just heard, at the behest of Congress for the past 2 years. They should keep on doing it.

Now, in our testimony, we review some of the objections to this that we are likely to hear in a few minutes, and I will be happy to take those up in Q and A. But the basic message I will leave you with at this point is that these objections remind me of generals who are fighting the last war. The war over the usefulness of benefit-cost analysis is over. The government has been doing it for 25 years, although imperfectly.

The right approach is in S. 59, which sets up a process that will make the government do it even better, rather than to just simply throw one's hands up and say that analysis cannot or should not be done. If anything, there is a need to do more cost-benefit analysis of on-budget programs as well as regulatory programs.

Mr. Chairman, I just finished serving as the main writer for a report by the President's Commission on Capital Budgeting that had bipartisan membership, Republicans and Democrats, and one of those recommendations in the report was that all major Federal programs, budget programs, should have a cost-benefit analysis performed on them. That same logic, it seems to me, easily carries

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<sup>1</sup>The joint prepared statement of Mr. Hahn and Mr. Litan appears in the Appendix on page 91.

over to the regulatory sphere, illustrating again strong bipartisan support for this concept.

The proposed CORA legislation would further improve matters by giving Congress in the regulatory sphere what it has long had in the budgetary arena, namely a source of independent analysis on the impacts of regulatory activity, which, as you have noted, are now quite substantial.

As useful as the regulatory review by OMB is, and with all due respect to Mr. Arbuckle and his team, whom I admire and once worked with from afar, OMB faces inherent political constraints that prevent it from providing Congress and the public with totally independent analysis. If you need any evidence of this, you do not have to look any further than the GAO report which just came out today which documents in thorough detail that OMB is constrained because it is part of the same administration as are the agencies that are issuing the rules that Congress mandated originally ought to be written.

In my few remaining minutes, I will just tick off a few suggestions for modification of the proposals. I may not get through all of them, but they are in the testimony.

First, on S. 59, we suggest that OMB ought to be required to recommend in its annual report some minimum number of regulations or programs that ought to be reformed or eliminated. This does not override the current policy making process, as implied in Mr. Arbuckle's testimony. In fact, if anything, it just simply directs how the policy making process should proceed within the administration.

Second, OMB should be similarly required to identify some minimum number of regulations where its assessment of the likely impact of regulation substantially differs from that of the agency.

Third, in a similar vein, the bill should require OMB to review the regulatory analyses of a selected number of existing rules each year. This would help start to develop some estimates independent of those of the agencies.

Fourth, the bill should make clear that the estimates are to be stated in monetary terms, to the extent practicable.

And fifth, the Congress should take into account in setting agencies' annual appropriations the degree of agency compliance with OMB's guidelines for reporting costs and benefits.

Let me conclude with a few thoughts on CORA. Briefly, we do not believe that CORA should do its own regulatory analyses of every rule, as the Shelby-Bond draft would mandate. This simply would duplicate what is already going on in the agencies. Instead, we think that CORA should perform the same kind of broad review of options and analysis that OMB now conducts, but CORA will be more independent.

We also suggest that CORA not review non-major rules and that it confine its assessment to major rules and focus also on the OMB annual report.

You raised this question in your Q and A with Mr. Arbuckle about when CORA should get involved. We suggest in our testimony at the notice of proposed rulemaking stage and that the bill ought to encourage CORA to file comments in the rulemaking record. It does not have to do it because it is always going to put

out a final report at the end, but I would suggest that if CORA is putting these comments on the record, it will become the 800-pound gorilla of commentators.

The agencies will pay more attention to CORA, it seems to me, than probably anybody else, and, in fact, what will happen over time is that the agencies will pay so much attention to Congress through CORA that it will, I think, eliminate or substantially reduce the number of rules that are challenged in court. This is because if a rule is issued and CORA basically says "fine" at the end of the day, it will make it much more difficult for those who are challenging rules to actually sustain their challenges in court. So if anything, a CORA will streamline the regulatory process and at the same time give Congress the source of independent analysis that I think you need and deserve. Thank you.

Chairman THOMPSON. Thank you very much.

Unfortunately, I have just a few minutes left on a vote that is occurring right now. If you will bear with me, let me go over and vote just as quickly as I can and then I will return and we will continue. Thank you very much.

[Recess.]

Chairman THOMPSON. Mr. Weidenbaum, we are especially honored to have you here with us today. Thank you very much, and proceed with any statement that you would like to make.

**TESTIMONY OF MURRAY WEIDENBAUM, PH.D.,<sup>1</sup> CHAIRMAN,  
CENTER FOR THE STUDY OF AMERICAN BUSINESS, WASHINGTON UNIVERSITY**

Mr. WEIDENBAUM. Thank you, sir. It is a great pleasure to be here, Mr. Chairman.

The legislation you are considering will raise the level of public understanding of a very important area of public policy. Here is the case for S. 59 in a nutshell. Neither benefits nor costs of regulations show up in the totals of Federal spending or taxation, but the amounts are very substantial, totaling many hundreds of billions of dollars every year. The public has a right to know this information on a regular basis. Regulation affects so many aspects of our lives, economic factors, such as employment, inflation, productivity, and competitiveness, as well as social factors, such as the environment, consumer and employee safety.

Some say that data on regulatory benefits and costs are not reliable. Let me hit that one right away. As a pioneer in developing this information, I am aware of the shortcomings and also the progress made. But, Mr. Chairman, criticism is still leveled against the data on the gross domestic product, yet the government goes on to produce that information and it is used for essential decision making in both the public and the private sectors.

If you really want to see shortcomings in the data, look at the budget that the Congress acts on. Treasury's projections of capital gains taxes and corporate income taxes are often way too high or way too low. Similar problems arise on the spending side. Estimates can be way off for credit programs, the CCC (Commodity Credit Corporation) military procurement, and entitlements.

<sup>1</sup>The prepared statement of Mr. Weidenbaum appears in the Appendix on page 108.

But whatever the limits, this kind of data is useful, as are the data on benefits and costs of regulation. That has alerted the public to the huge magnitude of resources involved. I see no reason to deprive the public of this vital knowledge.

And there is a positive feedback effect, as we learned in the budget data. By making permanent the temporary requirement for an annual regulatory accounting, S. 59, likewise, will encourage the Executive Branch to develop a better database.

Let me hit just a few procedural details. OMB reports, in response to the Stevens Amendment, lack the data that we need on individual regulatory agencies and programs. Thus, Section 4(a)(1) in your bill is badly needed. But I think we need to be sensitive to the concerns about the load you are imposing, so I would say going on to include distributional effects generates too large a research burden that would delay the entire effort to measure benefits and costs. I urge you to eliminate it.

Likewise, 4(a)(2) seems to require extensive research on the indirect effects of Federal rules. I think, instead, estimating costs and benefits should get priority. That is a big enough job. Analysis of impacts could rely on studies prepared by private researchers.

On the other hand, there is merit in estimating future costs and benefits. Given the burden imposed by S. 59 to prepare historical data, I urge you to phase in this requirement. Advance warning will give the agencies time to develop new methodologies.

Chairman THOMPSON. Excuse me. Phase in which requirement?

Mr. WEIDENBAUM. Phase in the requirement for making forecasts of future benefits and costs. That will take time to develop, so perhaps you can phase in the aggregate projections in the year 2003, projections by agencies in 2004, estimates by program element in 2005.

Yet Section 7 on peer review, I think, is essential to enhance confidence in the data. But peer reviews usually involve more than one peer. I urge the Committee to provide for two or more. Several public policy research centers have the required capability.

Turning to the companion bill about CORA, an expanded flow of regulatory data means that Congress, I think, really needs its own staff to analyze the information, but I do not believe bills like S. 1675 go far enough. After all, this proposal is limited to improving the way agencies write regulations. But key decisions on regulation occur earlier. When you all write an OSHA Act or a new Clean Air Act. There is an information gap here, I suggest that each Congressional Committee when writing a regulatory statute should consider the expected benefits and costs and that data should be provided by CORA.

Where do you put CORA? It could be independent. It could be part of CBO. There are pluses and minuses on both of that. But I think the substance is important. It should focus both on the early stage where Congress is writing a new statute and on the latest stage where under SBREFA (Small Business Regulatory Enforcement Fairness Act) you are reviewing proposed regulations.

Accompanying my formal statement is the CED report on modernizing government regulation, which covers that in more detail. As you might suspect, I helped to write it.<sup>1</sup>

To summarize quickly, enacting S. 59 and establishing an Office of Regulatory Analysis would be important improvements. It is gratifying to see the bipartisan nature of these bills and of their Congressional supporters. Their enactment would raise the information level of deliberations on regulation and might even lower the decibel level. Thank you very much.

Chairman THOMPSON. Thank you very much. I appreciate it.

Professor Shapiro.

Mr. SHAPIRO. Thank you. When I debated with Bob Litan, I usually tried to go second so I could do any necessary clarifications that were necessary, and I am happy to play that role again.

Mr. LITAN. We were on the same team then.

Mr. SHAPIRO. Even more necessary.

Chairman THOMPSON. You have to keep in mind, you only have a few minutes here.

**TESTIMONY OF SIDNEY A. SHAPIRO,<sup>2</sup> VISITING SCHOLAR,  
SCHOOL OF POLICY AND ENVIRONMENTAL AFFAIRS, INDIANA UNIVERSITY**

Mr. SHAPIRO. Bob Litan suggested maybe I and others who have reservations about S. 59 are fighting the last war, and I do not think that is necessarily the case. Clearly, as he said, cost-benefit analysis is here to stay. But the issue is what to do with it in light of its real limitations on what economics and economic data can teach us. How do we best use the numbers in light of the very real limitations we understand and know about to make all of us a little smarter in terms of how we do regulation?

Second, most of what we want to know about regulation deals with individual rules. Cost-benefit analysis is particularly revealing when we go rule-by-rule and look at the particular benefits and costs that they may yield. Yet S. 59 is not about rule-by-rule cost-benefit analysis. It is about aggregate or total costs and benefits, and when those are compiled, particularly in light of the real limitations of the data, I think it has very little to teach us about the merits of particular policy disputes.

I would also like to mention Dr. Weidenbaum's point about the gross national product. During the break, I was getting a very interesting economics and historical lecture from him, very informative—always good to be a student—about those numbers, and as he mentioned in his testimony, there are certainly limitations about those numbers, and yet we use it, and of course we do.

But this is a little bit different in two ways. First, as you heard from OMB, there is a diversion of resources here. If we produce these numbers, we cannot be doing other things. So we have to weigh the value of these numbers and what they have to say and what we can get out of them versus other things that agencies can be doing, particularly their statutory mandates of protecting the American public.

<sup>1</sup>The report referred to appears in the Appendix on page 260.

<sup>2</sup>The prepared statement of Mr. Shapiro appears in the Appendix on page 114.



Also, there is the matter of understanding what these numbers finally mean. Will the production of regulatory accounting teach the American public about costs and benefits of regulation? Well, sure, to some extent. But, on the other hand, if you only produce numbers, if you only have tables and tables of numbers, you lose in a very real sense important qualitative information that is also necessary to assess the costs and benefits of regulation.

In that regard, I would point to EPA's Section 812 study, which was mandated by Congress. EPA was told to estimate the total costs and benefits of the Clean Air Act, and it did so and it is continuing to do so, and it produced a very thick study its first time out. The study was subject to extensive peer review. That is really the way to do regulatory accounting, to my mind, because EPA in a qualitative sense as well as a quantitative sense was able to describe the costs and benefits.

I would note also from the EPA's study that this type of regulatory accounting does not come cheap. The study took 7 years to complete, cost millions of dollars, and I would guess S. 59, which is much more ambitious, would cost even more.

I would also point out that when EPA went to estimate the benefits, because of data limitations, the best they could do was estimate that the total benefits were somewhere between \$5.6 and \$49.4 trillion, a huge magnitude. Because of that, we really do not learn much about the clean air program, or we certainly do not learn as much as focusing on individual policies and policy choices.

In light of these limitations, I would urge some degree of modesty is necessary, that we proceed slowly to try to total up these costs and benefits, and I would urge second that we need to find better ways to mix qualitative and quantitative information so that the numbers we produce are accurate and helpful representations and pictures of the regulatory process.

Chairman THOMPSON. Thank you very much. Dr. Bass.

**TESTIMONY OF GARY D. BASS, PH.D.,<sup>1</sup> EXECUTIVE DIRECTOR,  
OMB WATCH**

Mr. BASS. Thank you, Mr. Chairman. I think one thing that might be helpful is if I go back and trace some of the elements of the regulatory accounting bill and that might help to identify why we oppose both the accounting bill as well as the CORA bill.

Going back to the original Stevens rider, as I understand it, there were four requirements: An estimate for total annual costs and benefits of regulations; an estimate of the costs and benefits of rules having an annual impact of \$100 million in costs or more; a third requirement to do direct and indirect impacts on private sector, State and local, and Federal Government; and then, fourth, recommendations for reform or repeal.

My understanding of the history is that Senator Stevens, who authored it, Senator Roth, Senator Glenn, and Senator Levin had a number of exchanges that emphasized that there was no need for new research. The idea was to rely on existing materials. I pulled out Senator Levin's comments saying the amendment simply directs OMB to pull together information that it already has on exist-

<sup>1</sup>The prepared statement of Mr. Bass appears in the Appendix on page 130.

ing Federal regulatory programs and to use that to estimate the total annual costs and benefits. He said, in fact, that is why he was supporting it.

And in the next year, when Congress again adopted the Stevens language, Mr. Chairman, you reiterated at that time you did not expect to increase the workload on OMB, that they could rely on existing studies.

It was after that that OMB published its second report, which warns very carefully that, "We still believe that the limitations of these estimates for use in making recommendations about reforming or eliminating regulatory programs are severe. Aggregate estimates of the costs and benefits offer little guidance on how to improve the efficiency, effectiveness, or soundness of the existing body of regulations." That echoes what Professor Shapiro was just indicating about the need for doing individual reviews and what we heard yesterday in the discussions of S. 746.

Despite this, the third regulatory accounting rider changed dramatically. And by the way, I should mention, I am very pleased that today there was a hearing, because there has been no previous hearing on this subject.

In the third rider, I want to point out five changes. First, you changed it from an annual process to every 2 years instead.

Second, the total annual costs and benefits requirement expanded in a number of ways to cover both rules and paperwork and require aggregate estimates by agency, by agency program, and by major rule. With these new requirements, you included the clause "to the extent feasible."

The third change was under the direct and indirect impacts. You dropped "direct and indirect" impact and just said look at impacts. You also dropped the Federal Government, the private sector and added wages and economic growth and tribal governments.

Fourth, you added this notion that OMB is to provide guidance to standardize cost-benefit measures.

And fifth, you had a requirement that the OMB guidance, as well as the accounting report, must be subjected to peer review.

Under this bill, you again expand and change significantly what was done last year in seven distinct ways. First, you go back to making it annual.

Second, you drop the clause "to the extent feasible" when doing the annual estimate. Now, that is critical from our perspective because, while there are numbers for major rules on costs and benefits, there are no cost-benefit analyses done for non-major rules. With the language "to the extent feasible," OMB, and the agencies, did not have to create new research. By dropping that, S. 59 requires a whole new set of data. In addition, while you mentioned earlier today that under the Paperwork Reduction Act there are burden estimates, there are not cost-benefit numbers, so the agencies or OMB would be required to generate those kinds of numbers anew.

Also under the annual estimate, you added a new category called program elements, which are related components. So there is an additional estimate there as well.

Under the impact section, you have reintroduced direct and indirect impacts, even though OMB highlighted the importance and

mentioned repeatedly that doing indirect impacts is very difficult, if not impossible, to do.

You added back in the private sector to look at, a very comprehensive piece.

And then, unlike the discussion on S. 746, you made a major point in this bill to emphasize quantified net benefits. Now, OMB points out in its research and its reports that the only way to do net benefits is to monetize all factors. You are moving more in that direction.

Fifth, all of this covers the 4 preceding years.

Sixth, you propose the peer review is to be done by an outside entity as though the Federal Government is not competent to do it. The GAO report that has been referred to today identifies seven leading experts who would be likely peer reviewers, all of which have a very conservative viewpoint.

Most interesting, though, is the seventh point in this bill, which is that, unlike public comments which are to be considered by OMB, you would require the peer review materials to be used by OMB, not just to be considered.

All of this moves far away from the original intention of not generating new research and would clearly grind agencies to a halt.

Let me make three comments about CORA. What you propose is to have CORA do in 45 days a regulatory impact analysis, but it takes agencies years to do.

Second, you require CORA to generate regulatory options that would achieve the same regulatory goal but at a lower cost, which is a completely different standard than what agencies must go through. On top of this, it raises serious questions about political manipulations and activities.

Third, the whole office would be highly political in the sense that the Director would be appointed by the Majority Leader and the Speaker.

One last comment I want to make about CORA. You referred to this as a question earlier: Is this like the budget process? I would argue it is not like the budget process. In that case, the Executive Branch proposes, you, Congress, dispose. In the case of the regulatory process, you generate the law and it becomes the Executive Branch's responsibility to implement that law or execute it. You have oversight at any point in that process, through hearings, through legislation, any approach you want. So it is different than the budget process and I would not make them identically compared. Thank you.

Chairman THOMPSON. All right. Thank you.

Let us address the question of whether or not this is going to require a lot of new resources. You said, Dr. Bass, grinding agencies to a halt, and you point out that we have expanded the scope of the statutes as we have gone along. The question arises, do the agencies have the tools? What tools do they have now in order to comply with the statute, were it to become law? Are they available now? What kind of burden would be imposed on them?

Dr. LITAN, do you have any thoughts on that?

Mr. LITAN. Well, the amount of cost obviously depends on the scope of what OMB is asked to do on S. 59. My guess is that to faithfully provide the disaggregated estimates, not only just the to-

tals but the agency and the program numbers, there may be some additional expenditures. I cannot tell you how much. Your Committee can ask OMB for them. My view is it is money well worth spending. If it is several extra million dollars, it is a drop in the bucket compared to hundreds of billions of dollars that we impose on the private sector.

The second thing I would add is that if you have a choice in terms of where to spend the money—and don't have sufficient funds to spend more money both on a CORA and more analysis at OMB—I would give higher priority to creating CORA because you are more likely to get greater bang for the buck in terms of having another independent estimating body out there. So I would give priority to CORA.

Ideally, of course, I would spend money on both agencies. I do not think you are talking huge numbers, maybe \$5 or \$10 million. These are rounding errors in the overall size of the budget.

Chairman THOMPSON. What about, expanding on that a little bit, Dr. Weidenbaum, what about the ability of the government? This kind of runs into my basic notion that we oftentimes think we know more than we really do, that we do not appreciate our own limitations and we feel like if we can apply the right green eye shade method to a problem, we can figure it out forever, and it never works out that way. What about the question of whether or not we really do have the tools to make these assessments?

You talk about the progress in terms of cost-benefit analysis and how that is the current thinking now, although we are still having trouble getting that implemented in terms of major rules. But especially in light of the fact that we are talking about non-quantifiable costs as well as benefits, is it feasible, does it really help us when we roll in the quantifiable and the non-quantifiable all in the same number? Can we really do that? Does it really mean anything? Is the state of the art, as it were, such that we can get something that is meaningful to us?

Mr. WEIDENBAUM. First of all, I think that we need to be sensitive to the serious concerns that have been expressed at this hearing about the burden, and as you put it, the availability of resources to carry out all this analysis. Personally, I think the number one priority should be estimating the benefits and costs of Federal Government regulation. That is a tall order in itself. All the other, frankly, nice-to-know information, the direct, indirect impacts, I would put aside for later. It is not that they are not important, but you cannot do everything at once.

But if you devoted 1 one-hundredth of 1 percent of the likely total cost imposed by regulation, 1 one-hundredth of 1 percent of that to analysis, you would have a tremendous pot of money, more than is feasible to spend. So we are talking about devoting a very relatively minute amount of money.

Do we have the resources? I think if you focus laser-like just on that one point, estimating benefits and costs, and I think you are right in here, you do have, contrary to what one of the witnesses said, you do specify that you want benefits and costs by major rule. That is Section 4(a)(1)(C). The reason you need that is that is the bread and butter, that is the basic building block for all the other data, whether it is by agency or in the aggregate.

Can it be done? Yes. Are there difficulties? That is why I talked about all the difficulties we still debate about the gross domestic product, about the balance of payments. You know, if the two witnesses, interestingly, to my left, were around when the Congress was considering the Budget and Accounting Act of 1921 and all your predecessors took them seriously, we would not have a modern budget process today. Are we in better shape now in dealing with regulation than our forbearers were in estimating revenues and all that back in 1921? I think the answer is yes. We have advanced the state of the art.

I hope that a stripped-down version of S. 59, deferring all the nice-to-know but items not directly related to benefits or costs of regulation, a stripped-down version be voted on so the task can get going right away.

Chairman THOMPSON. Let me make sure I understand what your recommendations are. First of all, the distributional effects, you do not think that is necessary?

Mr. WEIDENBAUM. Not at this stage, no.

Chairman THOMPSON. Dr. Litan, would you agree with that?

Mr. LITAN. I agree.

Chairman THOMPSON. Also, as I understand it, under Section 4(a), costs and benefits, first in the aggregate, second, by agency, agency program and program element, would you leave that in?

Mr. WEIDENBAUM. Yes, sir.

Chairman THOMPSON. Third, by major rule, you indicated you would leave that in?

Mr. WEIDENBAUM. Yes, sir.

Chairman THOMPSON. Then we get to two here, and I take it that you would eliminate that, an analysis of direct and indirect impacts of Federal rules on State and Federal and local government—

Mr. WEIDENBAUM. Correct.

Chairman THOMPSON [continuing]. The private sector, small business, wages, economic growth. Is that what you were—

Mr. WEIDENBAUM. In good measure, that is already taken up in the estimates of benefits and costs. So I would not have a second, in a sense, competitive set of analyses. Focus on estimating the benefits and the costs.

Chairman THOMPSON. You are getting more speculative there, I mean, just to use a lay term. It seems to me like when you get into this, you are getting more speculative.

Mr. WEIDENBAUM. That would be fine for a narrative section, where OMB could pull together a great variety of studies done by private researchers on direct and indirect impacts. But OMB and the agencies themselves would not be developing this de novo.

Chairman THOMPSON. Let us turn the page now, at least the way my statute is drafted here. Section 4(b), benefits and costs, it says, to the extent feasible, the Director shall quantify the net benefits and net costs under Section (a)(1). How do you view that?

Mr. WEIDENBAUM. Well, I interpret that as follows. If in the given program the non-quantifiable, the verbal benefits or costs are so substantial they overshadow the measurable, then it is not feasible to do the net benefit. That says, just quantifying is not useful where the non-quantifiable is so important. I do not know how you

would legislate common sense, but my interpretation of this is common sense would go a long way.

Chairman THOMPSON. Mr. Dyer.

Mr. DYER. Well, I would just like to make a comment that I know in Washington you are very concerned about the money that is spent. You have got to work on your budget. But I am on the receiving end of these hidden costs and these burdens, and looking at the tremendous costs that our regulations put on our economic activity, I am reminded of an expression that we have at work. I do not want a dollar waiting on a dime. I think the amount of money that we would spend delving into these matters a little more would be well spent if it can save some unnecessary regulatory burden.

Chairman THOMPSON. I appreciate that, too, and I was looking at some figures here. One study by the Small Business Administration found that in small companies with less than 20 workers, the annual cost of regulation is about \$5,500 per worker. By contrast, the SBA study found that the regulatory cost for large companies with over 500 workers is about \$2,900 per worker. So this impacts on you guys more than it does anybody else, really. That is why I am glad to have you here today.

Mr. WEIDENBAUM. I am also glad you are citing the work by Dr. Tom Hopkins, who is a distinguished adjunct scholar at our Center for Study of American Business. We both appreciate your plug.

Chairman THOMPSON. Glad to do it.

Mr. BASS. Mr. Chairman, in the spirit of debate, could we respond to some of that?

Chairman THOMPSON. Yes. I was getting ready to go back to you, but just go ahead.

Mr. BASS. I would like to make five points based on the conversations that just happened. One is that, looking at the Congressional Budget Office's figures, a cost-benefit analysis costs about \$570,000 on an average. Just doing some very quick math based on a piece of work that was out on the front table by Angela Antonelli of the Heritage Foundation, she seems to indicate that there are about 4,000 to 5,000 rules per year. That means over \$2 billion would be spent on doing cost-benefit analysis, not including paperwork. That is assuming that all rules receive a comprehensive CBA. The point would be that we are talking about a sizeable amount of dollars and resources for the agencies.

Second, I am very intrigued by Dr. Weidenbaum's idea of retrospective review of rules, in part because we do not have an opportunity, as you heard at yesterday's hearings, to reassess the kinds of costs that the market takes on in making adaptive changes to lower the cost of actually doing a regulation, and there was some research that was referenced in several of the testimonies to make that point. So I am intrigued about the looking back and reassessing costs.

Third, in terms of the net benefit issue, in the OMB report, on Table 3—I just pulled it out—what they do here is very interesting. In coming up with net benefits, OMB does not include a quantifiable number for lives saved because they say that an assessment of net benefit requires subtracting the benefits from the costs,

which means they have to monetize all factors. If we do not monetize, then we cannot get to the net benefits.

The fourth point is if there is a lack of information, as several of the panelists have suggested, about major rules, about individual rules and about the impact of costs and benefits, go to GAO's web site. Already, this information is all up there, freely and widely available.

The last point I would make is about the issue of distributional effects. I believe where it is in your bill is under the definitions of cost and benefits. I would be concerned that in dropping it, there would be nothing that addresses equity. And if distributional effects was intended to reach that path, one would want to be sure to include something that addresses equity concerns along those lines, much like the Executive Order 12866 does already.

Chairman THOMPSON. Thank you.

Dr. Shapiro, did you have any comment on that?

Mr. SHAPIRO. Thank you, Mr. Chairman. I appreciated your comment earlier about inquiring whether we are adding layer upon layer here and just how much we will get for the additional layers.

When one goes to total up the costs and benefits, if we had individual agency estimates of every cost and benefit of every regulation, then I suppose it would be a simple accounting function. But much of today's regulations are based on rules that were passed 20 years ago, 25 years ago, when, for good or bad, we did not do as good a job of estimating the costs and benefits.

So as to that historical data, which still have ongoing costs and benefits, we really do not have the costs and figures. The academic studies have done their best to estimate those, but they are full of tremendous gaps and OMB discusses those gaps when it tries to pull together the historical data.

Now, for the more recent rules, we do have estimates of costs and benefits for the major rules, but as Dr. Bass just pointed out, not for the minor rules. Even there, however, when you ask, do agencies have the tools necessary, it is a tough job to estimate individual costs and benefits for any one rule, which explains in part the high cost you just heard about of \$570,000.

Let me just offer one example. It is often the case that it is difficult to come up with precise estimates of risk. How much risk are people at because of some ongoing industrial activity? I noted earlier the EPA study of the Clean Air Act benefits ran from about \$5 trillion to \$200 trillion because of the imprecise nature of the numbers risk assessors give us.

Chairman THOMPSON. And they decided the benefits were about 40 percent of the gross domestic product, I believe, did they not?

Mr. SHAPIRO. There you go. Someone once tried to put a number to this. Unfortunately, this example is now kind of dated because of the budget surplus, but an economist once explained, or a risk assessor once explained, that these risk assessments are so imprecise that if you take the lower bound and the upper bound, it is the difference between a cup of coffee and paying off the national debt. We simply lack those numbers, so we are forced to retreat to qualitative factors.

Chairman THOMPSON. But they are out there and you know when you are going to put those numbers out. I would say in EPA's

case, for example, they have received a tremendous amount of criticism and even ridicule about some of the numbers they have come out with. Is not there a salutary benefit to knowing that when you put numbers out, that the best people in the world are going to be out there and looking at them and commenting on them and so forth? Does that not produce something in the mental processes that has benefit?

Otherwise, you are totally at the mercy—nobody is accountable. Nobody really ever has to worry about it. I say nobody is accountable, but we all know that there are a lot of different ways to hide the ball from an administrative process standpoint. Does it not have some good effect to know that you are going to have to put it out there and have your peers commenting on it?

Mr. SHAPIRO. Yes, sir. Absolutely. We should be as smart as we can be, and to the extent we have numbers, we ought to look at them for what they are worth.

Chairman THOMPSON. Going back to yesterday, by the way, how do you feel about cost-benefit analysis in general? Yesterday, we were talking about cost-benefit analysis for major rules, risk assessment, and so forth. I would be interested in how you and Dr. Bass feel about that in particular.

Mr. SHAPIRO. Agencies do it. They are required by OMB to do it and I think that is very salutary. I would point out two things, however.

First, as I just mentioned, agencies have to deal with the data they can get within the time frames they have to operate. As a result, various agencies have adopted slightly different ways of doing cost-benefit analysis because they are forced to these different accommodations given their differences in situation and availability of data. I think they do the best they can. We can always try to do better.

When you go to aggregate those, as this bill does, you have a bit of adding up apples and oranges because we do not have a common methodology, and were OMB to impose one, we run up against the constraint I just mentioned, which is the adaptation.

Chairman THOMPSON. Well, that is what they always say. Our situation is different. We need to apply our own methodology and all that. GAO does an analysis of it and finds that very, very often, the Executive Order is ignored, in total or in part.

But my point is, whether or not you agree with the legislation or not we were discussing yesterday, the idea that they ought to be doing a cost-benefit analysis, consistent with the Executive Order, anyway, is a good idea.

Mr. SHAPIRO. Yes, sir.

Chairman THOMPSON. Do you agree with that, Dr. Bass?

Mr. BASS. If your bill S. 746 only did that, we would not have been having the heavy debate that we were having. I think that there is not any question that agencies are currently required to do cost-benefit analysis for major rules. They should be doing it for those.

Chairman THOMPSON. Do you know, do you have an opinion or do you know whether or not they are doing a very good job in carrying out the Executive Order?



Mr. BASS. Well, no, I do not have a qualitative sense of how that is done. I know that GAO did report that certain major rules were not reviewed by OMB. There certainly should be greater oversight on the part of Congress to ensure compliance with that. The point I was going to make is not just solely whether cost-benefit is done, which is an economic tool. Regulatory decisions also should be made in the context of a number of other factors that an agency should be considering that may not be economic in nature.

Chairman THOMPSON. What, that would not be either quantifiable or non-quantifiable, what in addition to that should they be considering?

Mr. BASS. Oh, I believe that when we start to discuss issues around the benefits that are derived from environmental protection or from worker protection—

Chairman THOMPSON. That is non-quantifiable.

Mr. BASS. I am sorry. What?

Chairman THOMPSON. That is non-quantifiable. I mean, that is covered.

Mr. BASS. I understand that. The question that I was referring to, though, is how would you do an economic cost-benefit analysis and then derive in S. 59 a discussion about net benefits. That would be hard to do on the non-quantifiable side. You would ultimately have to monetize that, which is what OMB actually did, in order to come up with it.

Chairman THOMPSON. S. 59 says to the extent feasible.

Mr. BASS. Yes.

Chairman THOMPSON. Dr. Litan.

Mr. LITAN. Yes. I want to tick off several responses. First, on the cost of doing all of this, Gary said, well, 4,000 rules times \$570,000 is \$2 billion. In fact, we are probably only talking about major rules here and thus 30 or 40 major rules a year, so we are down to numbers in the \$15 to \$20 million range. This is not a huge amount of money.

The second thing is both Gary Bass and Sid Shapiro talk about the fact that there is all this historical data. We do not know a lot of this. Well, that is why in our testimony we suggest that your bill require OMB to begin the process of going back and looking at some of these rules and redoing some of them itself. And you know what? Gary Bass and Sid Shapiro may be right. Some of those rules may be a lot cheaper than we thought, but you would like to know that. I also will bet you some of them are more expensive than we thought.

Chairman THOMPSON. This all presupposes you are trying to knock something down.

Mr. LITAN. Exactly.

Chairman THOMPSON. I mean, the fact of the matter is, all these things that we all are for, the benefits greatly outweigh the costs. So it really helps your cause, I would say, and protective legislation to be doing this, whether or not it is meat inspection or children smoking or whatever.

My problem is that you start trying to add up the costs and benefits. You say, well, you cannot do that because you are not factoring in the non-quantifiable. You say, OK, we will factor that in. They

say, well, when you do that, it makes the numbers meaningless, so you cannot do that, either. That is kind of the objection we get.

So the idea, I suppose, is to allow the regulator in his sole discretion to make those determinations and not have to explain why he is doing what he is doing.

Mr. LITAN. Well, we have an example in our testimony of how—it was a hypothetical—where you have got, let us say, \$500 million of cost on a water pollution bill, \$400 million of benefits, and then you have the non-quantifiable factor that this rule may just give you clean lakes and clean rivers, which you cannot put a number on, but you go ahead and adopt the rule anyhow. What the analysis has done is that it allows you to at least implicitly value those non-quantifiables. You know they are at least worth at least \$100 million in this example. So I think the virtue of at least quantifying what you can is that it allows you to put a price tag on what you cannot quantify.

Two more points. Despite all this debate, I do not think we are all that far apart. The bottom line of Mr. Shapiro's testimony, orally as opposed to written, because I think he was more strenuous in his written testimony than his oral testimony, is be careful and go slower.

Mr. SHAPIRO. I am intimidated by the Chairman.

Mr. LITAN. OK. Well, something works. Oversight works.

Chairman THOMPSON. I am just sitting here thinking about how many hearings we would have to have to have a hearing for every rule.

Mr. LITAN. But in any event, my point is that Mr. Shapiro is basically saying, look, be careful, be aware, keep your eyes open before going into this. But the reality is that does not seem to me an overwhelming objection to doing what you are proposing.

Gary comes along with some very specific word changes, some of which I happen to agree with. I think I heard him say, take out "indirect," add some words like "to the extent feasible." Where the rubber hits the road is on monetization, OK?

Now, the President's Executive Order or OMB's guidance already says that agencies should monetize to the extent feasible. Your bill does not even do that. In my testimony, I suggest you should add such language. You should copy the words that are in the Executive Order, and as long as the words "to the extent feasible" are in there, it seems to me that should take care of Gary's objection. Now, I may be pushing him too far—

Chairman THOMPSON. A lot of people prefer to have the Executive Order down to use when it is convenient but not have it carried out and not have it be made law where it really means anything.

Mr. LITAN. No comment.

Chairman THOMPSON. Let us move, if we may, briefly to the CORA. Gentlemen, Professor Shapiro and Dr. Bass, do you have problems with the concept that the Congress should become more involved in the regulatory process in this way? Obviously, there is a question as to when, if it gets involved, or when it should, to what extent that it should. Questions have been raised as to Congress meddling in the administration's business, as it were. But, of course, it is all based on the laws that Congress passes and we

often find that the regulations are contrary to what our intent really was and we passed legislation that would give us another crack at it. There are only so many hearing days in a year.

What do you think the concept, regardless of how you would approach it, the concept of Congress becoming more involved in the process in general? Is there any approach that you would support in that respect that we are not doing now?

Mr. BASS. The answer would be yes. I do think, and I am mindful of the fact that you just said you have only so many days for hearings, but I do believe the oversight process is a critical one in order to educate you in the notion of developing any needed legislation.

I also think that the appropriate way to handle the regulatory maze, if you will, are through the appropriate oversight committees. That is, it is very difficult to deal with issues comprehensively. When there is a problem with the Clean Air Act, you should deal with the Clean Air Act, and on down the line. It is more effective and will be more efficient in the long run.

I also have a bit of a problem with Bob's idea that a letter from Congress, or CORA as its substitute, to an agency becomes, as you say, the 800-pound gorilla. I think the Administrative Procedure Act was established to ensure some kind of even ground for everyone in the public to participate in the rulemaking. If just by perception Congress' letter has greater weight, you have then tilted the whole regulatory playing field enormously.

By the same token, when you just asked the question about accountability, ultimately, it is not only Congress that deals with it, it is going to be the courts, and the courts are going to be guided by the Administrative Procedure Act. So there are many factors that have to be woven into all of this.

Chairman THOMPSON. But for Congress to weigh in, of course, it would be helpful if they had a little more expertise than most of us have on some of these arcane rules, and for the courts to weigh in, I mean, the horse is way out of the barn then and it is very expensive. The question is whether or not it would not be better to have a little more input earlier on so that we might avoid some of these problems. We know that in many areas, we are coming up with rules that are not only putting resources in the wrong places but are actually harmful in some respects.

Mr. BASS. Mr. Chairman, I assume that in order to achieve that, you hire staff that are experts. Certainly, Paul Noe knows the substance of the regulatory matters inside and out, and if he was on the Environment Committee, the staff would know the details of the particular legislation that they have oversight on.

Chairman THOMPSON. Well, he is a man of many talents, but he is not a scientist and an expert in every regulatory area that could come up.

Mr. BASS. Fair enough. I do not believe that CORA would have that same kind of expertise that you are looking for, and, in fact, if you take Bob's numbers that he just did with my figure of the CBO cost estimate, you are talking about an institution that, at its minimum, would be \$32 million a year, which is more than what CBO is. We are not talking about something that is trivial here.

Chairman THOMPSON. Dr. Weidenbaum, you said you thought either a new agency or as a part of CBO. Dr. Litan, do you have any

thoughts about that? Again, part of me says the fewer new entities, the better.

Mr. WEIDENBAUM. My preference is to——

Chairman THOMPSON. But on the other hand, CBO, I am not sure that what they are doing now would lend itself that readily to what we would be asking them to do here.

Mr. WEIDENBAUM. The reason I suggest putting it under CBO— but that is not essential, it could be independent——

Chairman THOMPSON. That is something we have talked about.

Mr. WEIDENBAUM. It uses a lot of the same type of talent. I am talking about micro-economists, particularly, people with a statistical bent. There would be a lot of mutual support from the existing portions of CBO for this new portion. Also, you would save an awful lot of overhead. So as a practical matter, you put this new organization under CBO, I think you will find it getting off to a start earlier than if it had to go through the whole motions of setting up a new separate agency in the Legislative Branch.

Chairman THOMPSON. Dr. Litan, before I get off the subject totally, do you have any thoughts on the agencies' compliance with the Executive Order?

Mr. LITAN. Only what I read, which is that it is imperfect.

Chairman THOMPSON. OK. Dr. Shapiro, do you have on this latter point we have been discussing with regard to CORA, first the bigger question, and then a preference as to whether, if you thought it ought to be done or not, if it was going to be done, how and where the responsibility might lie?

Mr. SHAPIRO. Thank you. I would refer to the early years of OMB and OIRA in the Reagan Administration. That was the first administration to take regulatory oversight seriously. It was very controversial. It was very controversial for a lot of reasons, but one of them was the feeling of outsiders that there was a lot of dealing behind the scenes, that people were getting special access to the regulatory process through the back door of OIRA. Subsequently, OIRA published procedural regulations which made them accountable for their process and who comes in and who goes out. The Clinton Administration strengthened those procedures, so they are even more on the record.

I mention that because we were talking earlier in the hearing, was talking earlier about when should Congress intervene, and I think the cause of the consternation over whether it should be before a notice of proposed rulemaking is this very concern. If it is after the notice of proposed rulemaking, there is more accountability, it is more open, everybody is dealing at the agency. At that point, and typically that is when Congress now intervenes to the extent, individual Senators or Congressmen want to have a say, and that seems to me maybe an important dividing line for that very reason.

The other point I would make, if I may, is this: Some of the dissatisfaction about agencies' compliance with the Executive Order, I think, deals not with the compliance with the Executive Order but with the underlying situation that when agencies go to regulate, their statutory missions are often tied to different factors than a cost-benefit test. Now, it is another whole debate whether we

should have regulation as a substantive matter, as the mandate tied to a cost-benefit test—

Chairman THOMPSON. Well, they are not very bashful about saying this does not apply to us so we are not going to do it and then going on.

Mr. SHAPIRO. I understand.

Chairman THOMPSON. It is not a real constraint. I do not think they are laboring under it in many cases.

Mr. SHAPIRO. No, but the extent to which they get involved with this data is affected by their mission and their mission points them in a somewhat different direction. So they come out with results that some of the critics do not like. They point to that as a failure of the cost-benefit process, but, in fact, the agency is responding to its statutory mission and I do not see that as a criticism of the way they do cost-benefit analysis. I see that as—

Chairman THOMPSON. Part of its statutory mission is to follow the President's Executive Orders, I would think, maybe not statutory, but there. Yes, sir?

Mr. LITAN. Yes. On CORA, two points. One is, how much would it cost? Not a \$570,000 analysis again? We are talking about, in my framework, a staff that looks like OIRA, like 15 or 20 people, so cost that out at \$1.5 or \$2 million. Add some peer review panels and so forth. If you are telling CORA not to do its own regulatory analysis but, in effect, do the same kind of review that OMB is doing, it is not \$570,000 a rule. It is maybe several million dollars. It is not \$32 million.

Second, where should it be? I say in my testimony my preference would be to have it be its own agency. I fear that it could sort of get lost and have its influence muted if it were part of CBO. I also suggest that you ought to talk to Dr. Crippen about this, but I think there is some reservation within CBO about putting it there and worry that this would compromise its relationships with the agencies. So that is something that you will have to assess, I think, in private conversation.

Chairman THOMPSON. Mr. Dyer, what do you come away with from all this? How big a part of this regulatory situation is a part of your life and doing business?

Mr. DYER. I can tell you, with my experience today, I will never order a BLT without wondering what it stands for. I have heard enough letters, all right. [Laughter.]

I think that most business people complain and gripe when we are filling out some form from the Commerce Department or the Labor Department. It is an aggravation. My business has grown. I will be frank. I do not do much of that myself anymore, but I pay people that do and it would be a little better for my bottom line if I did not have to.

Many of the regulations do not appear to make sense down at my end, and that may be because I am not very bright, I admit that, but we rely on trade associations and academic institutions to do the analysis. I think that what you are proposing would increase our confidence that what we do when we could be out playing with our kids is worthwhile. I do not believe business begrudges doing what it needs to do to make our country better. We just want to make sure that we are not spinning our wheels.

Chairman THOMPSON. You hear a lot of stories about one-size-fits-all rules that just simply have no relevance to an individual. They look at it and they get cynical and pessimistic and anti-government and anti-regulation and all that when we all know there are some things, as you say, you have kids that swim and canoe in that same water that we are trying to protect.

Mr. WEIDENBAUM. Mr. Chairman, could I pick up a theme that Professor Shapiro raised?

Chairman THOMPSON. Yes, sir.

Mr. WEIDENBAUM. That is, the burden of all this regulatory review. I think he has got a good point there, which is why I think when the Congress finishes writing a bill like S. 59, you ought to economize on all the regulatory review mandates that you are imposing.

Chairman THOMPSON. Do a little cost-benefit analysis, in other words?

Mr. WEIDENBAUM. Will the benefit-cost analysis pass the benefit-cost test? But there is a little hook to my point here. What is sauce for the goose is sauce for the gander. If we are all so enthusiastic about the agencies doing good benefit-cost analysis, I would think that the Congress when it is first writing a Clean Air Act or a Clean Water Act could use some of that good stuff, as well, perhaps—

Chairman THOMPSON. Now you started meddling again. [Laughter.]

Mr. WEIDENBAUM. Yes, sir. Guilty. But that would deal with the problem that a lot of these agencies are catching holy heck for things that they have no discretion over. You have tied their hands.

Chairman THOMPSON. You are absolutely right. The classic case is the IRS. We pass these God-awful laws, overreaching, broad, and then beat them up for enforcing it. There is no question about that.

So on that happy note, I want to thank you gentlemen. This has been an extended version here today, but it has been extremely helpful to us. I hope that we can stay in touch with each of you as we go along and come up with a good result. So thank you very much and we will stand in recess.

[Whereupon, at 1:05 p.m., the Committee was adjourned.]

## A P P E N D I X

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### OPENING STATEMENT BY SENATOR GEORGE V. VOINOVICH

Mr. Chairman, I commend you again for holding these important hearings on regulatory reform both yesterday and today.

Over the years, as a State legislator, a mayor and a governor I have become increasingly concerned about the unnecessary and burdensome costs that are imposed on our citizens and State local governments through Federal laws and regulations.

Since 1994, I have worked closely with Members of this Committee—with you in particular Mr. Chairman—and the State-local government coalition to enact common-sense legislation that would result in greater protection of public health and the environment while alleviating cost burdens on State and local governments and the private sector.

As a nation, we spend vast sums on regulation. A report commissioned by the U.S. Small Business Administration estimates that regulations cost the economy about \$700 billion a year—more than \$7,000 for the average American household.

Unfortunately, these cost burdens have not always resulted in maximum health or environmental protection. I think it is imperative that we take a close look at whether regulations are meeting their intended goals and at what costs.

Yesterday we held a hearing on the Regulatory Improvement Act, which will help to ensure that new regulations are based on sound science and cost-benefit analysis. I believe the two bills we will discuss today help to round out the regulatory reform process. One tracks the costs and benefits of existing regulations, while the other provides Congress with an independent analysis of the costs and benefits for major regulations.

Mr. Chairman, I am pleased to be a cosponsor of your Regulatory Right-to-Know Act, S. 59. This bill would require the Office of Management and Budget to submit an annual report to Congress on the total costs and benefits of Federal regulations—particularly those imposed on State and local governments. It also requires OMB to submit any recommendations for reforming wasteful or outdated regulations. However, it does not mandate that any regulation or program be eliminated because the benefits do not outweigh the costs.

I commend the bipartisan work that you and Senator Breaux have done on this bill. This bill also has the bipartisan support of the Nation's governors, mayors, State legislation and county commissioners.

We will also discuss a bill that was introduced last year that would establish the Congressional Office of Regulatory Analysis. The purpose of this bill would be to provide Congress with independent analyses of new rules to help determine whether a regulation should be challenged under the Congressional Review Act.

I strongly believe that all three bills from our 2 days of hearings will make the Federal Government more accountable to the people it serves. And they will help to ensure that costs, benefits, and sound science have been studied prior to finalizing rules.

Thank you, Mr. Chairman. I look forward to today's testimony.

106TH CONGRESS  
1ST SESSION

# S. 59

To provide Governmentwide accounting of regulatory costs and benefits, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. THOMPSON (for himself, Mr. BREAUX, Mr. LOTT, and Mr. STEVENS) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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## A BILL

To provide Governmentwide accounting of regulatory costs and benefits, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Regulatory Right-to-  
5 Know Act of 1999".

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are to—

- 8 (1) promote the public right-to-know about the  
9 costs and benefits of Federal regulatory programs  
10 and rules;



- 1           (2) increase Government accountability; and  
2           (3) improve the quality of Federal regulatory  
3 programs and rules.

4 **SEC. 3. DEFINITIONS.**

5 In this Act:

6           (1) **IN GENERAL.**—Except as otherwise pro-  
7 vided in this section, the definitions under section  
8 551 of title 5, United States Code, shall apply to  
9 this Act.

10           (2) **BENEFIT.**—The term “benefit” means the  
11 reasonably identifiable significant favorable effects,  
12 quantifiable and nonquantifiable, including social,  
13 health, safety, environmental, economic, and dis-  
14 tributional effects, that are expected to result from  
15 implementation of, or compliance with, a rule.

16           (3) **COST.**—The term “cost” means the reason-  
17 ably identifiable significant adverse effects, quantifi-  
18 able and nonquantifiable, including social, health,  
19 safety, environmental, economic, and distributional  
20 effects, that are expected to result from implementa-  
21 tion of, or compliance with, a rule.

22           (4) **DIRECTOR.**—The term “Director” means  
23 the Director of the Office of Management and Budg-  
24 et, acting through the Administrator of the Office of  
25 Information and Regulatory Affairs.

1           (5) MAJOR RULE.—The term “major rule”  
2           means any rule as that term is defined under section  
3           804(2) of title 5, United States Code.

4           (6) PROGRAM ELEMENT.—The term “program  
5           element” means a rule or related set of rules.

6 **SEC. 4. ACCOUNTING STATEMENT.** . . . . .

7           (a) IN GENERAL.—Not later than February 5, 2001,  
8           and each year thereafter, the President, acting through  
9           the Director of the Office of Management and Budget,  
10          shall prepare and submit to Congress, with the budget of  
11          the United States Government submitted under section  
12          1105 of title 31, United States Code, an accounting state-  
13          ment and associated report containing—

14                 (1) an estimate of the total annual costs and  
15                 benefits of Federal regulatory programs, including  
16                 rules and paperwork—

17                         (A) in the aggregate;

18                         (B) by agency, agency program, and pro-  
19                         gram element; and

20                         (C) by major rule;

21                 (2) an analysis of direct and indirect impacts of  
22                 Federal rules on Federal, State, local, and tribal  
23                 government, the private sector, small business,  
24                 wages, and economic growth; and

1           (3) recommendations to reform inefficient or in-  
2           effective regulatory programs or program elements.

3           (b) **BENEFITS AND COSTS.**—To the extent feasible,  
4 the Director shall quantify the net benefits or net costs  
5 under subsection (a)(1).

6           (c) **YEARS COVERED BY ACCOUNTING STATE-**  
7 **MENT.**—Each accounting statement submitted under this  
8 Act shall cover, at a minimum, the costs and correspond-  
9 ing benefits for each of the 4 fiscal years preceding the  
10 year in which the report is submitted. The statement may  
11 cover any year preceding such years for the purpose of  
12 revising previous estimates.

13 **SEC. 5. NOTICE AND COMMENT.**

14           (a) **IN GENERAL.**—Before submitting a statement  
15 and report to Congress under section 4, the Director of  
16 the Office of Management and Budget shall—

17           (1) provide public notice and an opportunity to  
18           comment on the statement and report; and

19           (2) consult with the Comptroller General of the  
20           United States on the statement and report.

21           (b) **APPENDIX.**—After consideration of the com-  
22 ments, the Director shall incorporate an appendix to the  
23 report addressing the public comments and peer review  
24 comments under section 7.

1 **SEC. 6. GUIDANCE FROM THE OFFICE OF MANAGEMENT**  
2 **AND BUDGET.**

3 (a) **IN GENERAL.**—Not later than 180 days after the  
4 date of enactment of this Act, the Director of the Office  
5 of Management and Budget, in consultation with the  
6 Council of Economic Advisors, shall issue guidelines to  
7 agencies to standardize—

8 (1) most plausible measures of costs and bene-  
9 fits; and

10 (2) the format of information provided for ac-  
11 counting statements.

12 (b) **REVIEW.**—The Director shall review submissions  
13 from the agencies to ensure consistency with the guide-  
14 lines under this section.

15 **SEC. 7. PEER REVIEW.**

16 (a) **IN GENERAL.**—The Director of the Office of  
17 Management and Budget shall arrange for a nationally  
18 recognized public policy research organization with exper-  
19 tise in regulatory analysis and regulatory accounting to  
20 provide independent and external peer review of the guide-  
21 lines and each accounting statement and associated report  
22 under this Act before such guidelines, statements, and re-  
23 ports are made final.

24 (b) **WRITTEN COMMENTS.**—The peer review under  
25 this section shall provide written comments to the Director  
26 in a timely manner. The Director shall use the peer review

1 comments in preparing the final guidelines, statements,  
2 and associated reports.

3 (c) FACA.—Peer review under this section shall not  
4 be subject to the Federal Advisory Committee Act (5  
5 U.S.C. App.).

105TH CONGRESS  
2D SESSION

# S. 1675

To establish a Congressional Office of Regulatory Analysis.

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 25, 1998

Mr. SHELBY (for himself and Mr. BOND) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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## A BILL

To establish a Congressional Office of Regulatory Analysis.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Congressional Office  
5 of Regulatory Analysis Act".

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—Congress finds that—

8 (1) Federal regulations can have a positive im-  
9 pact in protecting the environment and the health  
10 and safety of all Americans; however, uncontrolled  
11 increases in the costs that regulations place on the  
12 economy cannot be sustained;

1           (2) the legislative branch has a responsibility to  
2 see that the laws it passes are properly implemented  
3 by the executive branch;

4           (3) effective implementation of chapter 8 of  
5 title 5 of the United States Code (relating to con-  
6 gressional review of agency rulemaking) is essential  
7 to controlling the regulatory burden that the Gov-  
8 ernment places on the economy; and

9           (4) in order for the legislative branch to fulfill  
10 its responsibilities under chapter 8 of title 5, United  
11 States Code, it must have accurate and reliable in-  
12 formation on which to base its decisions.

13       (b) PURPOSE.—The purpose of this Act is to estab-  
14 lish a congressional office to provide Congress with inde-  
15 pendent, timely, and reasoned analyses of existing and an-  
16 ticipated Federal rules and regulations, including—

17           (1) assessments of the need for, and effective-  
18 ness of, existing and anticipated Federal rules and  
19 regulations in meeting the mandates of underlying  
20 statutes;

21           (2) statements of the existing and projected  
22 economic and noneconomic impacts, including the  
23 impacts of reporting requirements, of such rules and  
24 regulations; and

1           (3) separate assessments of the effects of exist-  
2           ing and anticipated regulations on segments of the  
3           public, such as geographic regions and small entities.

4 **SEC. 3. ESTABLISHMENT OF OFFICE.**

5           (a) **ESTABLISHMENT.**—

6           (1) **IN GENERAL.**—There is established a Con-  
7           gressional Office of Regulatory Analysis (hereafter  
8           in this Act referred to as the “Office”). The Office  
9           shall be headed by a Director.

10          (2) **APPOINTMENT.**—The Director shall be ap-  
11          pointed by the Majority Leader of the Senate and  
12          the Speaker of the House of Representatives without  
13          regard to political affiliation and solely on the basis  
14          of the Director's ability to perform the duties of the  
15          Office.

16          (3) **TERM.**—The term of office of the Director  
17          shall be 4 years, but no Director shall be permitted  
18          to serve more than 3 terms. Any individual ap-  
19          pointed as Director to fill a vacancy prior to the ex-  
20          piration of a term shall serve only for the unexpired  
21          portion of that term. An individual serving as Direc-  
22          tor at the expiration of that term may continue to  
23          serve until the individual's successor is appointed.

24          (4) **REMOVAL.**—The Director may be removed  
25          by a concurrent resolution of Congress.



1           (5) COMPENSATION.—The Director shall re-  
2           ceive compensation at a per annum gross rate equal  
3           to the rate of basic pay for a position at level III  
4           of the Executive Schedule under section 5314 of title  
5           5, United States Code.

6           (b) PERSONNEL.—The Director shall appoint and fix  
7           the compensation of such personnel as may be necessary  
8           to carry out the duties and functions of the Office. All  
9           personnel of the Office shall be appointed without regard  
10          to political affiliation and solely on the basis of their fit-  
11          ness to perform their duties. The Director may prescribe  
12          the duties and responsibilities of the personnel of the Of-  
13          fice, and delegate authority to perform any of the duties,  
14          powers, and functions of the Office or the Director. For  
15          purposes of pay (other than pay of the Director) and em-  
16          ployment benefits, rights, and privileges, all personnel of  
17          the Office shall be treated as if they were employees of  
18          the Senate.

19          (c) EXPERTS AND CONSULTANTS.—In carrying out  
20          the duties and functions of the Office, the Director may  
21          procure the temporary (not to exceed one year) or inter-  
22          mittent services of experts or consultants or organizations  
23          thereof by contract as independent contractors, or, in the  
24          case of individual experts or consultants, by employment  
25          at rates of pay not in excess of the daily equivalent of

1 the highest rate of basic pay under the General Schedule  
2 of section 5332 of title 5, United States Code.

3 (d) RELATIONSHIP TO EXECUTIVE BRANCH.—

4 (1) IN GENERAL.—The Director is authorized  
5 to secure information, data, estimates, and statistics  
6 directly from the various departments, agencies, and  
7 establishments of the executive branch of Govern-  
8 ment, including the Office of Management and  
9 Budget, and the regulatory agencies and commis-  
10 sions of the Government. All such departments,  
11 agencies, establishments, and regulatory agencies  
12 and commissions shall promptly furnish the Director  
13 any available material which the Director determines  
14 to be necessary in the performance of the Director's  
15 duties and functions (other than material the disclo-  
16 sure of which would be a violation of law).

17 (2) SERVICES.—Upon agreement with the head  
18 of any such department, agency, establishment, or  
19 regulatory agency or commission—

20 (A) the Director may use the services, fa-  
21 cilities, and personnel with or without reim-  
22 bursement of such department, agency, estab-  
23 lishment, or commission; and

24 (B) the head of each such department,  
25 agency, establishment, or regulatory agency or

1           commission is authorized to provide the Office  
2           such services, facilities, and personnel.

3           (e) RELATIONSHIP TO OTHER AGENCIES OF CON-  
4 GRESS.—In carrying out the duties and functions of the  
5 Office, and for the purpose of coordinating the operations  
6 of the Office with those of other congressional agencies  
7 with a view to utilizing most effectively the information,  
8 services and capabilities of all such agencies in carrying  
9 out the various responsibilities assigned to each, the Direc-  
10 tor is authorized to obtain information, data, estimates,  
11 and statistics developed by the General Accounting Office,  
12 Congressional Budget Office, and the Library of Congress,  
13 and (upon agreement with them) to utilize their services,  
14 facilities, and personnel with or without reimbursement.  
15 The Comptroller General, the Director of the Congres-  
16 sional Budget Office, and the Librarian of Congress are  
17 authorized to provide the Office with the information,  
18 data, estimates, and statistics, and the services, facilities,  
19 and personnel, referred to in the preceding sentence.

20           (f) APPROPRIATIONS.—There are authorized to be  
21 appropriated to the Office for fiscal years 1998 through  
22 2006 such sums as may be necessary to enable the Office  
23 to carry out its duties and functions.

1 **SEC. 4. RESPONSIBILITIES.**

2 (a) **TRANSFER OF FUNCTIONS UNDER CHAPTER 8**  
3 **FROM GAO TO OFFICE.—**

4 (1) **DIRECTOR'S AUTHORITY.**—Section 801 of  
5 title 5, United States Code, is amended by striking  
6 “Comptroller General” each place it occurs and in-  
7 serting “Director of the Office”; and

8 (2) **DEFINITION.**—Section 804 is amended by  
9 adding at the end the following:

10 “(4) The term ‘Director of the Office’ means  
11 the Director of the Congressional Office of Regu-  
12 latory Affairs established under section 3 of the  
13 Congressional Office of Regulatory Analysis Act.”.

14 (3) **MAJOR RULES.—**

15 (A) **REGULATORY IMPACT ANALYSIS.**—In  
16 addition to the assessment of an agency's com-  
17 pliance with the procedural steps for major  
18 rules described under section 801(a)(2)(A) of  
19 title 5, United States Code, the Office shall  
20 conduct its own regulatory impact analysis of  
21 such major rules. The analysis shall include—

22 (i) a description of the potential bene-  
23 fits of the rule, including any beneficial ef-  
24 fects that cannot be quantified in monetary  
25 terms and the identification of those likely  
26 to receive the benefits;

1           (ii) a description of the potential costs  
2           of the rule, including any adverse effects  
3           that cannot be quantified in monetary  
4           terms and the identification of those likely  
5           to bear the costs;

6           (iii) a determination of the potential  
7           net benefits of the rule, including an eval-  
8           uation of effects that cannot be quantified  
9           in monetary terms;

10          (iv) a description of alternative ap-  
11          proaches that could achieve the same regu-  
12          latory goal at a lower cost, together with  
13          an analysis of the potential benefit and  
14          costs and a brief explanation of the legal  
15          reasons why such alternatives, if proposed,  
16          could not be adopted; and

17          (v) a summary of how these results  
18          differ, if at all, from the results that the  
19          promulgating agency received when con-  
20          ducting similar analyses.

21          (B) TIME FOR REPORT TO COMMITTEES.—  
22          Section 801(a)(2)(A) of title 5, United States  
23          Code, is amended by striking “15” and insert-  
24          ing “45”.

1           (4) NONMAJOR RULES.—The Office shall con-  
2           duct a regulatory impact analysis, in accordance  
3           with paragraph (3)(A), of any nonmajor rule, as de-  
4           fined in section 804(3) of title 5, United States  
5           Code, when requested to do so by a committee of the  
6           Senate or House of Representatives, or individual  
7           Senator or Representative.

8           (5) PRIORITIES.—

9           (A) ASSIGNMENT.—To ensure that analy-  
10          ses of the most significant regulations occur,  
11          the Office shall give first priority to, and is re-  
12          quired to conduct analyses of, all major rules,  
13          as defined in section 804(2) of title 5, United  
14          States Code. Secondary priority shall be as-  
15          signed to requests from committees of the Sen-  
16          ate and the House of Representatives. Tertiary  
17          priority shall be assigned to requests from indi-  
18          vidual Senators and Representatives.

19          (B) DISCRETION TO DIRECTOR OF OF-  
20          FICE.—The Director of the Office shall have  
21          the discretion to assign priority among the sec-  
22          ondary and tertiary requests.

23          (b) TRANSFER OF CERTAIN FUNCTIONS UNDER THE  
24          UNFUNDED MANDATES REFORM ACT OF 1995 FROM  
25          CBO TO OFFICE.—

1 (1) COST OF REGULATIONS.—Section 103 of  
2 the Unfunded Mandates Reform Act of 1995 (2  
3 U.S.C. 1511) is amended—

4 (A) in subsection (b), by striking “the Di-  
5 rector” and inserting “the Director of the Con-  
6 gressional Office of Regulatory Analysis”; and

7 (B) in subsection (c), by inserting after  
8 “Budget Office” the following: “or the Director  
9 of the Congressional Office of Regulatory Anal-  
10 ysis”.

11 (2) ASSISTANCE TO THE CONGRESSIONAL OF-  
12 FICE OF REGULATORY ANALYSIS.—Section 206 of  
13 the Unfunded Mandates Reform Act of 1995 (2  
14 U.S.C. 1536) is amended—

15 (A) by amending the section heading to  
16 read as follows: “**SEC. 206. ASSISTANCE TO**  
17 **THE CONGRESSIONAL OFFICE OF REGU-**  
18 **LATORY ANALYSIS.**”; and

19 (B) in paragraph (2), by striking “the Di-  
20 rector of the Congressional Budget Office” and  
21 inserting “the Director of the Congressional Of-  
22 fice of Regulatory Analysis”.

23 (c) OTHER REPORTS.—In addition to the regulatory  
24 impact analyses of major and nonmajor rules described  
25 under subsection (a), the Office shall issue an annual re-

1 port on an estimate of the total cost of Federal regulations  
2 on the United States economy.

3 **SEC. 5. EFFECTIVE DATE.**

4 This Act and the amendments made by this Act shall  
5 take effect 180 days after the date of enactment of this  
6 Act.

○



MAH i - 1022  
MAH i - 1022

**National Governors' Association  
National Conference of State Legislatures  
Council of State Governments  
The U.S. Conference of Mayors  
National League of Cities  
National Association of Counties  
International City/County Management Association**

March 10, 1999

The Honorable Fred Thompson  
Chairman  
Senate Governmental Affairs Committee  
340 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable John B. Breaux  
United States Senate  
516 Hart Senate Office Building  
Washington, DC 20510

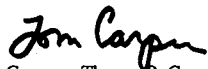
Dear Mr. Chairman and Senator Breaux:

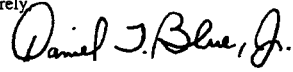
We are writing on behalf of the nation's Governors, state legislators, and local elected officials to support the "Regulatory Right-to-Know Act of 1999." The proposed legislation would greatly assist state and local governments in assessing the costs and benefits of major regulations. This bill would lead to improved quality of federal regulatory programs and rules, increase federal government accountability, and encourage open communication among federal agencies, state and local governments, the public, and Congress regarding federal regulatory priorities.

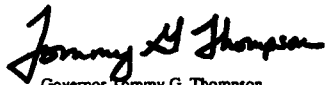
This bill calls for an annual report to Congress by the President and the Office of Management and Budget that would analyze the impacts of federal rules on federal, state, and local governments. One of the highest priorities of the state and local interest groups is to prevent costly intergovernmental mandates on state and local governments. With your help, we were successful in preventing legislative mandates through the 1995 Unfunded Mandates Reform Act (UMRA). This new bill seeks to prevent costly mandates from regulatory agencies. While UMRA provides this type of analysis for legislation that creates federal intergovernmental mandates, there is no clear, streamlined process to assess the impact of federal regulations on a regular basis.

We applaud your efforts to encourage greater accountability with regard to the burden of costly federal regulations on state and local governments. The changes proposed would, we believe, benefit all of our taxpayers and constituents. We look forward to working with you in securing enactment of this legislation.

Sincerely

  
Governor Thomas R. Carper  
State of Delaware  
Chairman, National Governors' Association

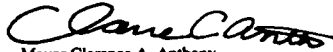
  
Representative Dan Blue  
North Carolina State House of Representatives  
President, National Conference of State  
Legislatures



Governor Tommy G. Thompson  
State of Wisconsin  
President, Council of State Governments



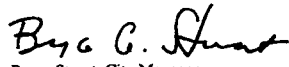
Commissioner Betty Lou Ward  
Wake County, North Carolina  
President, National Association of Counties



Mayor Clarence A. Anthony  
South Bay, Florida  
President, National League of Cities



Mayor Deedee Corradini  
Salt Lake City, Utah  
President, The U.S. Conference of Mayors



Bryce Stuart, City Manager  
City of Winston-Salem  
President, International City/County  
Management Association



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

STATEMENT OF DONALD R. ARBUCKLE  
ACTING ADMINISTRATOR AND DEPUTY ADMINISTRATOR  
OFFICE OF INFORMATION AND REGULATORY AFFAIRS  
OFFICE OF MANAGEMENT AND BUDGET  
BEFORE THE  
COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
April 22, 1999

Good morning, Mr. Chairman and members of this Committee. You invited me to discuss S. 59 and H.R. 1074, the "Regulatory Right-to-Know Act of 1999." These bills would expand the current requirement that the Office of Management and Budget (OMB) prepare an annual Report on the Costs and Benefits of Federal Regulations. You also asked for our views on the "Congressional Office of Regulatory Analysis Act" (S. 1675 in the last Congress).

S. 59 and H.R. 1074 would make permanent what Congress has passed as an appropriation rider each of the past three years. First, I would like to discuss the prior legislation and how the Office of Information and Regulatory Affairs (OIRA) has implemented it. Second, I would like to discuss how S. 59 and H.R. 1074 differ from this prior legislation, and our concerns with these bills.

As drafted, the Administration opposes both S. 59 and H.R. 1074. However, we believe that S. 59 is preferable to the House version of the "Regulatory Right-to-Know Act" (H.R. 1074). If the Committee believes it is necessary to codify the current reporting process into permanent law, we would recommend using the appropriations language that created the report in the first place, and would welcome an opportunity to work with the Committee to do so.

Legislative Background

The first two riders, which we supported, were passed on a bipartisan basis. They called upon OIRA to issue an annual report containing two categories of cost-benefit information: (1)

estimates of the total annual costs and benefits of Federal regulatory programs, in the aggregate; and (2) estimates of the costs and benefits of major regulations issued during the year. Major regulations are, in general, those with an economic impact of over \$100 million.

OIRA followed the guidance provided by the legislative history<sup>1</sup> in developing these two reports, and compiled the information concerning aggregate costs and benefits from economic studies prepared by outside experts or the agencies. Much of the information concerning major rules was based on the economic analysis prepared by agencies in the course of each rulemaking. Similarly relying on studies by outside experts and agencies, OIRA assessed the impacts of Federal rules on the private sector, State and local government, and the Federal government in general terms.

We have learned a great deal in the course of preparing these two reports. We have learned how difficult and labor intensive this task is and how uneven and limited the existing data. In addition, we describe the many, significant methodological problems associated with aggregating estimates of the costs and benefits of regulation. We detail gaps and inconsistencies in many of the existing aggregate estimates. We point out that agencies have not been using the same assumptions and methodologies in preparing cost-benefit analyses of individual rules. We emphasize that not all costs and benefits can be measured in dollars or other quantitative means, but need to be described qualitatively.

We have underlined in both reports that progress in improving our ability to estimate costs and benefits is an incremental, iterative task. We believe we have made substantial progress in the 1997 and 1998 reports. The 1998 report, for example, refined cost-benefit estimates presented in the first report and summarized cost-benefit estimates for previously issued regulations in order to build an historic data base. The 1998 report also responded to criticism of the first report by taking steps to standardize agency assumptions and monetize estimates where agencies had only quantified them.

We believe that these reports have been useful by compiling and explaining what we

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<sup>1</sup> Senators Glenn and Levin, September 12, 1996, Congressional Record, p. S10397. Chairman Thompson, July 17, 1997, Congressional Record, p. S7701.

know regarding the costs and benefits of regulations. They have also been useful, however, in pointing out what we do not know, and the difficulties inherent in developing this knowledge. We have tried to emphasize in both reports, for example, that there are many methodological problems that are still being explored and argued within the economics profession. We have also underlined the relative paucity of data on the costs and benefits of regulatory program currently on the books, and the enormity of the task of developing such data.

Last year, Congress passed a third appropriation rider that was broader in scope and more detailed than the first two. The cost-benefit report is to accompany the FY 2001 budget. "To the extent feasible," the third appropriations rider calls for additional levels of cost-benefit analysis, grouped by "agency and agency program." It also calls for an assessment of the impacts of Federal rules on "small business, wages, and economic growth." Following the same incremental, iterative approach OIRA took with the first two reports, we plan to develop a third report building on the previous reports. Consistent with the legislative history, OIRA will review studies prepared by outside experts and the agencies, identify the studies that OIRA believes are most pertinent to the issues addressed in the report, and present a compilation of these existing studies.

The only procedural requirement in the first two appropriations riders was publication of the draft report for public comment. The third appropriations rider adds two more procedures: (1) OMB issuance of guidelines to agencies to standardize "measures of costs and benefits; and the format of accounting statements;" and (2) "independent and external peer review" of both the guidelines and the draft report. OIRA is in the process of developing the guidance requested. This guidance will be based on the "Best Practices" document already issued as the result of an exhaustive, two-year interagency effort.

Our experience in preparing these reports leads us to several comments relevant to your consideration of S. 59 and H.R. 1074. These first reports have been developed under clear guidance in legislative history that OIRA serve as a *compiler* of *existing* agency analyses. The drafters of the legislation recognized that the task of filling the data gaps and resolving methodological difficulties was one that OIRA and the Executive agencies could not reasonably be expected to accomplish in the near term.

Nevertheless, some commenters on our reports appear to have overlooked this essential legislative history and expect much more. We are concerned that the new requirements of the third rider, as well as the more extensive new provisions of S. 59 and H.R. 1074, reflect a belief that there is more information available than we believe is the case, that this information can be produced by the agencies without significant diversion of resources, and that OIRA could expand these efforts without damaging effect on its other regulatory oversight. We are concerned that the new provisions will create unreasonable expectations, and neither resolve nor even acknowledge the methodological and data collection difficulties inherent in this task.

S. 59 and H.R. 1074, the “Regulatory Right-to-Know Act of 1999.”

Both S. 59 and H.R. 1074 add significant burdens to what has been enacted before. In the discussion below, I am referring to H.R. 1074, as it was marked up in Subcommittee on April 20, 1998. We object to a number of these provisions. In general, they require production of data that is not now available; in some cases, they require creation of estimates for which there is no basis for consensus even in the academic community. They specify processes and require recommendations that do not take into account what the Executive branch already does. In short, these provisions – despite having the admirable intention of making sure there is progress in regulatory analysis and oversight – themselves overregulate.

1. S. 59 and H.R. 1074 appear to require the compilation of data that is not now available.

- Last year’s appropriation rider directs OIRA to estimate total annual costs and benefits (A) in the aggregate; (B) by agency and agency program; and (C) by major rule to the extent feasible. OIRA does this by aggregating cost-benefit estimates based on existing academic and peer reviewed agency studies and by detailing aggregates for agencies and agency programs where data is reasonably available. For major rules, OIRA will be able to rely upon the cost-benefit analyses prepared by the agencies in the course of OIRA’s regulatory reviews under E.O. 12866.

S. 59 and H.R. 1074, by deleting the qualifying phrase “to the extent feasible,” could require the creation of a large number of new economic analyses that do not now exist.

This would divert efforts to analyze the consequences of new policies and turn them instead to review of policies and programs that have been in existence for years, sometimes decades – programs for which there have already been multiple opportunities to review and suggest changes.

- Under section 4(b), S. 59 adds provisions requiring OMB to “quantify the net benefits or net costs” of Federal regulatory programs. H.R. 1074 has a similar, but even more prescriptive provision. If an agency is able to provide data of sufficient specificity and reliability to quantify both costs and benefits, OIRA would be able to do this. If the necessary data are unavailable to the agency, however, OIRA will not be able to quantify it. To the extent this provision could be interpreted to apply to a currently existing “program component” – meaning “a set of related rules” – it is our understanding that no agency regulatory impact analyses and only a few other studies are able to provide such data. Furthermore, for some types of benefits, there is no consensus even in the academic community as to the appropriate method for quantification.
- Under section 4(b)(1), H.R. 1074 adds provisions calling for an analysis of the “impacts of Federal rules and paperwork” on “consumer prices, and economic growth.” OIRA is unaware of any comprehensive body of economic literature concerning these and other of the topics covered by section 4(b)(1) for specific Federal rules and paperwork. The topics covered by section 4(b)(1) tend to be macroeconomic in scope, and, therefore, are not easily addressed using the available techniques of microeconomic analysis that underlies the cost-benefit analyses of individual rules and paperworks on which the annual report is largely based.

2. Both S. 59 and H.R. 1074 appear to change the standards under which regulations are to be developed.

- Both S. 59 and H.R. 1074 call for “*most plausible* measures of costs and benefits.” It appears that adding “most plausible” is intended in part to give policy guidance concerning risk assessments and cost-benefit analyses, directing agencies to choose particular assumptions over others, thus oversimplifying a complex analytic process. The insertion of “*most plausible*” appears to be short-hand for the more detailed

provisions relating to risk assessment found in Sections 624(c), (e), and (f) of S. 746, on which you heard testimony yesterday. As “*most plausible*” appears less flexible than the counterpart provisions in S. 746, we object to including “most plausible” in S. 59 and H.R. 1074.

- Both S. 59 and H.R. 1074 require OIRA to issue guidelines. Under the third appropriation rider, OIRA is already in the process of issuing these guidelines. We are concerned that including this requirement in S. 59 or H.R. 1074 is either duplicative or intended to change rulemaking standards.

3. S. 59 and H.R. 1074 would require OIRA and OMB to recommend policies or program changes, rather than rely on the President’s existing policymaking processes. In addition to requiring a report on the costs and benefits of regulations, both bills call for recommendations for modification of current regulatory programs. The Administration has a long record of suggesting changes in regulatory policies and procedures when appropriate, ranging from the Safe Drinking Water Act amendments and the Food and Drug Administration Modernization Act, to the Food Quality Protection Act. All of them were developed in an interagency policy process, generally coordinated by one of the President’s policy councils. They require extensive work throughout the Executive branch, including in-depth review and evaluation of current statutes, program administration, budget priorities, and agency resources. It is neither feasible nor appropriate to require creation of a separate and additional policy process as part of this report.

4. S. 59 and H.R. 1074 would establish a ponderous institutional structure that is not administratively justified and that will delay the report and reduce OIRA’s flexibility in preparing it.

Let me describe these many procedures. To develop the annual report, OMB is to issue guidelines “to standardize most plausible measures of costs and benefits; and the format of information” that agencies are to provide OMB. OMB is to issue these guidelines after consultation with both the Council of Economic Advisors (CEA) and Comptroller General of the United States (under the Senate version) or the Congressional Budget Office (under the House version). The draft guidelines are to be subject to a public comment period (60 days under the



House version, unspecified under the Senate version), presumably through publication in the Federal Register. The draft guidelines are to be subject to the peer review of one nationally recognized public policy research organizations with expertise in regulatory analysis and regulatory accounting (Senate version) or two or more persons with a similar expertise in regulatory matters (House version). Peer reviewers are to provide written comments "in a timely manner," and OMB is to "use" the peer review comments "in preparing" these guidelines. With these guidelines, OMB is to include an appendix "addressing the public comments and peer review comments" OMB has received. OMB is to review agency submissions "to assure consistency" with these guidelines, and assemble a draft report. OMB is to implement all of these consultations, public comment, and peer review procedures before issuing the final report.

These detailed procedures prescribe how and when OMB and OIRA are to consult concerning the costs and benefit calculations for each regulation described in each report. While we do consult and seek outside review when it is constructive to do so, S. 59 and H.R. 1074 take a one-size-fits-all approach that is a textbook example of overregulation. We believe the cumulative effect of all of these procedures will undermine, not enhance the timely development of the annual reports, and urge their deletion.

In sum, S. 59, and its counterpart in the House, H.R. 1074, could be interpreted to limit OIRA's discretion and flexibility to compile a useful report based on existing agency and academic studies and to undertake other initiatives to improve agency cost-benefit analysis. To satisfy S. 59 or H.R. 1074, agencies may have to be called upon to compile detailed data that they do not now have, and undertake analyses that they do not now conduct, using scarce staff and contract resources, regardless of any practical analytic need as part of the rulemaking process. We are concerned that if Congress wants cost-benefit analysis to improve and become institutionally more routine, S. 59 or H.R. 1074 do not create the institutional incentives to do this. In fact, they may delay it.

Before completing my testimony, I would like briefly to discuss the "Congressional Office of Regulatory Analysis Creation Act" (S. 1675 as introduced in the last Congress). As is tradition, the Administration defers to Congress on matters of internal organization of the Legislative branch. However, we believe it is important to clarify that no Congressional office should be involved in the Executive branch's development of new regulations prior to their

formal publication. Legislation which would directly involve Congress during the development of regulations would undermine the candid exchange of views within the Executive branch, and could jeopardize the careful rulemaking process established through the Administrative Procedure Act over the past 50 years. Congress has established a workable regulatory review process in which it oversees Executive branch regulatory decisions after those decisions are made in accordance with established statutory administrative procedures, and we believe that process should be maintained.

This concludes my testimony. Thank you for the opportunity to appear before you, and I welcome any questions you may have.



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**TESTIMONY OF**

**SENATOR STEVE SALAND  
NEW YORK STATE SENATE**

**ON BEHALF OF  
THE NATIONAL CONFERENCE OF STATE LEGISLATURES**

**BEFORE THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE  
ON THE 'REGULATORY RIGHT TO KNOW ACT OF 1999'**

**APRIL 22, 1999**

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Chairman Thompson, Senator Lieberman, members of the Senate Governmental Affairs Committee. I am Senator Steve Saland, a member of the New York State Senate and chairman of its Children and Families Committee. I appear before you today on behalf of the National Conference of State Legislatures. For 1998-99, I am serving as a member of NCSL's Executive Committee.

I want to thank you, Mr. Chairman, for offering NCSL an opportunity to participate in this hearing. The National Conference of State Legislatures represents the state legislatures of the 50 states and the nation's commonwealths and territories. Since its inception, NCSL has been outspoken about the need to maintain and strengthen our federal system of government and to enhance intergovernmental relations. The focus of most of NCSL's policies and advocacy activity is on preserving state authority, avoiding costly unfunded federal mandates, assuring flexibility to carry out state-federal partnerships and strengthening intergovernment relations. We are strong supporters of S. 59, the "Regulatory Right to Know Act of 1999."

**1. NCSL'S AND THE BIG SEVEN'S SUPPORT FOR S. 59.** I come before you today not only as NCSL's representative, but also on behalf of all national organizations representing state and local government elected officials. In addition to NCSL, the National Governors Association, the Council of State Governments, the National Association of Counties, the U.S. Conference of Mayors, the National League of Cities and the International City Managers Association (hereafter, the "Big Seven"), have endorsed S. 59, The Regulatory Right To Know Act of 1999. The Big Seven is supporting this bipartisan legislation because (1) it will strengthen

federal regulatory programs and rules, (2) will increase federal government accountability and (3) will foster better communications among federal agencies, state and local governments, the public and Congress. At this point, I would like to ask permission for the Big Seven's letter of March 10, 1999 supporting S. 59 to be inserted into the committee's record.

The Big Seven has endorsed S. 59 because it represents a critical piece in an agenda we adopted in late 1998 to bolster federalism. This agenda was crafted to temper the increasing propensity to preempt state and local authority and to improve communications with and consultations between the federal government and state and local government elected officials. We also identified the need to improve accountability and information regarding federal action and its impact on state and local governments. Finally, we identified numerous lingering problems with federal grant management that have prolonged unnecessary inefficiencies. Therefore, NCSL and its state and local government association partners have endorsed a series of federalism measures, including not only S. 59 and its House counterpart, H.R. 1074, but also S. 746, the Regulatory Improvement Act that was the focus of yesterday's hearing. We are also supporting S. 468, the Federal Financial Assistance Management Act (and its House counterpart, H.R. 409) and Section 5 of H.R. 350 that makes a technical correction to the Unfunded Mandate Reform Act regarding the Congressional Budget Office's scorekeeping responsibilities. We are very hopeful that members of both houses will soon unveil a "government partnership act" including procedural curbs on preemption, to complete the Big Seven's federalism agenda for the 106th Congress.

**2. THE ANNUAL ACCOUNTING STATEMENT IN S. 59.** S. 59 provides for an annual report analyzing the direct and indirect impacts of federal rules on federal, state, local and tribal governments. This legislation is primarily about accountability and information. It is fundamental and workable. From the perspective of state legislators, the potential long-term benefit of this report is best understood when comparing it with procedures and annual reports now provided by the Congressional Budget Office pursuant to the Unfunded Mandates Reform Act (UMRA). UMRA provides a sound procedural mechanism for assessing the potential fiscal impact of unfunded federal mandates on state and local governments. This process has proven quite successful in limiting costly unfunded mandates on state and local governments. In short, when Congress and the administration are more informed about mandates, fewer mandates are imposed and costs to states and localities are potentially limited. Additionally, UMRA requires the Congressional Budget Office to produce an annual report summarizing the analyses it has completed and commenting on congressional activities related to UMRA. This document has proven to be informative, accountable and useful. Without it, neither Congress nor state and local elected officials would have anything but hearsay, perceptions and anecdotes to document the workability and effectiveness of UMRA. Furthermore, the report has helped to identify shortcomings in the UMRA law. NCSL believes the annual report required in S. 59 could produce similar benefits and thereby strengthen our intergovernmental partnership.

The reporting mechanism contemplated in S. 59 is needed to prevent, or at least to account for, similar mandates imposed through the regulatory process. S. 59 calls on the President and the Office of Management and Budget to provide an annual regulatory statement that will include a

summary accounting of annual actions taken by federal regulators. NCSL does not expect it will end the imposition of all unfunded federal mandates, but better, more comprehensive information and more accountability will limit the costs of regulatory mandates. Many regulatory mandates result from legislative directives, in which case agencies would appropriately continue to issue regulations regardless of the enactment of S. 59. Other regulatory mandates, however, result from assumptions and overly broad reading of statutory language made during the rulemaking process. An annual report will go a long way to identifying the true fiscal impacts on state and local governments of promulgated rules, the vast majority of which do not have the same visibility as legislation. This report would give Congress an important tool in its oversight function to help ensure that agencies have not exceeded their statutory authority. The report could also assist with identification of unintended or undesirable consequences of current statutory language. Our hope is that the accounting statements required in S. 59 would prove as useful as the fiscal analyses required in UMRA. If so, they could curb the imposition of unfunded mandates that are not based on clear statements of legislative intent. They would also give Congress better information on the cumulative costs to state and local governments of regulatory actions.

S. 59 directs that these impacts be reported cumulatively. That is essential and it is critical it be accomplished from the outset. When regulations have a fiscal impact, it is best that state and local government policymakers be made aware of potential costs and benefits so they can plan accordingly — and be accountable to the populace. The cumulative reports will also lend the

public, as well as elected officials, information accounting for both short-term and long-term regulatory action.

**3. THE BENEFITS OF COST-BENEFIT REPORTING.** The accounting report should shed an intensive light on the costs and benefits of federal regulations. Lawmakers at all levels in recent years have come to understand the advantages of reasonable cost-benefit analyses. S. 59 calls for the same to be accomplished for major federal rules individually and in the aggregate. The cost-benefit analyses we sought and secured in the Safe Drinking Water Act amendments of 1996 are but one example of the strong, informational merit of these analyses. It compels those responsible for implementing programs to provide the public with summaries of how much funding it takes to provide particular benefits. NCSL believes these cost-benefit analyses make government officials increasingly accountable for and knowledgeable of the programs they create and carry out. NCSL believes this regulatory accounting report of net costs and benefits is essential. NCSL will volunteer to consult with this committee and the administration on the implementation of this reporting requirement. It is important, just as it has been with UMRA, to develop a process for preparing the aggregate report that will ensure that its utility and informativeness.

**4. STREAMLINING THE REGULATORY PROCESS.** One of the critical sections of S. 59 is section 4 (a) (3). This section calls for the reporting of recommendations to reform inefficient or ineffective regulatory programs or program elements. We envision that it will work like many state administrative review laws, sunset laws and other initiatives aimed at streamlining the



regulatory process and making government more accountable and informative regarding the costs of its actions. Just as laws are not perfect, neither are regulations. Therefore, we hope that a section for recommendations will lead to developing constructive means for seeking regulatory options and corrections. If faithfully implemented by OMB, S. 59 would provide a good opportunity to weed out inefficiencies and to highlight "best practices" to be shared among federal regulators.

**5. COMMENT AND NOTICE.** The comment and notice requirement in Section 5 of S. 59 is essential. This requirement would avail elected state and local government officials and representatives of their national associations and the general public a final opportunity to comment on the accounting report and to have those remarks incorporated in an appendix along with the critiques of at least one peer review organization. I suggest that you add a durational requirement of at least 60 days to S. 59 so that there is ample time for state legislators and others to comment, ensure accuracy of information and bring to closure concerns with costs and benefits of regulatory actions.

**6. THE STATES' EXPERIENCE.** Over the past three decades, state legislatures have made significant and much-needed strides with accountability, openness and information. "Sunshine" and "sunset" laws opened up state governments and put durational limits on laws and regulations in order to enhance scrutiny, oversight and program evaluation. Cost-benefit analyses and risk assessments have become familiar legislative and executive branch activities. Over the past two decades, state legislatures have experimented with varying approaches for reviewing rules and

ensuring objectives such as those sought in S. 59. The attached chart gives you at least an overview of what is being done with administrative rule review and the application of legislative powers.

I bring this to your attention, understanding that it is not directly related to S. 59. However, it is important for addressing the second topic you requested that I comment on — the Congressional Office of Regulatory Analysis Act, S. 1675, from the 105th Congress. It also speaks to the ongoing effort on the part of many state legislatures to enhance regulatory oversight, without breaching separation of power doctrines and constitutional provisions. It represents efforts to ensure accountability not only for the laws we pass, but for the regulations that almost certainly follow in the wake of enacted legislation.

#### **7. ESTABLISHING A CONGRESSIONAL OFFICE OF REGULATORY AFFAIRS.**

Given what state legislatures have accomplished in their pursuit of intensified rule review and regulatory oversight, and given our commitment to finding means for strengthening the intergovernmental partnership, I strongly urge you to attach the provisions of S. 1675 to S. 59. If your intention is to expand congressional efforts regarding regulatory oversight, analysis and accountability per S. 59 and S. 746 — and NCSL is encouraging you to do so — you should do so after considering several options. Based on state experience, you may want to consider the following changes to S. 1675:

(1) Congressional analyses of major rules, or some select basis of rules, should occur within a window of time prior to their being finalized. These analyses can run from checks on legislative

intent such as in Ohio, to en bloc consideration of all new rules from the past year as in Tennessee, to reviews of fiscal impact such as are accomplished by Illinois' Joint Committee on Administrative Rules. The time state legislatures use to review proposed rules ranges from Pennsylvania's 20 days up to South Carolina's 120 days. Most states fall into the 30-60 day window. Similar time constraints would ensure your ability to review for agency compliance with legislative intent and to review any cost-benefit or risk assessment analyses attached to proposed rules.

(2) I would suggest that you tap staff resources already available to you, the course most state legislatures who are engaged in rule review and oversight have followed. The attached chart gives you a sense of what personnel resources state legislatures utilize for these functions. Connecticut uses a Legislative Regulatory Review Committee established 26 years ago, and added to the state's constitution in 1982. Ohio has a Joint Committee on Agency Rule Review. Both are staffed with internal legislative personnel. Just as you have a Congressional Budget Office to perform functions similar to those of the Office of Management and Budget, it seems to make sense for there to be a Congressional Office of Regulatory Affairs performing generally similar activities as that of the Office of Information and Regulatory Affairs. This is a matter not only of information, but of legislative independence and responsibility.

(3) While S. 1675 suggests reviewing major rules, other rules and those suggested by individual members, in that order, you may want to consider commencing activities, including cost-benefit scrutiny, with just major rules or some workable combination so you build a successful review mechanism. Colorado and Indiana review only existing rules, but most states are focused on proposed regulations or existing regulations that often are about to sunset. Any kind of rule

review will entail the consumption of lawmaker and staff time. That has been a challenging question for state legislatures, many of which are part-time bodies.

You will note in the chart the powers of state legislatures to veto, reject, suspend or disapprove proposed or existing rules. These are powers that appear to be invoked infrequently. However, the mere authority to exercise these options seems to influence either the modification or withdrawal of rules. NCSL has also found that any public hearings conducted on rules target the rules themselves, and are not used to reopen legislative debates. Cost-benefit analysis and risk assessment is increasing, but it is an activity more frequently carried out at the executive branch level. On the other hand, there are several states, such as Maine, where the legislature has a very long history of evaluating programs, and these evaluations have included assessments of regulatory and program performance, fiscal impact, administrative efficiency and public benefit. These mirror, although not completely, the cost-benefit analyses and assessments addressed in S. 59 and S. 746. Finally, many states, including Connecticut and Illinois, do measure the fiscal impact of regulations on local governments, business and not-for-profits.

Let me close, Mr. Chairman, by noting that S. 59 and H.R. 1074, with some minor exceptions, are virtually the same legislation. They both enjoy bipartisan cosponsorship. They both enjoy the support of NCSL and our state and local government association partners. I am hopeful this committee and the entire Senate will act on this legislation expeditiously. Thank you for this opportunity to appear before you today on behalf of the National Conference of State Legislatures. I welcome your questions on the testimony I have provided.

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
Alabama	Members of Legislative Council	Proposed	Committee reviews then approves or disapproves rules within 35 days. Committee may suspend rules. Inaction is automatic approval.	Legislature may veto rules by joint resolution.
Alaska	Joint bi-partisan	Proposed and existing	Committee may advise only.	Legislature must pass law to veto rules.
Arizona	Joint bi-partisan	Proposed and existing	Committee may advise only.	Legislature must pass law to veto rules.
Arkansas	Joint bi-partisan	Proposed and existing	Committee may advise only.	Legislature must pass law to veto rules.
Colorado	Joint bi-partisan	Existing	Committee reviews then approves or disapproves rules. Inaction is automatic approval.	Legislature may pass law to amend or veto rules due to sunset. Each new or amended rule sunsets in May of the year following adoption or amendment.
Connecticut	Joint bi-partisan	Proposed and existing	Committee must review then approve, reject or disapprove of rules within 65 days. Inaction is automatic approval. Committee reports	Legislature may pass law to sustain or reverse disapproval of a rule by committee.

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
<b>Connecticut (continued)</b>			on all disapproved rules to legislature.	
<b>Florida</b>	Joint bi-partisan	Proposed and existing	Committee may advise only. Committee is required to report annually to the legislature to recommend legislation.	Legislature may act on committee recommendation by enacting law.
<b>Georgia</b>	Standing	Proposed	Committee must introduce resolution to veto a rule within first 30 days of session after rule is proposed. Must pass by two-thirds majority or goes to Governor final decision. . Inaction is automatic approval.	Legislature may veto rule by resolution.
<b>Idaho</b>	Germane joint	Proposed	Committee must approve all proposed rules that impose fees. Inaction is deemed rejection. All other proposed rules deemed approved if committee takes no action.	All rules expire one year from adoption. Legislature may reauthorize by passing concurrent resolution.
<b>Illinois</b>	Joint bi-partisan	Proposed and existing	Committee reviews then approves or objects to proposed rules.	Legislature may veto rules by joint resolution.

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
Illinois (continued)			Agency may adopt, modify or withdraw rules. Committee may suspend objectionable rules for 180 days.	
Indiana	Joint bi-partisan	Existing	Committee may advise only.	Legislature may influence rules only after formal adoption, not during rulemaking process. Legislature may amend rules only by amending statute.
Iowa	Joint bi-partisan	Proposed and existing	Committee reviews then approves or objects to rules. Committee may suspend rules. Inaction is automatic approval.	Legislature may veto rules by joint resolution.
Kansas	Joint bi-partisan	Proposed and existing	Committee must review then comment on proposed rules within 60 days. Final rules are submitted for additional review and comment.	Legislature may veto rules by enacting statute.
Kentucky	Joint bi-partisan	Proposed and existing	Committee reviews then approves or objects to rules	Legislature may veto rules by enacting statute.

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
Kentucky (continued)			within 45 days. Inaction is automatic approval.	
Louisiana	Standing	Proposed and existing	Committee reviews then approves or objects to rules within 60 days. Inaction is automatic approval. Committee reports objectionable bills to the governor, who may allow or block adoption of rules.	Legislature may suspend, amend or repeal rules by concurrent resolution.
Maine	Joint standing	Proposed and existing	Committee reviews then approves or objects to rules. Inaction is automatic approval.	Major rules must be reviewed by the legislature prior to finalization. Legislature must approve, amend or disapprove rule by statute.
Maryland	Joint bi-partisan	Proposed and existing	Committee must review then approve or delay rules within 45 days.	Legislature may veto rules but governor has final word.
Massachusetts	No committee	Proposed	No committee.	Legislature must pass bill then signed by governor to supercede proposed rule.



## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
Michigan	Joint bi-partisan	Proposed	Committee reviews then approves or suspends rules.	Legislature may veto rules by concurrent resolution. Resolution must pass within 60 days of introduction or it veto bill dies.
Missouri	Joint bi-partisan	Proposed and existing	Committee reviews then approves or suspends rules. Inaction is automatic approval.	Legislature may veto or suspend rules by concurrent resolution or statute.
Montana	Joint bi-partisan	Proposed and existing	Committee reviews then approves or suspends rules.	Legislature may veto rules by statute.
Nevada	Joint bi-partisan	Proposed	Committee reviews then approves or temporarily suspends rules. Inaction is automatic approval.	Legislative action is necessary to indefinitely suspend rules.
New Hampshire	Joint bi-partisan	Proposed	Committee must review then approve or reject rules within 45 days. Inaction is automatic approval.	Legislature may veto or suspend rules by statute.
New Jersey	The entire legislature is involved in the review process.	Proposed and existing	No committee.	Legislature may review rules to ensure consistency with

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
New Jersey (continued)				statutory intent. Legislature may communicate objections to governor and agency. Legislature may veto rules with a majority vote.
New York	Joint bi-partisan commission	Proposed and existing	Commission may advise only.	Legislature has no veto power over rules.
North Carolina	Public members appointed by legislature	Proposed and existing	Commission reviews and advises to approve or reject rules.	Upon commission's advice, legislature may disapprove rules by statute.
North Dakota	Interim	Proposed and existing	Committee reviews then approves, suspends or voids rules. Inaction is automatic approval.	Legislative action is not necessary to void rules.
Ohio	Joint bi-partisan	Proposed and existing	Committee reviews then may recommend invalidation of all or part of rules. Inaction is not considered approval.	Legislature may veto rules by concurrent resolution.
Oklahoma	Standing	Proposed and existing	Committee reviews then advises regarding rules. Inaction is automatic approval.	Legislature may disapprove any rule at any time by joint resolution.

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
Oklahoma (continued)			Legislature may disapprove permanent rule by concurrent resolution within 30 legislative days.	
Oregon	Joint bi-partisan	Proposed and existing	Committee reviews and reports on rules to legislature.	Neither the legislature nor governor has any veto power over rules.
Pennsylvania	Standing and independent commission	Proposed	Committee has 20 days to review final rules. Commission has 30 days to review final rules. Inaction is automatic approval.	Legislature has 14 days to introduce and 10 legislative days to enact legislation to veto rules.
South Carolina	Standing	Proposed	Committee must review and approve or reject rules within 120 days. Inaction is automatic approval.	Legislature may veto rules by joint resolution within 120 days of proposal.
South Dakota	Joint bi-partisan	Proposed	Committee reviews then approves or rejects rules. Inaction is automatic approval.	Legislature may veto rules by statute.
Tennessee	Joint standing	Proposed	Committee reviews then approves or rejects rules.	Legislature may veto rules by statute. New rules automatically sunset after one

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
Tennessee (continued)				year unless specifically reauthorized by the legislature by statute.
Utah	Joint bi-partisan	Proposed and existing	Committee reviews rules.	New rules automatically sunset after one year unless specifically reauthorized by the legislature.
Vermont	Joint bi-partisan	Proposed and existing	Committee must review and approve or object to proposed rules within 30 days. Inaction is automatic approval.	Legislature may veto rules by statute.
Virginia	Standing	Proposed and existing	Committee has the option to review and approve or, with concurrence of the governor, temporarily suspends effective date of rules.	Legislature has no veto power over rules.
Washington	Joint bi-partisan	Proposed and existing	Committee reviews and approves or objects to rules. Committee, by majority vote and with concurrence of the governor, may temporarily suspend effective date of rules.	Legislature has no veto power over rules.

## STATE LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS

STATE	REVIEWING COMMITTEE	RULES SUBJECT TO REVIEW	COMMITTEE POWERS	LEGISLATIVE POWERS
West Virginia	Joint bi-partisan	Proposed	Committee reviews rules and provides advice.	Agencies must receive specific legislative authorization to promulgate all new rules.
Wisconsin	Joint bi-partisan	Proposed and existing	Committee must review then approve or suspend proposed rules within 30 days. Committee may suspend existing rules at any time. Inaction is automatic approval.	Legislation is required to sustain the suspension. In addition, legislature may veto rules by statute.
Wyoming	Joint bi-partisan	Proposed and existing	Committee reviews rules and may recommend action be taken by full legislature.	Legislature may nullify a rule by statute but action must be taken prior to the end of the next succeeding session.

The following states do not have a formal process for legislative review of administrative rules: California, Hawaii, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, Rhode Island, and Texas.

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TESTIMONY OF  
ARTHUR J. DYER  
President, Metal Products Company  
on behalf of the  
NATIONAL ASSOCIATION OF MANUFACTURERS  
before the  
COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
April 22, 1999

Mr. Chairman, members of the committee, my name is Arthur J. Dyer. Thank you for the opportunity to testify on S. 59, the Regulatory Right-to-Know Act, and on the establishment of a Congressional Office of Regulatory Analysis. I am president of the Metal Products Company in McMinnville, Tenn., and am before you to represent the views of the National Association of Manufacturers (NAM). I am accompanied by Larry Fineran, assistant vice president and director, resources, environment and regulation, for the NAM.

The Metal Products Company is a small contract manufacturer of sheet metal fabrications and stampings located in a rural section of middle Tennessee. My father founded MPC in 1947, and today we have almost 100 employees and more than \$12,000,000 per year in sales.

The National Association of Manufacturers (NAM) is the nation's largest national broad-based industry trade group. It's 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. The NAM's member companies and affiliated associations represent every industrial sector and employ more than 18 million people.

The NAM's mission is to enhance the competitiveness of manufacturers and improve living standards for working Americans by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

The NAM supports both the Regulatory Right-to-Know Act and the establishment of a Congressional Office of Regulatory Analysis. The NAM believes that each proposal will contribute to improving the regulatory process and the efficiency of regulatory programs. Neither bill will harm efforts to protect public health, safety, the environment or the public interest (such as consumer or antitrust programs). To the contrary, they should provide guidance to the agencies about how best to use their limited resources. They should also provide a signal to Congress and the public at large about how effective regulatory programs are, whether they should be changed and what further refinements should be made. The NAM thanks you for your efforts in support of the Regulatory Right-to-Know Act during the 105<sup>th</sup> Congress, as well as the time and effort that Senator Richard Shelby expended last Congress on behalf of S. 1675, the Congressional Office of Regulatory Analysis Creation Act of 1998. (When S. 1675 is referenced in this testimony, it refers to the bill introduced during the 105<sup>th</sup> Congress.)

**Regulatory Right-to-Know Act**

In this era of international global competition, manufacturers cannot raise the prices for the goods being produced by 18 million Americans. The only way to continue increasing prosperity for Americans is to increase productivity through investment and

cutting costs. Regulations, whether beneficial or not, almost always add to costs, sometimes substantially, and decrease capital available for investment.

Therefore, the NAM has been a vigorous supporter of increased congressional and agency attention to minimizing the cost impacts of federal regulations through honest risk assessments, risk prioritization and cost/benefit assessments of alternative risk mitigation proposals.

The two bills under discussion today both would contribute to this overall goal. S. 59 will improve and make permanent an overall reporting structure that will enable agencies, Congress and the public to weigh the costs and benefits of the current archeological pile of regulations that now affects commerce, our health and safety, and the environment. Any new regulations will be assessed by an Office of Regulatory Analysis. Such an office will facilitate congressional oversight of the regulations that agencies promulgate to implement federal regulatory statutes and, hopefully, ensure that the regulatory costs will be in line with the real benefits envisioned by the laws.

As the committee is well aware, federal regulations cost Americans approximately \$700 billion per year, or about \$7,000 for every household. This burden has rightly been dubbed a "hidden tax." Of course, the NAM recognizes that regulatory programs provide substantial benefits. However, except for the appropriations amendments for the past two years offered by you, Mr. Chairman, and your predecessor, Senator Ted Stevens, an overall accounting of this hidden tax would not show up anywhere in any official government document.

Exactly a week after the tax-filing deadline for most Americans, I am certain that many wonder, as I do, what we are actually getting in return for sending these hard-



earned dollars to Washington. Similarly, it is healthy to question what we are getting for our hidden tax dollars. While OMB has acknowledged that its two existing reports submitted to Congress in response to the Stevens and Thompson amendments are rough estimates at best and can be improved, the reports have begun to shed some light on the answer to the question that Americans ask at this time of year. Making permanent these regulatory cost reports will help both to refine the methodology and to allow year-to-year comparisons.

In talking about the Administration's Reinventing Government initiative, Vice President Al Gore has referred to the American people as "customers" of government agencies. I prefer to think of myself – and other Americans – as part owners. As an owner, I'd like to know how effective government agencies are. In this regard, I am not talking about numbers of on-site inspections or fines levied. Rather, what are the goals of enabling statutes administered by the agency, and how efficiently are these goals being met? Are these goals being retested in light of improved science and technology?

If you will allow me, I would like to explain how this proposed legislation relates to how I operate my own business. About once a quarter I gather my employees in small groups and go over our financial condition. I project on the wall our financial statements and the status of our bonus plan, and I go over things like sales projections and upcoming equipment purchases. When I am implementing some new program or change in operation, I always explain what we are doing and why. I try to convey exactly what we want to accomplish and what the benefits will be. My employees are much more likely to implement some new program successfully if they see how it will benefit them as individuals and the company as a whole. But much more important than that, I have an

opportunity to listen to their comments about whatever it is I'm proposing. "Have you thought about this?" or "Wouldn't it be better if we did that?" My employees are usually much closer to the problems than I am, and I recognize that they usually know much more about how to fix them. Their questions, comments, gripes and suggestions always help to improve whatever we're about to do. I suggest that small business people throughout the country are much closer to the problems than the regulators and bureaucrats who try to solve them are. I believe that American businesspeople truly want to do what's right for their employees, their customers, and their country. The Congressional Office of Regulatory Analysis and the Regulatory Right-to-Know Act would provide all Americans, from the members of this committee to me and my employees, an opportunity to have a more open and honest debate, based on more objective information, about regulatory agencies' decisions. We all want to do what is right, but in today's competitive global environment, we simply cannot afford to waste time and money on the wrong regulatory solutions.

I believe that a comprehensive analysis of each regulatory function – especially major rules – could help the Administration, Congress and others determine where resources should be focused in order to maximize their impact. I know personally that I need to continually review each aspect of Metal Products Company to determine where improvements can and should be made. I believe open debate and reviews will help the regulatory agencies as well.

The current OMB opposes enactment of the Regulatory Right-to-Know Act. I find this puzzling. Executive Orders over the past quarter century have directed agencies to use cost-benefit analysis, at least for major rules. In addition, as I noted, two

consecutive bills providing appropriations for OMB have mandated that OMB carry out the essential elements of S. 59.

The Office of Information and Regulatory Affairs (OIRA), in particular, should be able to institutionalize the provisions of S. 59, since it has a mandate under Executive Order 12866 (and, before that, E.O. 12291) to ensure that cost-benefit analysis is performed for major rules. Despite this, OMB notes “data gaps” and inconsistencies among agencies as reasons why it could not provide a better estimate in the reports responding to the Stevens and Thompson amendments. S. 59 would grant OIRA additional arrows in its quiver – as well as statutory direction and incentives to eliminate the data gaps and accomplish the goals of S. 59.

S. 59 has many provisions that would be helpful, both to OMB as it prepares its net benefits report and to those interested in the results of that report. First and foremost, it directs OMB, in consultation with the Council of Economic Advisors, to issue consistent guidelines to standardize the most plausible indicators of costs and benefits and requires OMB to review agency adherence to these guidelines. Codifying the requirement to issue consistent guidelines is an important improvement that addresses the most vivid example of cavalier analysis by an agency in last year’s report: the reliance on EPA’s estimate of “up to” \$3.2 *trillion* in benefits under the Clean Air Act. OMB acknowledged concerns about this estimate, but rather than review it for accuracy or correct the methodology, it merely incorporated EPA’s numbers. The peer review of the net benefits reports, provided for in Section 7 of S. 59, would give OMB an additional tool with which to review agency-prepared reports for adherence to the guidelines and sound economic methods.

The NAM is pleased that S. 59 continues with the public notice-and-comment provisions. This is important because it allows experts not involved in the peer review to highlight problems with the methodology and offer suggestions for improvement.

**Congressional Office of Regulatory Analysis**

The establishment of a Congressional Office of Regulatory Analysis (CORA) (which presumably would offer appropriate comments on the viability of the analysis in the annual OMB net benefits report) would serve as an additional check on OMB for sound analysis in the net benefits report. Furthermore, CORA would provide oversight committees with an additional resource of reliable, independent information. In the last Congress, the NAM was a strong supporter of creating CORA. Indeed, the NAM led industry's efforts for its enactment and looks forward to doing so once again.

As proposed in S. 1675, CORA would have been an independent congressional agency. It would have been funded at about \$5 million, which is equivalent to OIRA. Most resources and personnel would have come from the General Accounting Office (GAO) and the Congressional Budget Office (CBO).

Although the NAM is disappointed that S. 1675 did not become law, this Congress has the opportunity to make changes to that proposal in response to those who had legitimate concerns. Chief among these changes would be not to make CORA an independent agency. Rather, it could be a specified function of an existing congressional office. While GAO has had experience over the years with regulatory review, placing CORA under CBO would make a statement that CORA is the congressional equivalent of OIRA, which is housed within OMB. In addition, CBO would be better equipped to

handle the reviews of the cost-benefit analyses. Thus, when the bill is re-introduced, the NAM encourages the sponsors to place CORA within CBO.

Another criticism that should be acknowledged regarding last year's bill is that, even though CORA was conceived as a non-partisan office, selection of the director by the Speaker of the House and the Senate Majority Leader, as provided in last year's bill, would be inherently political. Establishing CORA within CBO would put this argument to rest. (The NAM would like to note, however, that the selection of the director of CORA in S. 1675 was akin to the selection of the CBO director. Any equivalent concerns raised at the time of passage of the Congressional Budget and Impoundment Act of 1974 have long been put aside and, with the passage of time, the procedure of selecting the CBO director is now accepted.)

One criticism of the CORA proposal that the NAM rejects is that CORA would be duplicative of OIRA. This is tantamount to saying that CBO is duplicative of OMB. While this may have been a concern at the time of CBO's creation, history and experience show that the results of any tension between it and OMB have been positive: The competition has led to better analyses and a system of checks and balances.

Similarly, establishment of CORA is an idea that is long overdue. It has not been uncommon for an agency to produce a slanted cost/benefit analysis to justify a regulatory choice or statutory mandate. Oversight committees have always been at the mercy of these slanted analyses, as has GAO in its reports to Congress on major rules under the Congressional Review Act. CORA, on the other hand, would fastidiously review agency procedures and analyses to ensure compliance with statutes, such as the Administrative Procedures Act, the Small Business Regulatory Enforcement Fairness Act, the Paperwork

Reduction Act, the Congressional Review Act and the Regulatory Flexibility Act. In addition, CORA would help ensure that agencies follow executive orders and other regulatory procedural requirements. Such a consolidated review would substantially assist oversight committee members and staff, whose expertise would be more on the substantive issues rather than on these procedural ones.

In order to avoid a log-jam of analyses at CORA, S. 1675 correctly provided for CORA to prioritize its analyses of rules. Major rules would have first priority, followed by requests from committees and then individual members.

Another function of CORA would be to explore alternative ways to meet the goals of a regulation that would be more effective than the rule as promulgated. This additional analysis would provide a fresh perspective on how the statutory goal might be achieved. Accordingly, if an agency promulgated an inferior approach, CORA could provide Congress with information regarding more efficient alternatives to consider as a statutory amendment or, using the Congressional Review Act, to reject the more burdensome alternative.

Finally, S. 1675 called for CORA to issue a net benefits report similar to the one envisioned in S. 59. The NAM hopes that the re-introduced bill will retain this requirement. Combined with the requirement in S. 59, separate reports by OMB and CORA would provide a check for both to use sound methodologies.

Passage of the Regulatory Right-to-Know Act and creation of a Congressional Office of Regulatory Analysis would both improve the performance of the federal regulatory program by improving our understanding of the priorities and resource commitments embodied in existing regulations and by providing Congress with additional tools to review new regulations.

On behalf of the NAM, I thank you again for this opportunity. I would be pleased to answer any questions you may have.



**J O I N T   C E N T E R**  
AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES

**The Regulatory Right-to-Know Act  
and  
The Congressional Office of Regulatory Analysis Act**

**Joint Testimony before the  
Committee on Governmental Affairs  
U.S. Senate**

**Robert W. Hahn and Robert E. Litan**

**Testimony 99-1**

**April 1999**

Mr. Hahn is Director of the AEI-Brookings Joint Center for Regulatory Studies, a Resident Scholar at AEI, and a Research Associate at Harvard University. Robert E. Litan is Director of Economic Studies at the Brookings Institution and Codirector of the AEI-Brookings Joint Center for Regulatory Studies. A copy of this testimony can be obtained from the Joint Center's web site: [www.aei.brookings.org](http://www.aei.brookings.org). The authors have benefited from the comments of Ariene Holen and Randy Lutter. The views expressed here represent those of the authors and do not necessarily reflect those of the institutions with which they are affiliated.

### Executive Summary

Regulation is becoming increasingly important in many aspects of our economy. Congress has traditionally paid much less attention to the benefits and costs of regulation than to directly budgeted expenditures. This imbalance needs to be rectified.

Congress is now holding hearings on the Regulatory Right-to-Know Act and the Congressional Office of Regulatory Analysis Act. Those acts, if passed, will highlight the impact of regulation on consumers and workers; help inform the process of designing new laws and regulations; and also help provide insight on how to improve existing regulations.

This testimony argues that both those bills are likely to improve regulatory accountability. We offer some specific suggestions for strengthening the Right-to-Know Act, for example, by encouraging the Office of Management and Budget regulatory oversight unit to make greater use of its expertise in evaluating the actual impacts of federal regulation on the general public. We also make some practical suggestions for implementing a congressional Office of Regulatory Analysis, including recommendations on which regulations to analyze, the scope of the analysis, and the timing of such analysis so that it can have an important impact on the regulatory process.



**The Regulatory Right-to-Know Act  
and the Congressional Office of Regulatory Analysis Act**

Robert W. Hahn and Robert E. Litan

1. **Introduction**

We are pleased to appear before the committee to provide our views on the Regulatory Right-to-Know Act (S. 59) introduced this session by Senators Thompson, Breaux, Lott, and Stevens and the Congressional Office of Regulatory Analysis Act introduced in the past congressional session by Senators Shelby and Bond.

The two of us have studied and written about regulatory issues for over two decades. Recently, we helped the two institutions with which we are affiliated—the American Enterprise Institute and the Brookings Institution—form a new Joint Center for Regulatory Studies which, among other things, is reviewing federal regulatory and legislative proposals.

We believe that both bills are good ideas and should be adopted, with minor modifications. Both would help ensure that regulators, lawmakers, and interested parties have better information on the benefits and costs of individual regulations as well as the cumulative impact of the entire federal regulatory effort. In that respect, the bills would help bring information disclosure about regulatory activity up to the standards long required for on-budget activity, thus enhancing regulatory accountability.

Indeed, one lesson the United States has been preaching to the rest of the world in the wake of financial crises in Southeast Asia and Russia is that activity in both the public and private sectors must be “transparent.” This simply is another way of saying that the public has a “right to know” information that is relevant to decisionmaking by both firms and governments. Both bills would apply that principle to regulation in this country. It is about time.

2. The Regulatory Right-to-Know Act

S. 59 would make permanent a requirement that Congress has imposed on the Office of Management and Budget (OMB) over the past two years: to prepare annually a report to Congress on the total benefits and costs of federal regulations.

Before those annual reports were required, the American people had no idea of the cumulative impact of federal regulatory activity. Now they know that federal regulations impose burdens on the private sector most likely in excess of \$200 billion a year, depending on how the costs are defined; and according to estimates supplied by federal agencies, federal regulations deliver total benefits of at least that magnitude and conceivably much more.

The OMB reports have been far from perfect, as we will explain. But that does not mean that they should be abandoned, especially now that the agency has gained experience preparing them. In making the reporting requirement permanent, Congress should be urging OMB to improve its estimates of benefits and costs and to expand its recommendations for legislative changes.

A. Responses to Possible Objections

Before outlining our suggestions for improving S. 59, we want to anticipate a number of possible criticisms of the bill and address each in turn.

*General Concerns about Using Benefit-Cost Analysis*

Some interest groups object to the basic concept of collecting and reporting information on the benefits and costs of regulations for various reasons. For example, some claim that the numbers are too imprecise to be of much use. Others claim that the seeming precision of hard numbers drives out nonquantifiable considerations from regulatory decisions. And still others object on moral grounds—in particular, to the monetization of human health benefits. We do not believe that any of those objections defeats the usefulness of the kind of report that S. 59 would mandate and that OMB has already issued twice.

The broadest response to the critics is that the rear-guard battle over benefit-cost analysis, frankly, is over. Successive presidents from both parties for twenty-five years have issued and adhered to executive orders that require the executive branch agencies to analyze the benefits and costs to the best of their ability before taking regulatory action. Those orders do not require the quantification or monetization of the impossible. But they do recognize that benefit-cost analysis provides a useful *framework* for making decisions: an organized and systematic version of a list of pros and cons. We strongly suspect that if any of those individuals who object to benefit-cost analysis were to become the head of a regulatory agency, he or she would use something that approximated that method of decisionmaking, even if only implicitly. The executive orders make the analysis explicit. And S. 59 simply asks that OMB report to Congress and the American people the cumulative impact of all those decisions.

We are not oblivious to the concerns of critics, however. It is true that the current state-of-the-art does not often permit precise numerical estimates of benefits and costs. For that reason, some agencies include ranges for the relevant figures as well as best estimates. There is nothing wrong with that; indeed, specifying reasonable ranges often can be far more illuminating than offering precise estimates that do not acknowledge key uncertainties.

Although benefit-cost analysis provides a useful framework for decisionmaking, there are times when policymakers may not wish to take the results literally. For example, the numbers generated in the exercise do not remove nonquantifiable factors from decision making. Instead, they can help policymakers put *implicit* price tags on those factors so that they better understand the implications of decisions.

For example, suppose that the best estimate of the economic impact of a water pollution rule is that it would cost \$500 million annually to implement while generating quantifiable social benefits of \$400 million. Regulatory officials may still choose to approve the rule, however. In some cases, they may not be permitted by the authorizing statute to balance benefits and costs, in which case Congress and the public would then at least know the consequences of such a statute. Alternatively, the officials may be allowed to balance, but they recognize other *nonquantifiable* benefits—such as the benefit to society of having clean bodies of water—that, in their view, tip the balance toward adopting the rule. In that case, the benefit-cost analysis will have revealed the

*implicit* value of the nonquantifiable benefits to be at least \$100 million. That, too, is useful information for the public and Congress.

The critics of monetizing benefits, such as putting values on saving or extending lives and reducing the risk of injury—ignore one simple point. Whether one does it implicitly or explicitly, judgments are made all the time in both the public and private sectors about how much to spend to achieve given levels of safety. The fact is that limitless resources are not spent in pursuit of that objective. We do not spend the whole gross domestic product (GDP) attempting to save lives, however much we would like to do that. If we did, there would no other activity taking place in our society—no recreation, no travel, and no education. Instead, we all make decisions about how to trade off some objectives against others. You, as legislators, do it when you decide how much to allocate to education, to transfer payments, and to various other activities that in their own ways help save lives—national defense, medical research, and crime prevention, to name a few. Juries put values on human lives and injuries; they do not place infinite values on either. When regulators place values on saving lives or avoiding injuries, they are simply making explicit judgments that can be used to help compare the benefits with the costs that the private sector and public will be asked to pay under different regulatory proposals. In the process, they help decide how and to what extent society should allocate its scarce resources toward given regulatory objectives.

Significantly, the executive orders instructing the agencies to conduct regulatory analyses do not mandate that all benefits be monetized in every case—only that this be done to the extent practicable. It is noteworthy that S. 59 does not even go so far, for it speaks only of “effects.” We believe that the bill should go further and follow the approach of current Executive Order 12886. Specifically, the bill should include additional language instructing OMB to estimate both benefits and cost in monetary terms, to the extent practicable. Furthermore, Section 6 of the bill—which instructs OMB (with advice from the Council of Economic Advisers) to issue guidelines to agencies to standardize their measurement of benefits and costs—should also instruct OMB to standardize the monetization of benefits and costs, when such estimates are available.

*Many Statutes Do Not Require Regulatory Balancing*

A second possible objection to S. 59 would question the usefulness of a regulatory accounting when a number of regulatory statutes do not allow the balancing of benefits and costs. We believe that the annual report is nonetheless useful.

As noted, executive orders have for over two decades required regulatory analyses to be conducted, even for regulations where balancing is not allowed. We believe that this is so because regulators still find estimates of benefits and costs useful in rendering their decisions, if for no reason than to have a basic "reality check" before issuing their rules. Furthermore, whether or not the information is used to provide such a check, Congress and the public have a right to know the impact of the rules that are being promulgated under statutes that prohibit balancing. Such information could lead Congress to change its mind about the statutes, as in fact Congress has done in recent years by changing the Delaney Clause of the Food, Drug and Cosmetic Act and introducing some balancing language in the Safe Drinking Water Act.

The annual reports can also help Congress consider the overall "balance" of the regulatory effort: in particular, whether private sector resources might be reallocated so as to generate even larger benefits for the same aggregate cost. In that regard, one well-known study by researchers at Harvard found that a reallocation of mandated expenditures toward those regulations with the highest payoff to society could save as many as 60,000 more lives a year at no additional cost. Whether that is the right number is not the point. That kind of inquiry should be of central importance to Congress. But Congress cannot begin to address such issues without having the kind of information included in the OMB annual report, which under S. 59 must include not only total benefits and costs, but similar information by agency, agency program, and major rule.

*Official Estimates May Be Based on Unreliable Studies*

A third possible objection questions the value of the annual report to the extent that OMB and/or the agencies include estimates of questionable reliability. In particular, is it possible that

OMB and/or the agencies can "game" Congress by displaying estimates strongly favoring existing regulations, so as to fend off possible criticism?

In fact, we are sympathetic to that concern. The most important difference between OMB's report of 1997 and the 1998 report is that the more recent one includes a new estimate of the benefits of the Clean Air Act from the so-called Section 812 study, which EPA estimated at over \$3 trillion annually (at the high end). That estimate alone pushed the upper bound of benefits of all federal regulation to \$3.5 trillion, compared with a total cost range of \$170-\$230 billion.

While we recognize that the EPA estimate was the product of a peer-reviewed study, even OMB highlighted the strong sensitivity of the estimate to a number of assumptions and pointedly noted that other agencies held different views from EPA about those assumptions. That is hardly surprising. While we believe that the Clean Air Act may indeed produce benefits well in excess of its costs, we also believe that the EPA estimate, which OMB only indirectly questions in its report, on its face lacks credibility. Can one statute really generate benefits that are approximately 40 percent of the nation's annual GDP?

It is therefore understandable why some might question the usefulness of a report that accepts agency estimates without independent analysis. There is nothing in S. 59 that would prevent OMB from continuing to follow that practice in the future.

But that does not mean that the reports are useless. It is important to have the administration on record as to what it believes the values of its regulatory effort to be, just as the administration every year must defend its annual budget. But the buck does not stop there, so to speak. Congress can and should play a role in questioning the basis for regulatory estimates, just as it does now for budget requests. The annual regulatory report thus serves as the beginning of debate and thoughtful deliberation, not the end of them.

Over two decades ago, Congress recognized that it could not properly discharge its appropriations and budget responsibilities without having its own analytical arm to provide independent evaluations of the administration's budget request. Hence, in 1974, it created the Congressional Budget Office (CBO). We believe that the assessment of regulatory impacts deserves the same kind of independent consideration. Therefore, we will shortly discuss why we

believe that the proposal to establish a counterpart to CBO for regulatory analysis is also meritorious.

Finally, we note that S. 59 can be implemented with few additional resources. In any event, to the extent additional resources are required, we believe that they are well worth the cost. There is the potential to save billions of dollars annually while ensuring that consumers get better regulatory results. And there is reason to believe that the government does not spend enough money analyzing the potential for improving regulations. An average homebuyer, for example, spends about ten times more per dollar actually invested in housing than regulators spend analyzing expenditures that are required by regulations.

B. Suggested Modifications

Having strongly defended the need for S. 59, we nonetheless believe that it could be improved in several respects, either in the body of the bill or in accompanying legislative history.

**First, OMB should be required in its report to recommend each year some minimum number (perhaps ten) of regulations, programs or program elements that should be reformed or eliminated.** Those recommendations should be based on a careful assessment of the likely economic benefits and costs of the regulation or program. We are concerned that without such a requirement OMB may choose not to recommend any regulations or programs for elimination or reform. Indeed, OMB chose not to make such recommendations in its first report to Congress and only briefly addressed the topic in its second report.

**Second, OMB should identify in each report some minimum number of regulations (such as five) where its assessment of the likely impact of a regulation substantially differs from that of the agency proposing the regulation.** The issues relating to the Section 812 Study provide perhaps the most dramatic illustration of what can happen when OMB adopts without change an agency estimate of benefits and costs: in that case, the estimate on its face raises more questions than it answers and thus can cast a cloud over the reliability of OMB's entire report. If

OMB is critical of certain agency estimates, but unable or unwilling to provide its own estimates, then at least it ought clearly to indicate that to be the case.

**Third, Congress should develop mechanisms for better enforcement of the OMB guidelines.** OMB has already issued guidance to agencies on how to measure the benefits and costs of proposed regulations and formats for reporting that information. While there is room for improvement, the fundamental problem is one of enforcement. We suggest that OMB, in addition to providing guidance, issue an annual peer-reviewed statement about the extent to which agencies are complying with such guidance. That statement could be included in the associated report. In addition, when agencies are not complying, Congress should take the degree of agency compliance into account in setting appropriations for the agency and in instructing the agency how to proceed in the coming year.

**Fourth, as noted above, the bill should make clear that the estimates of both benefits and costs should be stated in monetary terms, to the extent practicable or feasible.** By estimating benefits in monetary terms to the extent feasible, they can be compared more easily. At the same time, the limitations of such comparisons need to be noted.

**Fifth, the statute should require OMB to redo the regulatory analyses on a select number of existing rules.** As it is now, OMB has been relying on estimates in the professional academic literature (to which we have contributed) to provide baseline estimates of existing regulations and has then buttressed those estimates with agency estimates of their most recently adopted rules. As some critics have rightly pointed out, the baseline estimates are getting dated. Firms have perhaps responded to mandates issued long ago in different ways from what was initially expected. In addition, scientists or other analysts may have learned more about the magnitude of the benefits of certain rules. As a result, it is important that OMB incrementally look back over the existing body of regulations and update the benefit and cost estimates.

Why not have the agencies do that? The major reason is to begin to develop some independence in the estimates. Where those estimates suggest a need for modification of some rules, then those results can help form the basis of the recommendations in changes in



regulations that S. 59 would mandate. The agencies can then get to work considering those modifications based on the new estimates.

We recognize that our suggestions would require OMB to hire consultants in the same way that agencies now do this for the new rules they develop—and that this will cost some money. The amount, of course, will depend on the minimum number of such analyses Congress mandates. The total additional resources in any event should not exceed several million dollars. Given the fact that many existing rules now impose annual costs on the private sector in the billions of dollars, not to devote some small measure of added resources would be penny-wise and pound-foolish.

3. **The Congressional Office of Regulatory Analysis Act**

You have also asked to us to assess the Congressional Office of Regulatory Analysis Act, which Senator Shelby proposed last year (as did Representative McIntosh in the House). That act would create a CORA to provide Congress with “independent, timely, and reasoned analysis of existing and anticipated Federal rules.” As noted earlier, such an office would serve as the regulatory counterpart to CBO.

A. **Why CORA Is Sound**

We believe that the CORA proposal 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, because it will help to make the regulatory process more transparent; and third, because Congress can use the independent analysis to help improve regulation and the regulatory process.

OMB’s Office of Regulatory and Information 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 is not to press the agencies “too 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 rarely made public; and the scope of those challenges is likely to be limited. The constraints on 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 would also make the regulatory process more transparent by providing both a more independent and a more public voice than OIRA. As noted below, CORA could submit comments on proposals that would help the public and Congress gauge their accuracy.

Congress can use CORA to help implement its recent legislation. For example, Congress adopted legislation (the Small Business Regulatory Enforcement Fairness Act) giving itself the opportunity for at least sixty days after a regulation is finalized to disapprove it before it becomes effective. Congress has yet to exercise that responsibility. 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 Congress, which had to make budget and appropriations decisions based solely on the information developed by the executive branch. We doubt seriously that, whatever their day-to-day criticisms of CBO may be, few if any members of Congress would wish to return to the pre-CBO era for appropriations decisions. Analogously, Congress should want to create an office to provide information and assessments of the impacts of regulations that are independent of those of the agency.

CORA could also aid Congress in periodically assessing the need to modify its own regulatory statutes. The OMB annual report, mandated by S. 59, would assist in that effort, but again, it will be based solely on the information that OMB chooses to convey to Congress. CORA can and should provide an independent assessment of that report, a responsibility that should be added to the language of the bill.

#### B. Implementation Issues

The CORA proposal raises a number of practical questions that this committee should consider before deciding whether to recommend it to the full Senate. We examine those questions below and suggest the need for modifying the bill in some cases and providing guidance in the form of legislative history in others.

*What should be the scope of CORA's duties?*

The Shelby draft of last year would require CORA to perform its own regulatory impact analysis (RIA) for every "major rule." We do not believe that CORA has to go that far—in effect, replicating everything the agencies do, but without anywhere near the level of resources. Instead, Congress and the public would be better served if CORA reviewed the RIAs and the rules—both as they are proposed (see further comments below) and when they are issued—for their methodological and factual integrity and for whether they reflect a consideration of reasonable alternatives and whether they are consistent with the authorizing statute. In other words, CORA should be doing the same kind of review that OIRA now performs, only without the political constraints.

In addition, as we have just suggested, CORA should also be required to provide Congress with an assessment of the OMB annual report, much as CBO now does with the annual budget.

*How many rules should CORA review?*

If it is required to analyze all major rules, CORA is likely to be doing thirty or so analyses a year (and maybe more, counting the rules of independent agencies). The Shelby draft also requires CORA to analyze nonmajor rules if they are so requested by a Senate or House committee.

The ability of CORA to carry out that full mandate depends on the level of resources Congress gives it. Our view that CORA should learn to walk before it runs, and therefore, should start on the small side—perhaps with fifteen to twenty senior-level analysts—and only ramp up in the number of personnel as it gains experience (by comparison, although OIRA has more

employees, it has, to our knowledge, only about fifteen to twenty-five senior-level regulatory analysts).

If that view is sustained—indeed, if CORA is given even fewer resources at the outset—then serious attention should be given to limiting the number of rules analyzed. At a minimum, therefore, we would propose striking the requirement that CORA analyze nonmajor rules. In addition, for major rules, CORA should be able to devote more resources to reviewing very important rules with potentially large economic impacts than to major rules of lesser import.

*How much information should CORA get, and when should it get it?*

The Shelby draft (which closely tracks the McIntosh proposal in the House) would ensure that CORA gets the same information that OMB now gets when reviewing rules. As a practical matter, that means that CORA would get the regulatory impact analyses and underlying supporting materials that are placed in the rulemaking record, along with the notice of proposed rulemaking (NPRM), at the time the rule is proposed. CORA also should have access to any other materials the agency used to help prepare its RIAs, so that it has the data and models necessary to replicate agency results on benefits and costs. And, of course, CORA should get all comments filed in the public record after the comment period closes.

We understand that the administration has previously objected to the CORA proposal for intruding excessively into the rulemaking process. There is a valid concern here. CORA should not be created to replicate everything the agencies do, just as CBO was not created to replicate everything that OMB does or that the budget offices of the individual agencies do. Instead, CBO was created to provide a “check”—an independent source of evaluation.

CORA can and should play the same role. It can do that, for example, by placing its own comments in the rulemaking record of the agencies during the comment periods, which typically last from 90–120 days. Indeed, we suggest that the language of the bill and/or its legislative history strongly encourage CORA to provide such comments, which should help give the agencies early warning of what CORA is likely to say in its report to Congress after the rules are issued. Where the RIAs, their supporting documents, and NPRMs have provided insufficient information for CORA to submit meaningful comments, CORA should say so in its comments

and thus put the agency on notice of the need to do more homework before issuing the final rule (a circumstance Congress can and should take into account in deciding whether to review rules after they are issued). Knowing that CORA may file such comments would provide a powerful incentive for agencies to compile thorough records and analyses before proceeding with their NPRMs.

When should CORA get its information? In particular, should it get it when OMB does—which is often well before the NPRM, at the stage when the agencies are just scoping out their options and in the preliminary stages of their analysis? The administration's objections to the proposal seem to center on the answer to this question being yes. But the proposal can be easily modified to clarify that CORA is to receive the information that OMB obtains only at the time when rules are proposed. That should alleviate the administration's legitimate concern about excessive intrusion into the deliberations of the agencies, but at the same time leave enough time for CORA to do its work. As long as CORA is not doing its own RIA—which we have counseled against—the 90–120 day comment periods that are typical of agency rulemakings should allow sufficient time for CORA to carry out its functions. But just to be sure, Congress may want to add language in the bill allowing CORA to request the agency to hold open its comment period for an additional period—perhaps thirty to sixty days—when CORA believes that additional time is warranted and when the agency has not otherwise claimed a need for issuing the rule on an “emergency basis” (an option that should be retained).

#### C. Staffing CORA

As noted above, we believe that it is appropriate for CORA to build up a staff over time with individuals from backgrounds similar to those of the analysts now working at OIRA. In addition, we believe that CORA should have a permanent set of well-known independent scientists, economists, and other technicians on peer-review panels. CORA can and should draw on those individuals for advice and, in appropriate cases, for help in preparing analyses. The members of the peer-review panels should be individuals of unquestioned expertise and of high standing in their academic or professional communities. No individual should be chosen to serve on a panel working on a particular rule if he or she works in an industry affected by that rule or

could benefit financially from its adoption. The same conflict-of-interest considerations should apply to putting individuals on peer-review panels who work for public-interest organizations that have stated their views on the rule or related rules.

D. Alternatives to a CORA

We believe that it is best for the independent review function to be lodged in a separate congressional agency. Otherwise, if made a part of CBO or GAO, the office is likely to have less clout, and there is a greater chance that its activities will get lost amid the larger functions already performed by those agencies.

4. **Conclusion**

Regulation is becoming increasingly important in many aspects of our economy. It has an important effect on our quality of life and the costs of goods and services; it also affects the ability of firms to compete in an increasingly global economy.

The Regulatory Right-to-Know Act and the Congressional Office of Regulatory Analysis Act, if passed, will help enhance regulatory accountability. Those acts would help highlight the impact of regulation on consumers and workers. In addition, they would inform the process of designing new laws and regulations and could also help provide insights on how to improve existing regulations.

Congress has traditionally paid much less attention to the benefits and costs of regulation than to directly budgeted expenditures. That imbalance needs to be rectified.

Congress needs to have better information on the likely benefits and costs of regulations that flow from the laws it passes. In addition, American citizens have a right to know how regulations are likely to affect them in everyday life.

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**THE PUBLIC AND THE CONGRESS NEED TO KNOW  
MORE ABOUT GOVERNMENT REGULATION**

by Murray Weidenbaum

Testimony to the  
Senate Committee on Government Affairs  
Washington, DC

April 22, 1999

Thank you for the invitation to testify on S.59, the Regulatory Right-to-Know Act of 1999 and on proposals for a Congressional Office of Regulatory Analysis. This legislation provides a superb and unusual opportunity to raise the level of public understanding of an important and controversial area of public policy. (1) S.59 accomplishes that desirable objective in a very straightforward and nonpartisan manner: providing, on a regular basis, data on the benefits and costs of government regulation. (2) Likewise, a new Office of Regulatory Analysis would give Congress an independent source of information—provided its charter were broad enough for the task.

**The Case for S.59**

The reason S.59 is necessary is that neither the benefits nor the costs of compliance with government regulation shows up in any measure of federal spending or taxation. But these effects are very substantial—available estimates total hundreds of billions of dollars a year. The cost of operating the federal regulatory establishment, according to the Center for the Study of American Business, is reaching an all-time high of \$18 billion in fiscal year 1999.

The public surely has a right to know this information on a consistent and regular basis. As a former federal official, I know that such data would contribute to better-informed decision making on key issues of public policy. Government regulation affects so many aspects of our economy and society—economic factors such as employment, inflation, productivity, and competitiveness, as well as social factors such as the environment, consumer and employee safety, and public health.

Some sections of S.59 are especially noteworthy. Section 4(a) requires the President to trans-



mit the regulatory data with the annual budget. That is an excellent idea, to help ensure that regulatory programs receive adequate attention in the key public and congressional deliberations on federal activity. As a practical matter, I hope that the full regulatory report would be included in the accompanying volume of special analyses now covering credit programs, capital outlays, and other important categories of federal activity—and that the President's budget message would present the highlights.

As a general proposition, more information is better than less. Nevertheless, we must acknowledge and respond to the criticisms that have been raised. It is true that S.59 will require some modest expenditure of federal funds. But modest surely is the accurate description when we compare the minimal requirements of this bill with the enormous existing structure for preparing the estimates of federal revenues and expenditures.

A related criticism is that data on regulatory benefits and costs are not sufficiently reliable to be worthy of dissemination. As someone who has pioneered the development of statistical information on regulation, I certainly am aware of the shortcomings that we have encountered—as well as the progress that has been made. First of all, we should note that, to this day, strong criticism is also leveled against the data on gross domestic product and other aggregate measures of economic activity. Nevertheless, officials in both the public sector and the private sector find that information essential for their decision making.

Closer to home, there are well-known shortcomings in the budget data that Congress acts upon. In the area of taxation, it takes several years after the fact for the Internal Revenue Service to issue its key report, *Statistics of Income*. As a result, the historical revenue data contained in the budget document, especially for the past year, are preliminary and subject to likely change. More important, it is demonstrably difficult to estimate major portions of federal revenues under existing tax law, especially capital gains taxes and corporate income taxes. On occasion, the Treasury's projections are much too high or much too low. Similar problems arise on the expenditure side, notably in the case of spending not tied directly to annual appropriations. Examples where budget estimates can be way off range from the activities of the Commodity Credit Corporation to military

procurement outlays to entitlements.

The shortcomings of the budget statistics notwithstanding, the nation still bases important decisions on that information. Surely the available data on the benefits and costs of regulation, whatever their limitations, have been very useful in alerting the public to the large magnitude of resources that are involved and to the substantial range of impacts generated by regulatory activity. I see no advantage in depriving the public of such knowledge.

Moreover, there is a positive feedback effect at work. For example, because the revenue estimates are so vital in the budget process, considerable effort has gone into improving the procedures for estimating the various categories of federal taxation. The enactment of S.59 would provide a similar incentive to improve the data on the benefits and costs of federal regulation. By making permanent the now-temporary requirement for an annual regulatory accounting statement, S.59 would encourage the executive branch to devote additional resources to developing a regulatory database.

From time to time, lawyers criticize economists who attempt to estimate values of a statistical life for groups of individuals, data needed to quantify the impacts of some important regulatory programs. Such criticism is surprising in view of the great frequency with which lawyers—when they are in a courtroom—go far beyond such generalized statistics by introducing estimates of the value of a specific human life and urging that large financial indemnities be based on such data.

#### **A Few Procedural Points**

On the positive side, I am delighted to see the details specified in Section 4(a)(1). The OMB reports in response to the Stevens Amendment, albeit helpful, have been deficient in providing data on individual regulatory agencies and programs. Likewise, the requirement for presenting recommendations to reform government regulation should help to generate improvements in this important aspect of government activity.

On the other hand, including distributional effects generates a disproportionately large research requirement that would unduly burden and delay the entire effort to measure benefits and

costs. On this score, I urge the Committee to consider the House version, which does not contain this requirement. That treatment does not prevent the inclusion of distributional analyses, should they become available. Section 4(a)(2) might be interpreted as requiring a very extensive research effort in order to cover the indirect effects of federal rules. In terms of priority, estimating the costs and benefits of federal regulatory programs should receive the great bulk of the effort and attention. In contrast, the required analysis of direct and indirect impacts could rely on gathering relevant studies already prepared by government and private researchers.

As a general proposition, restraint is needed in adding to the existing paperwork burden of the regulatory review process, especially by avoiding items that are "nice to know," but where the expected use is not likely to justify the burden of preparation. In that spirit, the relatively clean Senate version of Section 4(c)(2) is preferable to the more extended version contained in Sections 4(c)(2) and 4(d)(2) of the House bill (H.R.2840).

However, there is merit in the proposal that estimates of costs and benefits be prepared for several years following the year for which the basic report is being made. Given the new burden that is being imposed by S.59 to prepare historical data, I suggest deferring and then phasing in the requirement to provide estimates for the future.

Such advance warning would give the regulatory agencies the time needed to develop the necessary new methodology. Aggregate benefit and cost projections might be required, say, in 2003, projections by agency in 2004, and estimates by program element in 2005.

Section 5(a)(2) requires OMB to consult with the Comptroller General before issuing the annual report on regulation. The House bill names, instead, the director of the Congressional Budget Office. I am not impressed by either requirement but, if pressed, would lean toward the House version.

In Section 6(a), a small procedural change would maintain a parallel relationship. The director of OMB should be required to consult with the chair of the Council of Economic Advisers. Both officials, of course, are free to delegate some of this responsibility.

Section 7, on peer review, can be a useful innovation in both improving the regulatory data

and in enhancing confidence in the data. Because peer reviews usually involve more than one reviewer, I urge the committee to adopt the language of H.R. 1074, which provides for two or more reviewers. A number of public policy research organizations have the capability of performing the task. Several of them have provided detailed analyses of the first two OMB annual reports on regulatory benefits and costs.

#### **A Proposed Congressional Office of Regulatory Analysis**

With an expanded flow of data on regulatory programs, it would be helpful if Congress had its own expert staff to analyze such information and to prepare specific regulatory studies on its own. Legislation to establish a Congressional Office of Regulatory Analysis is an appropriate companion to S. 59. However, the specific proposals that I have seen do not go far enough, although in some minor regard they may go too far.

Virtually all generic regulatory reform proposals focus on improving the way in which government agencies write regulations to carry out laws already enacted. Although such change is needed, this approach ignores the compelling fact that the key decisions on government regulation occur earlier in the process—when Congress writes an Occupational Safety and Health Act or an amendment to the Food, Drug, and Cosmetics Act or any other important regulatory law.

Each congressional committee, when drafting a regulatory statute, should present estimates of the expected benefits and costs of the regulatory program in the report accompanying the legislation. To the extent feasible, this report should include a monetary evaluation of costs and benefits as well as a description of other advantages and disadvantages of the regulatory proposal.

To help it carry out reviews of proposed regulatory laws and rules, Congress should establish its own professional, nonpartisan regulatory analysis organization to provide it with reliable data, including estimates of benefits and costs. This organization could be a part of the Congressional Budget Office (CBO). That would both minimize overhead costs and enable the new office to become operational more quickly.

In carrying out their respective functions, it would be helpful if OIRA (the regulatory office of

OMB) and its new congressional counterpart developed a cooperative attitude on exchanging statistical and technical information, consistent with the separation of powers between legislative and executive branches. Such an effort would be similar to existing cooperation between CBO and OMB on budget matters.

On the other hand, the new congressional regulatory office should be careful not to intrude into the process of executive branch drafting of regulations. Rather, as noted above, it should focus on the earlier stage where Congress is considering a new regulatory statute and also on the later stage where Congress is reviewing a proposed regulation under the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Additional analysis of these points is contained in the attached copy of the recent report of the Committee for Economic Development, *Modernizing Government Regulation* (I served as project director for the CED report).

#### Conclusion

In summary, the enactment of S.59 and of a bill to establish a Congressional Office of Regulatory Analysis would be important improvements in the federal regulatory system. It is especially gratifying to see the bipartisan nature of these bills and of their congressional supporters. Their enactment would raise the information level of deliberations on regulation—and might even lower the decibel level.

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*Murray Weidenbaum is chairman of the Center for the Study of American Business and Mallinckrodt Distinguished University Professor at Washington University in St. Louis. In 1980, he chaired President-elect Ronald Reagan's Task Force on Regulatory Reform and served on the Presidential Task Force on Regulatory Relief in 1981-82. In 1998, he wrote A New Approach to Regulatory Reform. The views expressed are entirely personal.*

**Prepared Statement of Sidney A. Shapiro**

**John M. Rounds Professor of Law, University of Kansas Law School**

**and**

**Visiting Scholar, School of Policy and Environmental Affairs, Indiana University**

**at a Hearing Before**

**Senate Committee on Governmental Affairs**

**April 22, 1999**

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## SUMMARY

Mr. Chairman and Members of the Committee:

My name is Sidney Shapiro. I appear today in my personal capacity. I am the John M. Rounds Professor of Law at the University of Kansas. At the present time, I am a Visiting Scholar at the School of Policy and Environmental Affairs at Indiana University, in Bloomington.

I appreciate your invitation to discuss the "Regulatory Right-to-Know Act of 1999." My conclusion is that, as a matter of regulatory policy and process, S. 59 is unlikely to accomplish the objectives of its sponsors and more likely will make regulatory oversight more, not less, difficult. Analysts simply cannot accomplish the type of precise calculations needed for regulatory accounting, and even if they could, the results would not be relevant to policy decisions. Worse, the legislation is likely to mislead, rather than inform, the American public. Finally, the legislation is likely to distract OMB from effective regulatory oversight.

*Statistical House of Cards:* An accounting of regulatory costs and benefits, for the entire economy or for particular regulatory programs, must inevitably make assumptions and judgements that turn the exercise into a "statistical house of cards."

- ❖ Efforts to estimate total costs and benefits are confounded by a lack of data.
  - Present regulatory costs and benefits reflect regulations enacted over many years, yet there are no reliable estimates of costs and benefits for many such regulations and historical estimates may or may not be an accurate representation of today's current costs.
  - Regulatory accounting requires OMB to establish an appropriate baseline, but as OMB has pointed out, "[W]hat would have happened in the absence of regulation can only be an educated guess since it never happened."
  - Regulatory accounting requires OMB to evaluate the secondary impacts of regulations, positive and negative, on the economy, but there is no comprehensive body of economic literature that would permit OMB to undertake such a study.
- ❖ Efforts to estimate total costs and benefits are confounded by valuation problems. The calculation of the costs and benefits of individual rules are subject to a host of problems that make such estimates a shaky base for aggregating costs and benefits.
  - Cost estimates are based, for the most part, on industry-generated before-the-fact predictions, which the evidence suggests are often far too high.
  - Benefit estimates require analysts to grapple with the exceedingly complex issues inherent in measuring the beneficial impact of health and environmental

regulation.

- Current techniques for risk assessment simply do not have the power to permit anything approximating precise calculations of the number of lives saved by a health or safety standard. Translated into economic terms, the difference between low and high estimates of cancer risk can approximate the difference between the price of a cup of coffee and the national debt.
  - The evidence used by analysts to estimate that individuals will pay between \$3 and 7 million to reduce their risk of premature death is subject to a number of potential errors that suggest that current estimates for the value of a statistical life are too low.
  - Because of data limitations, it is difficult to measure with any precision, if at all, the value of reducing non-fatal illnesses, the lost productivity attributable to accidents and diseases, or the welfare and social security payments made to persons who become ill or are disabled.
- Benefit estimates also require analysts to resolve difficult value-laden issues inherent in measuring the beneficial impact of health and environmental regulation.
- OMB discounts future benefits to present value, which drastically reduces the benefits of federal regulation, yet there is no public consensus that the value of saving future lives should be determined solely by their discounted value.
    - Consider, for example, OSHA's lockout/tagout regulation. OMB estimated the regulation costs \$70.9 billion for each premature death it prevents. OSHA, which did not discount future benefits, estimated the cost for each premature death avoided as between \$190,000 and \$1.2 million.
    - Under OMB's approach, because of discounting, we would do little or nothing to protect today's workers against the risk of getting cancer in 25 or 30 years. Yet, the Occupational Safety and Health Act commits us, as a nation, to engage in such protection. Congress made this commitment because it considered factors other economic values in establishing policy.
    - Benefit estimates are based on how much individuals are "willing to pay" for results such as a safer workplace, less water pollution, or a reduction of air pollution over the Grand Canyon. This measurement biases a cost-benefit analysis in favor of less protection because a person's wealth will limit the amount that he or she can pay to purchase the right to be safe or to reduce harm to the environment.
- Finally, when OMB aggregates the costs and benefits of regulation, it adds up agency estimates that use different methods and assumptions, which is another source of potential errors.



*Usefulness of the Information:* In light of these severe methodological problems, the comparison of costs and benefits required by S. 59 is of limited utility to Congress or the public in determining the effectiveness or appropriateness of regulation. Moreover, regulatory accounting asks the wrong questions for oversight of government regulation. Worse, the results are likely to mislead, rather than inform, the American public.

- ❖ Critics contend that many regulations cost more money than can be justified or rationalized under economic theory. One can agree with these criticisms (and I do not) and still conclude that regulatory accounting asks the wrong questions.
- ❖ The numbers that would be produced under S. 59 are not only of little use, they will produce misleading answers about the wisdom of regulation.
  - S. 59 appears to require OMB to adopt point estimates of regulatory costs and benefits, but it is simply not possible in many cases to identify precisely the benefits, let alone the costs, of regulations.
  - The benefits of regulations can not always be captured by numerical estimates because many regulatory benefits are not, and cannot be, quantified on the basis of available data.
    - According to OMB, for example, EPA's regulation called "Hazardous Waste Listing For Wood-Preserving Chemicals" spends \$5.7 trillion dollars for each statistical life it saves. EPA estimated the entire annual cost of the regulation to be between \$11 and \$14 million dollars per year.
    - How did OMB turn a modest \$14 million dollar regulation into such a high-priced regulation? OMB's calculation is misleading because it assumes that the only benefit of the regulation is to reduce a health risk to humans. In fact, the regulation is primarily intended to protect the environment. Because there were only modest health benefits, OMB's calculation suggests that the regulation was extraordinarily unwise, when it was nothing of the kind.

*Impact on Regulatory Oversight:* Since the Reagan administration, OMB has been assigned the role of ensuring that agencies take into account economic information in rulemaking. S. 59 threatens to deter OMB from this mission by assigning it the difficult and time-consuming function of regulatory accounting.

*EPA's Section 812 Study:* In the 1990 Clean Air Act Amendments, Congress required EPA to assess periodically the costs and benefits of the Clean Air Act. In October, 1997, OMB produced the first report in response to this mandate. The peer reviewers found the "Retrospective Study Report to Congress is a serious, careful study and employs sound methods along with the best available data." As such, the report provides a useful case study to consider what would be the results if S. 59 is signed into law.

- ❖ First, the report indicates that good accounting does not come cheap. The study took seven years to complete and cost millions of dollars. Because of its more extensive mandate, S. 59 would cost far more.
- ❖ Second, the report estimated the total monetarized benefits realized during the period 1970 to 1990 range from \$5.6 to \$49.4 trillion dollars (present value in 1990 dollars). The vast range of benefits reflected EPA's difficulty in making precise estimates of regulatory benefits. Moreover, a number of benefits could not be quantified because of limitations in risk data or the unavailability of reliable economic methods to assign a monetary value.
- ❖ Third, the report indicates that competent analysts can differ concerning how benefit and cost estimates should be calculated. In compiling the report, there were debates over difficult methodological and policy issues between EPA and the peer reviewers, and OMB has indicated that it has its own reservations about some choices made by EPA.
- ❖ Fourth, the report emphasized that regulatory accounting can give citizens a misleading understanding of the value of regulation because dollar estimates fail to capture the often significant qualitative benefits of regulation.
- ❖ Fifth, the report corroborates the danger that quantitative estimates of regulatory costs and benefits can be easily misunderstood and misused.
- ❖ Finally, the report verifies that regulatory accounting fails to provide useful information about potential regulatory reforms. EPA stressed that the total estimates of costs and benefits do not address the issue of whether individual regulations are worthwhile.

## STATEMENT OF SIDNEY A. SHAPIRO

Mr. Chairman and Members of the Committee:

My name is Sidney Shapiro. I appear today in my personal capacity. I am the John M. Rounds Professor of Law at the University of Kansas. At the present time, I am a Visiting Scholar at the School of Policy and Environmental Affairs at Indiana University, in Bloomington. The subjects I teach include regulatory law and policy and administrative law, both of which deal with the substantive and procedural issues raised in my testimony. I have written (with co-authors) casebooks on regulatory law and policy (Lexis Law Publishing 2d ed. 1998) and administrative law (West Publishing 1997), as well as a treatise on administrative law (Foundation Press 3<sup>rd</sup> ed. 1999), which are also relevant to my testimony. I have published more than 30 law review articles on these and related subjects, all of which are attached to this statement. I have previously testified before House committees on occupational safety and health reform. Much of my professional research has been addressed to the role of regulatory oversight by the Office of Management and Budget (OMB), Congress, and the federal judiciary in making regulatory policy more effective.<sup>1</sup>

I appreciate your invitation to discuss the "Regulatory Right-to-Know Act of 1999, S. 59, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999). My conclusion is that, as a matter of regulatory policy and process, S. 59 is unlikely to accomplish the objectives of its sponsors and more likely will make regulatory oversight more, not less, difficult. Analysts simply cannot accomplish the type of precise calculations needed for regulatory accounting, and even if they could, the results would not be relevant to policy decisions. Worse, the legislation is likely to mislead, rather than inform, the American public. Finally, the legislation is likely to distract OMB from effective regulatory oversight.

#### A. History of Regulatory Accounting

The idea that regulatory accounting can be used to constrain regulation dates back to a proposal in the early 1980s that Congress adopt a regulatory budget.<sup>2</sup> The idea died out because even sympathetic commentators were dubious about its practicality in light of the difficulty of computing costs and of enforcing budget limits,<sup>3</sup> the choice of budget

<sup>1</sup> See, e.g., Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L. J. 89 (1996); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994).

<sup>2</sup> See, e.g., Christopher C. DeMuth, *The Regulatory Budget*, REGULATION, Mar/Apr. 1980, at 29.

<sup>3</sup> See, e.g., ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 157 (1983); John Mendeloff, *Regulatory Reform and OSHA*, 5 J. POLICY ANALYSIS AND MGMT. 440 (1986).

limitations invited partisan wrangling, and because choosing a ceiling without consideration of regulatory benefits is incoherent.<sup>4</sup>

Although the idea of the regulatory budget lost steam, critics of regulation continued to point to the high total costs of regulation as a source of concern, as they still do.<sup>5</sup> In response, the academic literature attempted to determine whether total costs were greater than total benefits.

Robert Hahn and John Hird undertook the first such effort in 1990.<sup>6</sup> Based on studies published by various analysts, the authors estimated that regulation in seven areas had costs of \$78.0 to \$107.1 billion. Benefit estimates were also based on prior published studies, but Hahn and Hird estimated benefits for only two of the seven areas for which they had costs.<sup>7</sup> No benefit estimates were made for the other five areas because of a lack of data or in one case (occupational safety) because existing studies suggested only negligible benefits. Hahn and Hird estimated the benefits of environmental protection and highway safety regulation to be \$41.9 to \$181.5 billion. These estimates produce a net effect of social regulation between a negative \$65.2 billion and a positive \$103.5 billion. In light of the overlap between the estimates of costs and benefits, the authors' "best guess" was that the costs and benefits included in the study were "roughly comparable."

In 1996, Robert Hahn published a comparison of costs and benefits of rules that were issued after his earlier study.<sup>8</sup> Starting with data that regulatory agencies submitted

<sup>4</sup> In economic theory, when marginal regulatory benefits exceed regulatory costs, regulation produces a net increase in social welfare. A ceiling on costs set without regard to benefits would prevent the country from obtaining increases in social welfare that regulation could have produced.

<sup>5</sup> See, e.g., Statement of Clyde Wayne Crews, Jr., Competitive Enterprise Institute, Before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, Mar. 24, 1999.

<sup>6</sup> Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 *YALE J. REG.* 233 (1991).

<sup>7</sup> The seven areas were consumer product safety, environmental, equal employment, highway safety, nuclear power and occupational safety. Environmental programs and highway safety were the two areas for which there were benefit estimates.

<sup>8</sup> Robert W. Hahn, *Regulatory Reform: What Do The Government's Numbers Tell Us?*, in *RISKS, COSTS, & LIVES SAVED 208* (1996). Despite Hahn's title, his calculations are *not* based on the government's numbers. For one thing, Hahn substituted in his own preferred measurement of the value of a statistic premature death avoided when an agency refused to monetize the value of the lives that a regulation would save. Further, Hahn threw out two EPA rules for which the agency's numbers indicated that benefits vastly exceeded costs. He concluded that the two studies (but none of the others for which benefits did not exceed costs) were unreliable "outliers." His weak explanation in a footnote was that because we will probably cure the type of cancer the regulations prevented in the next twenty years, the future benefits will be zero. Throwing out the two studies dramatically shifted the overall results. See Thomas O. McGarity, *A Cost-Benefit State*, 50 *ADMIN. L. REV.* 7, 35-36 (1998).

to OMB or published in the *Federal Register*, Hahn estimated the costs and benefits of 54 final "major" regulations promulgated by five agencies that engage in risk regulation.<sup>9</sup> Hahn estimated the net benefit of regulation was \$278.8 billion (1994 dollars), based on benefits of \$499.2 billion and costs of \$220.4 billion.

In response to congressional mandates, OMB has conducted its own studies of the total costs and benefits of government regulation. In 1998,<sup>10</sup> OMB used three separate sources to estimate total annual costs and benefits for environmental, transportation, labor and other regulation. Based on these sources, OMB estimated that safety and environmental regulation produced net benefits between \$34 billion and \$3.38 trillion per year (in 1996 dollars), based on benefits of \$258 billion to \$3.551 trillion and costs of \$170 to 224 billion.

### B. Statistical House of Cards

The first problem suggested by prior efforts to account for total costs and benefits is that such estimates are subject to numerous sources of error. An accounting of regulatory costs and benefits, for the entire economy or for particular regulatory programs, must inevitably make assumptions and judgements that turn the exercise into a "statistical house of cards."

*Lack of data:* Present regulatory costs and benefits reflect regulations enacted over many years, yet there are no reliable estimates of costs and benefits for many such regulations. For regulations promulgated after 1994, OMB used cost and benefit information submitted to it by regulatory agencies concerning "major" regulations. OMB did not have, nor is there any readily available source for, information about the costs and benefits of non-major regulation. OMB was forced to guess about the benefits for regulations promulgated between 1987 – 1994 because benefit data was not readily available.<sup>11</sup> For regulations promulgated prior to 1987, OMB used the cost and benefit estimates of Hahn and Hird, but their study failed to account for any regulatory benefits in five or the seven areas for which they recorded costs, because of data limitations. Unless these programs produced no benefits, their study underestimated the aggregate benefits of regulation, as did the OMB study.

<sup>9</sup> Hahn reviewed regulations promulgated between 1990 and mid-1995 by the Consumer Product Safety Commission (CPSC), EPA, National High Traffic Safety Administration (NHTSA), Mine Safety & Health Administration (MSHA), and OSHA.

<sup>10</sup> Office of Management and Budget, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 63 Fed. Reg. 44034 (1998).

<sup>11</sup> For regulations promulgated between 1987 – 1994, OMB added the costs of all major regulation it reviewed during that period. Because OMB was unable to calculate benefits based on agency data, it estimated benefits based on the ratio of benefits to costs in Hahn's 1996 study. For example, because Hahn's data indicated the benefit-cost ratio for environmental regulations was 1.4, OMB multiplied its cost estimate by 1.4 to obtain its benefit estimate.

Regulatory accounting is also subject to three additional problems associated with lack of data. First, where cost and benefit estimates are available, they are often many years old. This historical data may or may not be an accurate representation of today's current costs. Second, it is impossible to determine an appropriate baseline. As OMB has pointed out, "In order to estimate the impact of regulations on society and the economy, one has to determine how things would have been if the regulations had not been issued." Yet, as OMB concludes, "[W]hat would have happened in the absence of regulation can only be an educated guess since it never happened."<sup>12</sup>

Finally, because cost-benefit analysis considers only the immediate effects of regulation, it misses the secondary impacts, positive and negative, on the economy. Section 4 of S. 59 does require OMB to estimate secondary effects,<sup>13</sup> but there is no comprehensive body of economic literature that would permit OMB to undertake such a study.<sup>14</sup> As OMB indicates, section 4 requires analysis of economic impacts that "are not easily addressed using the available techniques of microeconomic analysis that underlies the cost-benefit analysis of individual rules . . . on which the annual [OMB] report is largely based."<sup>15</sup>

*Valuation Problems:* The calculation of the costs and benefits of individual rules are subject to a host of problems that make such estimates a shaky base for aggregating costs and benefits. On the cost side, the principal problem is that cost estimates are based, for the most part, on industry-generated before-the-fact predictions. Attempts to validate cost projections in light of subsequent experience have been sparse, but the evidence that does exist suggests that pre-implementation cost estimates are often far too high.<sup>16</sup>

To estimate benefits, analysts must grapple with the exceedingly complex and value-laden issues inherent in measuring the beneficial impact of health and environmental regulation.<sup>17</sup> To begin with, current techniques for risk assessment

<sup>12</sup> Office of Management and Budget, *supra* note 12, at 44036.

<sup>13</sup> S. 59, § 4(a)(2).

<sup>14</sup> Statement of G. Edward Deseve, Deputy Director for Management, OMB, Before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, March 24, 1999, at 3.

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Winston Harrington, Richard D. Morgenstern, and Peter Nelson, On the Accuracy of Regulatory Cost Estimates (Resources for the Future Jan. 1999); Eben Goodstein and Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, THE AMERICAN PROSPECT, Nov./Dec. 1997, at 64; Office of Technology Assessment, *Gauging Control Technologies and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach* (1995).

<sup>17</sup> See Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998); Thomas O. McCarty, *supra* note 8, at 7; Sidney A. Shapiro & Thomas O. McCarty, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729.

simply do not have the power to permit anything approximating precise calculations of the number of lives saved by a health or safety standard. For example, the predictions of cancer risk assessment models can vary over ten orders of magnitude.<sup>18</sup> Translated into economic terms, the difference between low and high estimates of cancer risk approximates the difference between the price of a cup of coffee and the national debt.<sup>19</sup> Risk assessment can improve health and environmental decisionmaking only to the extent it is based on good data and sound assumptions. Unfortunately, for most of the risks that regulatory agencies must address, data are sparse and consensus about the assumptions is rare. Serious students of risk assessment are sympathetic to its use in regulatory decisions, but they are also highly aware of its limitations.

The vagaries inherent in calculating the benefits of a health or safety standard extend beyond the uncertainties in estimating the number of lives saved, the number of illnesses prevented, and the amount of pain avoided. The dollar-for-dollar comparisons of cost-benefit estimates require the numerical estimates of risk be multiplied by the dollar value of avoiding each of those unattractive outcomes. Analysts estimate the value of avoiding a premature death by relying on a "willingness to pay" measurement defined by the wage premium that workers receive for working in dangerous conditions.<sup>20</sup> Based on these studies, analysts at OMB and private institutes appear to be converging on a range of about \$3 to 7 million for the value of a statistical life. Nevertheless, there are good reasons to distrust the empirical evidence on which such estimates are based.<sup>21</sup> These considerations suggest that current estimates for the value of a statistical life are too low. Moreover, wage premium studies assume that workers voluntarily accept risks in return for additional compensation, which is not always the case.<sup>22</sup> Even if workers

<sup>18</sup> Shapiro & McGarity, *supra* note 17, at 732.

<sup>19</sup> See Colhern, Coniglio & Marcus, *Estimating Risk to Human Health*, 20 ENVTL. SCI. & TECH. 111, 115 (1986).

<sup>20</sup> Because a worker will give up the wage premium if he or she accepts safer employment, the amount of the additional compensation is how much the person is "willing to pay" to reduce his or her risks.

<sup>21</sup> Almost all of the studies concern safety risks, rather than health risks, which limits their reliability concerning health benefits. Further, the prediction that workers will be compensated for occupational risks is predicated on the assumption that bargaining for such wages is not itself subject to market failures. We know, however, that many labor markets are subject to market imperfections. Workers are not fully informed of risks, the risk perception of workers is distorted by psychological defects in the way in which individuals process risk information, firms lack sufficient information on worker expectations and preferences (directly or through revealed preferences), and bargaining between employers and employees is not transacted in anonymous, perfectly competitive labor markets. See PETER DORMAN, *MARKETS & MORTALITY: ECONOMICS, DANGEROUS WORK, AND THE VALUE OF HUMAN LIFE* ch. 2 (1996) (discussing why labor markets are likely to be subject to one or more market imperfections that would limit risk compensation).

<sup>22</sup> Low paid workers in hazardous industries where there are no unions have little choice about what jobs they accept. Dorman and Hagstrom explain, "In plain terms, nonunion workers in dangerous jobs are, in many cases, simply unlucky: they have found their way into situations of high risk and low pay and would presumably move to a better job if they could." Peter Dorman & Paul Hagstrom, *Wage Compensation For Dangerous Work Revisited*, 52 INDUS. & LAB. REL. REV. 116, 133 (1998). Because hazardous jobs pay 20 to 30 percent less than safe employment, persons with education and training will simply avoid such

voluntarily accept risks, however, the relevance of this measurement is open to question when federal regulation protects the public from risks that are not voluntarily accepted.

The valuation of reducing non-fatal benefits produces its own set of problems. Because of data limitations, it is difficult to measure with any precision, if at all, the value of reducing non-fatal illnesses,<sup>23</sup> the lost productivity attributable to accidents and diseases, or the welfare and social security payments made to persons who become ill or are disabled.

In addition, basing calculations of benefits on supposed wage premiums entails two controversial value judgments. First, OMB discounts future benefits to present value. Second, analysts use a "willingness to pay" measure of the benefits of a health or environmental regulation.

Discounting drastically reduces the benefits of federal regulation.<sup>24</sup> Consider, for example, OSHA's lockout/tagout regulation. OMB has estimated the regulation costs \$70.9 billion for each premature death it prevents.<sup>25</sup> OSHA, which did not discount future benefits, estimated the cost for each premature death avoided as between \$190,000 and \$1.2 million.<sup>26</sup> Despite this profound impact on the value of regulatory benefits, there is no public consensus that the value of saving future lives should be determined solely by their discounted value. The logic of discounting by five percent assumes that the value of saving a life declines five percent every year, and that a life saved in the future is worth less than a life saved today. Thus, saving the lives of your children in the future is worth less than saving their lives today. Economic analysts may accept this result, but it would be surprising if many parents see reducing future risks to their children as less important than current risks. Discounting reduces a difficult moral question – to what extent should we reduce risks in the future – to a simple, one dimensional consideration – the discounted value of those lives. For example, discounting commits us to do little or nothing to protect today's workers against the risk of getting cancer in 25 or 30 years. Yet, the Occupational Safety and Health Act

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jobs. JAMES C. ROBINSON, *TOIL AND TOXICS, WORKPLACE STRUGGLES AND POLITICAL STRATEGIES FOR OCCUPATIONAL HEALTH* 93 (1991). According to Robinson, the labor pool for hazardous jobs therefore consists of "disadvantaged workers who are willing to accept health and safety risks in return for very modest amounts of compensation." *Id.* at 94.

<sup>23</sup> If such benefits are quantified, analysts often adopt some simplifying assumption, such as so many illnesses have the same economic value as a premature death. See, e.g., John F. Morrall III, *A Review of the Record*, *REGULATION*, Nov./Dec. 1986, at 25, 28 (value of non-fatal injuries quantified by converted non-lifesaving health benefits into an index equivalent to additional lives saved).

<sup>24</sup> See Heinzerling, *supra* note 17 (demonstrating impact of discounting on reducing the value of benefits).

<sup>25</sup> Office of Management and Budget, *Regulatory Program of the United States*, Apr. 1, 1991-March 31, 1992, at 370 (Table C-2, Part 2).

<sup>26</sup> See 54 Fed. Reg. 36644 (1989).



commits us, as a nation, to engage in such protection. Congress made this commitment because it considered factors other than economic values in establishing policy.

Second, most of those who advocate application of a cost-benefit test for health, safety, and environmental regulation use a "willingness to pay" measure of the benefits of a regulation. That is, they ask how much individuals are "willing to pay" for results like a safer workplace, less water pollution, or a reduction of air pollution over the Grand Canyon. They do not use a "willingness to sell" measurement that would ask what price would individuals demand for results like a less safe workplace, more water pollution, or more pollution over the Grand Canyon. Reliance on "willingness to pay" would make no difference if the offer and asking prices are identical, but this assumption fails once the distribution of wealth is taken into account. A person's wealth will limit the amount that he or she can pay to purchase the right to be safe or to reduce harm to the environment. A person's wealth, by comparison, does not limit his or her "asking" price in the same manner. A poor person can demand the same amount of money to sell the right to be safe (or have the environment degraded) as a rich person. A "willingness to sell" measurement of regulatory benefits therefore biases a cost-benefit analysis in favor of less protection.<sup>27</sup>

*Aggregation problems:* When OMB aggregates the costs and benefits of regulation, it adds up agency estimates that use different methods and assumptions, which is another source of potential errors. S. 59 seeks to avoid this result by ordering OMB to require agencies to comply with guidelines that would "standardize" the "most plausible measures" of "reasonably identifiable" costs and benefits" and "the format of information provided for accounting statements. The legislation fails to define the terms "most plausible" and "reasonably identifiable" and these are not terms of art that everyone would understand. A more profound problem is that the legislation appears to invite, if not require, OMB to impose one method of calculating costs and benefits. Agencies end up using different assumptions and methods because they face different problems in estimating costs and benefits. There is no one right method that can be applied across the board. If S. 59 only intends to create a common system of accounting for purposes of this legislation, it means agencies will have to keep two sets of books – one for making regulatory decisions and one for regulatory accounting. This replication of effort would cause confusion, increase administrative costs and delay agency efforts to protect the public and the environment.

### C. Usefulness of the Information

In light of these severe methodological problems, the comparison of costs and benefits required by S. 59 is of limited utility to Congress or the public in determining the effectiveness or appropriateness of regulation. Moreover, aggregate regulatory

<sup>27</sup> Benefit estimates are also biased in favor of less protection because analysts fail to consider other "soft variable" benefits, such as the emotional loss to the loved ones from the premature death of a family member.

accounting asks the wrong questions for oversight of government regulation. Worse, the results are likely to mislead, rather than inform, the American public.

*Wrong Questions:* As discussed earlier, once benefits are taken into account, the studies suggest that risk regulation is not excessive, despite the high costs that are involved. Risk regulation is costly, but it has generated benefits in excess of its costs, and the benefits may be greatly in excess of costs. Critics contend, however, that many regulations cost more money than can be justified or rationalized under economic analysis. They argue that the net benefits of regulatory programs, such as environmental regulation, are produced by just a few regulations, and most fail a cost-benefit test.<sup>28</sup> They also contend that if the money spent on the most expensive regulations were reallocated to other life-saving measures, greater benefits could be produced.<sup>29</sup> One can agree with these criticisms (and I do not<sup>30</sup>) and still conclude that revelations about total costs and benefits tell us nothing useful for important policy decisions. Put another way, even if the critics have made a correct diagnosis of the problem, S. 59 is a prescription that will not cure the disease.

*Misleading Answers:* The numbers that would be produced under S. 59 are not only of little use, they will mislead the American public concerning the benefits and costs of government regulation. First, S. 59 appears to require OMB to adopt point estimates of regulatory costs and benefits. Yet, it is simply not possible in many cases to identify precisely the benefits, let alone the costs, of regulations. As noted earlier, such estimates are difficult to make because of limited and imprecise data and the necessity of making methodological assumptions. The use of different assumptions or data can generate widely varying estimates of costs and benefits. Moreover, regulatory accounting hides the moral and political judgments that must be made in order to produce such numbers. Few, if any, members of the public are likely to be aware of the controversial judgments that lie behind adopting an economic value for a statistical life and discounting the economic value of lives saved in the future.

Unless accounting results are presented as a range of benefits and costs, the result is highly misleading. It suggests a degree of certainty and objectivity that simply does not exist. Moreover, regulatory accounting should acknowledge and explain the controversial judgment calls that are required in order to produce economic estimates.

Second, the benefits of regulations can not always be captured by numerical estimates. Consider, for example, a regulation called "Hazardous Waste Listing For Wood-Preserving Chemicals."<sup>31</sup> According to OMB, this EPA regulation spends \$5.7

<sup>28</sup> See, e.g., Hahn, *supra* note 8.

<sup>29</sup> See, e.g., Morrill, *supra* note 23.

<sup>30</sup> See, e.g., Shapiro & McGarity, *supra* note 17; Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 *WAKE FOREST L. REV.* 587 (1996).

<sup>31</sup> 55 *Fed. Reg.* 50450 (1990).

trillion dollars for each statistical life it saves.<sup>32</sup> The cost-estimate, however, is extremely misleading. The regulation requires firms that treat lumber with wood preservative chemicals place a plastic drip pad under coating machines in order to prevent the chemicals from dripping on the ground and take other modest actions to prevent environmental contamination. EPA estimated the entire annual cost of the regulation to be between \$11 and \$14 million dollars per year. How did OMB turn a modest \$14 million dollar regulation into such a high-priced regulation? OMB's calculation is misleading because it assumes that the only benefit of the regulation is to reduce a health risk to humans. In fact, the regulation is primarily intended to protect the environment. EPA identified a number of locations where wood preservation without drip pads had created serious environmental contamination,<sup>33</sup> but it did not monetize the environmental benefits. OMB's failure to provide a qualitative description of the benefits erroneously suggests that the entire cost of the regulation should be attributed to preventing premature deaths. Because there were only modest health benefits, OMB's calculation suggests that the regulation was extraordinarily unwise, when it was nothing of the kind.

As in the case of the previous rule, many regulatory benefits are not, and cannot be, quantified on the basis of available data. For this reason, regulatory agencies should (and do) consider both quantitative and qualitative information in making regulatory decisions. If Congress determines that regulatory accounting is necessary, then it should mandate that regulatory results be expressed as a mix of qualitative and quantitative factors that reveal the limits of the quantitative data and the assumptions that were used in compiling it. S. 59, by comparison, seeks an accounting statement that would reflect the benefits that OMB is able to quantify.<sup>34</sup>

#### D. Impact on Regulatory Oversight

Since the Reagan administration, OMB has been assigned the role of ensuring that agencies take into account economic information in rulemaking. OMB oversight has produced greater attention in the agencies to such information and has spurred agencies to develop their own capacity for undertaking such economic analysis. The fact that the relationship between OMB and agencies has sometimes been antagonistic and sometimes cooperative does not change this conclusion. OMB has been the cop on the beat in terms of compliance with executive orders requiring regulatory analysis.

S. 59 threatens to deter OMB from this mission by assigning it the difficult and time-consuming function of regulatory accounting. As noted earlier, regulatory reform occurs at the level of individual regulations. If OMB is to have this function, this is where it ought to devote its resources.

<sup>32</sup> Regulatory Program of the United States, *supra* note 25.

<sup>33</sup> Prior to promulgation of the rule, EPA had listed 54 wood preserving facilities on the Superfund National Priorities List (NPL), and it had ordered correction actions under the Superfund Act for numerous other facilities because of "extensive groundwater and soil contamination."

<sup>34</sup> S. 59, § 4(b).

### E. EPA's Section 812 Study

In the 1990 Clean Air Act Amendments, Congress required EPA to assess periodically the costs and benefits of the Clean Air Act. In October, 1997, OMB produced the first report in response to this mandate.<sup>35</sup> The peer reviewers found the "Retrospective Study Report to Congress is a serious, careful study and employs sound methods along with the best available data."<sup>36</sup> As such, the report provides a useful case study to consider what would be the results if S. 59 is signed into law.

First, the report indicates that good accounting does not come cheap. The study took seven years to complete and cost millions of dollars.<sup>37</sup> Because of its more extensive mandate, S. 59 would cost far more.

Second, the report confirms my earlier observation that regulatory benefits are difficult to estimate because of the lack of precise information and the unavailability of other information. The report estimated the total monetarized benefits realized during the period 1970 to 1990 range from \$5.6 to \$49.4 trillion dollars (present value in 1990 dollars).<sup>38</sup> The vast range of benefits reflected EPA's difficulty in making precise estimates of regulatory benefits. Moreover, a number of benefits could not be quantified because of limitations in risk data or the unavailability of reliable economic methods to assign a monetary value.

Third, the report indicates that competent analysts can differ concerning how benefit and cost estimates should be calculated. In compiling the report, there were debates over difficult methodological and policy issues between EPA and the peer reviewers,<sup>39</sup> and OMB has indicated that it has its own reservations about some choices made by EPA.<sup>40</sup>

<sup>35</sup> United States Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act 1970-1990* (October, 1997).

<sup>36</sup> SAB Council, *Letter to EPA Administrator Browner*, July 8, 1997, p. 1 (quoted at 63 Fed. Reg. 44042 (1998)). The report was the subject of intensive peer review by an independent, external panel of well-known economists, health scientists, and environmental scientists, known as the Science Advisory Board Council on Clean Air Act Compliance Analysis ("Council").

<sup>37</sup> Communication with Geneva A. Craig, Program Analyst, Office of Air and Radiation, Office of Policy Analysis and Review, EPA, April 15, 1999.

<sup>38</sup> 812 Study, *supra* note 35, at ES-8.

<sup>39</sup> See, e.g., *id.* at ES-10 (giving reasons for rejecting suggestion that benefits be measured by assigning a value to the reduction in years of remaining life expectancy resulting from pollution exposure).

<sup>40</sup> 63 Fed. Reg. 44042-44.

Fourth, the report emphasized that regulatory accounting can give citizens a misleading understanding of the value of regulation because dollar estimates fail to capture the often significant qualitative benefits of regulation. EPA warned readers:

[I]t is important to realize the substantial controversies and uncertainties that pervade attempts to characterize human health and ecological effects of pollution in dollar terms. To many, dollar-based estimates of the value of avoiding outcomes such as loss of human life, pain and suffering, or ecological degradation do not capture the full and true value to society of avoiding or reducing these effects. Adherents to this view tend to favor assessment procedures which (a) adopt the most technical defensible dollar-based estimates for valuation purposes but (b) leave the moral dimensions of policy evaluation to those who must decide whether, and how, to use cost-benefit analysis in making public policy decisions. This is the paradigm adopted in the present study. Given the Congressional mandate to perform a cost-benefit study of the Clean Air Act, the Project Team has endeavored to apply widely recognized, customary techniques of Applied Economics to perform this cost-benefit analysis. However, EPA believes there are social and personal values furthered by the Clean Air Act which have not been effectively captured by the dollar-based measures used in this study.<sup>41</sup>

Fifth, the report corroborates the danger that quantitative estimates of regulatory costs and benefits can be easily misunderstood and misused:

[T]he results of the retrospective study provide useful lessons with respect to the value and the limitations of cost-benefit analysis as a tool for evaluating environmental programs. . . . When used properly, cost-benefit analysis can help illuminate important effects of changes in policy and can help set priorities for closing information gaps and reducing uncertainty. . . . When cost-benefit analyses are presented without effective characterization of the uncertainties associated with the results, cost-benefit studies can be used in highly misleading and damaging ways.<sup>42</sup>

Finally, the report verifies that regulatory accounting fails to provide useful information about potential regulatory reforms. EPA acknowledged that a "large portion of the monetarized benefits of the historical Clean Air Act derives from reducing two pollutants: lead and particulate matter."<sup>43</sup> This fact, EPA suggested, may lead some to argue that "while programs to control these two pollutants may have been worthwhile, many other historical Clean Air Act programs would not pass a cost-benefit test when considered in isolation."<sup>44</sup> EPA concluded, however, that "[w]hile this may or may not be true," its "analysis provides no evidence to support or reject such conjectures."<sup>45</sup>

<sup>41</sup> 812 Study, *supra* note 35, at ES-9-10.

<sup>42</sup> *Id.* at ES-11-12.

<sup>43</sup> *Id.* at ES-11.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

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OMB WATCH

Statement of  
**Gary D. Bass, Ph.D.**  
 Executive Director  
 OMB Watch

Before the Senate Committee on Governmental Affairs

On  
**The Regulatory Right-to-Know Act**  
 and  
**Congressional Office of Regulatory Analysis**  
 April 22, 1999

Thank you for the opportunity to testify today regarding S. 59, the Regulatory Right-to-Know Act (Regulatory Accounting), and the establishment of a Congressional Office of Regulatory Analysis (CORA).

My name is Gary Bass, and I am the executive director of OMB Watch, a nonprofit research and advocacy organization. OMB Watch has been deeply involved in monitoring executive branch regulatory matters since its founding in 1983 and has worked to encourage a more open, responsive, and accountable federal government. OMB Watch also chairs a coalition, called Citizens for Sensible Safeguards, that includes more than 300 organizations dedicated to protecting and promoting the interests of consumers, workers, public health, civil rights, and the environment.

Speaking for OMB Watch, as well as Citizens for Sensible Safeguards, we strongly oppose the regulatory accounting bill and CORA for similar thematic reasons:

- **Both have little practical utility for public policy, yet would carry hefty price tags.** As OMB has stated, "Aggregate estimates of the costs and benefits offer little guidance on how to improve the efficiency, effectiveness, or soundness of the existing body of regulations." Yet with the expanded analytical requirements of S. 59, a substantial resource burden would be placed on OMB and the agencies for cumulative cost-benefit analysis — as well as brand new subanalyses — when regulatory matters are, in fact, handled best on a case-by-case basis. Likewise, CORA adds little to policy-making, as it duplicates work already done by the agencies, OMB, and GAO. This work is readily available to Congress, and as a result, Members have had little difficulty in obtaining cost-benefit information when assessing the merits of agency rules. Undoubtedly, CORA would carry a price tag at least equal to that of the Congressional Budget Office at \$25 million, and probably more if it were to truly carry out all its functions, such as cost-benefit analysis of all major rules.
- **Both deal in vast analytical uncertainty.** OMB has emphasized the uncertainty of regulatory accounting in its first two reports, as have legal and economic experts. Part of the problem here is the masking of value judgements that inevitably occurs in a monetized study of this kind, which actually

undermines the public's "right-to-know." Moreover, S. 59 marks a significant analytical expansion of previous regulatory accounting requirements, calling for a substantial amount of data that is not now available, such as cost-benefit analysis of paperwork requirements. Similarly, CORA's data would be unreliable because it would have to conduct its own cost-benefit analysis for each major rule within a 45-day period, and without having been part of the rulemaking process. Such a limited time-frame would likely force CORA to rely heavily on industry estimates.

- **Both raise concerns that they could be used as political weapons.** Many of the backers of regulatory accounting have also been vocal proponents of other various "reform" measures designed to stem regulatory costs. A regulatory accounting report showing very large costs and small benefits could be a useful tool in advancing this agenda. S. 59, with its slanted analytical requirements, could be seen as an attempt to forcibly bend OMB's numbers in an ideological direction consistent with the proponents of broad regulatory "reform." There is also a danger that CORA would be used as a political instrument. It's not hard to imagine a body like CORA, which would function as an arm of Congress, being influenced by the expectations of individual lawmakers looking to push an ideological agenda. Indeed, under last session's CORA bill, the House and Senate leadership would control the appointment of CORA's director, which is especially troubling if data from CORA is to be used as the basis for rejecting agency rules, as its proponents suggest.

#### **S. 59, the Regulatory Right-to-Know Act**

Mr. Chairman, when introducing S. 59, which requires OMB to perform a yearly cumulative cost-benefit analysis, you indicated a desire to build on previous regulatory accounting riders and OMB's two subsequent reports released in September of 1997 and February of this year. But before moving forward with this legislation — which marks a significant analytical expansion of the previous riders — it is first important to consider some of OMB's conclusions.

#### **Problems with Existing Regulatory Accounting**

OMB makes a special effort in both reports to point out that rulemaking decisions are made on a case-by-case basis, as they must be, and that throwing all of the government's diverse regulations, from environmental standards to economic controls, into the same pot has little practical utility for public policy. "[W]e still believe that the limitations of these estimates for use in making recommendations about reforming or eliminating regulatory programs are severe," OMB states in its second report. "Aggregate estimates of the costs and benefits offer little guidance on how to improve the efficiency, effectiveness, or soundness of the existing body of regulations."

Further calling into question S. 59's applicability to policy-making is the inherent uncertainty involved in cumulative cost-benefit analysis. OMB discusses a litany of factors that, in its words, make it "difficult, if not impossible, to estimate the actual total costs and benefits of all existing Federal regulations with any degree of precision." These include:

- **The "apples and oranges" problem.** The studies OMB bases its report on, and indeed OMB's report itself, have simply added together a diverse set of individual studies that vary in quality, methodology, and type of regulatory costs examined.

To produce its estimates for costs and benefits for regulation prior to 1988, OMB relied heavily on a 1991 study by Robert Hahn and John Hird. The Hahn-Hird study does not include benefit estimates for all regulations (e.g., consumer product safety was not counted), but still showed costs and benefits to be about the same. Even more interesting was that the Hahn-Hird data was not new; it was actually based on an earlier 1982 study. As a result, the Hahn-Hird study does not reflect the benefits of key environmental regulation that occurred under the Clean Air Act during the 1980s, such as the reduction of airborne lead and fine particles in the air. Taking this into account, OMB supplemented the Hahn-Hird work with two EPA studies — "Cost of a Clean Environment" (1990) and "The Benefits and Costs of the Clean Air Act, 1970 to 1990" (1997). EPA's 1997 report was not included as part of the first report and, as a result, the second report contains substantially higher aggregate benefit estimates.

"In addition to using different assumptions about baselines and time periods, the studies use different discount rates, different valuations for the same attribute, and different concepts of costs and approaches to dealing with uncertainty, to mention a few," OMB writes. In the end, a regulatory accounting effort will always involve adding apples and oranges, with results more akin to rotten tomatoes, in which the final numbers, far from creating transparency, are virtually impenetrable.

- **Dated studies and analysis.** The older the study, the less reliable it is. That is because business learns to adapt to regulation and reduce costs over time through technological advancements, "learning by doing," and other factors. The studies used by OMB were essentially static estimates that did not try to predict future adaptive effects. Moreover, because there are no studies comparable to Hahn-Hird that cover regulations after 1988, OMB relies on Regulatory Impact Analyses (RIAs) — which are conducted by agencies during major rulemakings — for rules since 1988. The RIAs used by OMB are especially unreliable because they were conducted before any adaptive effects could take hold (whereas the other studies were retrospective), and as a result are likely to overstate costs dramatically. For instance, EPA estimated in 1990 that acid rain controls would cost electrical utilities about \$750 per ton of sulfur dioxide emissions; yet the actual cost today is less than \$100 per ton, billions of dollars less than what was initially anticipated.<sup>1</sup>
- **Setting a baseline.** To estimate the impact of regulations on society and the economy, you must first determine how things would have been in the absence of regulation — in other words, set a baseline against which to measure costs. But because it is impossible to know what would have happened without regulation, this can only be an educated guess. This problem is accentuated the larger the regulatory changes. "If we use as a baseline a world with no regulation, one can reasonably argue that the

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<sup>1</sup> Eban Goodstein and Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, THE AMERICAN PROSPECT, Nov./Dec. 1997, at 64.



benefits of regulation must clearly swamp any likely cost," OMB writes.

- **No accounting of equity.** None of the analyses used by OMB's two reports provide quantitative information on the distribution of benefits or costs by income category, geographic region, or any other equity-related factor.

In order to meet the requirements of the regulatory accounting report, OMB has, not surprisingly, found it necessary to put cumulative costs and benefits in terms of dollars and cents. And indeed, S. 59 puts a premium on monetization, asking OMB to show "net benefits or net costs." In its last report, OMB demonstrates the method for showing "net benefits" through a benefits minus the cost calculation.<sup>2</sup>

Yet agencies often evaluate benefits using qualitative factors, such as the reduction in health or safety risks to children, whereas costs are more easily stated in monetary terms. This analytical discrepancy is only accentuated when you attempt to monetarily add up all federal regulation at once and can produce numbers that are greatly misleading.

When seemingly qualitative factors are converted to monetized figures — as OMB has begun to do with agency RIAs to fulfill its regulatory accounting obligations — value judgements become hidden behind a mask of technical expertise. For instance, OMB's most recent report incorporated the estimated benefits of reducing lead in gasoline, including the prevention of IQ loss in children. Although it's hard to imagine a parent who would regard their child's drop in IQ as adequately captured by an estimated loss of future earning capacity, this is actually one of the many value judgements buried in OMB's numbers.<sup>3</sup>

#### **Problems with S. 59**

Despite all of the uncertainty described above, and in the face of warnings from OMB, S. 59 would make cumulative cost-benefit analysis even more problematic. Specifically:

1. **It seeks to dramatically expand analytical requirements contained in the previous appropriations riders.** S. 59 — which has removed language from the previous appropriation rider requiring analysis only "to the extent feasible" — calls for OMB to estimate the annual costs and benefits of rules and paperwork (a) in the aggregate, (b) by agency, agency program, and program element, and (c) by major rule.<sup>4</sup> In addition, OMB would have to assess the direct and indirect impacts of federal rules on federal, state, local and tribal governments, the private sector, small business, wages, and economic growth.

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<sup>2</sup> Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulations*, Table 3, at 17 (1998).

<sup>3</sup> Testimony of Lisa Heinzerling, before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs of the Committee on Government Reform, United States House of Representatives, March 24, 1999.

<sup>4</sup> S. 59 applies to all rules, including those in independent agencies, except those promulgated under the Telecommunications Act and its amendments.

The inclusion of these new subanalyses, all aimed at elevating cost considerations, make it even more likely that "net benefits" will be understated. Notably, the bill calls for no such specificity in evaluating benefits, although there are certainly subcategories here worth considering — including effects on vulnerable populations, such as children, the elderly and the disabled.

But the biggest problem with these new requirements is that much of the information called for is not currently generated during agency rulemakings. When the first appropriations rider was passed, a colloquy between Sen. Stevens and Sen. Levin made clear that the intent was not to generate new data or studies, but rather to pull together existing information. "I expect a rule of reason will prevail: Where the agencies can produce detail that will be informative to the Congress and the public, they should do so," Sen. Stevens said at the time. "Where it is extremely burdensome to provide such detail, broader estimates should suffice." S. 59 represents a departure from this logic and takes an all-things-are-possible approach.

For instance, under the Paperwork Reduction Act, agencies are not currently required to conduct cost-benefit analyses for paperwork (either on the whole or specifically for the sub-categories listed in S. 59); rather, the agency is to assess "practical utility" and burdens imposed. Nor do agencies currently conduct analysis by "program element," meaning a cluster of related rules. And still another problem is that S. 59 applies to all regulations, including minor rules for which an RIA is not currently done and no data is available for OMB to apply. This might mean that agencies would need to spend resources and time on cost-benefit analysis, even for small, regularly renewed rules.

Testifying against similar legislation in the House, former OMB Deputy Director Ed DeSeve recently explained, "... agencies may have to be called upon to compile detailed data that they do not now have, and undertake analyses that they do not now conduct, using scarce staff and contract resources, regardless of any practical analytic need as part of the rulemaking process."<sup>5</sup>

**2. It requires OMB to issue guidelines on agency cost-benefit analysis and make recommendations on agency policy.** The requirement that OMB issue such guidelines is puzzling since OMB only recently issued its "Best Practices" document, containing guidelines for cost-benefit, after extensive interagency discussion. Moreover, the last regulatory accounting rider, introduced by you Mr. Chairman, also contained the same requirement that OMB issue new guidelines for cost-benefit analysis; it makes little sense to require that OMB repeat this task only a short time later through S. 59.

In addition, it is important to keep in mind that there will always be differences in the way cost-benefit analysis is conducted between federal agencies because of the many different functions they perform. But S. 59 seems to assume that there must be uniform approaches to the cost-benefit calculation, granting OMB, in consultation with the Council of Economic Advisors, the power to "standardize" across government the "most plausible measures of costs and benefits" and to review agency submissions "to ensure consistency with the guidelines."

<sup>5</sup> Testimony of Ed DeSeve, Deputy Director, OMB, before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs of the Committee on Government Reform, U.S. House of Representatives, March 24, 1999.

This expansion of authority would put OMB in the position of prescribing value-laden analytical judgements to agencies that each face their own unique methodological obstacles in assessing costs and benefits. In many cases this would require agencies to actually conduct two separate assessments, one to meet the demands of an underlying statute, the other to meet the demands of OMB and its regulatory accounting report.

S. 59 goes even further in expanding OMB power by requiring "recommendations to reform inefficient or ineffective regulatory programs or program elements." OMB is a body that reviews agency analysis and coordinates regulatory plans. It should not be within its jurisdiction to set policy at other federal agencies, especially on the basis of something with such dubious reliability. And indeed, in both reports required by the appropriations riders, OMB expresses great reluctance in making recommendations based on its findings.

3. It requires OMB to subject its findings and guidelines to "peer review." S. 59 requires OMB to subject its findings and guidelines to peer review provided by "a nationally recognized public policy research organization with expertise in regulatory analysis and regulatory accounting." There are only a handful of groups who would qualify under this language, and virtually all are more concerned with the cost side of the regulatory equation. Given that the bill instructs that OMB "shall use the peer review comments" — not simply consider the comments — in preparing its report, this could allow a single, privileged organization to greatly bias results and achieve a disproportionate amount of influence over the future of agency cost-benefit analysis.

The exclusive format of the peer review process actually undercuts the bill's all-inclusive public notice and comment process. For the first two reports, which were not subject to peer review, the comment period meant that everyone enjoyed the same fair shot at influencing OMB's final product. That would no longer be the case with the addition of the "peer review" section.

4. It would move in the direction of a regulatory budget and appears to be constructed as a political weapon. In light of all the uncertainty involved in cumulative cost-benefit analysis, it seems fair to question the motives of those who say regulatory accounting is about "right-to-know." While some, no doubt, honestly believe this to be the case, the idea of regulatory accounting actually originated during the Reagan Administration as part of a proposal to create a regulatory budget, which later resurfaced again in the Contract with America. Under the Contract with America proposal, federal agencies would have to cap regulatory costs at a certain percentage of our GDP; if costs exceed that cap, agency rules would have to be eliminated and no new regulations could be issued. In fact, this proposal actually required cuts in regulatory costs by reducing the cap by a set percentage each year. But to institute such an approach or any type of regulatory budget, you must first have a system that aggregates regulatory expenditures on an ongoing basis, and S. 59 would put proponents of regulatory budgeting halfway to their final goal.

In addition, many of the backers of regulatory accounting have also been vocal proponents of other various "reform" measures designed to stem regulatory costs. A regulatory accounting report showing very large costs and small benefits could be a useful tool in advancing this agenda. In this respect, however, OMB's first two reports were major disappointments. (The first found \$298 billion in benefits and \$208 billion in costs for social — i.e., health and safety

— and environmental regulation, and the second found \$170 billion to \$224 billion in annual costs and \$258 billion to \$3.55 trillion in annual benefits, expressed in ranges “to reflect the substantial uncertainty in the estimates.”) S. 59, with its slanted analytical requirements, could be seen as an attempt to forcibly bend the numbers in an ideological direction consistent with the proponents of broad regulatory “reform.”

In the absence of higher cost estimates from OMB, another regulatory accounting study,<sup>6</sup> by Thomas D. Hopkins, that yielded very high estimates of costs is often cited despite a methodology that was refuted by OMB. Among its many problems, the Hopkins study includes process costs that are not normally considered a part of the regulatory reform debate, such as the burden of filling out income tax forms or doing the necessary paperwork to obtain visas, passports, small business loans, and veterans benefits. This does two things, according to OMB: “It produces large numbers and it creates confusion.”

Citing this one obviously skewed report over and over again, as some proponents of regulatory accounting have done, contradicts their stated desire to provide better information, and instead seems to be an attempt to mislead the public. Inevitably, this leads one to question whether S. 59 is really about the public’s “right-to-know,” and is in fact more about building a political weapon.

**In summary**, by allowing crucial value judgments to be masked by monetized figures, we believe a report of this kind implies a sort of detached objectivity that simply doesn’t exist, and in doing so creates less transparency, not more, as proponents suggest. Moreover, the slanted analysis required by S. 59 appears to be intended as a political weapon to undermine critical health, safety, and environmental standards. Certainly such a regulatory accounting has no real utility for public policy, as OMB has pointed out. And yet, as constructed by this legislation, it could prove extremely burdensome for already cash-strapped federal agencies.

#### **Congressional Office of Regulatory Analysis**

S. 1675 of the 105<sup>th</sup> Congress — the Congressional Office of Regulatory Analysis Act — would have set up a congressional office to review agency rulemakings and conduct its own cost-benefit analysis for every major rule (and non-major rule upon the request of Members).

It has been suggested that through the creation of CORA, Congress would be better informed on agency rules, and more likely to use the recently-enacted Congressional Review Act (CRA). As Sen. Shelby pointed out on Feb. 25, 1998, when introducing S. 1675, neither the Senate or the House has moved a resolution of disapproval through the expedited track provided for under the law and no rule has been struck down.

Yet if you look at the recent case examples, there appears to be little confusion among Members. Is there anyone here on this Committee who in the last Congress didn’t develop an opinion on OSHA’s methylene chloride rule or EPA’s recent clean air standards? Most, if not

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<sup>6</sup> Thomas D. Hopkins, *Regulatory Costs in Profile*, Policy Study No. 132, Center for the Study of American Business, August 1996.

all, know exactly how they feel. And if they don't, there is a wealth of information already made available to Congress to help Members make prudent decisions.

The CRA requires that agencies submit all proposed rules to the parliamentarian and leadership in each chamber. In addition, the General Accounting Office must prepare a report on each agency rule and submit it to the appropriate congressional committees in both the House and Senate. (In fact, this information can be viewed by anyone who has access to the world wide web — [www.gao.gov](http://www.gao.gov)) Thus, the intimate details of each agency rulemaking (e.g., the cost-benefit analysis, risk assessment, and small business panel recommendations) are right there at the finger tips of each Member and readily available to the relevant oversight committees.

And if after reviewing all this information Congress still has questions, congressional leaders can hold hearings. There have been many hearings on the CRA and specific regulations such as OSHA's methylene chloride rule and EPA's clean air standards. The true reason that these sort of rules — which have been vocally opposed by some Members — have not been considered under the disapproval process is political. There is a fear among those who might vote to strike down rules that they would be branded anti-environment or anti-worker as a result. More research will not address these political considerations, and it is not likely to lead to more resolutions of disapproval as Sen. Shelby hopes.

But apart from whether a Congressional Office of Regulatory Analysis would accomplish its stated purpose, the proposal has many other problems. Specifically:

1. **It would create a costly new government apparatus that would duplicate functions already performed by OIRA and the individual agencies.** Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) must review all major rules (rules with an annual economic impact of \$100 million or more, or rules OMB so designates) and other nonmajor rules that OIRA believes warrant consideration. For 1998, this amounted to the review of 486 agency rules; the content of these reviews is readily available to Congress.

CORA would duplicate all the work done by OIRA, including an annual report estimating the total cost of federal regulations on the U.S. economy. Although these responsibilities are time-consuming and expensive — OIRA operates on an annual budget of \$5 million — previous CORA proposals have sought to go further than simply creating a second OIRA.

CORA would also engage in activities currently handled by individual agencies, performing an additional "Regulatory Impact Analysis" for each major rule, and some tasks currently required of the Congressional Budget Office under the Unfunded Mandates Reform Act of 1995.

In explaining the necessity for this duplication, the bill states that "in order for the legislative branch to fulfill its responsibilities ... it must have accurate and reliable information on which to base its decisions." This is true, but it assumes that information from CORA would be more reliable than that coming from OIRA, the agencies, and GAO. Considering the nature of rulemaking, and all of its components, along side CORA's 45-day review period, it's hard to see how this could be the case.

Predictably, this new and redundant regulatory review apparatus would cost taxpayers millions, carrying with it few or no benefits. Shelby's version authorizes whatever appropriations are necessary to fulfill the office's requirements, the sky's the limit. To conduct a cost-benefit analysis for a major rule, it costs an average of \$570,000, according to the Congressional Budget Office.<sup>7</sup> It's unclear how many Regulatory Impact Analyses CORA would conduct each year. But taking CBO's estimate into consideration, if CORA were to do an RIA for each of the 75 economically significant rules in 1998, the office would have cost about \$43 million for the year. If it were to do an RIA for all of the 486 major rules reviewed by OMB last year, the office would have cost about \$277 million. Now we realize Congress is not going to appropriate that much, but certainly CORA would have to be given resources at least equal to CBO at \$25 million.

A House version of this bill (H.R. 1704) was reported out of the Judiciary Committee and the Government Reform and Oversight Committee during the 105<sup>th</sup> Congress. And precisely because CORA has the potential to be so outrageously expensive, it was amended to limit its annual appropriation to roughly the same level as OIRA's. But considering that the scope of CORA's activities would be far greater than OIRA's, this surely would not be enough.

We believe that regardless of funds, the information generated by CORA would be unreliable, for reasons explained below. But without proper funding, this undoubtedly would be the case.

If Members are truly concerned about the quality of analysis coming out of the agencies, perhaps Congress should use the funding that some seem ready to apply to CORA and appropriate it to the agencies. Just within the last several years the President has signed into law the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, and amendments to the Paperwork Reduction Act — all of which require agencies to perform rigorous new regulatory cost assessments. The obligations under these laws would be more easily fulfilled with greater resources, and the results would likely be better as well.

**2. It runs counter to current efforts to streamline the government.** Members of this Congress have often raised objections to agencies that perform apparently redundant functions. The administration has responded to such criticism through E.O. 12866 and the Vice President's "Reinventing Government" initiatives, both of which have attempted to increase government efficiency. CORA, however, would run counter to these efforts by duplicating functions at OIRA and the individual agencies. Such redundancy calls into question whether CORA could stand up to the same sort of rigorous cost-benefit analysis so valued by many Members of this Committee.

**3. It contains the unreasonable expectation that CORA conduct its own Regulatory Impact Analysis for all major rules.** OIRA does not do this, and for good reason. Cost-benefit analyses are extremely time-consuming, require significant expertise, and are done within the context of each rulemaking. Yet Sen. Shelby's bill seems to imply that CORA would do the various types of analyses within a 45-day period before reporting to the appropriate committee. Even if CORA gets a head start on its requirements — say when the agency

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<sup>7</sup> House Judiciary Committee Report on H.R. 1704, Dissenting Views, March 13, 1998.

publishes a Notice of Proposed Rulemaking — such analysis would still be unworkable.

Without being a part of that rulemaking (e.g., without being involved in the agency's public comment period, SBREFA panels, etc.), it would be impossible for CORA to make a credible, independent estimate at both cost and benefits. CORA could essentially copy agency findings, but if that's the case, the bill does not meet its stated purpose. More likely, the limited time-frame would force CORA to rely very heavily on estimates from regulated interests. Under this scenario, however, the proponents would lose the independence they say they want — which would be especially troubling if Congress intends to use information generated by CORA as a basis for rejecting agency rules. Adding to the concern here is CORA's lack of public accountability. When agencies choose a regulatory option that is "arbitrary or capricious," they can be sued. But the public would have no recourse for sloppy work produced by CORA.

During the 1994 debate over unfunded mandates, Robert Reischauer, director of CBO at the time, was very skeptical of the legislative branch's ability to conduct these sorts of highly technical and time-consuming cost estimates, calling it "impossible in any practical sense."<sup>5</sup> Congress heeded Reischauer's warning by narrowing the scope of analysis that CBO is to do under the Unfunded Mandates Reform Act. Yet CORA would move Congress directly into areas that Reischauer warned would be dangerous.

**4. It would place CORA in the position of describing "lower cost" regulatory alternatives, raising Constitutional concerns over separation of powers.** Sen. Shelby's bill requires CORA not only to conduct detailed cost-benefit analyses, but also determinations of "potential net benefits" and descriptions of alternative regulatory approaches that could "achieve the same regulatory goal at a lower cost" and cost-benefit analyses of these approaches. These types of assessments are not required of agencies at this time and, most significant, put public protections secondary to finding "lower cost" regulatory approaches.

Moreover, it moves CORA in the direction of subordinating the powers granted to the executive branch to execute the laws of the land. Congress has every right to establish laws and revise them, but CORA would place the legislative branch in the role of describing regulatory alternatives for the way the executive branch is to execute. In addition, under Sen. Shelby's proposal, CORA could utilize executive branch facilities and personnel, upon approval from OMB and the agency head, without reimbursement to carry out work it needs done. This opens a process in which CORA could have a direct impact on agency activities and decisions.

**5. It contains no language requiring CORA to operate in the sunshine.** During the 1980s, OMB was permitted to operate in secret with little public accountability. Rules would go to OMB, changes could be made, and no one would know exactly why. Similarly at CORA, significant decisions on agency rules affecting everything from small business to the environment to children's health could be made without ever providing a proper explanation to the public. This is especially significant if Congress is going to use CORA findings as a basis to reject agency rules.

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<sup>5</sup> Testimony of Robert D. Reischauer, Director, Congressional Budget Office, before the Committee on Governmental Affairs, U.S. Senate, April 28, 1994.

As the Freedom of Information Act has been advanced, OMB has opened up slightly (though problems still remain since it is not subject to the same statutory requirements as federal agencies). But Sen. Shelby's bill doesn't touch the subject of whether or not FOIA would apply to CORA, nor does it spell out any other mechanisms to bring CORA into the sunshine to ensure greater public accountability.

More importantly, CORA raises serious concerns involving the Administrative Procedure Act. Under the APA, agencies are required to take a number of steps (e.g., public notice and comment) to ensure openness. Agencies can also be sued if the agency decision is "arbitrary or capricious," providing important checks and balances. CORA would have to conduct cost-benefit analyses just like federal agencies, but unlike federal agencies would not be bound to the APA. This means important decisions at CORA that could lead to the defeat of health, safety, or environmental protections might be made without any input from the public. In the absence of public accountability, it is possible that CORA could be used as a tool to advance a political agenda rather than a source of objective analysis on agency rules.

6. **It would politicize the evaluation of agency rules.** It's not hard to imagine a body like CORA, which would function as an arm of Congress, being influenced by the expectations of individual lawmakers looking to push an ideological agenda. Indeed, under Sen. Shelby's bill, the House and Senate leadership control the appointment of CORA's director, which is especially troubling if data from CORA is to be used as the basis for rejecting agency rules.

7. **It contains a regulatory accounting provision that could become a congressional regulatory budget.** There are many problems with the requirement in Sen. Shelby's bill that CORA do an annual report on the "total cost of Federal regulations" on the U.S. economy (many of which are discussed in our comments above on S. 59).

First, this would require significant work. CORA would not be able to review every rule generated by the executive branch, and therefore would need to establish a process for determining costs for every rule. Currently, OMB does not keep such information either.

Second, the regulatory accounting provision does not define what is meant by its requirement to estimate total costs. Does this include indirect costs? In the past, business has used such vague language to create opportunities for showing significant cost (e.g., lost business opportunity) relative to benefit, inflating burdens and justifying a decision not to regulate.

Third, there have been many recent attempts to quantify the cumulative costs of federal regulations by independent organizations and other researchers, yet in virtually every case, these studies vary by hundreds of millions of dollars — influenced by the various ideological underpinnings of the researchers. Likewise, it is easy to see how CORA's study could be influenced by Members of Congress looking to push an ideological agenda.

Fourth, the requirement does not instruct CORA to provide an annual estimate of the total benefit of federal regulations, including the economic benefit of regulation. This would create a one-sided figure that could be greatly misused.

Finally, as an annual requirement, the regulatory accounting provision raises serious concerns



that it could become a backdoor approach to creating a regulatory budget — something strongly opposed by the public interest community but called for in the Contract with America.

**8. It is not necessary.** Under the Congressional Review Act, GAO must provide an analysis of each agency rule to the appropriate congressional committees. Furthermore, information on OIRA's regulatory review and the agency's rulemaking is also delivered to Congress. This gives lawmakers all the tools they need to exercise necessary executive branch oversight. Supporters of CORA have failed to identify a compelling reason to transfer GAO's functions to a new congressional agency. Although CORA purports to enhance congressional knowledge of agency rulemaking, Members have exhibited little confusion in this regard. For instance, most Members from the last Congress were able to form well-developed opinions on OSHA's rule on methylene chloride and EPA's new clean air standards without an expensive apparatus like CORA.

**In summary,** the fact that Congress has not used the CRA is a function of political will, not a lack of information, and therefore CORA would not lead to more resolutions of disapproval as its proponents hope. But it would create a costly new government apparatus to perform a myriad of functions already performed by other government entities. This is not a wise use of resources and contradicts recent efforts to streamline government. In addition, an array of problematic side-effects would result from CORA's creation, such as its license to operate in secret and questions regarding the separation of powers between the executive and legislative branches of government. Furthermore, there are questions about CORA's mandated requirements and why they exceed those imposed on agencies.

United States General Accounting Office

**GAO**

Report to Congressional Requesters

April 1999

**REGULATORY  
ACCOUNTING**

**Analysis of OMB's  
Reports on the Costs  
and Benefits of Federal  
Regulation**





United States  
General Accounting Office  
Washington, D.C. 20548

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General Government Division

B-261445

April 20, 1999

The Honorable Fred Thompson  
Chairman  
Committee on Governmental Affairs  
United States Senate

The Honorable Ted Stevens  
Chairman  
Committee on Appropriations  
United States Senate

The Honorable Tom Bliley  
Chairman  
Committee on Commerce  
House of Representatives

The Honorable David McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
House of Representatives

The Honorable John B. Breaux  
United States Senate

This report responds to your requests that we provide information on the Office of Management and Budget's (OMB) 1997 and 1998 reports to Congress regarding the costs and benefits of federal regulations. Specifically, we were asked to describe, for each of four statutory requirements, (1) how OMB addressed the requirements in its reports and (2) the views of noted economists in the field of cost-benefit analysis regarding OMB's responses in these reports.

We are sending copies of this report to Senator Joseph I. Lieberman, Senator Robert C. Byrd, Representative John D. Dingell, and Representative Dennis J. Kucinich in their respective capacities as the Ranking Minority Members of the Senate Committee on Governmental Affairs, the Senate Committee on Appropriations, the House Committee on Commerce, and the House Committee on Government Reform's Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs. We are also sending copies to the Honorable Jacob Lew, Director of OMB, and will make copies available to others on request.

B-281445

If you have any questions about this report or would like to discuss it further, please contact me on (202) 512-8676. Major contributors to this report are listed in appendix V.

A handwritten signature in black ink, appearing to read "L. Nye Stevens". The signature is stylized with a large initial "L" and a long horizontal stroke extending from the end of the name.

L. Nye Stevens  
Director, Federal Management  
and Workforce Issues

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## Executive Summary

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### Purpose

The process of issuing and enforcing regulations is a basic tool of government, but the costs that nonfederal entities pay to comply with federal regulations are not accounted for in the federal budget process. Some researchers have estimated those costs in the hundreds of billions of dollars, and some estimates of aggregate benefits are even higher. Congress decided that it needed more information on regulatory costs and benefits, so it required the Office of Management and Budget (OMB) to submit two successive annual reports to Congress providing (1) estimates of the total annual costs and benefits of federal regulatory programs; (2) estimates of the costs and benefits of each rule likely to have a \$100 million annual effect on the economy in increased costs; (3) an assessment of the direct and indirect effects of federal rules on the private sector, state and local governments, and the federal government; and (4) recommendations to reform or eliminate any federal regulatory program or program element that is inefficient, ineffective, or not a sound use of the nation's resources.

GAO conducted this review at the request of several Members of Congress. GAO's objectives were to describe, for each of these four requirements, (1) how OMB addressed the requirements in its 1997 and 1998 reports and (2) the views of noted economists in the field of cost-benefit analysis regarding OMB's responses in these reports.

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### Background

Conceptually, cost-benefit analysis is a rigorous procedure of weighing the costs and benefits of a proposed action and various alternatives and is generally regarded as an important and useful tool in regulatory decisionmaking. For nearly 20 years, both the executive and legislative branches have required federal agencies to prepare cost-benefit analyses for certain rules. Under Executive Order 12866, OMB reviews agencies' regulations and associated cost-benefit estimates to ensure that the regulations are consistent with applicable laws, the executive order's principles, and the President's priorities.

The statutes requiring OMB to prepare its reports on regulatory costs and benefits do not prescribe how those reports should be prepared, and no clear legislative history exists to describe congressional intent. Some Members of Congress expressed their individual views that OMB should simply compile existing information about regulatory costs and benefits. However, other Members of Congress said that OMB should prepare an independent assessment of regulatory effects, not just report the results of agencies' cost-benefit analyses.

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**Results in Brief**

OMB's 1997 and 1998 reports contained some, but not all, of the elements Congress required. OMB provided estimates of total regulatory costs and benefits and provided estimates for some (but not all) \$100 million rules issued within particular 1-year periods. OMB's 1998 estimate of total federal regulatory benefits was 12 times its 1997 estimate, driven almost entirely by a 1998 Environmental Protection Agency (EPA) estimate of the benefits associated with the Clean Air Act. However, OMB did not separately assess the direct and indirect effects of federal regulations on various sectors in either report. Also, although it discussed a proposal for electricity restructuring and some previously announced agency initiatives in its 1998 report, OMB did not provide any new recommendations to reform or eliminate regulatory programs or program elements.

The cost-benefit analysis experts that GAO consulted were generally critical of OMB's performance, with regard to three of the four statutory requirements. The experts said OMB's 1998 upper-bound estimate of total regulatory benefits was questionable or implausible, and they were particularly critical of OMB's unadjusted use of EPA's Clean Air Act benefit estimate. They also said OMB should not have simply accepted agencies' cost and benefit estimates for the "major" and "economically significant" rules and should have provided new regulatory reform recommendations. However, the experts said they understood why OMB could do little to discuss the other statutory requirement regarding indirect regulatory effects on particular sectors. Overall, they said OMB should have been more than a "clerk," transcribing the agencies' and others' estimates of costs and benefits. However, several of the experts also recognized that, as part of the administration, OMB was politically constrained from doing more than it did because providing independent assessments would have required OMB to criticize positions approved by the administration.

OMB has a responsibility to review agencies' estimates of regulatory costs and benefits in rules and reports before they are published. However, after their publication, those rules and reports become statements of administration policy. It is politically difficult for OMB to provide an independent assessment and analysis of the administration's own estimates in a public report to Congress. If Congress wants an independent assessment of executive agencies' regulatory costs and benefits, it may have to look outside of the executive branch or outside of the federal government.

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**Principal Findings**

The first statutory requirement was that OMB provide estimates of the total annual costs and benefits of federal regulatory programs. In its 1997

report, OMB estimated that the annual cost of federal regulations was \$279 billion and estimated annual benefits at \$296 billion. In its 1998 report, OMB estimated annual regulatory costs at between \$170 billion and \$230 billion and estimated annual regulatory benefits at between \$260 billion and \$3.5 trillion. The decrease in the cost estimate between 1997 and 1998 was primarily because OMB did not include efficiency losses from economic regulations in its 1998 summary table. Virtually all of the increase in the benefits estimate was due to the inclusion of an EPA estimate of the benefits associated with the Clean Air Act. The experts that GAO consulted generally said that OMB's 1997 and 1998 cost estimates were reasonable, but most of the experts said the upper-bound benefits estimate in the 1998 report was questionable or implausible. Most of the experts criticized OMB for accepting agencies' cost and benefit estimates without adjustment or standardization and were particularly critical of OMB's unadjusted use of EPA's benefit estimate. However, most of the experts also said that OMB faced political constraints in adjusting agencies' cost and benefits estimates, noting that an independent assessment of those estimates would potentially require OMB to criticize its own administration's policy positions.

The second statutory requirement was that OMB provide estimates of the costs and benefits of each rule likely to have a gross annual effect on the economy of \$100 million or more in increased costs. OMB interpreted this requirement broadly to include rules that were "major" or "economically significant," even if they did not necessarily result in \$100 million in increased costs. However, OMB narrowly focused on rules issued during specific 1-year periods and did not include rules issued by independent regulatory agencies in its summary tables. Also, OMB did not include all rules that met its criteria and did not provide cost-benefit data for all of the rules it included. Most of the cost-benefit experts that GAO consulted said OMB should have included rules from independent regulatory agencies. Several experts also said OMB should not have simply accepted the cost and benefit estimates provided by the executive agencies, but some of them also recognized that it was politically difficult for OMB to alter agencies' estimates in its report to Congress.

The third statutory requirement was that OMB provide an assessment of the direct and indirect impacts of federal rules on the private sector, state and local governments, and the federal government. Although OMB did not separately assess the direct and indirect effects of federal regulation on these sectors, OMB indicated that it believed it had discussed the direct effects through the overall cost and benefit estimates that it provided in relation to the first statutory requirement. OMB discussed the difficulty in



## Executive Summary

determining indirect regulatory effects in its first report but did not provide any description of those effects in either report. The cost-benefit analysis experts that GAO consulted were generally sympathetic toward OMB's treatment of this requirement, describing it as a lower priority than the other requirements and difficult for anyone to satisfy.

The fourth statutory requirement was that OMB provide recommendations to reform or eliminate any federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the nation's resources. OMB's 1997 report contained no such recommendations, with OMB stating that existing data were inadequate. The 1998 report contained an endorsement of 10 previously announced regulatory or statutory changes and a discussion of restructuring the electrical generation industry. All of the cost-benefit experts were dissatisfied with OMB's response to this requirement, and several said sufficient cost-benefit data existed to support making some recommendations. However, several of the experts also said that it was politically difficult for OMB to make recommendations to Congress to eliminate or reform existing administration programs.

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**Recommendations**

GAO is making no recommendations in this report.

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**Matter for  
Congressional  
Consideration**

It is politically difficult for OMB to provide Congress with an independent assessment of executive branch agencies' regulatory costs and benefits. If Congress wants an independent assessment, it may wish to consider assigning that responsibility to an organization outside of the executive branch. That organization could include a congressional office of regulatory analysis, which would have to be established, or an organization outside of the federal government.

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**Comments and GAO's  
Evaluation**

GAO requested comments on a draft of this report from the OMB Director. OMB's Office of Information and Regulatory Affairs (OIRA) said the report raised a number of useful analytical issues regarding how regulatory costs and benefits can most appropriately be estimated and reported. However, OIRA stated that it disagreed fundamentally with several of the statements attributed to the experts in the report, saying their comments reflect a significant misunderstanding of OMB's role in developing, overseeing, and coordinating the administration's regulatory policies. OIRA also said that it had provided original estimates of regulatory costs and benefits, that the EPA estimate of the benefits associated with the Clean Air Act had been peer reviewed, and that it had provided Congress with the estimates that Congress directed it to prepare.

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**Executive Summary**

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GAO believes OIRA's comments buttress its conclusions and matter for congressional consideration. It is politically difficult for OMB to disagree publicly with agencies' statements of regulatory policy, particularly because OIRA staff typically participates in developing those policies.

GAO also obtained the views of six of the seven cost-benefit experts that it consulted on the draft report. The experts generally said the report accurately reflected their statements, but some of them suggested particular clarifications, which GAO has incorporated into this report where appropriate.

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**Abbreviations**

AEI	American Enterprise Institute
CORA	Congressional Office of Regulatory Analysts
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
HHS	Department of Health and Human Services
NPRM	notice of proposed rulemaking
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
RISC	Regulatory Information Service Center
SBREFA	Small Business Regulatory Enforcement Fairness Act of 1996
SEC	Securities and Exchange Commission
UMRA	Unfunded Mandates Reform Act of 1995
USDA	United States Department of Agriculture

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## Introduction

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Regulations serve as the means by which statutory requirements are implemented and specific requirements are established. Like taxing and spending, the process of issuing and enforcing regulations is a basic tool of government. Although the cost of operating federal regulatory agencies is captured in the federal budget process, the budget does not reflect the costs that nonfederal entities pay to comply with federal regulations. Some researchers have estimated that the direct cost of complying with all federal regulations is in the hundreds of billions of dollars.<sup>1</sup> Some estimates of the benefits that federal regulations provide to society are even higher than the costs.<sup>2</sup>

Conceptually, cost-benefit analysis is a rigorous procedure that involves weighing the costs and benefits of various alternatives to a proposed action and underlies most if not all attempts to assess the cumulative effects of regulations on society.<sup>3</sup> Both Congress and the executive branch have required certain federal agencies to conduct cost-benefit analyses on their most significant rules. Cost-benefit analysis is generally recognized as an important and useful tool in making decisions about particular regulations. However, applying cost-benefit analysis to major regulations can be a complex and controversial undertaking. Also, there is disagreement regarding the weight that the analyses should receive in the decisionmaking process.

Although cost-benefit analysis for a single rule can be controversial, estimating the costs and benefits of all federal regulations can be even more controversial. Some questions center on whether certain types of regulatory costs or benefits should be included in the totals. Other questions are even more basic, focusing on whether developing accurate estimates of total federal regulatory costs and benefits is feasible or, if so, how policymakers should use those estimates.

Congress decided that it needed more information on total regulatory costs and benefits, so in 1996 and 1997 it required the Director of the Office of Management and Budget (OMB) to submit reports to Congress providing (1) estimates of the total annual costs and benefits of federal

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<sup>1</sup>See, for example, Thomas D. Hopkins, *Regulatory Costs in Profile*, Policy Study 132, Center for the Study of American Business, August 1996.

<sup>2</sup>For example, in "Regulatory Reform: What Do the Government's Numbers Tell Us?" in *Risks, Costs, and Lives Saved* (Washington, D.C.: The AEI Press, 1996, pp. 206-253), Robert W. Hahn states that "using government agency data, it would appear that there is a present value of about \$280 billion in net benefits to government regulation" in the areas of environment, health, and safety.

<sup>3</sup>Cost-benefit analysis is also referred to as benefit-cost analysis and regulatory impact analysis.



regulatory programs, (2) estimates of the costs and benefits of each rule likely to have a gross annual effect on the economy of \$100 million in increased costs; (3) an assessment of the direct and indirect effects of federal rules on the private sector, state and local governments, and the federal government; and (4) recommendations to reform or eliminate any federal regulatory program or program element that is "inefficient, ineffective, or is not a sound use of the Nation's resources." On September 30, 1997, OMB published its *Report to Congress On the Costs and Benefits of Federal Regulations* in response to the 1996 requirement. On February 5, 1999, OMB published its second report to Congress in response to the 1997 requirement. Both the OMB reports and the requirements that generated them have been the subject of considerable controversy.

### Background

The federal government has long regulated economic activity, often through independent regulatory agencies such as the Securities and Exchange Commission (SEC) and the Federal Communications Commission (FCC). Social regulation in such areas as environmental quality, workplace safety, and consumer protection grew dramatically in the 1960's and 1970's with the creation of such agencies as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). However, by the 1980's, concerns began to be raised about whether the benefits that these regulations and regulatory agencies were attempting to achieve were worth the costs associated with compliance.

### Executive and Legislative Branch Efforts to Control Regulatory Burden

Every president in recent years has taken steps intended to reduce the burden of federal regulations. Those presidential initiatives often involve OMB, whose stated mission is to help the president carry out his responsibilities. For example, in 1981, President Reagan issued Executive Order 12291, which required executive departments and agencies to prepare cost-benefit analyses identifying the benefits, costs, and alternatives of all proposed and final "major" rules, and to submit those analyses to OMB. A major rule was defined in the executive order as any regulation that was likely to result in (1) an annual effect on the national economy of \$100 million or more; (2) a major increase in costs or prices for consumers, industries, governments, or geographic regions; or (3) significant adverse effects on competition, employment or investment, productivity, innovation, or the international competitiveness of U.S. enterprises. The executive order also required agencies to submit all of their proposed and final rules to OMB for review before being published in the Federal Register to ensure consistency with administration policies. To the extent permitted by law, the order said agencies should not issue

regulations unless the potential benefits "outweigh" the potential costs to society.

In 1993, President Clinton issued Executive Order 12866 revoking Executive Order 12291 but reaffirming the legitimacy and basic framework of OMB's regulatory review process. Like its predecessor, the executive order explicitly excludes from OMB review regulatory actions issued by independent regulatory agencies such as the FCC or the SEC. The order states that OMB's review is "necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order," and that OMB's Office of Information and Regulatory Affairs (OIRA) is the "repository of expertise concerning regulatory issues . . . ." The order also says OMB shall provide guidance to the agencies and assist the President, the Vice President, and other regulatory policy advisors to the President. Noting that some costs and benefits are difficult to quantify, the order says agencies should adopt regulations only if the benefits "justify" the costs. Also, one of the order's stated objectives is "to reaffirm the primacy of Federal agencies in the regulatory decision making process."

Executive Order 12866 states that agencies should submit detailed cost-benefit analyses to OIRA for all economically significant regulatory actions. The order defines an "economically significant" regulatory action as one "that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." The agency issuing the regulation must submit an assessment, including the underlying analysis, of the anticipated benefits associated with the action, the anticipated costs, and the costs and benefits of reasonably feasible alternatives to the action (e.g., economic incentives instead of "command and control" regulators).

In January 1996, OMB issued guidance to federal agencies on "best practices" for preparing cost-benefit analyses under Executive Order 12866. Developed by a group that was co-chaired by the OIRA Administrator and a Member of the Council of Economic Advisors, the guidance says cost-benefit analyses should be guided by the principles of full disclosure and transparency regarding their data, models, and assumptions, but it allows analysts to use their professional judgment in precisely how the studies should be conducted. The guidance also says that agencies should focus on incremental changes—i.e., the costs and benefits that are solely attributable to the regulation at issue.

Congress has also taken steps intended to reduce regulatory burden through oversight and increased analytical requirements. For example, Congress passed the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612), which requires federal agencies to analyze the anticipated effects of rules they plan to propose on small entities or they certify that the rules will not have a "significant economic effect on a substantial number of small entities." Also in 1980, Congress passed the Paperwork Reduction Act, which created OIRA within OMB to provide central agency leadership and oversight of governmentwide efforts to reduce unnecessary paperwork burden and improve the management of information resources. The act also made the OIRA Administrator subject to Senate confirmation.

More recently, title II of the Unfunded Mandates Reform Act of 1995 (UMRA) says that, unless otherwise prohibited by law, agencies must assess the costs and benefits of any rule containing a federal mandate that may result in the expenditure of \$100 million or more in any 1 year by state, local, and tribal governments, in the aggregate, or the private sector.<sup>4</sup> Also, the congressional review provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) require agencies to submit all of their rules to Congress and us before they become effective. On the date of submission, SBREFA also requires the agency issuing the rule to submit to us and make available to each House of Congress a copy of any cost-benefit analysis and the agency's actions relevant to certain provisions of UMRA and other analytical requirements. For "major" rules,<sup>5</sup> we are required to provide a report to the committees of jurisdiction in each House within 15 calendar days, assessing the agency's compliance with required procedural rulemaking steps.

Between 1994 and 1998, Congress considered a number of other bills that would have increased requirements for agencies to conduct cost-benefit analyses, but none of them were enacted. For example, the Regulatory Improvement Act of 1998 (S. 981) would have required agencies to prepare, among other things, a cost-benefit analysis and to place that analysis in the rulemaking file before publishing a notice of proposed rulemaking (NPRM) for any major rule. The bill also would have required agencies to prepare a similar analysis before publishing the final rule. (In

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<sup>4</sup>However, our analysis of title II indicated that these requirements do not apply to most economically significant rules. See *Unfunded Mandates Reform Act Has Had Little Effect on Agencies' Rulemaking Actions* (GAO/GGD-98-30, Feb. 4, 1996).

<sup>5</sup>The statute defined a "major" rule in essentially the same manner as Executive Order 12291. Copies of our major rule reports can be obtained at [www.gao.gov](http://www.gao.gov).

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Introduction

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March 1999, the Regulatory Improvement Act was reintroduced as S. 746, again requiring cost-benefit analysis of major rules.)

Another bill introduced during the 105th Congress (H.R. 1704, 105th Cong 2d Sess [1998]) would have established a "Congressional Office of Regulatory Analysis" (CORA). The bill would have required CORA to provide a report to the committees of jurisdiction in each House for each major rule that would include an assessment of the issuing agency's compliance with certain analytical requirements and an analysis of the rule's benefits, costs, and net benefits. According to the bill, CORA would allow the legislative branch to obtain accurate and reliable information on which to base its decisions as it carried out its responsibilities for congressional review under SBREFA. CORA would have also been required to issue an annual report including estimates of total costs and benefits of all existing and anticipated federal regulations. The bill's principal sponsor said CORA was needed to provide Congress with independent analyses of regulations and to supplement what she believed to be unreliable information being provided by executive branch agencies. However, critics of the proposal said it would duplicate functions preformed by agencies in the executive branch.

Congress Requires  
Regulatory Accounting

One of the more recent regulatory reform initiatives has been a series of requirements for an accounting of regulatory costs and benefits. Section 645(a) of the Treasury, Postal Services and General Government Appropriations Act for fiscal year 1997, enacted on September 30, 1996, required OMB to provide a report to Congress by September 30, 1997, that included several specific elements:

- (1) estimates of the total annual costs and benefits of federal regulatory programs, including quantitative and nonquantitative measures of regulatory costs and benefits;
- (2) estimates of the costs and benefits (including quantitative and nonquantitative measures) of each rule that is likely to have a gross annual effect on the economy of \$100 million or more in increased costs;
- (3) an assessment of the direct and indirect impacts of federal rules on the private sector, state and local government, and the federal government; and
- (4) recommendations from the Director and a description of significant public comments to reform or eliminate any federal regulatory program

that is inefficient, ineffective, or is not a sound use of the nation's resources.

Section 645(b) of the act directed OMB to obtain comments on the draft report before submitting it to Congress. On July 22, 1997, OMB published the draft report for comment, and on September 30, 1997, OMB issued its first Report to Congress on the Costs and Benefits of Federal Regulation.

On October 10, 1997, OMB was required to produce a second report on the cost and benefits of federal programs by September 30, 1998. The requirement was in section 625(a) of the Treasury and General Government Appropriations Act for fiscal year 1998 and contained the same four requirements that were in section 645(a) of the 1997 act. OMB published a draft of the 1998 report in the Federal Register on August 17, 1998, and established a 30-day comment period. Because of requests from both the public and Members of Congress, OMB extended the comment period until October 16, 1998. On February 5, 1999, OMB published its second regulatory accounting report.

On October 21, 1998, legislation was enacted requiring regulatory accounting for another year. Section 638 of the Treasury and General Government Appropriations Act for fiscal year 1999 requires OMB to provide Congress with a regulatory accounting statement and report for calendar year 2000 that is similar to the previous requirements. The statement and report are to be submitted with the budget and the report is to include "an estimate of the total annual costs and benefits . . . of Federal rules and paperwork, to the extent feasible (A) in the aggregate; (B) by agency and agency program; and (C) by major rule." Section 638 also requires OMB to issue guidelines to agencies standardizing agencies' measures of costs and benefits and the format of their accounting statements. Finally, it requires OMB to provide for independent and external peer review of the guidelines and each accounting statement and associated report.

Views of Individual Members  
 Regarding Regulatory  
 Accounting Requirements

The regulatory accounting provisions that required OMB to provide the 1997 and 1998 reports to Congress have limited legislative histories. A Senate Appropriations Committee report for the Treasury, Postal Service, and General Government Appropriations Act for fiscal year 1997 stated that "[r]egulatory costs and benefits should be quantified to the extent feasible and, where applicable, should be based on most plausible estimates. Most of the needed information is already available to the OMB. Executive Order 12866 requires cost-benefit analysis of significant rules, and private studies are available." These general comments are of limited

value in determining how Congress intended OMB to carry out its responsibilities under the provision or what types of regulations OMB should include in its reviews.

During consideration of the provision that established the first of these regulatory accounting requirements, several Members of Congress expressed their individual views regarding OMB's responsibilities to carry out this provision in comments recorded in the Congressional Record. (See app. I for a more complete discussion of these Members' comments.) Some of the Members indicated that OMB should simply compile existing information about regulatory costs and benefits. For example, during Senate consideration of this provision, one Member said the sponsors of the amendment were aware of OMB's resource constraints and intended that the report be based on a compilation of existing information rather than new analysis.

However, other Members indicated that OMB should not simply rely on existing cost and benefit information. For example, the principal sponsor of the first regulatory accounting provision said "OMB should use the valuable information already available, and supplement it where needed" when preparing the estimates of total annual costs and benefits. Subsequently, during the Senate debate, another Member said "(w)here there are gaps, OMB must supplement existing information." He also said OMB should "quantify costs and benefits to the extent feasible, and provide the most plausible estimate."

Several Members of Congress also commented on OMB's final and draft reports in letters to the OMB Director, expressing their view that OMB should not have simply relied on existing information to carry out its responsibilities. For example, on October 29, 1997, the Chairmen of the Senate Committees on Governmental Affairs and Appropriations said that OMB should "exercise leadership to assure the quality and reliability of information reported" by, among other things, providing an "independent assessment" of the information provided by the agencies. They also said OMB staff should be directed to "critique the quality of the estimates provided to them, not to simply compile data presented by the agencies." On the same day, the Chairmen of the House Committees on Commerce and Transportation and Infrastructure and the Chairman of the House Committee on Government Reform and Oversight's Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs wrote that "Congress expected OMB to assure the reporting of meaningful information and provide an independent assessment of regulatory effects."

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not merely to perform the "ministerial function of reporting information provided by other agencies."

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 Nongovernmental Groups  
 Also Study Federal  
 Regulatory Programs
 

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A number of organizations outside of the federal government are also examining federal regulatory programs and issues. Some of these organizations have taken public stands for or against federal regulatory activity. Other organizations are affiliated with academic institutions or public policy research organizations. For example, Carnegie Mellon University, with the cooperation of the University of Washington, in Seattle, WA, has established a Center for the Study and Improvement of Regulation housed within its Department of Engineering and Public Policy. According to its mission statement, the Center intends to combine studies to obtain a deeper understanding of particular issues and synthesize research to, among other things, (1) elaborate a framework for considering the risks to health, safety, and the environment; and (2) help improve health, safety, and environmental regulation at the federal, state, and local level. The Center is funded by grants from the National Science Foundation and from several corporations, foundations, and trade associations.

In 1998, the American Enterprise Institute (AEI) and the Brookings Institution established a Joint Center for Regulatory Studies with four primary missions:

- to publish timely, objective analyses of a number of important regulatory proposals before they are formally adopted;
- to publish analyses of existing regulations and approaches to regulatory reform, with recommendations for modifications (including proposals to strengthen rules where the benefits appear to justify the costs as well as proposals to eliminate or relax rules where the reverse may be true);
- to publish essays that evaluate the impact of regulatory policies and suggest ways to improve the regulatory process; and
- to publish an annual report on the state of federal regulation, including an independent assessment of both the total and marginal costs and benefits of federal regulation, broken down into useful categories.

According to the Center's mission statement, both AEI and Brookings "believe that the media and the policy community will look to the Joint Center as an objective, highly respected source of information on regulatory policy issues." The Joint Center is funded solely by foundation grants.

Our Previous Reports on  
Regulatory Costs/Benefits

We have issued a number of reports examining the costs and benefits of agencies' rules and estimates of total regulatory costs. For example, in April 1984, we said that cost-benefit analysis is a useful tool for estimating the costs and benefits of various regulatory actions.<sup>4</sup> We also said that its role might become increasingly critical because complying with federal environmental regulations could mean billions of dollars in costs and benefits. However, we also said that gaps in underlying scientific data, legal restrictions, and EPA's partial implementation of Executive Order 12291 had hampered cost-benefit analysis.

In December 1993, we reported that none of the studies released by the federal banking agencies and several of the major banking industry trade associations provided a comprehensive discussion of regulatory burden or the cost-benefit trade-offs associated with particular regulations.<sup>5</sup> We also found that estimates of regulatory compliance costs reported in the industry were of little value due to serious methodological deficiencies.

In March 1995, we reported that there was a great deal of uncertainty about the costs and benefits of regulations, with estimates varying, depending on assumptions about what constitutes regulatory cost.<sup>6</sup> For example, we noted that many economists argue that economic "transfers," such as the added cost a consumer pays for goods in the marketplace because of agricultural price supports, should not be included in aggregate cost estimates. We also said that some economists are concerned about including process costs because of measurement concerns and because any change associated with this category may be difficult to achieve (since most of the estimate derives from completing tax forms). Finally, although one researcher estimated that total regulatory costs increased between 1977 and 1994, we noted that the percentage of the gross domestic product devoted to the costs of federal regulations decreased during this period.

In November 1996, we concluded that, although perhaps not impossible, it is very difficult to measure the incremental cost of all federal regulations on individual businesses.<sup>7</sup> Therefore, we said, users of aggregate regulatory

<sup>4</sup>Cost-Benefit Analysis Can Be Useful In Assessing Environmental Regulations, Despite Limitations (GAO/RCED-84-62, Apr. 6, 1984).

<sup>5</sup>Regulatory Burden: Recent Studies, Industry Issues, and Agency Initiatives (GAO/GGD-94-26 Dec. 13, 1993).

<sup>6</sup>Regulatory Reform: Information on Costs, Cost-Effectiveness, and Mandated Deadlines for Regulations (GAO/PEMD-95-18ER, Mar. 8, 1995).

<sup>7</sup>Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies (GAO/GGD-97-2, Nov. 18, 1996).



cost studies need to be aware of the inherent difficulties and assumptions involved in producing such measures. We said questions need to be raised and answered regarding which regulations are included in such studies and whether they focus on incremental costs before policy makers use them to make decisions.

In May 1998, we reported that some of the 20 economic analyses that we reviewed did not incorporate the best practices set forth in OMB's guidance and often did not disclose why the guidance was not followed.<sup>16</sup> We also found that only 1 of the 20 analyses received an independent peer review. Nevertheless, agency officials said the cost-benefit analyses played a valuable role in regulatory decisionmaking.

### Objectives, Scope, and Methodology

Our objectives in this review were to describe, for each of the four statutory requirements underlying OMB's 1997 and 1998 reports to Congress, (1) how OMB addressed the requirements and (2) the views of noted economists in the field of cost-benefit analysis regarding OMB's responses in these reports. As noted previously, Congress required OMB to submit reports in 1997 and 1998 providing (1) estimates of the total annual costs and benefits of federal regulatory programs; (2) estimates of the costs and benefits of each rule likely to have a gross annual effect on the economy of \$100 million in increased costs; (3) an assessment of the direct and indirect effects of federal rules on the private sector, state and local governments, and the federal government; and (4) recommendations to reform or eliminate any federal regulatory program or program element that is "inefficient, ineffective, or is not a sound use of the Nation's resources."

To describe how OMB addressed each of these four requirements, we analyzed the reports' contents and interviewed officials from OIRA. Specifically, to determine how OMB addressed the first statutory requirement, we reviewed chapter II of the 1997 report and chapter I of the 1998 report, focusing on such issues as the data sources and methodology used to prepare the two reports. To determine how OMB addressed the second statutory requirement, we reviewed chapter III of the 1997 report and chapter II of the 1998 draft report, as well as relevant tables and appendixes. In both reports, OMB interpreted the statutory requirements to include all final rules on which OIRA concluded its review in the 1-year time periods that OMB specified and that were either (1) "economically significant" under Executive Order 12866, (2) "major" under the

<sup>16</sup>Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses (GAO/RCE-98-142, May 26, 1998).

congressional review requirements of SBREFA, or (3) met the threshold under title II of the Unfunded Mandates Reform Act of 1995. To determine whether OMB reported cost/benefit information on all rules that met its own criteria, we compared OMB's list to (1) our database of major rules submitted pursuant to the congressional review provisions of SBREFA and (2) a list of economically significant rules provided by the Regulatory Information Service Center (RISC) for the same time periods.<sup>11</sup> To determine which rules were "likely to have a gross annual effect on the economy of \$100,000,000 or more in increased costs," we identified only those rules in either databases that the agencies indicated had an annual estimated cost of \$100 million or more (excluding those rules that were either "economically significant" or "major" because they had benefits of \$100 million or for other reasons).

To determine how OMB addressed the third requirement, we reviewed chapter II from OMB's 1997 report and chapter I of its 1998 report. In both reports, OMB stated that the direct impacts of the regulations were accounted for in the total annual cost and benefit estimates, so we also reviewed those sections of the reports. To determine how OMB addressed the fourth requirement, we reviewed chapter IV of both the 1997 report and 1998 reports. We also examined the Unified Agenda of Federal Regulatory and Deregulatory Actions to determine when the agency initiatives listed in OMB's 1998 report were first announced.<sup>12</sup>

To describe the views of noted economists in the field of cost-benefit analysis regarding OMB's 1997 and 1998 reports and the four statutory requirements, we first selected the experts with whom we wanted to consult. We made our selections based on how frequently authors were cited in the bibliographies of OMB's 1997 report and its August 1998 draft report and in a computer-generated literature search of books and articles on cost-benefit analysis. Then, based on a suggestion from OMB officials, we noted which authors on this list participated on EPA's Science Advisory Board and in developing the AEI publication, "Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of

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<sup>11</sup>RISC works closely with OMB to provide information to the President, Congress, and the public about federal regulatory policies. Its primary role is to coordinate the development of the Unified Agenda of Federal Regulatory and Deregulatory Action, a comprehensive listing of proposed and final regulations.

<sup>12</sup>The Unified Agenda is compiled by RISC for OIRA and has been published twice each year since 1983. It is used to satisfy the requirements in the Regulatory Flexibility Act and other requirements that agencies identify rules that they expect to propose or promulgate.

Principles,"<sup>13</sup> and the AEI-Brookings Institution publication "An Agenda for Federal Regulatory Reform."<sup>14</sup>

We developed a preliminary list of 12 experts, based on those who had the most citations in the OMB reports and the literature search, had served on the EPA panel, and/or had helped develop the AEI and Brookings publications. However, five of these experts declined to participate because of time constraints or because they said they did not have expertise in the areas covered by the OMB reports. The remaining seven experts that we interviewed and their affiliations were the following:

- Robert W. Crandall, Senior Fellow, Brookings Institution, Washington, D.C.;
- Robert W. Hahn, Director, AEI-Brookings Joint Center for Regulatory Studies, Washington, D.C.;
- Thomas D. Hopkins, Professor of Economics, Rochester Institute of Technology, Rochester, NY;
- Lester B. Lave, Professor of Economics, Carnegie Mellon University, Pittsburgh, PA;
- Robert E. Litan, Co-Director, AEI-Brookings Joint Center for Regulatory Studies, Washington, D.C.;
- Paul R. Portney, President, Resources for the Future, Washington, D.C.; and
- Murray L. Weidenbaum, Chairman, Center for the Study of American Business, Washington University, St. Louis, MO.

Biographical information of these experts and citations of some of their relevant work are provided in appendix II of this report.

OMB officials reviewed our final list of cost-benefit analysis experts and had no objections to those included. The officials did not suggest additional experts that they believed we should consult and said that the experts we consulted are among the leading economists in the field of cost-benefit analysis research. However, the list of experts that we contacted is not the only such list that could have been developed. At the direction of the requesters, we focused on economists and did not include experts in other professions that have examined cost-benefit issues (e.g., legal experts or statisticians). Also, we focused our literature search on those economists who are knowledgeable about cost-benefit analysis in

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<sup>13</sup>Kenneth J. Arrow, et. al., 1996.

<sup>14</sup>Robert W. Crandall, et. al., 1997.

the federal government. Therefore, other experts with an extensive background in cost-benefit analysis were not included in our initial list.

We first obtained the experts' comments in late 1998 on OMB's 1997 report and on OMB's August 1998 draft report and obtained additional information from them after the final 1998 report was published in February 1999. We also consulted with them during the preparation of our report to ensure that we had accurately characterized their views. The views attributed to them are their own and do not necessarily reflect those of the organizations with which they are affiliated or our views.

We conducted our work between June 1998 and March 1999 at OMB in Washington, D.C., and at the sites of our interviews with the cost-benefit experts (Washington, D.C.; Rochester, NY; Pittsburgh, PA; and St. Louis, MO), in accordance with generally accepted government auditing standards. At the end of our review, we sent a draft of this report for comments to the Director of OMB. On April 7, 1999, we met with the Acting Administrator of OIRA to obtain OMB's comments, which are presented in chapter 6, along with our evaluation.

## Experts Questioned OMB's 1998 Estimate of Regulatory Benefits

OMB said in both its 1997 and 1998 reports that it had to confront a number of intractable problems in developing estimates of the total annual costs and benefits of federal regulatory programs. Those problems included (1) determining the baseline against which regulatory costs and benefits should be measured (i.e., what costs and benefits would have occurred if the regulations had not been issued) and (2) the "apples and oranges" problem of adding together the diverse (and sometimes dated) set of previously conducted regulatory studies. OMB qualified the estimates in both reports by stating that "it remains difficult, if not impossible, to estimate the actual total costs and benefits of all existing Federal regulations with any degree of precision."

In its 1997 report, OMB estimated federal regulatory costs at \$279 billion, and benefits at \$298 billion. In its 1998 report, OMB estimated regulatory costs at between \$170 billion and \$230 billion, and estimated regulatory benefits at between \$260 billion and \$3.5 trillion. The increase in the benefits estimate between 1997 and 1998 was almost entirely due to the inclusion of an EPA estimate of the benefits associated with the Clean Air Act. The decrease in the cost estimate was primarily because OMB did not include efficiency losses from economic regulations in its 1998 summary table.<sup>1</sup> The experts we consulted generally said that OMB's 1997 and 1998 cost estimates were reasonable but said the upper-bound benefits estimate in the 1998 report was questionable or implausible. All of the experts criticized OMB for accepting agencies' cost and benefit estimates without adjustment or standardization and were particularly critical of OMB's use of EPA's benefit estimate. However, most of the experts also said that OMB faced "political constraints" in adjusting agencies' cost and benefits estimates, noting that an independent assessment of those estimates would require OMB to criticize its own administration's policy positions

### OMB's 1998 Upper-Bound Benefits Estimate Was 12 Times the 1997 Estimate

OMB used similar but, somewhat different, data sources and methods of presentation in its 1997 and 1998 reports. The 1997 report presented the cost and benefit estimates in four categories, but in its 1998 report OMB used somewhat different categories of regulation. In the 1997 report, OMB included costs associated with paperwork and disclosure requirements, whereas in the 1998 report that information was reported separately without an estimate. However, the biggest difference between the reports was OMB's use of an EPA study on the costs and benefits of the Clean Air Act, which increased OMB's upper-bound benefit estimate in its 1998 report to 12 times what it had been in the 1997 report.

<sup>1</sup>OMB said efficiency losses associated with economic regulations result from higher prices and inefficient operations that often occur when competition is prevented from developing.

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 OMB's 1997 Report
 

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In its 1997 report, OMB presented its estimates of federal regulatory costs and benefits in four categories and in total.<sup>7</sup> The four categories were:

- **Environmental** regulations that focus on improving the quality of the environment and include those issued by EPA (which has issued the vast majority of these regulations) and the Departments of Transportation, Energy, and the Interior;
- **Other Social** regulations that are designed to advance the health and safety of consumers and workers, promote social goals such as equal opportunity, equal access to facilities, and protect the public from fraud and deception. They also include the disclosure of information about a product, service or manufacturing process where inadequate information might place consumers or workers at a disadvantage;
- **Economic** regulations that directly restrict business' pricing and output decisions as well as limit the entry or exit of businesses into or out of certain types of industries. These regulations often affect the agriculture, trucking or communications industries; and
- **Process** regulations that involve paperwork, such as filling out income tax forms and immigration papers.

In its table summarizing the cost and benefits estimates, OMB did not include estimates for one other category of regulation—the "transfer" costs and benefits of economic regulations. Transfers refer to regulations that move payments from one group in society to another, (e.g., federal Social Security payments and agricultural price supports). OMB estimated those transfers at \$140 billion in costs and benefits but said it did not include these estimates in its totals because it considered transfers to be payments that reflect a redistribution of wealth rather than social costs to society as a whole.<sup>8</sup>

OMB used a variety of academic and agency studies to develop estimates of the costs and benefits associated with the four regulatory categories included in the 1997 report. Those sources were

- a 1991 article by Robert W. Hahn and John A. Hird that reviewed and synthesized the work of more than 25 prior studies assessing the impact of

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<sup>7</sup>These categories had been previously used in a series of studies of federal regulatory costs by Thomas D. Hopkins of the Rochester Institute of Technology. For the most recent of these studies, see Thomas D. Hopkins, "Regulatory Costs in Profile," *Policy Sciences*, 31 (Dec. 1998), pp. 301-320.

<sup>8</sup>OMB noted that its 1996 "best practices" guidance states that transfers should not be added to the cost and benefit totals included in cost-benefit analyses but should be discussed and noted for policymakers.

regulations. The authors refined the results of these studies and created their own estimates of the costs and benefits of regulation. OMB said its review of the literature indicated that this was the only comprehensive study that attempted to estimate the total costs and benefits of all federal regulations. However, OMB pointed out in its 1998 report (p. 14) that there are gaps and weaknesses in underlying studies that Hahn and Hird rely on for their estimates and that not all the costs and benefits of social regulation are captured in these estimates;

- a 1990 EPA report (known as the Cost of Clean report) responding to requirements in section 312(a) of the Clean Air Act and section 516(b) of the Clean Water Act that presented data on environmental pollution control costs between 1972 and 1987.<sup>4</sup> The data used in this report were based primarily on surveys of actual spending conducted by the Department of Commerce and others;
- agencies' cost-benefit analyses (1987 through 1996) prepared pursuant to Executive Orders 12291 and 12866;
- a 1996 study by Hahn estimating the cost and benefits of major environmental, health, and safety regulations from 1990 through mid-1995;<sup>5</sup> and
- a 1992 study of the costs associated with economic regulations, prepared by Thomas D. Hopkins.<sup>6</sup>

To develop its cost estimates, OMB first established an estimate of the cost of environmental regulations and other social regulations, as of 1988 based on information contained in the Cost of Clean report and the 1991 Hahn and Hird article, respectively. OMB then updated those figures with the results of agencies' cost-benefit analysis conducted between 1987 and 1996 to develop the total environmental and other social cost and benefit estimates. To develop the cost estimate for economic regulations, OMB used the results of Hopkins' 1992 study (\$81 billion) but reduced the Hopkins estimate by \$10 billion to take into account the deregulation of financial services and telecommunications that occurred after Hopkins'

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<sup>4</sup>Robert W. Hahn and John A. Hird, "The Costs and Benefits of Regulations: Review and Synthesis," *Yale Journal on Regulation*, 8 (Winter 1991), pp. 233-278.

<sup>5</sup>"Environmental Investments: The Cost of a Clean Environment, Report of the Administrator of the Environmental Protection Agency to the Congress of the United States," (1990).

<sup>6</sup>"Regulatory Reform: What Do the Government's Numbers Tell Us?" in *Risks, Costs, and Lives Saved: Getting Better Results From Regulation*, (Washington, D.C.: The AEI Press, 1996, pp. 208-253).

<sup>7</sup>"Cost of Regulation: Filling the Gaps," Report Prepared for the Regulatory Information Service Center, Washington, D.C. (Aug. 1992).

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Experts Questioned OMB's 1996 Estimate of Regulatory Benefits

estimate.<sup>8</sup> OMB's estimate for the cost of federal paperwork and disclosure requirements focused only on those costs imposed by independent regulatory agencies because it said the costs associated with other agencies' paperwork was already included in the environmental and other social estimates. Estimates of the independent agencies' paperwork costs were drawn from their burden-hour estimates (390 million hours at the end of fiscal year 1997) multiplied by an estimate of the cost per hour to complete the paperwork (\$26.50 per hour).<sup>9</sup>

To estimate the benefits of environmental and other social regulations in the 1997 report, OMB used data from the 1991 Hahn and Hird article as the 1988 baseline and updated that baseline with information from Hahn's 1996 article. OMB did not provide estimates of the benefits of economic regulations or of federal paperwork and disclosure requirements, saying "significant benefits remain to be quantified."

Table 2.1 presents the cost and benefit estimates that OMB presented in its 1997 report in total and for each of the four categories of regulation. OMB noted that "other social" regulations have large net benefits (i.e., benefits minus costs) and said most of these net benefits were produced by highway safety regulations.

Table 2.1: Cost and Benefit Estimates From OMB's 1997 Report (in 1996 dollars)

Type of Rule	Costs (billions of dollars)	Benefits (billions of dollars)
Environmental	\$144	\$162
Other social	54	136
Economic (efficiency costs)	71	71
Paperwork/disclosure for independent regulatory agencies	10	0
Total	279	298

<sup>8</sup>OMB said that the benefits of economic and paperwork/disclosure "remain to be quantified."  
Source: Report to Congress on the Costs and Benefits of Federal Regulations, OMB, 1997.

As noted previously, OMB did not include \$140 billion in estimated transfer costs and benefits in these totals. OMB also excluded (1) tax paperwork costs (also estimated at \$140 billion) because, OMB said, "the burden of filling out income tax forms . . . are not what one usually thinks about when worrying about the cost of regulation," and it excluded (2) the costs of regulations issued between 1987 and 1996 with impacts on the economy

<sup>8</sup>Hopkins, in turn, had updated an estimate of the cost of economic regulations in Hahn and Hird's 1991 article.

<sup>9</sup>Burden-hour estimates were presented in OMB's Fiscal Year 1998 Information Collection Budget of the U.S. Government.



of less than \$100 million (and therefore were not covered by the executive order's cost-benefit analysis requirements).

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**OMB's 1998 Report**

OMB presented regulatory cost and benefit information somewhat differently in its 1998 report, and also used some additional data that it had not used in preparing the 1997 report. For example, OMB broke out the costs and benefits of the "other social" category of regulations into three separate categories for the 1998 report: labor, transportation, and other social regulations (mainly regulations from the Departments of Health and Human Services, Energy, and Agriculture). However, OMB dropped two categories of regulations from its summary table in 1998 that it had used in its 1997 report—economic regulations and paperwork/disclosure requirements. OMB said that including the indirect costs of economic regulations with the direct costs of social regulations in its 1997 report was "more misleading than helpful." OMB listed estimates of disclosure costs (\$7 billion) and benefits ("expected to be significant") with other types of regulations that it did not consider "true regulations" or did not believe should be considered in the same category as social regulations.

Therefore, OMB presented cost and benefit information for four categories of regulations in its summary table: environmental, labor, transportation, and other social rules. OMB reported other types of regulatory costs and benefits separately, including

- efficiency costs of economic regulations (estimated at \$71 billion but benefits "not estimated but expected to be small");
- tax compliance costs (estimated at \$140 billion in the August 1998 draft report but not estimated in the final report);
- transfer costs and benefits (estimated at \$140 billion in costs and benefits); and
- federal expenditures for social regulations (estimated costs of \$13 billion, benefits of between \$30 billion and \$3.3 trillion) and economic regulations (estimated costs of \$3 billion, benefits "likely to be significant").

The data and methodology that OMB used to develop its 1998 estimates in these categories were similar in some respects to the way OMB prepared the 1997 report. For example, OMB again used Hahn and Hird's 1991 study and the EPA Cost of Clean report to establish a 1988 baseline for the cost estimate. However, OMB changed its methodology in some other ways. For example, it used new estimates of the regulations that OMB reviewed between 1995 and 1998 to update the baseline and presented the cost and benefit information in terms of ranges rather than the point estimates used in the 1997 report. OMB developed the new estimates by "monetizing" (i.e.,

converting to dollars) some of the quantified benefits in the agencies' cost-benefit analyses (e.g., the number of lives expected to be saved as a result of the regulations).

EPA's Section 812 Report

A notable change in OMB's methodology in the 1998 regulatory accounting report was its use of data from EPA's 1997 report on The Benefits and Costs of the Clean Air Act, 1970 to 1990. Prepared because of requirements in section 812 of the 1990 Clean Air Act Amendments, the EPA report (hereinafter referred to as the "Section 812 report") estimated that the monetized benefits of the Clean Air Act from 1970 to 1990 were between \$6 trillion and \$50 trillion (present value in 1990 dollars). The report estimated direct compliance expenditures, research and development costs, and government costs were roughly \$0.5 trillion during this period.

OMB noted that EPA's Section 812 report was the result of a 6-year effort and was peer reviewed by EPA's Science Advisory Board's Council on Clean Air Act Compliance Analysis and that the Council said that the report's findings "are consistent with the weight of available evidence." OMB also noted that the Council's review closure letter stated that the report "is a serious, careful study and employs sound methods along with the best data available. However, OMB also described several elements of the analysis that it said "deserve further discussion in order to understand the basis for the benefit estimates." For example,

- OMB noted that the Section 812 report "assumed that no additional air pollution controls would have been imposed by any other level of government or voluntarily initiated by private entities after 1970. OMB said that "considerable uncertainty" surrounds this assumption and that any attempt to construct aggregate benefit and cost estimates are "somewhat speculative;"<sup>16</sup>
- OMB also noted that although the monetized benefit estimates associated with reducing exposure to fine particulate matter accounts for 90 percent of the report's total benefits estimate, there is "little discussion" in the report about the uncertainty associated with the presumed causal relationship between particulate matter levels and mortality; and
- OMB noted that the Section 812 report assumed that reductions in particulate matter yields contemporaneous reductions in the mortality and chronic health risks associated with long-term exposure. However, OMB noted that it is "quite possible" that there is a lag in these health effects and

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<sup>16</sup>OMB noted that the Section 812 report acknowledge that this is an obvious oversimplification and that state and local governments and the private sector were responsible for an important fraction of the estimated benefits and costs between 1970 and 1990.

Chapter 2  
 Experts Questioned OMB's 1998 Estimate of Regulatory Benefits

mortality, and that other researchers have assumed that these effects require 15 years of exposure. Applying a 15-year lag to the report's calculations and a 5-percent discount rate would, OMB said, reduce the estimated present value of the report's mortality benefits by a factor of two.

In summary, OMB said the results of the Section 812 report, like other studies, appeared to be "sensitive to choices made concerning the baseline for the analysis and the translation of the reduction of air pollution into human health benefits." OMB also noted in a footnote that "several agencies held different views pertaining to several key assumptions" in the study, but that these concerns were not resolved because of a court deadline. Therefore, OMB said the Section 812 report "reflects the findings of EPA and not necessarily other agencies in the Administration."

Table 2.2 presents the cost and benefit estimates from OMB's 1998 report. The ranges in OMB's estimates of total regulatory costs and benefits reflect substantial uncertainty regarding the estimates of environmental costs and benefits. Over 95 percent (or \$3,200 billion) of the environmental category's upper-bound benefit estimate was drawn from EPA's Section 812 report.

Table 2.2: Cost and Benefit Estimates From OMB's 1998 Report

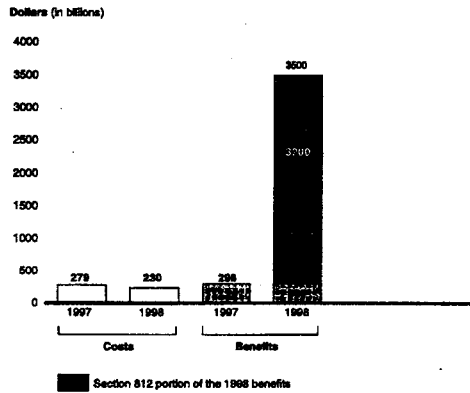
Type of Regulation	Costs (in billions)		Benefits (in billions)	
	Lower-bound	Upper-bound	Lower-bound	Upper-bound
Environmental	\$120	\$170	\$93	\$3,300
Transportation	15	18	84	110
Labor	18	19	28	30
Other	17	22	53	58
Total	170	230	260	3,500

Note: Numbers are as reported in OMB's report.

Source: Report to Congress on the Costs and Benefits of Federal Regulations, OMB, 1998.

OMB's estimate of the cost of federal regulations declined by between \$49 billion and \$109 billion between its 1997 and 1998 reports. This decline was largely because OMB excluded \$71 billion in costs associated with economic regulations that had been in the 1997 summary table and presented it in a separate table in the 1998 report. As figure 2.1 shows, OMB's upper-bound benefit estimate increased by about \$3.2 trillion between 1997 and 1998, virtually all of which was because of the inclusion of estimates from EPA's Section 812 report.

Figure 2.1: EPA's Section 812 Data Substantially Increased Upper-Sound Benefit Estimate Between 1997 and 1998



Source: Report to Congress On the Costs and Benefits of Federal Regulations, OMB, 1997 and 1998.

**Experts Said OMB Should Have Done More, but Political Environment Limits OMB's Role**

According to most of the cost-benefit analysis experts that we consulted, OMB should have done more than simply record the costs and benefits from the various sources it consulted. Most of the experts expressed particular concern about OMB's unadjusted use of the Section 812 report's benefit estimate. However, the experts also said that OMB faced political constraints in adjusting agencies' estimates. Most of the experts agreed with OMB's decision to report the costs and benefits of transfers and tax paperwork separately from the summary tables but differed as to whether economic benefits and federal expenditures should have been included in the totals.

**Experts Said OMB Should Not Be "Clerk," but Doing More Is Politically Difficult**

The experts that we consulted all indicated that OMB faced a daunting task estimating the costs and benefits of all federal regulation. Most of the experts said that OMB's general approach of aggregating the results from diverse studies was the only real option available. For example, Hopkins

said that although one would ideally like to have consistency in the studies aggregated, he also said he did not think that consistency was obtainable. However, Crandall said using different studies to derive a total figure is "problematic," and that the data in some of the studies forming the basis of OMB's estimates was "pretty thin" and unreplicated. Lave expressed similar concerns, saying that OMB should have used studies with uniform approaches.

Several of the experts said that OMB's cost estimates were reasonable—in Litan's words, "in the ballpark." However, most of the experts said that OMB's upper-bound benefits estimate in the 1998 report was questionable or even "implausible." Lave said the major increase in the benefits estimate between the 1997 and 1998 reports "is an indication that these numbers are not very good." Weidenbaum said that when the benefits of regulations are so large in comparison to the costs, "it stretches that credibility of the report."

Noting that the 1998 benefits estimate was driven, in large part, by the inclusion of data from EPA's Section 812 report, many of the experts voiced specific concerns about that report's assumptions and conclusions. Virtually all of those concerns were similar to the concerns that OMB discussed in its report—(1) the assumption that air quality would have deteriorated significantly between 1970 and 1990 in the absence of the Clean Air Act, (2) the assumed health effects from limiting exposure to particulate matter, and (3) the methods used to estimate the value that individuals would place on reducing health and mortality risks. Therefore, all of the experts said they believed that the benefits estimate in the Section 812 report (and therefore in the OMB report for 1998) was too high. For example, Portney said that although he believed that the benefits of the Clean Air Act are greatly in excess of its costs, EPA's (and OMB's) assertion that those benefits are as much as one-sixth of the gross domestic product "doesn't pass the common sense test." Weidenbaum said OMB's use of the Section 812 report's upper-bound benefits estimate "makes a mockery of the whole exercise."

Because of these concerns about the accuracy of the benefits estimate, most of the experts said they believed that OMB should have adjusted the Section 812 report's benefits estimates before including them in its report. For example, Hahn said that OMB could have followed the procedure it outlined in its report and accounted for the likely time lag between reducing particulate matter and any health effects (which he said would have reduced the benefits by a factor of two).

The experts' views regarding adjustment of the Section 812 report's benefits estimate were part of an overall view by most of the experts that OMB should have played a more assertive and independent role in the preparation of its aggregate benefit and cost estimate. Several of the experts said that OMB had simply played the role of "clerk," transcribing the estimates from previous studies by academicians and agencies without adjustment. For example, Weidenbaum said that agencies would naturally emphasize the good that their regulations are doing and that OMB should have done a "serious evaluation" of the agencies' figures before including them in its report. He said the "spirit" of the statutory requirement was for OMB to come up with its own estimates of regulatory costs and benefits and the absence of independent review of the benefit estimate of the Clean Air Act by OMB "puts a cloud over the report." Similarly, Litan said he believed the intent of the statutory requirements was for OMB to be more than a "clerk," and that Congress was asking for OMB's "own judgment" regarding regulatory costs and benefits. Hopkins said OMB should encourage agencies to provide independent assessments, and make adjustments where needed to account for "overblown" estimates. Lave said OMB should have monetized those benefits and costs that the agencies did not monetize (e.g., when agencies provided quantified, but not monetized, estimates of lives saved).<sup>11</sup>

Despite their view that OMB be more than a "clerk" and exercise independent judgment in adjusting agencies' cost and benefit estimates, many of the experts also indicated that it was politically difficult if not impossible for OMB to make such adjustments. In general, they indicated that agencies' regulations are ultimately approved by agency heads and, in some cases, the President or the Vice President. OMB's responsibility in the rule-review process is to ensure that agencies' regulations are consistent with applicable law, the President's priorities, and the principles in Executive Order 12866, including the cost-benefit analysis requirements. Although there may be great deliberation within and among agencies during their development, once a rule is promulgated it becomes a public statement of the administration's policy. At that point, OMB's responsibility is to support and defend that statement of policy. Therefore, requiring OMB to provide an "independent" view of those rules and their associated estimates of costs and benefits, altering those estimates when appropriate, would significantly change OMB's current role of supporting the administration's position and initiatives. In general, the experts said that it was politically difficult to ask OMB to criticize the administration of which it is a part.

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<sup>11</sup> As noted previously, OMB did monetize some of the agencies' quantified estimates.

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Chapter 2  
Experts Questioned OMB's 1996 Estimate of Regulatory Benefits

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Hahn said that he did not believe the report reflects the collective wisdom that resides at OMB on these issues. Although OMB staff had the technical expertise needed to develop its own "best estimate" of the effects of the Clean Air Act, he said it would be politically very difficult to publish such an estimate. Hahn also said that it would be more likely for OMB staff to say what they think if there were competition from some other group that would also examine agencies' cost and benefit estimates.

Litan said adjustment of the Section 812 report's benefit estimate was a "dicey issue," and that OMB was in "an inherently difficult position" on whether to use EPA's widely varying estimate. He said the reality of the situation is that the President and the Vice President are ultimately responsible for anything that comes from an executive branch agency and that "OMB will always be politically constrained in this process." Crandall said that OMB "responds within a political environment," and was not in a position to make an independent judgment contrary to that of EPA. Likewise, Hopkins said it was politically difficult for OMB to adjust the cost-benefit estimates "if OMB is supposed to be representing a President, a unified administration, a common party line." He said this is true regardless of which party occupies the White House.

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Experts Differed Regarding  
Inclusion of Certain Costs  
and Benefits in Summary  
Tables

All but one of the experts we consulted believed that OMB's exclusion of transfer costs and benefits from the summary tables was appropriate. For example, Portney said that transfers should be presented separately because they are not a social cost like environmental, health, and safety regulations. Hahn said such transfers should not be included in regulatory cost or benefit totals but said estimating the size of such transfers can be useful for other reasons.<sup>10</sup> Hopkins said that although basic economic logic says efficiency and transfer costs should not be mixed, he believes OMB should have included transfer costs in the totals to illustrate the magnitude of federal regulatory activity.

The experts also generally agreed with OMB that tax paperwork should not be included in the summary tables. Portney said including such costs would have been inappropriate and said he does not think of IRS as a regulatory agency. Weldenbaum said he believes that tax paperwork should be reported separately because the taxing power of the federal government is separate from its power as a regulator. Hahn said such costs should not be included because one cannot talk about the costs of the

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<sup>10</sup>See Robert W. Hahn, "Government Analysis of the Benefits and Costs of Regulation," *Journal of Economic Perspectives*, 12 (Fall 1998), pp. 201-210 for a complete discussion of Hahn's views on this issue.

current tax system without knowing the alternative to that system. However, Hopkins said the costs of tax paperwork should have been included in OMB's report. He indicated that the alternate to the current tax system could be a flat tax system and that OMB claimed in an earlier report that "[w]hen people speak of regulatory burden, they are usually referring to record keeping or reporting requirements—i.e., paperwork."<sup>15</sup>

The experts were divided about whether the costs and benefits of economic regulations should have been included in the OMB report's total cost and benefit estimates. Crandall said it does not make sense to include economic regulations with the total. Similarly, Lave said that these regulations differ from the social regulation should be reported separately. However, Hopkins and Litan said economic regulations should be included. Litan said that if economic regulations constitute a "deadweight efficiency loss, then it is a cost." He said it is particularly important that they be included "when we know the benefits are likely to be zero." Hahn said that estimating the costs and benefits of economic regulations was useful, but whether they are combined with social regulations "depends on what you want to do." Although price and entry regulations are generally considered different from social regulations, he said there is "no right or wrong way to go." Still others cited difficulties associated with these rules. For example, Portney said that it is difficult to measure the effect of regulations that affect the entrance to a market or, in the case of FCC regulation, to measure the benefits of public airwaves. Crandall said it was difficult for OMB to include these effects in its reports when agencies are not conducting the analyses.

With regard to federal regulatory expenditures, both Lave and Crandall said the amount involved is so small in comparison to other regulatory costs and benefits that it doesn't make much difference whether the costs are included in OMB's summary totals. However, Weidenbaum and Litan said federal expenditures should be included as regulatory costs. Weidenbaum said such costs are the "hardest" data available—straight out of the federal budget. However, he said OMB's presentation of the benefits of these expenditures (up to \$3.3 trillion) was already captured in the other categories, so presenting them as OMB did could be double counting. Hopkins, however, said it makes more sense to show federal expenditures as part of the fiscal budget, not in an accounting of off-budget regulatory costs.

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<sup>15</sup>OMB, OIRA, *More Benefits Fewer Burdens: Creating A Regulatory System that Works for the American People*, Dec. 1996, p. 23.



## OMB Did Not Provide Cost-Benefit Estimates for All \$100 Million Rules

The second statutory requirement was that OMB provide estimates of the costs and benefits of each rule likely to have a gross annual effect on the economy of \$100 million or more in increased costs. OMB interpreted the requirement broadly to include rules that were "major" or "economically significant" even if they did not necessarily have \$100 million in increased costs. However, OMB narrowly focused on rules issued during specific 1-year periods and did not provide cost or benefit data for rules issued by independent regulatory agencies. Also, OMB did not include all rules that met its criteria and did not provide cost-benefit data for all of the rules it included. Most of the cost-benefit experts that we consulted said OMB should have included rules from independent regulatory agencies and several said OMB should not have simply accepted the cost and benefit estimates provided by the executive agencies. Nevertheless, several of the experts also noted that it was politically difficult for OMB to alter agencies' estimates in its report to Congress.

### OMB Provided Data for Only Certain Rules in Both Reports

The statutory provisions mandating both the 1997 and 1998 reports required OMB to provide "estimates of the costs and benefits (including quantitative and non-quantitative measures) of each rule that is likely to have a gross annual effect on the economy of \$100,000,000 or more in increased costs." The requirements did not exempt rules issued by independent regulatory agencies or only apply to rules issued within a specific time frame. However, the requirements only applied to rules with expected regulatory effects of \$100 million or more in increased costs.

In the 1997 and 1998 reports, OMB interpreted these statutory requirements to include all final rules promulgated by executive departments and agencies and reviewed by OIRA under Executive Order 12866 during 1-year time frames that met any of the following criteria:

- Rules designated as economically significant under Executive Order 12866;
- Rules designated as major under the congressional review provisions of the Small Business Regulatory Enforcement Fairness Act (SBREFA);<sup>1</sup> or
- Rules designated as meeting the threshold under title II of the Unfunded Mandates Reform Act of 1995 (UMRA).<sup>2</sup>

<sup>1</sup>The congressional review provisions of SBREFA define a major rule as one that the Administrator of OIRA finds has resulted in or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

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OMB Did Not Provide Cost-Benefit Estimates for All \$100 Million Rules

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For the 1997 report, the 1-year time frame was between April 1, 1996, and March 31, 1997; for the 1998, report the time frame was between April 1, 1997, and March 31, 1998. OMB did not include any rules issued by independent regulatory agencies because those agencies' rules are not reviewed by OIRA pursuant to Executive Order 12866. Neither did OMB include any rules that were issued outside of the specific 1-year time frames it established. Therefore, in these respects, OMB's criteria were narrower than those set forth in the statute. In other respects, OMB's criteria were broader than the statute's requirements because they included rules that were economically significant or major for reasons other than requiring \$100 million in increased costs. For example, a rule may be economically significant or major because it has \$100 million in benefits to the economy or because it adversely affects in a material way a sector of the economy, productivity, competition, jobs, or state and local governments, not because it requires \$100 million in increased costs.

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OMB's 1997 Report

In its 1997 report, OMB identified 41 rules that met its criteria, of which it said 21 were social rules and 20 were transfer rules. The Department of Agriculture (USDA) issued the largest number of these rules (12), followed by the Department of Health and Human Services (HHS) (8), and the Environmental Protection Agency (EPA) (7). OMB reported the cost and benefits data that the issuing agencies included in the 21 social rules but did not provide any cost or benefit information for the 20 transfer rules. OMB said it did so because these transfers represent payments from one group to another that redistribute wealth and are not social costs. Although OMB recognized that these rules may have some associated costs and benefits, it said estimates of those costs and benefits are typically not available.

OMB noted in the report that there was "a wide variety in the type, form, and format of the data generated and used by the agencies" in their cost-benefit analyses for the social rules. For example, some of the analyses contained monetized cost and benefit estimates, some contained quantified but not monetized estimates (e.g., the number of deaths or injuries expected to be avoided or tons of a particular pollutant expected to be eliminated), and some contained qualitative estimates (e.g., increased efficiency or improved product quality). OMB said most of the analyses contained a combination of these estimates. OMB also said that agencies used a variety of reporting formats within these categories, including

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<sup>3</sup>The threshold under title II is for any proposed rule or any final rule for which a proposed rule was published that included any federal mandate that may result in the expenditure of \$100 million or more in any one year by state, local, and tribal governments, in the aggregate, or the private sector.

annualized values, present values, and constant annual values.<sup>4</sup> To present the information in a more consistent way, OMB made some basic adjustments to the agencies' data. However, OMB did not adjust the underlying information in the agencies' estimates and did not impose uniform assumptions across the agencies.

As noted previously, OMB did not include any rules in its report that had been issued by independent regulatory agencies. OMB said it did not believe the exclusion of independent agencies' rules was significant because "we believe that few of their individual regulations meet the statutory criteria of section 645(a)(2)." However, between April 1, 1996, and March 31, 1997, independent regulatory agencies submitted a total of 23 major rules to us pursuant to the congressional review provisions of SBREFA. The FCC issued the largest number of these major rules (13 rules), followed by the SEC (5 rules), and the Federal Energy Regulatory Commission and the Federal Reserve Board (each with 2 rules). Independent regulatory agencies are not covered by the cost-benefit requirements in Executive Order 12866, and the agencies did not conduct cost-benefit analyses for 20 of these 23 rules. However, in one SEC rule, the agency estimated that the rule would have nearly \$160 million in benefits.

To determine whether OMB had identified all of the rules that met its criteria, we obtained a list from the Regulatory Information Service Center of economically significant final rules on which OMB had completed its review between April 1, 1996, and March 31, 1997. We also developed a list of final major rules that agencies submitted to us pursuant to our review responsibilities under SBREFA that OMB reviewed during this period. We did not attempt to identify rules that met the UMRA threshold because those rules are a subset of economically significant rules.<sup>5</sup> We identified nine rules that met OMB's criteria but were not in OMB's 1997 report—five social rules and four transfer rules. Those nine rules are listed in table 3.1.

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<sup>4</sup>According to OMB, "annualized values" spread out variable effects into yearly sums that are financially equivalent to the actual temporal schedule. "Present values" convert effects over time into an immediate lump sum. "Constant annual values" reflect effects that have been estimated (or are assumed) to be fixed each year over the time horizon in which the regulation applies.

<sup>5</sup>See *Unfunded Mandates Reform Act Has Had Little Effect on Agencies' Rulemaking Actions* (GAO/GGD-98-30, Feb. 4, 1998).

Chapter 3  
OMB Did Not Provide Cost-Benefit Estimates for All \$100 Million Rules

Table 3.3.1: Rules That Met OMB's Criteria but Were Not in OMB's 1997 Report

Type of rule	Department or Agency	Rule
Social	Department of the Interior	Migratory Bird Hunting: Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds
		Migratory Bird Hunting: Final Rule on the Establishment of a Youth Waterfowl Hunting Day for the 1996-1997 Migratory Bird Hunting Season
		Migratory Bird Hunting: Seasons and Bag Limits for the 1996-1997 Youth Waterfowl Hunting Day
Environmental Protection Agency	Environmental Protection Agency	Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 1996-97 Late Season
		Control of Air Pollution: Final Rule for New Gasoline Spark-Ignition Marine Engines; Exemptions for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts and New Nonroad Spark-Ignition Engines at or Below 19 Kilowatts
Transfer rules	Department of Agriculture	Food Stamp Program; Child Support Deduction
	Department of Health and Human Services	Medicare Program; Physician Fee Schedule Updates for Calendar Year 1997 and Physician Volume Performance Standard Rates of Increase for Federal Fiscal Year 1997
	Department of Veterans Affairs	Medicare Program; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for 1997
	Department of Veterans Affairs	Compensation for Disability Resulting From Hospitalization, Treatment, Examination, or Vocational Rehabilitation

Source: OMB's 1997 Report to Congress on the Costs and Benefits of Federal Regulations (OMB, September 30, 1997); Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years (GAO/GGD-98-102R, Apr. 24, 1998); and Economically Significant Rules (ESR).

We then reviewed the agencies' cost and benefit estimates for all 50 of the rules issued during the 1-year period that met OMB's criteria and determined that 20 rules met the specific requirements of the statute—i.e., rules that the agencies believed were likely to have a gross annual effect on the economy of \$100 million in increased costs. Ten of these 20 rules were social rules and 10 were transfer rules. (App. IV lists these 20 rules by agency with their cost and benefit estimates.)

OMB's 1998 Report

OMB used essentially the same criteria to identify rules for its 1998 report as it had in its 1997 report—rules on which OMB concluded its review during a 1-year period that were either "economically significant" under Executive Order 12866, "major" under the congressional review provisions of SBREFA, or that met the threshold under title II of UMRA. The 1-year period that OMB focused on in its 1998 report was from April 1, 1997, until March 31, 1998.

As was the case in its 1997 report, OMB did not provide cost or benefit data for rules that were issued by independent regulatory agencies because OMB did not review them under the executive order. However,

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OMB Did Not Provide Cost-Benefit Estimates for All \$100 Million Rules

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OMB included in its 1998 report a discussion of major rules issued by these agencies between April 1, 1996, and March 31, 1998, based on data provided to us under the congressional review provisions of SBREFA. Citing our report on the major rules submitted under SBREFA,<sup>4</sup> OMB noted that independent regulatory agencies submitted 44 major rules to us during this period, 41 of which were issued by 5 agencies (FCC, SEC, the Federal Reserve Board, the Nuclear Regulatory Commission, and the Federal Energy Regulatory Commission).<sup>5</sup> Of these 41 rules, OMB said 12 had some discussion of costs or benefits, 4 had monetized cost information, and 1 had monetized benefit information. Because only one of these rules contain an estimate of costs or benefits exceeding \$100 million (an SEC rule allowing electric storage for brokers or dealer reporting, which the industry estimated would reduce costs by \$160 million), OMB concluded that our reports on the 41 rules contained "no information useful for estimating the aggregate costs and benefits of regulations." However, OMB relied on the information in our major rules reports; it did not ask these agencies if they had any other information about the costs or benefits of these rules.

OMB identified 33 rules that met its criteria—22 social rules and 11 transfer rules. EPA issued the largest number of the social rules (nine), followed by USDA and HHS (three each). As it did in its 1997 report, OMB reported the cost and benefits data that the issuing agencies included for the 22 social rules but did not report cost or benefit information for the transfer rules.

To determine whether OMB identified all of the rules that met its criteria, we obtained a list of economically significant rules on which OMB concluded its review between April 1, 1997, and March 31, 1998, and developed a list of major rules that OMB reviewed during the same period of time. We identified five rules that met OMB's criteria but were not in OMB's 1998 report—four social rules and one transfer rule. Those rules are shown in table 3.2.

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<sup>4</sup>Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years (GAO/GGD-98-102R, Apr. 2, 1998).

<sup>5</sup>Actually, all 44 rules were issued by these 5 agencies.

**Table 3.2: Rules Meeting OMB's Criteria But Not Included in the 1998 Report**

Type of rule	Department or agency	Rule
Social rules	Department of the Interior	Migratory Bird Hunting; Early Seasons and Bag and Possession Limits for Certain Migratory Game Birds in the Contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands
		Migratory Bird Hunting; Regulations on Certain Federal Indian Reservations and Ceded Lands for the 1997-1998 Early Season
		Migratory Bird Hunting; Late Seasons and Bag and Possession Limits for Certain Migratory Birds
Transfer rules	Department of Agriculture	Migratory Bird Hunting; Regulations on Certain Federal Indian Reservations and Ceded Lands for the 1997-1998 Late Season
		Child Nutrition and WIC Reauthorization Act Amendments

Sources: OMB's 1998 Report to Congress on the Costs and Benefits of Federal Regulation; our 1998 report, *Regulatory Reform: Major Rules* (GAO/GGD-98-102R, Apr. 24, 1998); and RISC.

We then reviewed the agencies' cost-benefit estimates for all 38 of the rules issued during the 1-year period that met OMB's criteria and determined that 22 rules met the specific requirements of the statute—rules that the agencies estimated were likely to have a gross annual effect on the economy of \$100 million in increased costs. Thirteen of these 22 rules were social rules and 9 were transfer rules. (App. V lists these 22 rules by agency with their cost and benefit estimates.)

**Experts Suggested Changes in OMB Major Rule Information**

Most of the cost-benefit analysis experts that we consulted had few comments about OMB's listings of individual rules in relation to the second statutory objective. They most frequently said that OMB should have included rules issued by independent regulatory agencies in its listings. Several also indicated that OMB should have made adjustments to the agencies' cost-benefit estimates, particularly to provide a consistent monetary estimate of the value associated with the reduction of mortality rates. However, they also recognized political difficulties associated with adjusting agencies' estimates.

**Experts Said Include Independent's Rules, Adjust Agencies Estimates**

Most of the experts that we consulted indicated that OMB should have included cost and benefit estimates in its reports for the major rules issued by the independent regulatory agencies. For example, Weidenbaum said there was no reason to exclude these agencies' rules, and described their exclusion as a "shortcut." However, several of the experts noted that Executive Order 12866 does not cover these agencies, thereby limiting the information that OMB receives from them and what could be included in OMB's reports. Similarly, Hopkins and Hahn said that if Congress wanted OMB to include independent regulatory agency's rules in its reports,

Congress could require those agencies to produce cost and benefit analyses. Weidenbaum said that despite the limitations in the statutes and the executive order, OMB interacts with independent regulatory agencies through the budget process and through its responsibilities in carrying out the Paperwork Reduction Act. Therefore, he said, OMB could have gone to these agencies and asked them to provide their best estimates of the costs and benefits associated with their major rules.

Similar to their comments on OMB's response to the first statutory requirement, several of the experts that we consulted indicated that OMB should have conducted more independent analysis of the agencies' cost and benefit estimates instead of simply performing as a "clerk" and including the estimates without adjustment. These experts said that OMB should have provided its own analysis and adjusted those estimates that it considered to be in need of refinement. In particular, Hopkins, Lave, Litan, and Weidenbaum said OMB should have monetized some of the data when the agencies did not do so (e.g., converting the number of lives saved into monetized estimates). Weidenbaum said it did not make sense for some agencies to provide monetized estimates of the benefits associated with reductions in mortality while other agencies do not. Hopkins said that if OMB were to make its own critical judgements regarding the agencies' estimates, the agencies would be more likely to provide good estimates in the first place. He said OMB should place its own critical appraisals of agencies' estimates in the public record. As a result, he said, the agencies would improve their estimates because they do not want to be publicly criticized for overstating regulatory benefits.

However, Hahn, Hopkins, and Weidenbaum also noted political and organizational difficulties associated with OMB adjusting agencies' cost or benefit estimates. Hopkins said OMB's "clerical" function in this regard was driven by OMB's organizational placement within the Executive Office of the President and the interplay between the President, OMB leadership, and the political appointees in the executive agencies. He said that OMB could have been more aggressive regarding agencies' cost and benefit estimates if the President wanted an energetic OMB pressing on the agencies. In the absence of such direction, Hopkins said those wanting a critical analysis of agencies' cost or benefit estimates will need to look outside of OMB. Weidenbaum said that OMB is trapped between two roles—one in which it challenges agencies to do better cost-benefit estimates and the other in which it is forced to defend those agencies' estimates after they have been approved. Hahn said that the report does not reflect the collective wisdom that OMB staff has regarding regulatory

costs and benefits, and the problem is "how do you get them to really tell you what they think."

Several of the experts also questioned why OMB limited its presentation of major rules to those it reviewed within selected 1-year periods. For example, Weidenbaum said he did not interpret the statutory requirement to be limited to 1-year's worth of regulations. However, he said OMB may have done so because of data limitations and because including all \$100 million rules would have been a "big chore." Hopkins said it was "curious" that OMB established a time frame for these rules despite the absence of any such time limits in the statute. Lave said it would have been better to include more data than for just 1 year, but he added that this issue was "not high on my list of concerns" about OMB's report.

None of the experts expressed concerns about OMB including economically significant and major rules that did not have \$100 million in increased costs. Weidenbaum and Hopkins said they preferred the inclusive definition that OMB used because it included a larger set of rules than would have been included by sticking strictly to the statutory language. Lave said he also agreed with OMB's approach.

Overall, Hopkins said it was "astonishing" how little information executive branch agencies had on regulatory costs and benefits despite 17 years of executive orders requiring agencies to provide such information. Crandall said that a "selection bias" might be in operation here, with agencies not conducting cost-benefit analysis or not placing a value on certain elements in the analyses when doing so would demonstrate that the rule would not pass a cost-benefit test. In order to overcome this problem, he said, OMB would need a lot of expertise in each of the regulatory areas—expertise that he doubted OMB possessed.



## OMB Did Not Separately Assess Direct and Indirect Impacts of Rules

The third statutory requirement was that OMB provide an assessment of the direct and indirect impacts of federal rules on the private sector, state and local governments, and the federal government. OMB indicated that it believed it had satisfied the "direct" portion of this requirement through the overall cost and benefit estimates that it provided in relation to the first statutory requirement. OMB discussed the difficulty in determining indirect regulatory effects in its first report but did not provide any description of those effects in either report. The cost-benefit analysis experts that we consulted were generally sympathetic toward OMB's treatment of this requirement, describing it as a lower priority than the other requirements and perhaps impossible for anyone to satisfy.

### OMB Reports Contained Little Discussion of Third Statutory Requirement

Unlike the first two statutory requirements, OMB did not have a separate chapter of its 1997 report devoted to the third requirement on the direct and indirect costs and benefits of federal rules on the private sector, state and local governments, and the federal government. Instead, OMB included a brief discussion of this requirement within the chapter that addressed the first requirement on total regulatory costs and benefits. OMB indicated that its estimates of the direct costs and benefits of all rules in relation to the first requirement satisfied the portion of the third requirement regarding an assessment of direct impacts. The report then discussed indirect effects by first noting that several studies have found those effects to be significant, and then describing several problems associated with using those studies (e.g., they only examine indirect costs, and it is impossible to validate models or view their assumptions). Overall, OMB emphasized the methodological difficulties associated with determining the indirect effects of federal rules.

OMB had less discussion of the third statutory requirement in its 1998 report. In the introduction to the report, OMB said that the first chapter on the total annual costs and benefits of federal regulatory programs also discusses such factors as economic efficiency losses, federal on-budget regulatory expenditures, and "the possible indirect effects of regulation on the economy as directed by Section 625(a)(3)." For example, in that chapter OMB explained that it did not include the "indirect, mostly consumer surplus, losses of economic regulation" in its summary table because it concluded that those indirect losses may have significantly different long term effects than direct compliance costs. However, other than these types of references, OMB did not specifically discuss the direct or indirect effects of federal regulations on the private sector, state and local government, or the federal government in its 1998 report.

In its response to comments on the first report, OMB acknowledged that its summary of the literature on the direct and indirect effects of regulation on the economy "did raise more questions than it answered," but said that it was a fair summary of the existing knowledge in the area. OMB also noted that Executive Order 12866 calls on agencies to examine and consider the distributional and equity effects of regulations and said that both OMB and the agencies could do a better job in estimating those effects. Responding to comments on the second report, OMB again said that more information about indirect effects is needed and said it planned to do more searching for next year's report.

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### Experts Were Sympathetic to OMB's Treatment of Requirement

Most of the cost-benefit analysis experts we consulted were generally sympathetic to OMB's admittedly sketchy treatment of this statutory requirement. For example, Litan said that it would be "horrendously difficult" to obtain any other data besides direct compliance costs from the private sector. Although Hahn said this requirement was useful, he said OMB "punted" with regard to the requirement because data on indirect costs by sector are extremely limited, and suggested that this analysis be completed for only a select number of regulations to increase this requirement's usefulness and feasibility. Hopkins said that it would be difficult to be literally responsive to the requirement, but said more work needed to be done in this area. Several of the experts said that this requirement was a low priority and/or should not have been required of OMB. For example, Weidenbaum said he would not have included it in the legislation because the requirement itself "probably would not now pass a cost-benefit test." Portney said OMB's treatment was the best it could do given the time and resources available and said he was not sure how reasonable it was to impose this requirement. Crandall said that OMB's lack of response to this requirement "does not seem to be a bad trade-off given their resources."

However, Lave said OMB's approach to this requirement was "clearly not right," and did not believe that OMB had satisfied this requirement. He said determining the distributional effects (who bears the costs, who receives the benefits) of some types of regulations is very important and noted that studies already conducted on provisions of the Clean Air Act indicated that it is possible to make these types of estimates.

## Experts Criticized Lack of New Recommendations in OMB Reports

The fourth statutory requirement was that the OMB Director provide recommendations to reform or eliminate any federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the nation's resources. The 1997 report contained no such recommendations, but the 1998 report contained an endorsement of 10 previously announced regulatory or statutory changes and a discussion of restructuring the electrical generation industry. All of the cost-benefit experts disagreed with OMB's response to the requirement, and several said sufficient cost-benefit data existed to support making some recommendations. However, several of the experts also said that it was politically difficult for OMB to make recommendations directly to Congress to eliminate or reform existing administration programs.

### OMB Provided No New Recommendations

In its 1997 report, OMB concluded that it could not make any recommendations that would meet the statutory requirement. In explanation, OMB said

"We do not...believe that the existing evidence on aggregate costs and benefits rises to the level that would support a recommendation to eliminate any regulatory program. Virtually all of the evidence... is based either on dated studies of existing regulation or on estimates for proposed regulations. These data are not appropriate for determining whether existing regulations should be repealed or significantly modified because of the sunk costs and rising baseline problems discussed above. Before supportable recommendations are made to eliminate existing regulatory programs or elements of programs, empirical evidence based on analytical techniques designed to solve the methodological problems discussed above must be developed."

However, OMB did include in the report a number of recommendations to improve the quality of regulatory data and analysis, including (1) that OIRA lead an effort to improve agencies' regulatory analysis by promoting greater use of its January 1996 "best practices" guidance, (2) that an interagency group conduct a peer review of a selected number of agency regulatory analyses, and (3) that OIRA continue to develop a database on the costs and benefits of major rules.

In its 1998 report, OMB again indicated that data quality problems prevented it from making definitive recommendations on specific regulatory programs. However, OMB said it had identified some general themes during its review of the academic literature and analysis of data on the economic impacts of regulations and noted the general success of large scale procompetitive regulatory reforms. Within that theme, OMB then described the Clinton Administration's legislative recommendation for reform of electricity generation. OMB said this electricity restructuring proposal was an illustration of how regulatory reform can achieve "the

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Experts Criticized Lack of New Recommendations in OMB Reports

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economic benefits of competition in a manner that is fair and improves the environmental performance of the electricity industry."

OMB also said that agencies continue to reform their regulatory programs, which are described in the Regulatory Plan located in the fall edition of the Unified Agenda of Federal Regulatory and Deregulatory Actions. OMB said these initiatives were important to the administration and then listed nine such efforts that it endorsed in its 1998 report. We examined the Unified Agenda and discovered that many of these initiatives had been announced by the agencies years before the issuance of the OMB report. For example,

- the Department of Agriculture's Food Safety and Inspection Service first indicated that it was determining whether to convert some of its "command and control" regulations to performance standards in 1995 and issued an NPRM to convert those regulations to performance standards in May 1996;
- HUD issued an NPRM to provide consumers with increased disclosure concerning mortgage brokers' function and fees, and to provide greater clarity regarding the application of the Real Estate Settlement Procedures Act to mortgage broker fees in September 1996;
- the Department of Transportation began reviews of its side impact protection and heavy truck conspicuity regulations in October 1994 and September 1996, respectively; and
- the Department of Labor's Office of Federal Contract Compliance Programs issued an advance notice of proposed rulemaking in July 1981 to streamline, clarify, and reduce the paperwork burden of the regulations that govern the nondiscrimination and affirmative action obligations of federal contractors, and issued an NPRM in May 1996.

OMB also noted in its 1998 report that the Clinton Administration offered "Remediation Waste Legislative Specifications" in early 1998 to provide changes to the Resource Conservation and Recovery Act land disposal restrictions, minimum technology requirements, and permitting requirements for hazardous remediation waste. Although this appeared to be a new legislative proposal, EPA issued an NPRM related to this issue in May 1992. However, OMB officials told us during this review that the administration determined that EPA could not take this action administratively, so additional statutory authority was needed.

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### Experts Criticized OMB, but Noted "Constraints"

All the experts that we consulted indicated that OMB's responses to this statutory requirement did not adequately address the requirement. For example, Weidenbaum said he was "amazed" that OMB could not come up with a single program or regulation that it believed needed changing. Similarly, Portney said the lack of any recommendations "strains credulity." Hopkins said OMB's practice of citing the lack of perfect data is "a recipe for complete inaction." He said government always has incomplete and uneven data but that does not stop it from preparing fiscal budgets or implementing the tax laws.

Several of the experts specifically said that they did not believe OMB's endorsement of agencies' previously announced regulatory reform initiatives in its 1998 report addressed the statutory requirement. For example, Weidenbaum said that it was difficult to see how initiatives put forward by the agencies can be seen as recommendations from the OMB Director. Because these initiatives had already been proposed by the agencies, he said they should not be considered recommendations. Hahn said OMB needs to use its own expertise and institutional knowledge to help reform regulations, not simply rely on agencies for initiatives.

Some experts were also critical of the report's discussion of electricity restructuring in the 1998 report. For example, Hopkins said this discussion was "ridiculous," and found it interesting that OMB would include this proposal regarding an issue over which it has very little influence or data after asserting that it could not make recommendations with regard to issues that it can exert influence and has at least some data.

Several of the experts also said that enough cost-benefit data existed to support the reform or elimination of particular regulations or regulatory programs. For example, Hahn pointed to one of his recent articles in which he suggested a number of laws and regulations that could be eliminated, including certain international trade restrictions, USDA milk, average fuel economy standards, marketing orders, and the Davis-Bacon Act.<sup>1</sup> Weidenbaum suggested reform of agricultural marketing orders and the Maritime Commission. Portney said current regulations on coal-fired power plants should be replaced with performance standards. Portney noted that some regulations are in place in which the costs exceed the benefits because of statutory requirements that only Congress can change.

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<sup>1</sup>Robert W. Hahn, "Government Analysis of the Benefits and Costs of Regulation," *Journal of Economic Perspectives*, 12 (Fall 1998), pp. 201-216.

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**Chapter 8**  
**Experts Criticized Lack of New Recommendations in OMB Reports**

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Although most of the experts were critical of the lack of recommendations in OMB's reports, several of them also indicated that OMB may be unable to make recommendations for the reform or elimination of existing regulatory programs because of the previously discussed "political constraints." For example, Lave said he believed that OMB staff would have relished making recommendations to reform some of the programs they review, but were unable to do so because of the political environment that exists within OMB. "In the end," he said, "these are political issues and it lies with the President to make these political decisions."

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## Conclusions

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Although the precise dimensions of federal regulatory costs and benefits are unclear, there is general agreement that, in the aggregate, federal regulations have a substantial impact on the economy. Measuring the costs and benefits associated with a single rule can be extremely difficult, and developing accurate estimates of the effects of all federal regulations is even more complex. OMB's two reports on regulatory costs and benefits are notable initial attempts to provide Congress with information that it needs to gauge the extent of federal regulatory activity and to determine whether the benefits associated with federal regulations justify the related costs.

OMB addressed some, but not all, of the specific statutory requirements in its 1997 and 1998 reports. In both reports, OMB provided estimates of the costs and benefits of federal regulations both in total and for most (but not all) major or economically significant rules issued within particular 1-year time frames. To develop its estimates of total regulatory costs, OMB relied on previous estimates published in the professional literature, the agencies' published estimates for particular rules, and (in the 1998 report) EPA's Section 812 report estimate.

However, OMB's reports did not fully address other statutory requirements. First, OMB did not, as directed, discuss the direct and indirect effects of federal rules on particular sectors of the economy. In OMB's defense, most of the experts we consulted indicated that OMB's reluctance was understandable given the lack of data clearly documenting those effects. Some of the experts said this requirement was a lower priority than the other requirements. Second, OMB had no recommendations in its 1997 report and, although it discussed a number of previously announced agency and administration initiatives, it did not provide any new recommendations to eliminate or reform federal regulations or regulatory programs in its 1998 report.

Most of the cost-benefit analysis experts that we consulted during our review indicated they would have preferred that OMB provide an independent estimate of regulatory costs and benefits and not simply transcribe the estimates provided by federal agencies and others. In particular, the experts believed OMB should have adjusted EPA's Section 812 report estimate of the benefits associated with the Clean Air Act instead of using the unadjusted estimate that dominated the benefits estimate in OMB's 1998 report. Although the legislative history of the statutory provisions that established the reporting requirements is limited and does not demonstrate the intent of Congress in enacting these provisions, the comments of some individual Members of Congress

indicated that they wanted OMB to provide an independent regulatory accounting statement. Specifically, they said OMB should adjust published estimates of benefits and costs where necessary to reflect the agency's best professional judgment regarding those estimates.

In some cases, OMB used its professional judgment and adjusted the published estimates that it used to produce its estimates of total regulatory costs and benefits. For example, in the 1997 report, OMB subtracted \$10 billion from Hopkins' \$81 billion estimate of the efficiency losses associated with economic regulations to account for deregulatory actions that took place after the estimate was published. OMB performed the same adjustment in its 1998 report but did not include the efficiency loss estimate in its summary of total regulatory costs. OMB also monetized some of the agencies' quantified estimates for individual rules before using them to develop the total cost and benefit estimates for the 1998 report.

However, OMB did not materially adjust any of the published cost or benefit estimates from federal agencies—most notably EPA's Section 812 report estimates and the agencies' estimates for individual rules. Although many of the cost-benefit analysis experts said OMB should have adjusted the agencies' estimates, they also recognized that OMB faced political constraints in doing so. Specifically, they noted that OMB is part of the administration that issued those estimates and therefore would find it politically difficult if not impossible to disagree with those estimates in a report to Congress.

OMB has a responsibility under Executive Order 12866 to review the agencies' estimates of the costs and benefits of proposed and final rules before they are published in the Federal Register. Similarly, with the Executive Order establishing OIRA as the "repository of expertise on regulatory issues," OMB had a responsibility to provide EPA with its expert opinions during the development of the cost and benefit estimates in EPA's Section 812 report. However, after their publication, those rules and reports (and their associated estimates of costs and benefits) represent the administration's policy positions. OMB, as part of the administration and particularly as the staff office to the President responsible for regulatory policy, cannot realistically be expected to alter or dispute the administration's own estimates of regulatory costs and benefits in a public report to Congress. Doing so would also unilaterally substitute OMB's judgment for the mutually agreed upon results of its consultations with the agencies during the review process or, in the case of the section 812 report, reverse the judgment of EPA's Science Advisory Board.



If Congress wants a truly independent analytic perspective on executive branch agencies' regulatory costs and benefits, it may have to assign that responsibility to individuals or organizations located outside of the executive branch. One such organization could be the Congressional Office of Regulatory Analysis (CORA) that Congress considered establishing last year. Under that proposed legislation (H.R. 1704), CORA would provide a report to Congress on each major rule providing an independent perspective on the rules' costs, benefits, and net benefits. The proposed legislation also would have required CORA to provide an annual report including estimates of the total costs and benefits of all existing federal regulations. Although the proposed legislation would not have required CORA to assess the direct and indirect costs and benefits of federal regulation on particular sectors of the economy or to provide recommendations for reform or elimination of existing rules, such additional responsibilities could be added to future legislation if Congress believes them desirable.

Another way to obtain an independent perspective of executive branch agencies' regulatory costs and benefits is to look to organizations outside of government that are already engaged in the types of analyses that Congress envisioned. For example, according to the AEL-Brookings Joint Center for Regulatory Studies' mission statement, the Joint Center will publish an annual report that will include "an independent assessment of both the total and marginal costs and benefits of federal regulation, broken down into useful categories." The Joint Center also intends to publish objective analyses of selected forthcoming regulations, and recommendations for modifications or elimination of existing rules based on their benefits and costs.

An independent perspective on regulatory costs and benefits from outside of the executive branch could be either a substitute for the current OMB requirement or a supplement to that requirement. Requiring an independent perspective in addition to the existing OMB requirement could be a considerable duplication of effort, with both organizations obtaining information from regulatory agencies. However, a somewhat similar dual-track process is currently in place in the federal budgetary process, with both OMB and the Congressional Budget Office providing independent estimates of federal revenues, spending, and budget deficits or surpluses. Federal regulatory agencies and OMB may be prompted to develop better estimates knowing that another entity outside of the administration will be providing an independent perspective.

Regardless of which entity provides those estimates, agreement is needed among all parties regarding the types of regulations that should be included and other methodological issues. Agreement on these issues can prevent (or at least lessen) disputes regarding the accuracy of such estimates after they are developed. For example, the experts we consulted generally suggested focusing on the costs and benefits of health, safety, environmental, and other social regulations, and tallying economic and transfer rules separately. Other issues in need of agreement include whether (and if so, how) reductions in mortality risks should be monetized, whether agencies' assumptions should be standardized to permit interagency and interrule comparisons of regulatory costs and benefits and the degree to which regulatory costs and benefits should be disaggregated to allow the relative net benefits of regulatory programs to be compared. Also, although cost-benefit analysis is conceptually a valuable tool in regulatory decisionmaking, the results of any such analyses must be carefully examined to ensure that the estimates are properly developed, and care must be exercised in using any such estimates in public policy decisionmaking. Finally, whatever entity is charged with the responsibility of providing this kind of independent analysis of regulatory costs and benefits, those analyses will be most useful to policymakers if the entity has sufficient resources to do a proper job.

### Matter for Congressional Consideration

It is politically difficult for OMB to provide Congress with an independent assessment of executive branch agencies' regulatory costs and benefits. If Congress wants an independent assessment, it may wish to consider assigning that responsibility to an organization outside of the executive branch. That organization could include a congressional office of regulatory analysis, which would have to be established, or an organization outside of the federal government.

### Comments and Our Evaluation

On April 7, 1999, we met with the Acting Administrator of OIRA and other OMB staff to discuss a draft of this report, and we had subsequent discussions with OIRA regarding its views on the draft report. OIRA stated that the draft report reflected a substantial amount of work on our part, and that it raised a number of useful analytical issues regarding how regulatory benefits and costs can most appropriately be estimated and reported.

However, OIRA stated that it disagreed fundamentally with several of the statements attributed to the experts in the report. OIRA particularly noted that, at a number of points throughout the draft report, we quoted one or more experts who expressed strong opinions about what they believe

OMB should have done in reviewing and evaluating agencies' cost-benefit analyses. OIRA fundamentally disagreed with these statements, which it said reflect a significant misunderstanding of OMB's role in developing, overseeing, and coordinating the administration's regulatory policies. OIRA said it analyzes and evaluates agency work products and works with them to develop better quality analyses, evaluations, and policies. It said the role of OMB is not to play "gotcha" with the agencies but to work cooperatively with them, ensuring that their economic estimates are accurate and that administration policies and programs are faithfully executed.

We believe that OIRA's comments regarding OMB's role buttresses our conclusions and our matter for congressional consideration. It is politically difficult for OMB to disagree publicly with agencies' statements of regulatory policy, particularly because OIRA staff typically participate in developing those policies. The experts that we consulted indicated that, to be responsive to the statutory requirement, OMB should have adjusted agency cost-benefit estimates that it believed were in error. However, the experts also recognized the political constraints inherent in OMB's role of supporting the administration's position and initiatives, particularly when operating under an executive order that has as one of its stated objectives "to reaffirm the primacy of Federal agencies in the regulatory decision making process."

OIRA also pointed out that it had provided original, updated, and more refined estimates of the costs and benefits of regulations and regulatory programs, which the experts had evidently overlooked. In addition, OIRA noted that EPA's Section 812 report had been peer reviewed by the EPA Science Advisory Board's Council on Clean Air Act Compliance Analysis and that OMB had reported its concerns with some of the assumptions behind the estimates and had used the benefits estimate to establish an upper bound for the governmentwide estimate.

OIRA's statement that the experts overlooked original, updated, and more refined estimates of the costs and benefits for regulations and regulatory programs is not entirely correct. As we noted in the draft report, OMB did make some changes to published cost or benefit estimates to derive the governmentwide estimate in its 1998 report. However, OMB did not adjust the benefits estimate in the Section 812 report that constituted more than 90 percent of the governmentwide estimate. Neither did OMB adjust any of the agencies' cost or benefit estimates in relation to the second statutory requirement regarding rules with \$100 million in increased costs. Also, we noted in the draft report that EPA's Section 812 report had been peer

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reviewed by EPA's Science Advisory Board and that OMB reported its concerns with some of the assumptions behind the report's estimates.

OIRA stated that Congress recognized, when it directed OMB to prepare these reports, that OMB would be relying for the most part on existing, available information, including the agencies' cost-benefit analyses. OIRA therefore believes that OMB presented Congress with the estimates that Congress had directed it to prepare. However, OIRA did not specifically comment on our matter for congressional consideration.

Contrary to OIRA's assertion, neither the statutory language that required OMB to provide the 1997 and 1998 reports to Congress nor the limited legislative history of these provisions specifies that Congress expected OMB to rely on existing information to prepare its reports on the costs and benefits of federal rules. Although some individual Members of Congress indicated that OMB should simply compile existing information about regulatory costs and benefits, other Members said OMB should supplement that information where needed and provide an "independent assessment" of the effects of federal regulation.

OIRA offered comments on several additional points in the draft report. For example, OIRA disagreed that the recommendations that OMB provided in the 1998 report were simply a recitation of initiatives that had previously been put forward by the agencies. OIRA said they were major administration initiatives and met the statutory requirement that OMB provide recommendations. OIRA also offered suggestions to improve the presentation of certain issues, which we incorporated into this report as appropriate. For example, OIRA noted that some of the experts were critical of OMB for not assigning a dollar value to the costs and benefits of certain rules, but pointed out that OMB had, in fact, monetized some of the agencies' estimates. We agreed to add a footnote to the experts' comments noting that OMB had assigned monetary values to some of these estimates.

We also obtained comments on the draft report from six of the seven cost-benefit analysis experts that we consulted on the draft report. (Portney said he was unable to review the draft because of time constraints.) In general, the experts said the report accurately reflected their statements. However, some of them suggested particular clarifications or modifications to their statements and bibliographic references, which we incorporated where appropriate.

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## Appendix I

## Individual Views of Members of Congress Regarding Regulatory Accounting Requirements

As pointed out in the body of this report, the legislative history of the regulatory accounting provisions that required OMB to provide the 1997 and 1998 reports is of limited value in determining how Congress intended for OMB to carry out its responsibilities. However, several Members of Congress expressed their individual views regarding these requirements during floor consideration of the legislation. For example, on September 11, 1996, Senator Ted Stevens (the sponsor of the first regulatory accounting provision) said "OMB should use the valuable information already available, and supplement it where needed" when preparing the estimates of total annual costs and benefits called for in subsection 645(a)(1). He also said that "(w)here agencies have, or can produce, detailed information on the costs and benefits of individual programs, they should use it. I expect a rule of reason will prevail."

On September 12, 1996, Senators John Glenn and Carl Levin also discussed their views regarding subsection 645(a)(1). Senator Glenn said OMB should compile "existing analyses and estimates of regulatory costs and benefits." He said that the sponsors of the amendment "are aware of OMB's resource constraints and intend that the report be based on a compilation of existing information, rather than new analysis." Senator Levin said the amendment would ask OMB to "come up with its best estimate" of the costs and benefits of regulatory programs, but he noted that the amendment

"does not require OMB to conduct new studies or analyses or develop new data or information. That would be a time-consuming, and expensive use of taxpayer money. . . . (T)his amendment simply directs OMB to put together the already available information that it has on existing Federal regulatory programs and use that to estimate the total annual costs and benefits of each."

Similarly, on September 30, 1996, Senator William V. Roth, Jr. said OMB "should draw upon the wealth of studies and reports already done" to generate the estimate of total costs and benefits. However, he also said that "(w)here there are gaps, OMB must supplement existing information. To conserve its resources, OMB should issue guidelines to the agencies to gather the needed information, as OMB does for the fiscal budget process." He also said OMB should "quantify costs and benefits to the extent feasible, and provide the most plausible estimate."

In relation to the requirements in subsection 645(a)(2), Senator Levin said that "reporting on the costs and benefits of major rules is expected to require no more than reporting, in an organized and readable manner, the cost-benefit analyses of the major rules in effect that were already done prior to promulgation." However, he also said that "(t)o the extent there is

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updated information that would change the estimates in those analyses, such updates should be included in this part of the report if it is available."

Regarding the requirements in subsection 645(a)(3) for an assessment of the direct and indirect impact of the rules on different sectors, Senator Stevens said he believed that regulation "creates a drag on real wages, economic growth, and productivity," and that OMB "should discuss the serious problem of unfunded Federal mandates and inform Congress" about the problem. However, he also said that "OMB should use available information, where relevant, to assess the direct and indirect effect of federal rules." Senator Levin said the assessment of impacts

"is intended to be a narrative discussion of OMB's opinion on this subject. It does not require additional information gathering; rather, the intent, here, is that the Director use the information contained in the report on the costs and benefits of Federal regulatory programs and describe the expected impacts of such programs on State and local governments, business, and individuals."

Senator Glenn said the recommendations for reform required by subsection 645(a)(4) should include programs that should be eliminated or altered because they are too burdensome "as well as programs that should be strengthened to more effectively implement public policy." Senator Roth said that OMB should "highlight those programs or program elements that are inefficient, and it should provide recommendations to reform them."

Overall, Senator Stevens said he expected OMB to produce "a credible and reliable picture of the regulatory process—a picture that highlights the costs and benefits of regulatory programs and that allows Congress to determine which programs and program elements are working well, and which are not." Likewise, Senator Roth said OMB "must provide Congress with a credible and reliable accounting statement on the regulatory process.

The legislative history accompanying the second set of reporting requirements in section 625 of the fiscal year 1998 appropriations act is even more limited than for the first requirements. However, during Senate consideration of the legislation on July 17, 1997, Senator Fred Thompson expressed his support for the new requirements and suggested that certain information sources be used (e.g., existing studies by nonfederal experts and agencies' cost-benefit analyses conducted under Executive Orders 12291 and 12865). He said "regulatory accounting should not create a resource drain for OMB. OMB should issue guidelines requiring the agencies to compile needed information, just as OMB does in the fiscal budget process." In relation to the requirement in subsection 625(a)(1) that

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OMB estimate total annual costs and benefits, Senator Thompson said OMB should "do its best to estimate and quantify that figure on the cost side," and explain what benefits are being achieved for those costs. Where agencies such as EPA can provide detailed information on particular programs, he said OMB should make full use of this information. In relation to subsection 625(a)(3) requirement to assess the direct and indirect effect of federal rules, Senator Thompson said OMB need not "devote vast resources" to the development of complex economic models, but rather "may use available reports, studies, and other relevant information. . . ." In particular, he said OMB should discuss the "serious problems posed by unfunded federal mandates for State, local and tribal governments."

Senator Thompson also offered some specific suggestions regarding what costs and data should be included in OMB's reports. First, he said OMB should estimate the total costs of paperwork, including tax paperwork. Second, he said OMB's estimate of indirect effects should include costs associated with product bans and marketing limitations; the benefits associated with preservation of endangered species; and the impact of regulation on wages, innovation, employment, and income distribution. To do these analyses, he said, OMB could leverage the expertise and resources of other agencies, especially the President's Council of Economic Advisors. Finally, Senator Thompson said OMB's recommendations to improve the regulatory process and particular programs and regulations "do not have to be based on perfect empirical data."

Congressional Responses to  
OMB's Initial Regulatory  
Accounting Reports

On October 29, 1997, Senator Thompson and Senator Stevens, acting as the Chairmen of the Senate Committees on Governmental Affairs and Appropriations, respectively, sent a letter to the Director of OMB saying that the first regulatory accounting report was "an important foundation for improving the regulatory system." However, they also said they believed there were several opportunities for improvement. First, they recommended that the report adhere to the specific statutory requirements by recommending improvements and assessing the indirect impacts of federal regulation. Second, they said the report should more fully implement the legislation, breaking down costs and benefits by program or program element where feasible and estimating transfer costs and the costs of all paperwork requirements, including tax paperwork. Finally, the Chairmen said OMB should "exercise leadership to assure the quality and reliability of information reported" by, among other things, providing an "independent assessment" of the information provided by the agencies. They said OMB staff should be directed to "critique the quality of the



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estimates provided to them, not to simply compile data presented by the agencies."

On the same day, Representatives Thomas J. Bliley, Jr. and David McIntosh, the Chairmen of the House Committee on Commerce and the House Committee on Government Reform and Oversight's Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, respectively, wrote a similar letter to the OMB Director. They said the OMB report fell short of their expectations in that it (1) did not fully comply with specific statutory requirements (e.g., lacked recommendations); (2) reflected a narrow interpretation of the congressional mandate (e.g., provided estimates for only a small number of major rules issued during the previous fiscal year); (3) revealed the lack of any systematic approach to collecting, analyzing, and reporting data on regulatory impacts; and (4) failed to reflect the leadership role that Congress intended OMB to play. In relation to the last point, they said "Congress expected OMB to assure the reporting of meaningful information and provide an independent assessment of regulatory effects," not merely to perform the "ministerial function of reporting information provided by other agencies.

On August 28, 1998, Representative McIntosh provided his Subcommittee's comments on OMB's August 1998 draft report. He said the Subcommittee continued to have some of the same concerns mentioned in its October 1997 letter and said it was difficult to believe that OMB could not recommend any regulatory programs for reform or elimination other than electricity restructuring. He also said that OMB should have monetized costs for all rules issued by independent regulatory agencies and should have sought out research or reports on the direct and indirect impacts of federal rules on the private sector, state and local governments, and the federal government.

On October 10, 1998, Senators Thompson and Stevens, again acting as the Chairmen of the Senate Committees on Governmental Affairs and Appropriations, respectively, also provided comments on OMB's August 1998 draft report. They said they remained concerned that OMB had "not sufficiently used its expertise" in the draft report, and said OMB should not simply compile data presented by the agencies but should synthesize and evaluate the information "and provide an independent assessment." They indicated that OMB should prepare its best estimates of costs and benefits in the aggregate and for individual rules and programs and compare those estimates with agency estimates. In particular, they noted that OMB did not provide an independent assessment of EPA's estimates of the costs

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and benefits of the Clean Air Act. They also said that OMB should have done more to provide recommendations for the reform or elimination of federal rules, and "provide guidance on programs where the costs outweigh the benefits using its best judgment and input from regulatory scholars.

## Appendix II

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**Biographical Information of Regulatory Experts**


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Robert W. Crandall	Robert W. Crandall is a senior fellow in the Economic Studies Program at the Brookings Institution, Washington, D.C., where he has worked since 1978. He is a former deputy director of the Council on Wage and Price Stability during the Ford and Carter administrations, and a former faculty member at the Massachusetts Institute of Technology, the University of Maryland, and George Washington University. He also has been a consultant to the Environmental Protection Agency (EPA), the Antitrust Division of the Federal Trade Commission, and the Treasury Department. He has written widely in such fields as antitrust, the automobile industry, competitiveness, deregulation, environmental policy, mergers, regulation, and telecommunications policy.
Selected Publications	<p><b>An Agenda For Federal Regulatory Reform</b>, with Christopher DeMuth, Robert W. Hahn, Robert E. Litan, Pietro S. Nivola, and Paul R. Portney (Washington, D.C.: American Enterprise Institute for Public Policy Research and the Brookings Institution, 1997).</p> <p><b>Regulating the Automobile</b>, with Howard Gruenspecht, Ted Keeler and Lester Lave (Washington, D.C.: Brookings Institution, 1986).</p> <p>"What Ever Happened to Deregulation?" in David Boaz (ed.) <b>Assessing the Reagan Years</b> (Washington, D.C.: Cato Institution, 1988).</p> <p><b>Economic Deregulation and Customer Choice: Lessons for the Electric Industry</b>, with Jerry Ellig (Center for Market Processes, George Mason University, 1997).</p>
Robert W. Hahn	Robert W. Hahn is director of the American Enterprise Institute (AEI)-Brookings Joint Center for Regulatory Studies, Washington, D.C. He is also a resident scholar at AEI and a research associate at Harvard University. He also served as a senior staff member of the President's Council of Economic Advisers for 2 years and has served as a consultant to government and industry on a variety of issues involving regulation and privatization. His research interests include the reform of regulation in developed and developing countries and the design of new institutions for reforming regulation.
Selected Publications	<p>"The Costs and Benefits of Regulation: Review and Synthesis," with John A. Hird, <b>Yale Journal on Regulation</b> (Vol. 8, No.1 (Winter 1991)).</p> <p><b>Improving Regulatory Accountability</b>, with Robert E. Litan, (Washington, D.C.: AEI and the Brookings Institution, 1997).</p>

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**Risks, Costs, and Lives Saved: Getting Better Results from Regulation** (ed.), (Washington, D.C.: Oxford University Press and AEI Press, 1996).

"Regulatory Reform: Assessing the Government's Numbers" in **Revising Regulatory Reform: A Global Perspective**, (AEI-Brookings Institution, forthcoming).

"Policy Watch: Government Analysis of the Benefits and Costs of Regulation," **Journal of Economic Perspectives** (Vol. 12, No. 4 (Fall 1998)).

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**Thomas D. Hopkins**

Thomas D. Hopkins is Interim Dean of the College of Business and Arthur J. Goenell Professor of Economics at the Rochester Institute of Technology in Rochester, NY. He is also Adjunct Fellow for the Center for the Study of American Business, Washington University, St. Louis, MO. From 1975 to 1984, he served on the staff of the Council on Wage and Price Stability and as Deputy Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget. His published work includes a series of policy projects for the Organization for Economic Cooperation and Development, the Regulatory Information Service Center, and the Small Business Administration.

**Selected Publications**

"Regulatory Costs in Profile," Policy Study 132 (St. Louis: Washington University, Center for the Study of American Business, Aug. 1996).

"Progress in Developing Standards for Review of Government Regulations," **Business & the Contemporary World** (Vol. IX, No. 4 (1997)).

"OMB's Regulatory Accounting Report Falls Short of the Mark," Policy Study 142, (St. Louis: Washington University, Center for the Study of American Business, Nov. 1997).

"Regulatory Costs in Profile," **Policy Sciences** (Vol. 31, No. 4 (Dec. 1998)).

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**Lester B. Lave**

Lester B. Lave is University Professor and the Higgins Professor of Economics in the Graduate School of Industrial Administration and professor of engineering and public policy in the College of Engineering and Public Policy at Carnegie Mellon University, Pittsburgh, PA. He has consulted to EPA, the Office of Safety Administration, and other federal agencies on the theory and application of cost-benefit analysis.

**Selected Publications**

**Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles**, with Kenneth J. Arrow, Maureen L. Cropper, George C. Eads, Robert W. Hahn, Lester B. Lave, Roger G. Noll, Paul R.

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	Portney, Milton Russell, Richard Schmalensee, V. Kerry Smith, and Robert N. Stavins (Washington, D.C.:AEI, 1996).
	"Benefit-Cost Analysis: Do The Benefits Exceed the Costs?" in Robert W. Hahn, ed., <u>Risks, Costs, and Lives Saved: Getting Better Results from Regulation</u> (Washington, D.C.: Oxford University Press and AEI Press, 1996).
Robert E. Litan	Robert E. Litan is the codirector of the AEI-Brookings Joint Center for Regulatory Studies and serves as director of Economic Studies Program and Cabot Family Chair in Economics at the Brookings Institution. He has served as deputy assistant attorney general in the Antitrust Division of the Department of Justice, as Associate Director of the Office of Management and Budget, and as a regulatory and legal staff specialist for the President's Council of Economic Advisors. He has also consulted for numerous organizations, public and private, and testified as an expert witness in a variety of legal and regulatory proceedings.
Selected Publications	<u>Reforming Federal Regulation</u> , with William D. Nordhaus (New Haven, Ct.: Yale University Press, 1983).
	<u>An Agenda For Federal Regulatory Reform</u> , with Robert W. Crandall, Christopher DeMuth, Robert W. Hahn, Pietro S. Nivola, and Paul R. Portney (Washington, D.C.: American Enterprise Institute for Public Policy Research and the Brookings Institution, 1997).
Paul R. Portney	Paul R. Portney is president of Resources for the Future, Washington, D.C. He was previously the organization's vice president and director of its Center for Risk Management and its Quality of the Environment Division. He also has been a visiting professor at the graduate school of public policy at the University of California at Berkeley and a visiting lecturer at Princeton University's Woodrow Wilson School. He previously served as chief economist at the Council of Environmental Quality in the Executive Office of the President, as a member of the Board on Environmental Studies and Toxicology of the National Research Council, and as a member of the National Oceanic and Atmospheric Administration's Panel on Contingent Valuation. From 1994 to 1997, he was a member of the Executive Committee on EPA's Science Advisory Board and was chairman of the Board's Environmental Economics Advisory Committee.
Selected Publications	"Economics and the Clean Air Act," <u>Journal of Economic Perspectives</u> (Vol. 4 (1990), pp. 173-181).

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Biographical Information of Regulatory Experts

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Benefit-Cost Analysis in Environmental Health and Safety Regulation: A Statement of Principles, with Kenneth J. Arrow, Maureen L. Cropper, George C. Eads, Robert W. Hahn, Lester B. Lave, Roger G. Noll, Milton Russell, Richard Schmalensee, V. Kerry Smith, and Robert N. Stavins (Washington, D.C.: AEI, 1996).

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Murray Weidenbaum

Murray Weidenbaum is the Mallinckrodt Distinguished University Professor and Chairman of the Center for the Study of American Business at Washington University in St. Louis, MO. Before joining Washington University, he served as Corporate Economist at the Boeing Company. He was Assistant Secretary of the Treasury for Economic Policy during the Nixon administration. In 1980, he chaired the Task Force on Regulatory Reform for President-Elect Ronald Reagan. In 1981 and 1982, he was Chairman of the Council of Economic Advisers, and subsequently served as a member of the President's Economic Policy Advisory Board.

Selected Publications

Government-Mandated Price Increases (Washington, D.C.: AEI, 1975).

The Cost of Federal Regulation of Economic Activity, with Robert DeFina (Washington, D.C.: AEI, 1975).

"Regulatory Process Reform," Regulation (Winter 1997).

A New Approach to Regulatory Reform (St. Louis: Washington University, Center for the Study of American Business, 1996).

## Rules Meeting Specific Statutory Requirements for OMB's 1997 Report

Section 645(a) of the Treasury, Postal Services and General Government Appropriations Act for fiscal year 1997 required the Office of Management and Budget (OMB) to estimate the costs and benefits of each rule "that is likely to have a gross annual effect on the economy of \$100,000,000 or more in increased costs" in a report to Congress. In its September 30, 1997, report, OMB interpreted this requirement broadly to include all final rules promulgated by an executive branch agency and reviewed by OMB's Office of Information and Regulatory Affairs (OIRA) between April 1, 1996, and March 31, 1997, that met any of the following:

- Rules designated as "economically significant" under section 3(f)(1) of Executive Order 12866;
- Rules designated as "major" under 5 U.S.C. 804(2); and
- Rules designated as meeting the threshold under title II of the Unfunded Mandates Reform Act (2 U.S.C. 1531-1538).

A rule could meet one or more of these criteria and not have a gross annual effect on the economy of \$100 million or more in increased costs. For example, a rule may be economically significant because it has a \$100 million beneficial effect on the economy, or because it has material effect on a sector of the economy, the environment, or state or local governments.

Table III.1 lists the 20 rules that OIRA reviewed during the 1-year time frame that we determined had met the specific requirements of the statute—i.e., rules that the agencies believed were likely to have a gross annual effect on the economy of \$100 million in increased costs. Ten of the rules were "social" regulations (which include environmental, health and safety rules) and 10 were "transfer" rules (which involve payments from one group to another that redistribute wealth).

Two of these rules were not included in OMB's 1997 report to Congress but met OMB's criteria for inclusion in its report: (1) the Department of Veterans Affairs' rule on disability compensation and (2) EPA's rule on control of air pollution for new gasoline spark-ignition marine engines.

Appendix III  
 Rule Meeting Specific Statutory Requirements for OMB's 1997 Report

Table III.1: Rules Likely to Have Gross Impact On Economy of \$100 Million In Increased Costs

Type of rule	Department or agency	Rule	Costs (millions/year)	Benefits (millions/year)
Social rules	Department of Agriculture	Conservation Reserve Program—Long Term Policy	\$970	\$2,200
		Fertilizer Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems	\$100-\$120	\$70-\$2,800
	Department of Health and Human Services	Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents	\$180	\$9,900-\$11,000
	Department of Labor	Occupational Exposure to Methylene Chloride	\$110	\$90
	Environmental Protection Agency	Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(j)(7)	\$100	\$170
		Regulation of Fuels and Fuel Additives: Certification Standards for Deposit Control Gasoline Additives	\$150	\$120-\$350
		Acid Rain Program: Nitrogen Oxides Emission Reduction Program	\$190	\$430-\$2,000
		Motor Vehicle Emissions Federal Test Procedure Revisions	\$200-\$250	\$130-\$760
		Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: Voluntary Standards for Light-Duty Vehicles	\$840	\$230-\$1,000
		Control of Air Pollution: Final Rules for New Gasoline Spark-Ignition Marine Engines; Exemptions for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts and Nonroad Spark-Ignition Engines at or Below 19 Kilowatts	\$270	\$5150-\$680



Appendix III  
 Rule-Making Specific Statutory Requirements for OMB's 1997 Report

Transfer rules*	Department of Agriculture	Food Stamp Program: Certification Provisions of the Mickey Leland Childhood Hunger Relief Act	\$7-\$207
		Food Stamp Program: Child Support Deduction	\$125-\$145
	Department of Health and Human Services	Medicaid Program: Limitations on Aggregate Payments to Disproportionate Share Hospitals; Federal Fiscal Year 1995	\$1,105
		Individual Market Health Insurance Reform; Portability From Group to Individual Coverage; Federal Rules for Access in the Individual Market; State Alternative Mechanisms to Federal Rules	\$50-\$200
		Medicare Program; Physician Fee Schedule Update for Calendar Year 1997 and Physician Volume Performance Standard Rates of Increase for Federal Fiscal Year 1997	\$250
		Medicare Program; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for 1997	\$610
	Department of Justice	Inspection and Expedited Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures	\$205
	Department of Veterans Affairs	Compensation for Disability Resulting From Hospitalization, Treatment, Examination, or Vocational Rehabilitation	\$186.5-\$504.3
	Departments of Health and Human Services, Labor and the Treasury	Interim Rules for Health Insurance Portability for Group Health Plans	\$50-\$200

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**Appendix III**  
**Rules Meeting Specific Statutory Requirements for OMB's 1997 Report**

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Social Security Supplemental Security Administration Income; Determining Disability for A Child Under Age 18	\$90-\$185
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\*According to OMB, transfer rules are payments from one group to another that redistribute wealth. Therefore, OMB said, there are no real costs to society as a whole; the "benefits" of these rules are equal to the "costs."

Source: Regulatory Information Service Center and Federal Register.

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## Rules Meeting Specific Statutory Requirements for OMB's 1998 Report

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Section 625(a) of the Treasury and General Government Appropriations Act for fiscal year 1998 required OMB to estimate the costs and benefits of each rule "that is likely to have a gross annual effect on the economy of \$100,000,000 or more in increased costs" in a report to Congress. In its February 5, 1999, report, OMB interpreted this requirement broadly to include all final rules promulgated by an executive branch agency and reviewed by OIRA between April 1, 1997, and March 31, 1998, that met any of the following:

- Rules designated as "economically significant" under section 3(f)(1) of Executive Order 12866;
- Rules designated as "major" under 5 U.S.C. 804(2); and
- Rules designated as meeting the threshold under title II of the Unfunded Mandates Reform Act (2 U.S.C. 1531-1538).

A rule could meet one or more of these criteria and not have a gross annual effect on the economy of \$100 million or more in increased costs. For example, a rule may be economically significant because it has a \$100 million beneficial effect on the economy or because it has material effect on a sector of the economy, the environment, or state or local governments.

Table IV.1 lists the 22 rules that OIRA reviewed during the 1-year time frame that we determined had met the specific requirements of the statute—i.e., rules that the agencies believed were likely to have a gross annual effect on the economy of \$100 million in increased costs. Thirteen of the rules were "social" regulations (which include environmental, health and safety rules) and nine were "transfer" rules (which involve payments from one group to another that redistribute wealth).

Appendix IV  
Rules Meeting Specific Statutory Requirements for OMB's 1988 Report

Table IV.1: Rules Likely to Have Gross Effect on the Economy of \$100 Million In Increased Costs

Type of rule	Department or agency	Rule	Costs (in millions)	Benefits (in millions)
Social rules	Department of Agriculture	Environmental Quality Incentives Program	\$200	\$290
	Department of Energy	Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers	\$260	\$700-\$760
	Department of Health and Human Services	Quality Mammography Standards*	\$40	\$200-\$280
	Department of Labor	Respiratory Protection	\$120	\$560-\$2,700
	Departments of Health and Human Services, Labor and the Treasury	Interim Rules for Mental Health Parity	\$464	Not estimated
	Environmental Protection Agency	Emission Standards for Locomotives and Locomotive Engines*	\$60	\$230-\$300
		Control of Emissions of Air Pollution from Highway Heavy-Duty Engines	\$140	\$220-\$990
		Effluent Limitations Guidelines: Pulp and Paper	\$250	\$10-\$250
		National Emission Standards for Hazardous Air Pollutants for Sources Category: Pulp and Paper Production	\$120	(\$970)-\$1,100
		Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Hospital/Medical/Infectious Waste Incinerators	\$71-\$148	Not estimated
		National Ambient Air Quality Standards for Particulate Matter	\$17,000	\$11,000-\$59,000
		National Ambient Air Quality Standards for Ozone	\$4,500	\$770-\$4,300

Appendix IV  
Rules Meeting Specific Statutory Requirements for OMB's 1996 Report

		Addition of Facilities in Certain Industry Sectors, Toxic Chemical Release Reporting, Community Right-to-Know	\$143-\$226	Not estimated
Transfer rules*	Department of Agriculture	Child and Adult Care Food Program: Improved Targeting of Day Care Home Reimbursement	\$357-\$876	
		Amendments to the Peanut Pounding Quota Regulations <sup>†</sup>		
	Department of Health and Human Services	Medicaid Program: Coverage of Personal Care Services	\$340-\$1,540	
		Medicare Program: Changes to the Inpatient Prospective Payment Systems and Fiscal Year 1998 Rates	\$6,000	
		Medicare Program: Fee Schedule for Calendar Year 1998; Payment Policies and Relative Unit Adjustments	\$160-\$780	
		Medicare Program: Limit on the Valuation of a Depreciable Asset Recognized as an Allowance for Depreciation and Interest After Change of Ownership	\$91-\$114	
		Medicare Program: Schedule of Limits on Home Health Agency Costs Per Visit for Cost Reporting Periods Beginning on or after October 1, 1997	\$570	
		Medicaid Program: State Allotment for Payment of Medicare Part B Premiums for Qualifying Individuals: Federal Fiscal Year 1998	\$200-\$400	
	Department of Justice	Affidavit of Support on Behalf of Immigrants	\$301-\$1,701	

\*Although the annualized costs for this rule is less than \$100 million, according to the agency, initial costs will exceed \$100 million and then decrease. This rule is also an unfunded mandate.

†Although the annualized costs for this rule are less than \$100 million, according to the agency there are a number of years where the associated costs will be more than \$100 million. In addition, this rule is an unfunded mandate.

‡According to OMB, transfer rules are payments from one group to another that redistribute wealth. Therefore, OMB said, there are no real cost to society as a whole; the "benefits" of the rules are equal to the "costs."

§The cost estimate for this rule is reported only in the aggregate. The total cost associated with the Amendments to the Peanut Pounding Quota Regulations are \$1.75 billion (1996-2002). In order to compare and summarize the annual costs of all the rules, the cost associated with this rule will not be included.

Source: Regulatory Information Service Center and Federal Register.

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**Background**  
**Executive Summary**

No. 1274

April 20, 1999

## REGULATORY RIGHT TO KNOW: TRACKING THE COSTS AND BENEFITS OF FEDERAL REGULATION

ANGELA ANTONELLI

Since fiscal year (FY) 1997, Congress has required the White House's Office of Management and Budget (OMB) to report each year on the costs and benefits of federal regulation as a condition of its annual appropriations. Because of the contributions these reports have made to understanding the effects of federal regulation, bipartisan support in Congress now exists for making this report process permanent and for strengthening it. Toward that end, on January 19, 1999, Senators Fred Thompson (R-TN) and John Breaux (D-LA) introduced the Regulatory Right to Know Act of 1999, S. 59. And, on March 11, 1999, Representatives Tom Biley (R-VA), David McIntosh (R-IN), Gary Condit (D-CA), Charles Stenholm (D-TX), and 13 other Republicans and 14 other Democrats introduced a companion bill, H.R. 1074.

These legislative proposals reflect Congress's commitment to supporting the "public's right to know about the costs and benefits of federal regulatory programs." Unfortunately, federal regulators have been doing a woefully inadequate job of providing the public with useful information about the scope, scale, and impact of federal regulatory activity. Indeed, the size and frenetic pace at which the federal government produces new regulations strongly suggests the need for accountability and common sense. In FY 1998, some 53

federal departments and agencies—and 126,146 federal employees—spent approximately \$17 billion in writing and enforcing federal regulations.

As Table 1 summarizes, the U.S. General Accounting Office reports that, between April 1, 1996, and March 31, 1999, federal regulatory agencies issued more than 12,925 final rules and sent them to Congress for review. Of these, 188 were major final rules that each carried an estimated annual cost to the economy of more than \$100 million, for a total of at least \$18.8 billion in new regulatory taxes in the past three years. And this does not even account for the costs of the remaining 12,737 final rules.

The Regulatory Right to Know Act of 1999 builds on Section 625 of the Treasury and General Government Appropriations Act of 1998 (P.L. 105-61), which directs the OMB to prepare a

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regulatory accounting report. Similar reporting requirements also were in the 1996 and 1997 OMB appropriations laws, and these reports have been delivered to Congress. The most recent—the OMB's second annual report—was published on February 5, 1999.

The Regulatory Right to Know Act also builds on important lessons learned from the OMB's two annual reports to Congress. The act would require the OMB to report not only aggregate estimates of costs and benefits, but also the costs and benefits of individual rules because, as the OMB itself notes, the "substance is in the details, not in the total"; it is more useful to assess whether individual regulatory actions in and of themselves generate more benefits than costs. In addition, because agencies lack consistency in their benefit-cost methods of analysis and tend to overestimate benefits and underestimate costs, the OMB would be required to develop methods to standardize measures of costs and benefits, and the OMB's regulatory accounting statement would be subject to both peer review and public comment to make it more difficult for either the agencies or the OMB to engage in vast overstatements of benefits or underestimates of costs. Finally, the act would require the OMB to provide recommendations for the reform of regulatory programs.

The two OMB reports already sent to Congress demonstrate that such accounting not only is possible, but also has the potential to become an extremely useful accountability tool to help Members of Congress to ensure that regulatory investments maximize benefits while minimizing costs and achieve the greatest levels of protection for the money spent. The need for this approach is highlighted in a 1996 study by the Harvard Center for Risk Analysis, which concluded that, if regulatory agencies targeted their efforts more efficiently and

**Major Rules Sent to Congress  
April 1, 1996–March 31, 1999**

Fiscal Year	Major	Minor	Total
1996 <sup>1</sup>	35	2,024	2,059
1997	59	3,873	3,932
1998	70	4,666	4,736
1999 <sup>2</sup>	24	2,174	2,198
Total	188	12,737	12,925

Note: 1. Figures are from April 1, 1996, to September 30, 1996. GAO did not issue records prior to April 1, 1996.  
2. Figures are from October 1, 1998, to March 31, 1999.

Source: GAO, *Small Business Regulatory Enforcement Fairness Act Rules Report*.

reallocated their resources to solve the most serious problems first, as many as 60,000 more lives a year could be saved.

Americans have as much right to engage in dialogue over regulatory priorities and spending as they have to debate federal budget priorities and spending. The country's governors, mayors, and city and county officials as well as farmers and small businesses all strongly believe they have a right to more and better information to help them to participate more effectively in the process of making regulatory policy. Yet, today, unchecked, unaccountable federal regulators have little incentive to provide information that helps to facilitate such a debate. The Regulatory Right to Know Act of 1999 would begin to bring the hidden costs, benefits, and other less-than-obvious effects of federal regulation into the sunlight so that Congress and the public could assess their effectiveness more accurately and inspire regulators to make more sensible policy choices.

—Angela Antonelli is Director of The Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation.





The Heritage Foundation  
**Backgrounder**

No. 1274

April 20, 1999

## REGULATORY RIGHT TO KNOW: TRACKING THE COSTS AND BENEFITS OF FEDERAL REGULATION

ANGELA ANTONELLI<sup>1</sup>

Since fiscal year (FY) 1997, Congress has required the White House's Office of Management and Budget (OMB) to report each year on the costs and benefits of federal regulation as a condition of its annual appropriations. Because of the contributions these reports have made to understanding the effects of federal regulation, bipartisan support in Congress now exists for making this report process permanent and for strengthening it. Toward that end, on January 19, 1999, Senators Fred Thompson (R-TN) and John Breaux (D-LA) introduced the Regulatory Right to Know Act of 1999, S. 59. And, on March 11, 1999, Representatives Tom Bliley (R-VA), David McIntosh (R-IN), Gary Condit (D-CA), Charles Stenholm (D-TX), and 13 other Republicans and 14 other Democrats introduced a companion bill, H.R. 1074.

These legislative proposals reflect Congress's commitment to supporting the "public's right to

know about the costs and benefits of federal regulatory programs."<sup>2</sup> Unfortunately, federal regulators have been doing a woefully inadequate job of providing the public with useful information about the scope, scale, and impact of federal regulatory activity. S. 59 and H.R. 1074 would empower the public with such information so that they can hold regulators accountable for what they are doing and demand that they do a better job—including improving efforts to protect public

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1. This paper is adapted from the following works by the author: Statement of Angela Antonelli before the House Committee on Government Reform, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, on the Regulatory Right to Know Act of 1999, 106th Cong., 1st Sess., March 24, 1999; Letter to John F. Morrill III, Branch Chief, Human Resources, Office of Information and Regulatory Affairs, Office of Management and Budget, October 8, 1998; and, with Susan Dudley, "Shining A Bright Light on Regulators: Tracking the Costs and Benefits of Federal Regulation," Heritage Foundation Backgrounder No. 1142, September 30, 1997.
2. Statement of the Honorable David McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, on the Regulatory Right to Know Act of 1999, 106th Cong., 1st Sess., March 24, 1999.

Table 1 81274

**Major Rules Sent to Congress  
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Source: GAO, *Small Business Regulatory Enforcement Fairness Act Rules Report*.

hidden costs, benefits, and other less-than-obvious effects of federal regulations into the sunlight so that Congress and the public could judge their effectiveness more effectively and hold regulators accountable for making more sensible policy choices.

#### WHY REGULATORY RIGHT TO KNOW IS IMPORTANT

The Regulatory Right to Know Act represents an important way in which Congress, policymakers, and the public can better understand the magnitude and impact of federal regulatory programs. Empowered with such information, Members of Congress, state and local officials,

and many others would be better equipped to participate in setting the country's regulatory priorities and making sure Americans enjoyed the highest levels of protection for dollars spent. Every dollar spent on ineffective, unnecessary, or duplicative regulation is one less dollar that the states, communities, and families have available for other important priorities, such as health care, education, or police and fire services.

Indeed, the size and frenetic pace at which the federal government produces new regulations strongly suggests the need for accountability and common sense. In FY 1998, some 53 federal departments and agencies—and 126,146 federal employees—spent approximately \$17 billion in writing and enforcing federal regulations.<sup>3</sup>

As Table 1 summarizes, the U.S. General Accounting Office (GAO) reports that, between April 1, 1996, and March 31, 1999, federal regulatory agencies issued more than 12,925 final rules

health, safety, and the environment. The need for this approach is highlighted in a recently published Harvard Center for Risk Analysis study, which concludes that, if regulatory agencies targeted their efforts more efficiently and reallocated their resources to solve the most serious problems first, as many as 60,000 more lives a year could be saved.<sup>3</sup>

Americans have as much right to engage in dialogue over regulatory priorities and spending as they have to debate federal budget priorities and spending. The country's governors, mayors, and city and county officials as well as farmers and small businesses all strongly believe they have a right to more and better information to help them to participate more effectively in the process of making regulatory policy.<sup>4</sup> Yet, today, unchecked, unaccountable federal regulators have little incentive to provide information that helps to facilitate such a debate. The Regulatory Right to Know Act of 1999 would begin to bring the

3. Tammy O. Teags and John D. Graham, "The Opportunity Costs of Haphazard Societal Investments in Life-Saving," in Robert W. Hahn, ed., *Risks, Costs and Lives Saved: Getting Better Results from Regulation* (New York, N.Y.: Oxford University Press, 1996).

4. See letters of support for the Regulatory Right to Know Act of 1999 to the Honorable Tom Bliley from the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the International City/County Management Association, Alliance USA, American Farm Bureau Federation, the Business Roundtable, the National Association of Manufacturers, the National Federation of Independent Business, the Small Business Survival Committee, and the U.S. Chamber of Commerce.

NOTE: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

and sent them to Congress for review. Of these, 188 were major final rules that each carried an estimated annual cost to the economy of more than \$100 million, for a total of at least \$18.8 billion in new regulatory taxes in the past three years. And this does not even account for the costs of the remaining 12,737 final rules.

If government truly is accountable to the people, then people would be entirely reasonable in expecting some accounting for the impact of thousands of rules on individuals, consumers, and businesses—and on the economy more generally. Today, many of the costs of regulation remain hidden from public scrutiny. In its 1997 and 1998 reports to Congress on the costs and benefits of regulation, the OMB concluded that the regulations cost approximately \$300 billion per year.<sup>5</sup> Other estimates place the direct costs of compliance with regulations at more than \$700 billion annually.<sup>7</sup> Regardless of which estimate is more accurate, the reality is that regulations do impose costs, and that these costs are not insignificant. Indeed, put in some context, the costs of regulation could be equal to one-half of the federal annual direct taxes collected by the government, or in a range of \$3,000 to \$7,000 per household annually.

Although Congress has taken some modest steps toward demanding accountability and common sense from federal regulators, such as the Unfunded Mandates Reform Act (UMRA) of 1995 (P.L. 104-4) and the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996

(P.L. 104-121), it must take many more.<sup>8</sup> These two statutes fall short because they do not provide the public with much-needed information and analysis about the impact of regulations or regulatory programs that could be used, in effect, to hold regulators accountable for their decisions. A January 1999 GAO report reminds Congress that it cannot escape some blame for creating the burden and complexities of the current system.<sup>9</sup> Congress must take steps to give itself the tools it needs to create a more responsive, better-managed government. The Regulatory Right to Know Act's regulatory accounting system would begin to provide that information and analysis on the impact of regulations—whether it be proposals for new regulations or eliminating or modifying existing regulations—that would help Congress and further empower the public to debate and decide the best allocation of national resources. A more informed, democratic process would enable the federal government to devote *more*, not fewer, resources to the types of policies that would save more lives, improve the quality of life and of the environment for all Americans, and allow all Americans to be more prosperous.

#### BUILDING ON LESSONS LEARNED FROM OMB REPORTS

The Regulatory Right to Know Act of 1999 builds on Section 625 of the Treasury and General Government Appropriations Act of 1998 (P.L. 105-61), which directs the OMB to prepare a regulatory accounting report.<sup>10</sup> Similar reporting requirements also were in the 1996 and 1997

5. See Melinda Warren and William F. Lauber, "Regulatory Changes and Trends: An Analysis of the 1999 Federal Budget," Center for the Study of American Business *Regulatory Budget Report* No. 21, November 1998.
6. See Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress on the Costs and Benefits of Federal Regulation, 1998*, and *Report to Congress on the Costs and Benefits of Federal Regulation*, September 30, 1997.
7. See Thomas Hopkins, "Regulatory Costs in Profile," *Policy Sciences*, Vol. 31, No. 4 (December 1998), pp. 301-320.
8. For background on these statutes, see Angela Antonelli, "Regulation: Demanding Accountability and Common Sense," in Stuart M. Butler, Ph.D., and Kim R. Holmes, Ph.D., eds., *Issues '98: The Candidates Briefing Book* (Washington, D.C.: The Heritage Foundation, 1998), "Promises Unfulfilled: Unfunded Mandates Reform Act of 1995," *Cato Institute Regulation* No. 2 (1996), and "Needed: Aggressive Implementation of the Congressional Review Act," *Heritage Foundation FYL* No. 131, February 19, 1997.
9. U.S. General Accounting Office, "Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit," January 1999. GAO/GGD-99-20.

OMB appropriations laws, and these reports have been delivered to Congress.<sup>11</sup> The most recent—the OMB's second annual report—was published on February 5, 1999.<sup>12</sup>

These OMB reports demonstrate that such accounting not only is possible, but also has the potential to become an extremely useful accountability tool to help Members of Congress to ensure that regulatory investments maximize benefits while minimizing costs and achieve the greatest levels of protection for the money spent.

As Members of Congress contemplate whether to make permanent the annual requirement that the OMB track costs and benefits of federal regulation, they should consider some of the important lessons learned from the first two OMB reports.

**Lesson #1: Aggregate costs and benefits of rules are not nearly as important as the assessment of the costs and benefits of individual rules.** Although aggregate estimates provide a general context for understanding the impact of regulation, the OMB itself notes that the "substance is in the details, not in the total,"<sup>13</sup> which means examining individual regulations. Studies may suggest that, in the

aggregate, benefits outweigh costs but even more useful to the public and policymakers are studies that also examine individual regulations and determine whether each regulatory action in and of itself generates more benefits than costs.

The OMB's 1998 aggregate cost and benefit estimates differ significantly from its 1997 estimates. The primary reason for the difference is the OMB's decision to include a report by the Environmental Protection Agency (EPA) under Section 118 of the Clean Air Act (the "Section 812 report"). Many public commenters have expressed serious reservations about the OMB's use of these estimates because of serious methodological deficiencies.<sup>14</sup> The OMB, to its credit, actually does suggest that problems exist with the inclusion of the EPA estimates in its 1998 report. For example, because of the inclusion of the EPA's Section 812 Clean Air Act report, the OMB notes that the "monetized benefit estimates associated with reducing exposure to fine particulate matter (PM) account for 90 percent of the total estimated benefits."<sup>15</sup> This leads to two observations: (1) much of the EPA's stated benefit of the

10. "For calendar year 2000, the Director of the Office of Management and Budget shall prepare and submit to Congress, with the budget, (1) an estimate of the total annual costs and benefits of Federal rules and paperwork to the extent feasible (A) in the aggregate, (B) by agency and agency program, and (C) by major rule, (2) an analysis of impacts of Federal regulation on State, local and tribal government, small business, wages, and economic growth; and (3) recommendations for reform."

11. See Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, and *Report to Congress on the Costs and Benefits of Federal Regulation*, September 30, 1997. In these reports, Congress directs the OMB to provide "1) estimates of the total annual costs and benefits of federal regulatory programs, including quantitative and non-quantitative measures of regulatory costs and benefits, 2) estimates of the costs and benefits (including quantitative and nonquantitative measures) of each rule that is likely to have a gross annual effect on the economy of \$100,000,000 or more in increased costs, 3) an assessment of the direct and indirect impacts of Federal rules on the private sector, State and local government, and the Federal Government; and 4) recommendations from the Director and a description of significant public comments to reform or eliminate any Federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the Nation's resources."

12. See Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998.

13. Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, September 30, 1997, p. 21.

14. See Angela Antonelli, letter to John F. Morrill III, October 8, 1998; Susan Dudley, "Comments on OMB's Draft Report to Congress on the Costs and Benefits of Federal Regulations," Regulatory Studies Center, Mercatus Center, George Mason University; and Randy Lutter, "An Analysis of the Use of EPA's Clean Air Benefit Estimates in OMB's Draft Report on the Costs and Benefits of Regulation," American Enterprise Institute and the Brookings Institution, Joint Center for Regulatory Studies, *Comment No. 98-2* (October 1998).

Clean Air Act over the past 20 years (and of regulatory activity overall) now is to be derived only from its rulemaking on fine particulate matter;<sup>16</sup> and (2) by extension, many of the other Clean Air Act regulations issued over the past 20 years often had costs that far exceeded their benefits. Even though it recognizes problems with the EPA's estimates, however, the OMB still incorporates those estimates in its assessment.

The EPA's review of the costs and benefits of the Clean Air Act between 1970 and 1990 would have greater credibility and value if it examined individual regulations to determine which regulatory actions had produced significant benefits and which had been less successful. For this reason, the findings of a study by Robert W. Hahn of the American Enterprise Institute are much more useful to policymakers than the EPA's Clean Air Act study. The Hahn study, also used by the OMB, reviews 106 regulations and, as the OMB notes, concludes that

not all agency rules provided net benefits. In fact, less than half of all final rules provided benefits greater than costs...a few rules provided most of the net benefits.<sup>17</sup>

**What the Right to Know Act Would Do.** As Professor Thomas Hopkins observes in recent congressional testimony, "if we want to continue shooting ourselves in the feet, collectively, I think it only fair that we have a count of the bullet holes."<sup>18</sup> The Regulatory Right to Know Act would require the OMB to report not just the aggregate costs and benefits of rules, but also the costs and benefits of

individual rules. This is precisely the type of detailed information that regulators and policymakers need as they strive to make better decisions in the future.

**Lesson #2: Regulators have incentives to understate costs and overstate benefits.** In its second annual report the OMB includes some retrospective cases studies. They highlight the importance that agencies be held accountable for reevaluating individual regulations and regulatory programs to determine whether they achieve the benefits intended as well as their cost. The OMB reports that, if such agencies as the Occupational Safety and Health Administration and the National Highway and Traffic Safety Administration were to step back and look at how their regulations are being implemented, they could find that some rules had not produced the benefits predicted or that the agencies could have had significantly underestimated or overestimated the benefits and costs of rules.<sup>19</sup> Indeed, one should not find it surprising that when an agency is interested in justifying a regulatory action, overstated benefits and understated cost estimates often are the result. Congress should expect agencies routinely to undertake such retrospective studies and use their findings in future decision-makings, including whether it is necessary to reform or eliminate any existing programs.

**What the Right to Know Act Would Do.** By requiring aggregate estimates of costs and benefits, as well as estimates for individual rules, the proposed Regulatory Right to Know Act would require, by necessity, the OMB to consider and incorporate data from any retrospective studies done by agencies or any other

15. Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, p. 29.

16. See Angela Antonelli, "Can No One Stop the EPA?" Heritage Foundation Backgrounder No. 1129, July 8, 1997.

17. Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, p. 25.

18. See statement of Thomas D. Hopkins, Rochester Institute of Technology, before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, 106th Cong., 1st Sess., March 24, 1999.

19. See Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, pp. 35-43.

credible source. Congress could strengthen this requirement by making sure that the OMB specifically summarizes in its report each retrospective study it uses, as it did in its 1998 report.

**Lesson #3: Independent regulatory agencies issue rules that have costs (and benefits) that should be counted.** In response to public comment, the OMB expanded the scope of economically significant rules, including, for example, rules sent to Congress as required by the Congressional Review Act. In doing so, the OMB acknowledged that independent regulatory agencies whose rules the OMB does not review under Executive Order No. 12866, such as the Federal Communications Commission and the Securities and Exchange Commission, also issue major rules. During 1997, approximately one-third of the major rules issued had come from these two agencies alone.<sup>20</sup>

When it comes to providing the public with information about their regulatory activities, the independent regulatory agencies and the OMB appear to interpret "independent" as "without need to be held accountable." Unfortunately, the OMB does not include the benefits or costs of these agencies' rules in aggregate totals or provide any estimates of economic impact in the absence of such estimates from the agencies. The purpose of the OMB's report on the benefits and costs of regulation is to address both the aggregate and individual benefits and costs of all federal regulations. To the extent that many independent agencies fail to do benefit-cost analyses, the OMB should develop its own estimates. It should not continue to ignore the economic impact of such rules—as it did in its second annual report with the statement,

Since we have used a criterion of using only agency or academic peer reviewed estimates, we conclude that the 41 GAO reports contain no information useful for estimating the aggregate costs and benefits of regulation.<sup>21</sup>

If the OMB continues to refuse to provide the analysis, Congress should make sure that independent agencies develop capabilities to evaluate the costs and benefits of their rules systematically before imposing them on an unsuspecting public.

**What the Right to Know Act Would Do.** The Regulatory Right to Know Act would not exempt the regulations of independent agencies from regulatory accounting or accountability. The proposal would do nothing, however, to change the fact that regulations issued by independent regulatory agencies are not subject to review by the OMB and thus the agencies make little or no effort to estimate their benefits and costs. Until independent regulatory agencies are expected to estimate the costs and benefits of their rules, or until the OMB offers its own estimates, little additional useful information about the costs of rules from independent agencies can or should be expected.

**Lesson #4: Agencies lack consistency in their benefit-cost methods of analysis.** Although it is true that it is no easy task to estimate the impact of regulations on society and the economy, the OMB acknowledges that the estimation challenges it faces reflect the huge inconsistencies in methods used by the various federal agencies in benefit-cost analysis. A May 1998 GAO report confirms this wide variation in agency economic analyses.<sup>22</sup>

The continuing inconsistency in benefit-

20. Angela Antonelli, "Two Years and 8,600 Rules: Why Congress Needs an Office of Regulatory Analysis," Heritage Foundation *Backgrounders* No. 1192, June 26, 1998.

21. Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, p. 62.

22. See U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142, May 1998.

cost methods reflects the fact that neither the President nor Congress has demanded better from the agencies. If the OMB's current "Best Practices" guidelines for benefit-cost analysis<sup>23</sup> were enforced, many of the problems in estimating benefits and costs would have been mitigated long ago. There is no reason that agencies cannot follow one set of guidelines. Congress's efforts to promote accountability should do nothing to interfere with efforts to promote greater, more consistent use of these guidelines.

**What the Right to Know Act Would Do.** The Regulatory Right to Know Act would help to move agencies toward the standardization of their benefit-cost data by requiring that the OMB, in consultation with the Council of Economic Advisers, issue guidelines to standardize measures of costs and benefits.

**Lesson #5: Because regulators and even the OMB have self-interest, independent reviews are essential.** Because the OMB maintains a centralized regulatory review function and regulatory experts, it made sense for Congress to ask the OMB to track the benefits and costs of regulation across the government. In assigning this reporting power to the OMB, however, Congress also reasonably expected to see some of the OMB's own expertise in the report, providing its own independent, professional judgment about the consistency, quality, and validity of agency benefit and cost estimates.

In its 1998 report, the OMB does a better job by conducting its own review of agency economic analyses for rules issued between April 1995 and March 1998. Nevertheless, in many cases, the OMB fails to critique or offer its own estimates (and/or incorporate any third-party studies) of the direct or indirect

impact of rules, such as the EPA's Clean Air Act estimates or the lack of benefit estimates for the EPA's Toxic Release Inventory rulemaking.<sup>24</sup> As part of the executive branch, the OMB may not be able to offer a truly independent review of agency analyses; thus, it is necessary to ensure that any OMB report be subject to outside independent reviews and made available for public comment. Both the comments of independent reviewers and of the public should be thoroughly summarized and presented by the OMB in any final report to Congress.

**What the Right to Know Act Would Do.** The proposals in the Regulatory Right to Know Act would make sure that future regulatory accounting statements are subject to public comment and peer review to make it considerably more difficult for either the agencies or the OMB to engage in the vast overstatement of benefits or underestimation of costs.

**Lesson #6: The OMB and regulators have a responsibility to develop recommendations for regulatory reform.** In response to public comments, the OMB's second annual report includes recommendations for the reform of certain regulatory programs, such as food safety, airbags, and drug labeling (see Appendix).<sup>25</sup> Initially, the OMB took the position of only including recommendations suggested to it by the public, but many commenters found this unacceptable. The only problem is that the OMB and other regulatory agencies have far more expertise and experience than average Americans in determining how effectively regulatory programs are functioning. The OMB and the other regulatory agencies must take the responsibility to provide the public with policy recommendations for public comment. Congress also should demand that that

23. The OMB developed, through an interagency process, a document explaining "Best Practices," which it issued on January 11, 1996. "Best Practices" sets the standard for high-quality economic analysis of regulation, whether in the form of a prospective regulatory impact analysis of a proposed regulation or a retrospective evaluation of a regulatory program.

24. Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, Table 9.

25. See Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, Chapter IV.

OMB report not only about efforts to reform or eliminate regulatory programs or rules, but also any initiatives on the part of agencies to expand or add new regulatory programs, and provide the public with an opportunity to comment on those proposals as well.

What the Right to Know Act Would Do: The Regulatory Right to Know Act would require the OMB to continue to provide recommendations to reform inefficient or ineffective regulatory programs or program elements

**Lesson #7:** The OMB and the regulators may not present information to Congress and the public in a way that will prove useful or helpful. Not surprisingly, just as self-interested agencies have incentives to understate costs and overstate benefits, they also have incentives to avoid accountability whenever possible. Thus, it should come as no surprise that the OMB's reports to Congress do not present information in the most easy-to-digest manner. For example, in its second annual report, the OMB makes no real effort to

- Summarize net benefits (that is, do the math) for most of its aggregate estimates or estimates of individual rules;
- Present a summary table comparing trends from year to year (that is, does not compare 1996 estimates with 1997 estimates of the benefits and costs of regulation); and
- Provide much, if any, economic context to the either the benefits or the costs of regulation.

This last omission is perhaps the most serious flaw. For example, when put in its proper context, such as relative to gross domestic product, the EPA 812 benefit estimates suggest that the annual economic benefits of the Clean Air Act alone exceed the combined economic output of the U.S. agriculture, forestry, fishing, and health care industries.

To its credit, the OMB does point out in its second annual final report that

the expected value of the estimated monetized benefit for 1990 is \$1.25 trillion per year. This estimate implies that the average citizen was willing to pay over 25 percent of her personal income per year to attain the monetized benefits of the Clean Air Act.<sup>26</sup>

When put in this context, the reason is clear that such estimates should be subject to more critical evaluation.

Congress must work to ensure that the information provided by the OMB and agency regulators be easily digestible and understandable to the average American. Regulators, serving as employees of the American people, have the fundamental responsibility to explain the ways in which rules impact individuals, households, businesses, and state and local governments in understandable terms so that, ultimately, it is Americans who decide what national priorities and spending levels should be.

What the Right to Know Act Would Do: The Regulatory Right to Know Act proposals would require the OMB to determine the net benefits for aggregate estimates and the estimates of individual rules, and to present such information for previous years. H.R. 1074 goes beyond S. 59, however, to make the presentation of the data more similar to the way the OMB already presents information in its annual federal budget—reporting four years of projected estimates of benefits and costs as well as the two previous years.

## CONCLUSION

Congress's experience to date with the OMB's regulatory accounting report shows that it is an extremely valuable tool for showing the way to achieve longer-term regulatory improvements. Congress must act now to make such accounting

<sup>26</sup> See Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulation*, 1998, p. 26.



reports, and the regulatory accountability that comes with them, permanent.

The Regulatory Right to Know Act would take a good step in this direction because it would (1) build on the previous OMB accounting statements; (2) make such an accounting statement permanent; (3) tie it to the federal budget so that federal regulators take it seriously and know they would be held accountable annually for their priorities and spending, and, most important, (4) empower the public with information to debate regulatory priorities and spending more effectively, just as they debate federal budget priorities and spending each year.

Congress should continue to build and improve on this framework in the years to come. The public stands only to benefit by improving the ability of the federal regulatory system to determine the effectiveness of its programs and to do a better job establishing regulatory priorities—in order to ensure America's national resources are allocated in ways that maximize public health and well-being.

—Angela Antonelli is Director of The Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation.

**APPENDIX:  
REGULATORY REFORM RECOMMENDATIONS ENDORSED BY THE OMB'S 1998  
REPORT TO CONGRESS**

Section 625 of the Treasury and General Government Appropriations Act, 1998 (PL 105-61), directed the OMB to issue a second regulatory accounting report that, among other things, would include

recommendations from the Director and a description of significant public comments to reform or eliminate any Federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the Nation's resources.

The following is a summary of the recommendations "endorsed" by the OMB in its second report to Congress. Unless otherwise noted, the descriptions are extracted directly from Chapter IV of the report.

**NEW INITIATIVES**

**Electricity Restructuring.** The Clinton Administration has transmitted a bill to Congress to restructure the electricity industry. Under electricity restructuring, competition would replace regulation as the primary mechanism for setting prices for generating electricity. Utilities would be required to open up their distribution and transmission wires to all qualified sellers. The transmission and distribution of electricity would continue to be regulated, however, because they would remain under monopolies for the foreseeable future; the system would be restructured, not completely deregulated.

**EXISTING PROGRAMS**

**Department of Agriculture, Food Safety and Inspection Service.** To convert current "command-and-control" regulations governing the production of cooked beef products, uncured meat patties, and certain poultry products to performance standards.

**Department of Health and Human Services, Food and Drug Administration.** To make over-

the-counter drug labels more informative and understandable to consumers.

**Department of Housing and Urban Development.** To provide consumers with increased disclosure concerning mortgage brokers' function and fees, and to clarify for mortgage brokers the application of the Real Estate Settlement Procedures Act to mortgage broker fees.

**Department of the Interior.** To delist or down-list (reclassify from endangered to threatened), where appropriate, approximately 40 species that have been so identified, to ease the burden created by the Endangered Species Act.

**Department of Transportation, National Highway Traffic and Safety Administration.** To review and evaluate the actual benefits, costs, and overall effectiveness of existing standards and regulations for improving the safety performance of air bags (Standard 208), the dynamic side-impact requirements (Standard 214), and the reflective marking on heavy truck trailers to enhance their detectability at night or under other conditions of reduced visibility (Standard 108).

**Department of Labor, Occupational Safety and Health Administration.** To revise and simplify its injury and illness reporting and record-keeping system in order to improve the quality and utility of the data and exempt small businesses in low-hazard industries.

**Department of Labor, Office of Federal Contract Compliance Programs.** To streamline, clarify, and reduce the paperwork burden of regulations that govern the nondiscrimination and affirmative action obligations for federal contractors and subcontractors.

**Environmental Protection Agency, Office of Solid Wastes and Emergency Response.** To exempt low-risk wastes from the full management requirements designed for high-risk hazardous wastes.

Pension Benefit Guaranty Corporation. To continue its proposal for a new simplified defined benefit plan that removes some of the obstacles that discourage small businesses from adopting

such plans and look at ways to revitalize defined-benefit systems for larger employers and their workers



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**Memorandum**

April 15, 1999

TO : Honorable Fred Thompson, Chairman  
Senate Committee on Governmental Affairs

FROM : Morton Rosenberg  
Specialist in American Public Law  
American Law Division

SUBJECT : Substantiality of OMB Objections to Vesting Authority in a Proposed  
Congressional Office of Regulatory Analysis to Obtain Information From An  
Agency During the Pendency of An Informal Rulemaking Proceeding

On April 22, 1999, your Committee will conduct hearings on a proposal to create a Congressional Office of Regulatory Analysis (CORA), an independent legislative branch entity that would function as a screening body for the Congress to assist it in determining which major or non-major agency rules may need special congressional scrutiny and possible veto through existing legislative mechanisms. Legislation proposing a similar screening body was introduced in the Senate<sup>1</sup> and the House<sup>2</sup> in the 105<sup>th</sup> Congress but did not receive floor consideration in either House.

Under those bills, the Director of CORA would be charged with analyzing agency regulations, both major and non-major, and evaluating their potential costs and benefits. In developing such regulatory impact analyses the Director would be "authorized to secure information, data, estimates and statistics directly" from all Executive departments and agencies, including the Office of Management and Budget (OMB) and independent regulatory agencies. All such governmental entities are enjoined to "promptly furnish the Director any available materials which the Director determines to be necessary in the performance of" his statutory functions, "other than material the disclosure which would be

<sup>1</sup> See S. 1675, introduced by Senators Shelby and Bond, 144 Cong. Rec. S 1007 (daily ed. Feb. 25, 1998).

<sup>2</sup> See H.R. 1704, introduced by Reps. Kelly and Talent, 143 Cong. Rec. H 3201 (daily ed. May 22, 1997). The bill was considered by both the House Judiciary and Government Reform and Oversight Committees and different versions were reported by each Committee. See H. Rept. No. 105-441, Parts 1 and 2 (105<sup>th</sup> Cong., 2d Sess.) (1998). For a description and discussion of the differing versions, see Morton Rosenberg, "Congressional Review of Agency Rulemaking: A Brief Overview and Assessment After Three Years," CRS Report No. RL 30116, at 7-8 (March 31, 1999).

a violation of law."<sup>3</sup> In commenting on similar provisions of H.R. 1704, the Director of OMB concluded that the Administration would oppose the bill because these provisions would have "potential negative effects on the development of regulations by the Executive branch."<sup>4</sup>

The OMB Director expressed the specific concern that the CORA's evaluative efforts might require information from an agency or OMB on rules that had not yet become final under the Administrative Procedure Act (APA) (*i.e.*, "during the predecisional process when a regulation is under agency staff development") which would disclose agency deliberations and thereby "undermine the candid exchange of views within the Executive Branch, and could potentially jeopardize the careful rulemaking process long established through the Administrative Procedure Act over the past 50 years." The OMB Director characterized the proposed legislation as an attempt to intrude CORA into "the rulemaking process itself," an alleged departure from the historic practice of Congress "in which it oversees Executive branch regulatory decisions *after* those decisions are made in accordance with established statutory administrative procedures." (emphasis added).

You have requested a critical analysis of the substantiality of OMB's objections. It is concluded, first, that the neither H.R. 1704, commented on by the OMB Director, nor S. 1675, appears to expressly contemplate CORA review of agency rules that have not yet become final. However, assuming that S. 1675 can be read to authorize the CORA to secure agency information during the pendency of a rulemaking proceeding, or that future proposals will specifically authorize it, it is further concluded that Congress has the constitutional authority to provide the means of access to such information in support of its legislative and oversight functions.

## Discussion

The OMB Director's concerns may be tested against the formidable array of legal and historical precedent that buttress Congress's expansive oversight and investigative purview. Numerous Supreme Court precedents establish and support a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees have virtually plenary power to compel information needed to discharge its legislative function from executive agencies, private persons and organizations; and within certain constraints, the information so obtained may be made public. In its discretion, Congress may delegate its information gathering authority to an appropriate surrogate.

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<sup>3</sup> See Section 3 (d) (1) and 4 (a) (3) and (4) of S. 1675. The CORA would not be vested with subpoena power under the Senate bill.

<sup>4</sup> Letter to the Honorable Henry A. Waxman from Franklin D. Raines, Director, OMB, dated April 8, 1998.

More particularly, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress.<sup>5</sup> Thus, in *Eastland v. United States Servicemen's Fund* the Court explained that "[t]he scope of its power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."<sup>6</sup> In *Watkins v. United States*, the Court further described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."<sup>7</sup> The Court went on to emphasize that Congress' investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."<sup>8</sup> "[T]he first Congresses", it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"<sup>9</sup> and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered".<sup>10</sup> Accordingly, the Court stated, it recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government".<sup>11</sup> Moreover, in a variety of investigative proceedings congressional committees have in practice fleshed out in particular instances the wide range of access to informational matter that is required.<sup>12</sup>

<sup>5</sup> *E.g.*, *McGrain v. Daugherty*, 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); see also, *United States v. A.T.T.*, 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

<sup>6</sup> 421 U.S. at 504 n. 15 (quoting *Barenblatt, supra*, 360 U.S. at 111).

<sup>7</sup> 354 U.S. at 187.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 182.

<sup>10</sup> *Id.* at 194-95.

<sup>11</sup> *Id.* at 200 n. 33.

<sup>12</sup> See: *e.g.*, "Contempt of Congress Against Franklin L. Haney," H. Rept. No. 105-792, 105<sup>th</sup> Cong., 2d Sess. (1998) (rejecting claims of attorney-client privilege); "Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)", H. Rept. No. 104-598, 104<sup>th</sup> Cong., 2d Sess. (1996) (rejecting claims of executive privilege and attorney and work product privilege); "Refusal of William H. Kennedy, III To Produce Notes Subpoenaed By The Special Committee to Investigate Whitewater Development Corporation and Related Matters", Sen. Rept. No. 104-191, 104<sup>th</sup> Cong., 1st Sess. 9-19 (1995); (rejecting claim of attorney-client privilege); "Proceedings Against Ralph Bernstein and Joseph Bernstein", H. Rept. No. 99-462, 99<sup>th</sup> Cong., 2d Sess. 13, 14 (1986) (rejecting claim of attorney-client privilege); Hearings, "International Uranium Control", Before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95<sup>th</sup> Cong., 1st Sess. 60, 123 (1977). Also see generally, Morton Rosenberg, "Investigative Oversight: An Introduction to the (continued...)"

Finally, Congress on occasion has found it necessary and appropriate to delegate information gathering, investigative, and reporting functions to governmental entities outside the body to assist it in performing its legislative functions. Under 31 U.S.C. 716 (a) (1994), for example, all agencies are directed to provide the Comptroller General any information he "requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information." If such information is not provided within a reasonable period the Comptroller General may commence formal actions to compel inspection of the records in question which could culminate in a civil action to compel production, and a court may punish failure to obey a production order as a contempt of court. 31 U.S.C. 716 (b). Another example is the Commission on Civil Rights which has been vested with broad authority to gather information through hearings and investigations (including power to issue and seek court enforcement of subpoenas), and to report to Congress with respect to civil rights matters. See 42 U.S.C. 1974 (a) (1994). The Supreme Court has held generally that investigative and informative powers are of the kind that either House of Congress can delegate to one of its committees and therefore can be received and exercised by appointees and designees who are in the legislative branch. *Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976). It has specifically upheld the exercise of such powers by the Commission on Civil Rights in *Hannah v. Larche*, 363 U.S. 420, 425 (1960). There the Court noted that since the Commission was not vested with substantive regulatory or enforcement authority, its investigative hearings are closer in nature of to those of a congressional committee. As a consequence the claims of Commission witnesses that they were entitled to the rights of witnesses in adjudicatory proceedings, such as cross-examination, were rejected, the Court holding that "only infrequently have witnesses...[in congressional hearings] been afforded procedural rights normally associated with an adjudicatory hearing."

It is in light of these legal and historical precedents that OMB's objections must be assessed.

OMB appears to argue that the proposed CORA's regulatory impact studies would extend not only to final rules, but to rules still in the development stage. This would therefore subject to CORA scrutiny all documents containing opinions, recommendations or advice about agency decisions regarding pending rules. Shielding such information from such scrutiny, it could be asserted, is necessary because otherwise early disclosure would discourage open, frank discussions on matters of policy amongst agency officers and employees, undermine an ongoing proceeding, and lead to the premature disclosure of proposed policies before they are finally adopted. However, nothing in the proposed bills authorizes the CORA Director to seek information for impact analyses on any rule other than final rules that have been reported to Congress pursuant to the Congressional Review Act (CRA), 5 U.S.C. 801 et seq. (West Suppl 1998). Sections 2 (2), 2 (3), 3 and 4 those bills make it clear that the new CORA functions were tied to and meant to be integrated with the CRA process. Under the CRA scheme, congressional review actions do not commence until an agency reports a final rule to the Congress or it is published in the Federal Register. 5 U.S.C. 801 (4)(1). Thus, there is no apparent congressional intent to intervene in ongoing rulemaking proceeding. However, even assuming that the CORA bills may be read to allow such interventions, or that future proposals will explicitly allow it, there would appear to be

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<sup>12</sup>(...continued)

Law, Practice and Procedure of Congressional Inquiry", CRS Report No. 95-464A (April 7, 1995).

no legal obstacle to such congressional oversight. Indeed, a close reading of the OMB Director's letter reveals that the objections being raised are exclusively policy-based concerns and not legal issues.

OMB appears to be attempting to establish some species of agency privilege for use against congressional oversight efforts. The assertion, however, that such internal communications need to be "frank" and "open" does not lend it any special support. Nor does coupling that characterization with the notion that those communications were part of a "deliberative process" add any weight to the argument. In effect, the OMB Director uses a term of art that would attempt to justify a withholding from Congress on the same grounds that an agency would use to withhold such documents from a citizen requester under Exemption 5 of the Freedom of Information Act (FOIA).<sup>13</sup>

Such an argument is likely to be found to be without basis. As has been indicated above, Congress has vastly greater powers of investigation than that of citizen FOIA requesters. Moreover, in the FOIA itself, Congress carefully provided that the exemption section "is not authority to withhold information from Congress".<sup>14</sup> The D.C. Circuit in *Murphy v. Department of the Army*,<sup>15</sup> explained that FOIA exemptions were no basis for withholding from Congress because of:

the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others . . . Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers.<sup>16</sup>

Further, the ability of an agency to assert the need for candor to ensure the efficacy of internal deliberations as a means of avoiding information demands would severely undermine the oversight process. If that were sufficient, an agency could disclose only that which supports its positions, and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence, and become little more than a set-piece of entertainment in which an agency decides what to present in a controlled "show and tell" performance.

Every federal official, including attorneys, could assert the imperative of timidity -- that congressional oversight, by holding up to scrutiny the advice he gives, will frighten him away from giving frank opinions, or discourage others from asking him for them. This argument,

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<sup>13</sup> 5 U.S.C. 553(b)(5)(1994).

<sup>14</sup> 5 U.S.C. 552(d).

<sup>15</sup> 613 F.2d 1151 (D.C. Cir. 1979).

<sup>16</sup> 613 F.2d at 1155-56, 1158.



not surprisingly, has failed over the years to persuade legislative bodies to cease oversight. When the Supreme Court discussed the "secret law" doctrine in *NLRB v. Sears, Roebuck & Co.*,<sup>17</sup> it addressed why federal officials -- including those giving legal opinions -- need not hide behind such fears:

The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of agency and becomes *its* responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports . . . [disclosure].<sup>18</sup>

The recent appeals court ruling in *In re Sealed Case (Espy)*<sup>19</sup> is worthy of special note. The case involved, *inter alia*, White House claims of executive and deliberative process privileges for documents subpoenaed by an independent counsel. At the outset of the appeals court's unanimous ruling, it carefully distinguished between the "presidential communications privilege" and the "deliberative process privilege." Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decisionmaking. But the deliberative process privilege applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred."<sup>20</sup> The court's recognition of the deliberative process privilege as a common law privilege which, when claimed by executive department and agency officials, is easily overcome, and which "disappears" upon the reasonable belief by an investigating body that government misconduct has occurred, may severely limit the common law claims of agencies against congressional investigative demands. A demonstration of need of a jurisdictional committee would appear to be sufficient, and a plausible showing of fraud, waste, abuse or maladministration would be conclusive.

Finally, it is difficult to persuasively contend that disclosure to Congress will do injury to the quality and integrity of the ongoing rulemaking proceeding. Rather, a rulemaking exercise would appear to be a quintessential object of legislative scrutiny. An agency may engage in substantive rulemaking only with an express grant of legislative authority.<sup>21</sup> Often such delegations vest broad discretionary power in an agency. Congress has made agency lawmaking subject to the procedural requirements of the Administrative

<sup>17</sup> 421 U.S. 132 (1975).

<sup>18</sup> 421 U.S. at 161 (emphasis in original).

<sup>19</sup> *In re Sealed Case (Espy)*, 121 F. 3<sup>rd</sup> 729 (D.C.Cir. 1997).

<sup>20</sup> 121 F. 3d at 745, 746; see also *id.* at 737-738 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government'").

<sup>21</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

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Procedure Act,<sup>22</sup> which has fostered widespread public participation in the process, and which the courts have attempted to ensure is meaningful. It has not, however, abdicated control over this vital function. Congress may intervene in an agency rulemaking proceeding at any point. It is not limited simply to withdrawing an agency's authority or to negating a particular rule by law after the fact. The courts have recognized that where the nature of a rulemaking is general policymaking it is akin to the legislative process<sup>23</sup> and that "[u]nder our system of government the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall."<sup>24</sup> It is therefore "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policymaking . . . Administrative agencies are expected to balance congressional pressure with the pressures emanating from all other sources."<sup>25</sup>

Arguably, then, the integrity, even the legitimacy, of an agency rulemaking is more damaged by the attempted avoidance of oversight inquiries directed at the basis for proposed agency policy actions of general concerns than it would be by the temporary distress of officials and employees over revelation of position taken during the policy development process. A commentator has succinctly made this point:

The legitimacy and acceptability of the administrative process depends on the perception of the public that the legislature has some sort of ultimate control over the agencies. It is through the Congress that the administrative system is accountable to the public. If members of Congress "be corrupt, others may be chosen." The public may not, however, directly remove agency officials. The public looks to its power to elect representatives as its input into the administrative process. The public will perceive restrictions on reducing the accountability of agency officials. This will negatively affect the legitimacy of agency actions, as well as seriously erode notions of popular sovereignty. Even administrators, who may not perceive legislative intrusions into the administrative process as being particularly desirable, recognize congressional supervision as a necessary function in a democratic society. The nature of the government requires that the legislature maintain a careful supervision over agency action.<sup>26</sup>

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<sup>22</sup> See 5 U.S.C. 553 (1994).

<sup>23</sup> *Assoc. of National Advertisers, Inc., v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied 447 U.S. 921 (1980).

<sup>24</sup> *Sierra Club v. Costle*, 657 F.2d 798, 400-401 (D.C. Cir. 1981).

<sup>25</sup> *Id.* at 409-410.

<sup>26</sup> Comment, *Judicial Limitation of Congressional Influence on Administrative Agencies*, 73 *Northwestern L. Rev.* 931, 941 (1979) (footnotes omitted).

Some heed also may be paid to the salutary admonition of the Third Circuit Court of Appeals for a court to be "sensitive to the legislative importance of Congressional committees on oversight and investigation and recognize their interest in the objective and efficient operation of regulatory agencies serves a legitimate and wholesome functions with which we should not lightly interfere."<sup>27</sup>

### Conclusion

OMB's objections to the information gathering provisions of proposed CORA legislation appear to lack a substantial legal basis in the face of Congress's virtually plenary constitutional authority to engage in oversight and investigation in support of its legislative function. Case law and historical practice support the delegation of such authority to congressional agents. OMB's policy concerns with respect to the undermining of the candor and integrity of the deliberative process should Congress seek information during the pendency of a rulemaking proceeding involve a matter of legislative discretion. In the past, Congress has engaged in oversight to determine the course of particular agency policymaking proceedings before a final agency action is taken, and at times has delegated such authority to appropriate surrogates. In some instances this may prove disruptive of agency decisional processes. But this would appear to be a choice well within the established congressional prerogative.

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<sup>27</sup> *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 611 (3d Cir. 1977).

# Improving Regulatory Accountability

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Robert W. Hahn  
and  
Robert E. Litan

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American Enterprise Institute  
for Public Policy Research  
and  
The Brookings Institution  
1997

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## Executive Summary

Although regulations resulting from legislative mandates 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—about half as much as outlays for federal discretionary programs. Yet, the economic impacts of federal regulation receive much less scrutiny than discretionary programs in the budget.

In 1986 Senator Ted Stevens added an unprecedented amendment to the Omnibus Consolidated Appropriations Act of 1987 that could have a major impact on how regulations are assessed in the future. That amendment requires the director of the Office of Management and Budget to provide Congress with estimates of the total annual benefits and costs of federal regulatory programs and estimates of the benefits and costs of individual regulations. That is the first statute to mandate such an accounting.

The purpose of this primer is to lay out the case for such regular accounting beyond the steps mandated by the Stevens Amendment. In particular, we hope to enable policymakers to make better use of available economic tools as they develop more reliable and accessible information on the benefits and costs of regulations.

We conclude that the federal regulatory process is in need of repair. Part of what is required is an improved accounting statement conveying the benefits and costs of regu-

lation. The Office of Management and Budget, the Council of Economic Advisers, or both organizations should produce a unified economic regulatory accounting statement that systematically characterizes the benefits and costs of federal regulation on an annual basis in a form that would be accessible to a wide audience. The report would provide information to the public, interest groups, and legislators as they engage in debates about billion-dollar regulatory policies that are likely to affect all Americans.

While some will undoubtedly object to any proposal to reform regulation, we see our proposal as relatively modest. It does not require that regulations pass a benefit-cost or cost-effectiveness test. It simply helps to make an arcane, unsystematic process more transparent and systematic by introducing a unified approach for analyzing and disseminating key information on the effect that regulatory policies have on consumers, businesses, the environment, and government entities. The changes we propose will help promote democratic ideals by increasing public awareness and making the accountability of our elected officials. They should also improve regulatory policies by developing more effective and less burdensome regulations.

## I Introduction

In 1996 Senator Ted Stevens added an unprecedented amendment on regulatory accountability to the Omnibus Consolidated Appropriations Act of 1997. The amendment, which may become the first step in a significant reform, deals not with spending but with federal regulations. It requires, for the first time, that the director of the Office of Management and Budget (OMB) provide Congress with "estimates of the total annual costs and benefits of Federal regulatory programs" and estimates of the benefits and costs of individual regulations.<sup>1</sup> That is the first statute to mandate an accounting of the benefits and costs of federal regulation. The amendment, attached to an annual appropriations bill, requires only one report, but Congress has expressed interest in receiving such a report on a regular basis.<sup>2</sup>

This primer lays out the case for such regular reports on the federal regulatory process and suggests some elements of the design and production of the reports. While that may on the surface appear to be merely a bookkeeping exercise, in practice it would have large, beneficial effects not only on the regulatory system itself but on the well-being of the nation as a whole.

Two factors have provoked the call for greater regulatory accountability: the unprecedented growth of federal regulatory activity since 1970—including environmental, health, and safety rules, employer mandates, and adminis-

trative paperwork burdens—and the increasing concern that the public is not getting its money's worth from regulation. Many scholars have shown that designing better rules could produce better regulatory results at a lower cost.<sup>3</sup>

To cite one example among hundreds of what that means, consider the case of Amoco's Yorktown, Virginia, refinery. The Environmental Protection Agency (EPA) required the Yorktown refinery to spend \$31 million to reduce a small amount of benzene, when Amoco could have reduced five times as much for only \$8 million had the agency afforded the firm more flexibility to comply with the rules.<sup>4</sup>

Although regulations resulting from legislative mandates often have no direct fiscal impact, they pose real costs to consumers as well as businesses. The Family and Medical Leave Act of 1993, for example, did not significantly affect federal spending, but the General Accounting Office (GAO) projected that the act would cost employers close to \$700 million annually.<sup>5</sup> Regulations aimed at protecting health, safety, and the environment alone pose an annual cost of over \$200 billion—about half as much as outlays for federal discretionary programs.<sup>6</sup> And according to the OMB, final regulations issued by federal executive agencies increased total costs to the economy by an average of \$6 billion annually in real terms between 1987 and 1996.<sup>7</sup>

As efforts to balance the budget constrain programs involving spending, regulation will become an even more attractive tool for accomplishing social goals. The economic impact of regulation currently receives little scrutiny compared with the federal deficit. But as the public has become more aware of the inconsistency and waste in implementing various regulations, Congress has intensified its interest in more systematically measuring the economic impact of regulations. The aim is not to do away with regulations, nor, as some have charged, to halt the effort to reduce pollution or improve health and safety. Rather, it is

to achieve the results at less cost and to curb regulations that impose huge costs with very little benefit.

The move toward a comprehensive accounting of regulatory impacts is a positive development because such a discipline will provide lawmakers with better information on which to design regulatory statutes and also make members of Congress more accountable to the public for regulations that are implemented in response to the laws they pass. While economic analysis should not replace political judgment in a democracy, it should inform the decision-making process and help encourage more effective and less wasteful regulation. Assessing the strengths and weaknesses of regulatory proposals can ensure a consistent, systematic measurement of the relevant benefits and costs across agencies.

Our purpose here is to provide guidelines for improving regulatory accountability beyond the steps mandated by the Stevens Amendment.<sup>8</sup> In particular, we hope to enable policymakers to make better use of available information on the benefits and costs of regulations.

Currently, the federal government does not systematically assess the effects of regulations. Although regulatory agencies analyze the impacts of some rules, they fail to assess the benefits and costs of many other regulatory activities.<sup>9</sup> Moreover, the quality and scope of the analysis vary dramatically across agencies and programs. Until recently, policymakers have made little effort to develop a systematic way of collecting information needed to evaluate the economic impacts of regulatory policies and actions. The 105th Congress should follow up the Stevens Amendment with a permanent reform.



## 2 Attempts to Assess the Benefits and Costs of Regulation

Scholars have increased their focus on the benefits and costs of federal and state regulation. Here, we highlight studies and databases that one can use to develop aggregate estimates of regulatory impacts based on analyses of specific regulations and programs.

The regulatory impact analysis (RIA), required initially by President Ronald Reagan's Executive Order 12291 and now by President Bill Clinton's Executive Order 12866, provides the primary source of information on the benefits and costs of each major regulation that an executive branch agency promulgates; independent agencies are not required to conduct such an analysis. Executive agencies generally perform the assessment for any regulation whose annual economic impact exceeds \$100 million. Because executive agencies complete RIAs before regulations are put in place, RIAs provide rough estimates of the incremental economic benefits and costs of implementing different regulatory alternatives. In table 1 we offer an overview of the economic information contained in RIAs. The table includes regulations promulgated by the Consumer Product Safety Commission, the Mine Safety and Health Administration, the National Highway Traffic Safety Administration, the Occupational Health and Safety Administration, and the Environmental Protection Agency

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TABLE 1  
REGULATORY SCORE CARD, 1990 TO MID-1995

OSHA- Health Safety EPA	OSHA- Health	NHTSA	MSHA	CPSC	Proposed	Final	All
70	5	9	6	1	1	84	58
99%	100%	100%	100%	100%	100%	98%	99%
99%	100%	100%	100%	100%	100%	98%	99%
89%	100%	100%	100%	100%	94%	83%	87%
41%	100%	100%	100%	100%	57%	55%	55%
59%	0%	0%	0%	0%	53%	45%	45%
81%	0%	0%	0%	0%	35%	19%	25%
19%	20%	11%	17%	0%	24%	16%	18%
19%	20%	11%	17%	0%	24%	16%	18%

Note: CPSC=Consumer Product Safety Commission; MSHA=Mine Safety and Health Administration; NHTSA=National Highway Traffic Safety Administration; OSHA=Occupational Safety and Health Administration; EPA=Environmental Protection Agency.  
a. This category includes health benefits, benefits from pollution reduction, and any other benefits that were quantified or monetized.  
Source: Hahn (1996, 213, table 10-1).

from 1990 to mid-1995. In the table we show the number of regulations, the percentage of regulations for which the agency quantified some part of benefits and costs, and the fraction of regulations that would pass a benefit-cost test based on the agency's own dollar estimates.

The data in table 1 show the considerable variation in the type and quality of analysis that the executive branch agencies perform for individual regulations. While those agencies estimated some measure of costs for almost all regulations, the analyses of benefits were often incomplete. Moreover, the agencies could demonstrate that *quantified* monetary benefits would exceed quantified costs in less than 20 percent of all regulations promulgated. That does not imply, however, that less than one of five of the regulations would pass a benefit-cost test, because the agencies did not monetize many of the physical benefits, such as emission reductions. Nevertheless, more than half of those regulations appear not to have passed a benefit-cost test.<sup>10</sup>

In addition to the RIAs, executive agencies periodically survey areas related to regulation such as workplace injuries and expenditures on pollution abatement.<sup>11</sup> Although those surveys do not focus exclusively on regulatory costs, agencies have used them to assess the cost and effectiveness of different aspects of regulatory policy.

Executive agencies also occasionally issue reports that aggregate the costs of particular kinds of regulation or the benefits and costs of selected major regulations. Examples include the EPA's *Environmental Investments: The Cost of a Clean Environment*,<sup>12</sup> the National Highway Traffic Safety Administration and Federal Highway Administration's assessment of the impact of highway traffic, and motor vehicle safety programs,<sup>13</sup> and the OMB's reports on the federal regulatory program.<sup>14</sup> *Until recently, however, there has been no effort to require the government to explore systematically the economic impacts of regulation.* Section 812 of the 1990 Clean Air Act Amendments does, however, require the EPA periodically to conduct a retrospective analysis of the ben-

efits and costs of clean air regulations, as well as a prospective analysis every two years.

Scholars have also studied the aggregate benefits and costs of regulation and deregulation.<sup>15</sup> In addition, the Center for the Study of American Business at Washington University periodically reports on employment trends in regulatory agencies and the administrative costs associated with staffing those agencies.<sup>16</sup> The center does not, however, assess the economic impacts of the regulations that those agencies issue.

Recent legislation may change the haphazard approach to reporting and analyzing the benefits and costs of regulation. The Unfunded Mandates Reform Act of 1995,<sup>17</sup> the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>18</sup> and the aforementioned regulatory accountability provision in the Omnibus Consolidated Appropriations Act of 1997 together provide a more systematic basis for informed decision making on regulatory impacts. We summarize the requirements of those laws as well as the mandates of Executive Order 12866 in table 2.

While the thrusts of each piece of legislation and the executive order differ, they share one common theme—a requirement that agencies use economic analysis to assess the benefits and costs of different kinds of regulations. The laws and executive order consider a range of impacts on different constituencies, such as small business, local governments, consumers, income groups, demographic groups, and the private sector. Not surprisingly, the laws and the executive order have considerable overlap. For example, the executive order requires the EPA to assess the benefits and costs of the 1986 amendments to the Safe Drinking Water Act because the annual economic impacts exceed \$100 million, while the Unfunded Mandates Reform Act requires an assessment of the same law because the mandate on local governments exceeds \$100 million annually.

The 104th Congress considered other bills addressing

Statute	Description
Unfunded Mandates Reform Act of 1995	<p>CBQ is required to estimate the costs of laws with new mandates in excess of \$50 million in any one year on state, local, and tribal governments and in excess of \$100 million in any one year on the private sector. Likewise, an executive branch agency must prepare a benefit-cost analysis of regulations with new mandates in excess of \$100 million in any one year on state, local, and tribal governments or the private sector. The agency is required to choose the "least costly, most cost-effective, or least burdensome alternative" unless the provisions are inconsistent with law or the head of an agency can explain why such an alternative was not adopted.</p>
Small Business Regulatory Enforcement Fairness Act of 1996	<p>An agency must submit each final regulation and the supporting analyses to Congress and the GAO. Congress has at least sixty calendar days to review major regulations before they can become effective. During that time, Congress can enact a joint resolution of disapproval that, if passed and then signed by the president, would void the regulation. In addition, strengthened judicial review provisions hold agencies more accountable for the impacts of regulation on small entities.</p>
Regulatory Accountability Provision of 1996	<p>By September 30, 1997, OMB must submit to Congress an assessment of the annual benefits and costs of all federal regulatory programs and of each rule with annual costs over \$100 million. OMB can also make recommendations to reform or eliminate inefficient programs.</p>
Executive Order 12866 (1993)	<p>An agency must submit to OMB's OIRA an assessment of the potential benefits and costs of significant regulatory actions. A more extensive benefit-cost analysis is required if a rule is considered "economically significant," as defined by one or more characteristics, such as an annual effect on the economy of \$100 million or more or significant effects on productivity, competition, jobs, the environment, or public health or safety.</p>

a. This section of the act amends the Regulatory Flexibility Act of 1980.  
 b. This is the Stevens Amendment to the Omnibus Consolidated Appropriations Act of 1997.  
 c. This order contains requirements similar to those in Executive Order 12291 issued by President Reagan in 1981.  
 Source: Hahn (1997b).

TABLE 2  
 RECENT REGULATORY REFORM LEGISLATION AND EXECUTIVE ORDERS

how agencies evaluate the benefits and costs of regulation. Although the House passed the Risk Assessment and Cost-Benefit Act in 1995, the Senate defeated its counterpart.<sup>18</sup> Major stumbling blocks included the bill's requirement that all health, safety, and environmental rules be subject to periodic review, benefit-cost mandates, and judicial review.

### 3

## Guidance on Regulatory Accounting Legislation

Although recent legislation will enhance regulatory accountability, further legislation is necessary. We propose legislation requiring the OMB, the Council of Economic Advisers (CEA), or a newly created independent agency to issue an annual or at least a biennial regulatory accounting report to Congress that outlines the regulatory activities of the federal government. The report should be written in an accessible format, comparable to the CEA's *Economic Report of the President*, and should be available on the Internet. The report should focus on the benefits and costs of regulation defined in terms of traditional economic measures of consumer and producer welfare.

### Content of the Regulatory Accounting Report

Using those measures, the report should first and foremost provide a state-of-the-art review of the benefits and costs of federal regulation. Then the report should offer recommendations for reforms to promote more efficient regulations at a lower cost with less waste.

The state-of-the-art review should evolve over time. Initially, the organization producing the report should focus on developing data on the incremental benefits and costs of individual regulations that have recently been

come distribution—effects that are frequently very difficult to estimate. When such factors are particularly important, the reporting agency should assess their magnitude. The effects of regulation on employment should not, however, dominate the analysis, because they are extremely difficult to estimate. In addition, regulation rarely affects the overall level of employment, although it certainly can affect individual sectors.<sup>14</sup>

The organization producing the report should also use OMB data on paperwork to estimate the economic costs associated with administrative burdens on the private sector.<sup>15</sup> The report should not, however, present that category as a net cost of regulation without carefully analyzing alternative options for regulating with less paperwork. Since specifying such options is difficult, we prefer simply noting how paperwork requirements change over time and assigning a dollar value to the cost of such paperwork. Agencies could also use the format developed by the Center for the Study of American Business to report their administrative costs.<sup>16</sup>

#### Improving the Quality of RIAs

Agencies could dramatically improve the quality of RIAs by standardizing assumptions across analyses, providing a better treatment of uncertainties, defining baselines clearly, using peer-reviewed scholarship when available, and presenting results clearly.<sup>17</sup> In addition, agencies could use retrospective studies of actual impacts to complement prospective studies. Those analyses would provide a better assessment of actual benefits and costs and would improve prospective estimation techniques.

RIAs do not currently estimate the economic impacts of many regulatory activities. For example, agencies make almost no effort to compute the costs of licensing procedures, letters, minor regulations, and guidance.<sup>18</sup> Moreover, economic regulatory agencies do not typically estimate the potential gains from introducing greater competition into

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adopted.<sup>19</sup> It should use RIAs to estimate the economic impacts of major regulations promulgated by executive agencies. To assess the effects of all major regulations, our proposal would necessarily require the independent regulatory agencies to begin to conduct RIAs. Information derived from the RIAs would permit a crude estimate of the annual benefits and costs of regulation along with an assessment of their discounted present value.<sup>20</sup> Agencies should provide similar information for proposed regulations.

Eventually, the report should also include individual and aggregate estimates of the benefits and costs of past, present, and future regulations. Although aggregate estimates are less important initially because the best way to affect policy in the short term is to modify individual regulations, aggregate estimates do have value. They provide a better sense of areas in which the government has enhanced consumer welfare and economic efficiency, and they can help in developing a budget-like mechanism to encourage a more rational allocation of resources.<sup>21</sup>

The report should qualitatively describe important economic benefits and costs that are not easy to quantify. If, for example, a rule is likely to have an important positive impact on an ecosystem but its economic impacts are not easily measured, the report should describe the nature of those impacts as precisely as possible. Such descriptions enable voters to know what they are getting for their money.

Suggestions for reforms should include both procedural reforms to improve information and measurement and substantive reforms to improve the efficacy of regulation and to eliminate inefficient regulations. While reform is important, the organization producing the report should initially target its resources to develop state-of-the-art estimates of the benefits and costs of regulation so that those estimates can become central to the policy debate.

In addition to directly measuring consumer welfare and economic efficiency, the report should examine how regulation affects innovation, wages, employment, and in-

the markets that they regulate. Requiring the regulatory accounting report to include independent regulatory agencies, many of which are economic regulatory agencies, would increase the incentives of those agencies to consider the economic impacts of their regulatory activities.

#### The Role of Outside Parties

With a more transparent process and systematic accounting of the economic effects of regulations, outside parties should be in a position to help improve the quality of the estimates of regulatory impacts. The organization producing the regulatory accounting report should allow outside parties to submit comments on the substance of the document. That organization either could submit a preliminary version of the report for comment and briefly summarize comments in the final document or could publish that summary in the subsequent report.

#### Production of the Report

**Report Producer.** Either the OMB or the CEA would be the appropriate organization to produce the report. Both organizations have excellent reputations for their technical economic expertise. Each has its advantages: the OMB has a larger staff and more familiarity with details of regulation, the CEA is more closely aligned with the goal of promoting economic efficiency—ensuring that the public gets full value for its money—than is the OMB, with its preoccupation with balancing the budget. Perhaps the two organizations could collaborate. The leaders of those organizations should sign a statement on the front page of the document to certify that the estimates contained therein represent the best collective wisdom of their economists on the benefits and costs of regulation.

An alternative to choosing the OMB, the CEA, or both to produce the report would be to set up an independent

agency charged with that function. A call for creating such an agency is premature without first using one or both of those established organizations, but creating a new independent agency might be a viable option later.

**Frequency.** Ideally, the government should issue the report annually to facilitate analyzing and improving the steady flow of regulations costing billions of dollars per year. The information to produce the report already exists and will improve over time.

**Data Production, Data Analysis, and Final Reporting.** Production of the report would entail three stages: data production, data analysis, and final reporting. Responsibilities for the first two stages would evolve over time. Initially, the agency promulgating a regulation should produce the raw data on the benefits and costs of that regulation. Ultimately, that first stage would be subject to oversight by the organization producing the report to limit possible bias. In the second stage, the agency promulgating a regulation and the organization producing the report would share the responsibility for analyzing the raw data. In the short term, the agency producing the raw data would play a greater role in analyzing the data. In the long term, the organization producing the report should develop enough independent expertise to have primary responsibility for the analysis. Moving the primary responsibility for analyzing the data to the organization producing the report should improve the quality of the estimates because regulatory agencies are more likely to use inconsistent accounting measures and to choose those measures that favor their particular programs.

#### Resource Needs

The additional resources required for the analytical efforts we are proposing would be minuscule compared with the

costs that regulations impose. The executive agencies already bear the costs of producing the RIAs; the independent agencies would have to undertake RIAs, and that would entail an additional cost. As we noted, the methods used to produce RIAs are not standardized across—and sometimes even within—agencies, so there would be a one-time cost associated with developing and implementing standard estimating and reporting methods. In addition, the organization producing the report would bear some costs in helping to refine the RIAs, but the OMB already performs that task in its oversight activities. Accordingly, the main additional costs would be associated with conducting RIAs for the independent agencies and with assembling and then analyzing the relevant data found in all RIAs for the major rules.<sup>28</sup>

We estimate that ten full-time-equivalent senior economists or analysts could carry out those tasks, which would cost approximately an additional \$1 million annually. Even if expenses for administration, outside contractors, and printing doubled or tripled that cost, the resulting total of several million dollars a year would pale compared with the overall annual cost of regulation. Moreover, the process of making regulatory activity much more transparent should produce savings of regulatory costs that would easily outweigh the additional costs associated with the enhanced accountability.

In fact, the U.S. government currently allocates very few resources for producing and reviewing RIAs. An average home buyer spends more, as a proportion of the cost of the house, for a general house inspection than the government spends on analyzing regulations.<sup>29</sup> Just as home buyers need to know whether they are getting good value for their money, so do the beneficiaries of new regulations.

Another perspective on the problem of accurate regulatory accounting comes from the number of civil servants working on regulations compared with the number reviewing their economic content. While more than 130,000 full-

time-equivalent employees work at federal regulatory agencies, OMB's Office of Information and Regulatory Affairs (OIRA) has only forty-two professionals, fewer than half of whom actually review the economic analysis in the RIAs.<sup>30</sup>

#### Accessibility of the Report

The report should be presented in a clear, user-friendly format that is available on the Internet. One of the problems with existing regulatory impact analyses is that they are very difficult to read and vary widely in quality. The report should be accessible to a wide audience. A good model for the style and clarity of the report is the CEA's *Economic Report of the President*.

dual requirements but not from the requirement that, to the extent practicable, their benefits and costs be included in the regular report.

Critics of benefit-cost analysis also assert that it focuses on those factors that can be quantified and tends to give short shrift to those factors that cannot be easily quantified. Those critics contend that benefits, which may be less easy to quantify than costs, will get short shrift. But a regulatory accounting requirement will, if anything, push the reporting organization and the regulatory agencies to improve their measurements of benefits. That is our reason for recommending that the regulatory accounting report highlight qualitative economic impacts where they are thought to be important.

Finally, some scholars have criticized calls for more comprehensive regulatory accounting because the existing system of regulatory oversight already imposes analytical requirements that appear to make little difference. We assert, however, that improved analysis and dissemination of information on the impacts of regulation can help weed out ineffective and wasteful regulations and improve regulations that are implemented, as Congress and the executive branch become better informed about how regulations require the allocation of scarce consumer and taxpayer dollars. That change will come in part from the information itself, which heretofore has not been readily accessible. Putting all regulatory information in one place will facilitate comparisons of the effect of individual rules and thereby assist Congress, the regulatory agencies, and the White House to think more seriously about how to set regulatory priorities and design better regulations.

#### 4

### Responding to the Critics

Economists may value benefit-cost analysis more highly than others do. While this primer is not the place to provide a comprehensive defense of benefit-cost analysis, it is worthwhile to examine criticisms of the regulatory accounting tool that we are proposing. Four criticisms that we consider are workability, potential delay, potential to overemphasize costs at the expense of benefits, and the absence of any impact on policy.

Critics of improved accounting often argue that such measures are unworkable. They correctly point out the potential to misuse the instrument. That is true of almost any analytical approach, however. The critics must address the question of whether such analysis is preferable to the current regulatory mode, in which decisions tend to be driven more by inaccurate, incomplete, and inconsistently measured information. Surely, the status quo needs improvement.

Critics frequently contend that requirements for more economic analysis of regulations can cause "paralysis by analysis"—delaying the policy process. Simply requiring an agency to provide a systematic regulatory accounting need not delay implementing a specific regulation. Moreover, should a regulatory accounting statement cause policymakers to rethink regulatory priorities, that could be a good outcome, even if there were a delay. Policymakers could exempt emergency rulemaking from certain proce-



The regulatory reform debate has become unnecessarily polarized. Congress now has a unique opportunity to reduce the rhetoric and substantively improve policy making by asking government agencies to lead an effort to characterize systematically the impact of all federal regulation. The public has a right to know about those regulatory impacts. Just as every American-business must gather and present its economic and accounting information in an organized manner, so must regulatory agencies gather and organize pertinent information on the benefits and costs of regulations in an intelligible, systematic way. Only then will the American people begin to gain a better sense of what they are getting in return for their investment in different kinds of regulation.

## 5

### Conclusions

The federal regulatory process is in need of repair. Part of what is required is an improved accounting statement conveying the benefits and costs of regulation. This primer has identified key elements in that accounting statement.

Improved regulatory accounting is not a panacea, but it is a step in the right direction.<sup>31</sup> The OMB, the CEA, or both organizations can usefully produce a unified economic regulatory accounting statement that systematically characterizes the benefits and costs of federal regulation on an annual basis in a form that will be accessible to a wide audience. The report will provide information to the public, interest groups, and legislators as they engage in debates about billion-dollar regulatory policies that are likely to affect all Americans.

While some will undoubtedly object to any proposal to reform regulation, we see our proposal as relatively modest. It does not require that regulations pass a benefit-cost or cost-effectiveness test. It simply helps to make an arcane, unsystematic process more transparent and systematic by introducing a unified approach for analyzing and disseminating key information on the effect that regulatory policies have on consumers, businesses, the environment, and government entities. The changes we propose will help promote democratic ideals by increasing public awareness and raising the accountability of our elected officials. They should also improve regulatory decision making.

## Notes

1. Omnibus Consolidated Appropriations Act of 1997, U.S. Public Law 104-208, sec. 645, 1996 U.S.C.A.N. (110 Stat. 3009), 1088-89.
2. See, for example, Thompson (1997).
3. See, for example, Anderson et al. (forthcoming), Tengs and Graham (1996), Morrill (1986), and Viscusi (1996).
4. See Amoco Corporation and U.S. Environmental Protection Agency (1992).
5. See General Accounting Office (1993).
6. See Hopkins (1992) and Office of Management and Budget (1997).
7. See Office of Management and Budget, Office of Information and Regulatory Affairs (1997).
8. "Regulatory accounting" refers to a requirement for the executive branch to report the impact of regulation in terms of its economic benefits and costs. "Regulatory accountability" is a broader concept aimed at making regulators and regulators more accountable for regulation. We believe that a good regulatory accounting system will help promote regulatory accountability, but so too will other policies. See Crandall et al. (1997).
9. See Furchtgott-Roth (1996) and Hahn (1996).
10. See Hahn (1996, 318). To make the analysis consistent across different programs and regulations, Hahn converted estimates to 1994 dollars and used common discount rates and values for reducing health risks.
11. See, for example, the U.S. Department of Labor, Bureau of Labor Statistics's annual *Workplace Injuries and Illnesses*.
12. See Environmental Protection Agency (1990).
13. See National Highway Traffic Safety Administration and Federal Highway Administration (1991).
14. See Office of Management and Budget (1993).
15. See, for example, Weidenbaum and Defina (1978), Litan and

maely 1 percent of the price of the home (based on the authors' telephone survey of Washington, D.C., home inspectors). Thus, a home buyer spends about ten times more than the government when assessing a prospective investment.

30. The full-time equivalent employment at federal regulatory agencies comes from Warren and Jones (1995). OIRA staff members come from the *Federal Register*, Spring, 1997 (1997). While twenty-four of the OIRA professionals review the relevant regulatory agencies, they devote a significant amount of their time to ensuring compliance with information collection requirements under the Paperwork Reduction Act of 1990.

31. In particular, we believe that improved regulatory accounting could form the basis for applying other techniques aimed at developing smarter regulation, such as a regulatory budget. See Crandall et al. (1997). We hasten to add, however, that a systematic accounting of regulation is worth doing for its own sake because of the positive impact it is likely to have on the regulatory process and the design of regulations.

Nordhaus (1988), Hahn and Hird (1991), Hopkins (1992), Winston (1995), Hahn (1996), Winston (1997), and Guasch and Hahn (1997). Although occasionally updated and expanded, those studies are generally not done on any regular basis.

16. See, for example, Warren and Jones (1995).

17. Public Law 104-4, March 22, 1995, 109 Stat. 48.

18. Public Law 104-121, Title II, March 29, 1996, 110 Stat. 857-874.

19. See H.R. 1022, 104th Congress, First Session, Risk Assessment and Cost-Benefit Act of 1995; S. 343, 104th Congress, First Session, Comprehensive Regulatory Reform Act of 1995; and S. 291, 104th Congress, First Session, Regulatory Reform Act of 1995.

20. Where estimates of aggregate regulatory impacts are available or can easily be estimated, they should be reported, but they should not be the primary focus at the outset.

21. The present value is computed by applying a discount factor to the annual benefits and costs, which takes into account the tradeoff between present and future consumption.

22. See, for example, Crandall et al. (1997) and Litan and Nordhaus (1988).

23. See, for example, Arrow et al. (1996).

24. See Office of Management and Budget (1996a).

25. See Warren and Jones (1995).

26. For more detailed discussions of those improvements, see Arrow et al. (1996), Hahn (1996), and the Office of Management and Budget (1996b).

27. See, for example, Ruber and Thorne (1997), Furchtgott-Roth (1996), and Hahn (1997a).

28. It is difficult to estimate the resources that independent agencies would require to provide the necessary information for a regulatory accounting statement because relatively little is known about the economic impacts of agencies' rules, licensing requirements, and other activities. Nonetheless, those agencies frequently collect data on the economic implications of some of their activities, and their economists and policy analysts could help to develop RIAs. Thus, we believe that the additional resources needed would be modest, given a suitable reallocation of agency resources.

29. A review of executive agency RIAs from 1990 to mid-1995 showed that the average present value of gross costs for fifty-four final regulations was \$5.1 billion in 1995 dollars (Hahn 1996). In a review of eighty-five RIAs, the Congressional Budget Office found that the average cost was \$570,000 in 1995 dollars, which is 0.1 percent of the average cost of the regulation (Congressional Budget Office 1997). In contrast, for a single home valued at \$200,000, a prospective homeowner spends \$200 to \$250 for a general house inspection, incurring a cost that is approx-

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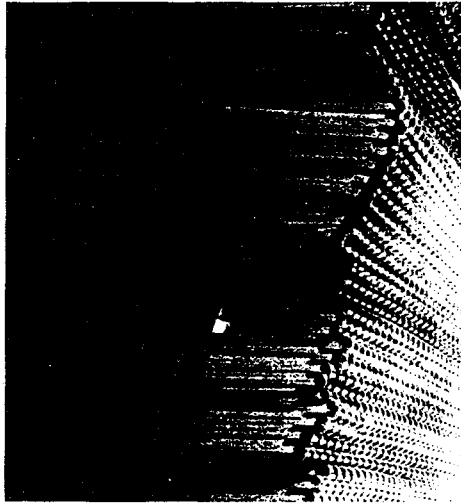
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***Modernizing  
Government  
Regulation:  
The Need  
For Action***



***A Policy Statement by the  
Research and Policy Committee  
of the Committee for  
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\*We do not approve the policy statement put submitted by the candidate or committee associations or its staff. See page 34.

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## Purpose of This Statement

Government regulation of economic and social activities permeates our lives. While regulation in many instances yields important public benefits, regulations often are imposed on individuals and organizations with too little thought or analysis of what is gained in comparison with the losses incurred in time, money, indecision, and productivity. The federal government's own data show that in far too many cases, the costs of regulation outstrip its benefits.

Further, the growth of government involvement in the market system sometimes constrains our ability to achieve fundamental economic and social goals. In today's global economy, a country's regulatory climate is an important competitive issue. Other leading nations — with safe workplaces and environments, but more rational, flexible regulatory structures — are becoming more attractive than the United States, as locations for production.

We urgently need a clear and studied appraisal of what we get for our regulatory efforts and how they can be improved.

Most of the recommendations in this policy statement focus on overhauling the way Congress creates regulatory law. We recommend that Congress be required to assess the likely effects of regulatory proposals before they become law and explicitly affirm that anticipated benefits justify expected costs. We also urge establishing a new office to assist Congress in these efforts. Other recommendations are designed to remove existing statutory barriers to more rational regulations and to improve regulatory review in the Executive Branch.

Fundamental reform is unlikely unless all of us, who rightly want clean air, safe products, and safe workplaces, fight vigorously for better outcomes from the enormous resources currently consumed by social and economic regulations.

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## A HISTORY OF CONCERN

The business and education leaders who comprise CED's board have a long-standing interest in improving our regulatory environment. CED has previously addressed government regulation issues in a wide range of studies, including *What Price Clean Air?* (1993), *Growth With Opportunity* (1997), *The United States in the New Global Economy: A Rallyer of Nations* (1992), *Putting Learning First* (1994), and *Who Will Pay For Your Retirement?* (1995).

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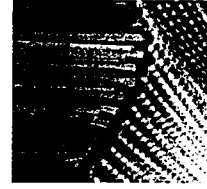
I also want to acknowledge the important contributions of Van Doorn Ooms, CED's Senior Vice President and Director of Research, and Andrew R. Haggard, CED Research Associate.

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Josh S. Weston  
 Chairman  
 CED Research and Policy Committee

# I.

## **Introduction and Summary**



After a comprehensive review of the structure and process of government regulation of our society and our economy, CED believes that the living standard and quality of life of Americans can be raised by improvements in the regulatory system. When modest-size firms across the nation report that regulation, rather than profitability, has become their biggest challenge, it seems clear that government decision makers need to pay more attention to this area.<sup>1</sup>

Suppose it were proposed that Congress grant the President the authority to repair the U.S. highway system without regard to prior analysis or cost and to tax any group of citizens he wished to pay for it. Congress and the public would reject such a proposal out of hand. Yet, our regulatory procedures are often effectively conducted in just this manner. The recommendations in this policy statement would simply establish rules for regulatory accountability like those that currently apply to fiscal legislation. Congress is required to estimate the costs of proposed programs, to judge whether their benefits justify those costs, and to finance them transparently. Our regulatory arrangements should require no less.

The current debate on global warming underscores the need for promptly carrying out the recommendations presented in this report. Should the treaty on global climate change, developed at Kyoto in December 1997, be ratified, Congress should use scientific risk assessment procedures and economic analysis of the benefits and costs of new regulations that would be required to comply with the treaty. The

specific recommendations presented in this report will help legislators and the public evaluate new proposals with far-ranging environmental, economic, and social consequences. Such an analysis should be done *before* enacting any regulatory program.

Swift action to improve our regulatory structure is also needed to respond to the regulatory reforms being adopted by other industrial nations. These reforms will increase the competitiveness of these economies, making the task of modernizing the U.S. regulatory structure even more urgent. The challenge that faces us is not to dismantle regulation, but to improve the often arcane structure that has accumulated over the years.

This policy statement presents our approach to modernizing government regulations and our recommendations for the changes required to do so. Unlike most previous examinations of regulatory reforms, which focus on the drafting of regulations in the Executive Branch, this statement emphasizes the need to revise the basic statutes governing regulation. The legislative process is the true birth stage of regulation, the point at which we have the greatest opportunity to affect the results of the entire regulatory process.

In considering regulation, an important distinction needs to be made between (1) *eco-*

1. A survey by Arthur Andersen reported in late 1994 that 52 percent of the midsize firms stated that government regulation was their biggest challenge. Only 18 percent listed turning a profit as their top concern.

*conomic regulation* historically used by such agencies as the Federal Communications Commission (FCC), the Maritime Commission, and two agencies which Congress has terminated, the Civil Aeronautics Board (CAB) and the Interstate Commerce Commission (ICC), and (2) *social regulation* performed by the Environmental Protection Agency (EPA), the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and similar government agencies. The characteristics of the two types of regulation are very different and so are the ways of reforming or improving them.

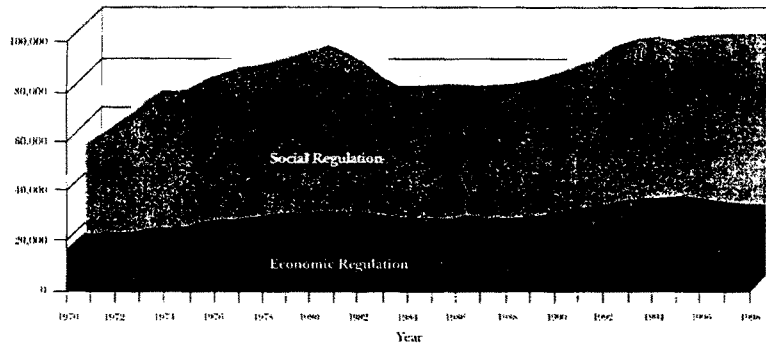
Economic regulation relates primarily to such characteristics of industries as prices, profits, entry, and exit. Typically, an agency or commission regulates a specific sector of the economy, such as transportation, communications, utilities, or banking. Social regulation, in contrast, is characterized by the use of agencies organized along functional or issue lines

(ecology, discrimination, product safety) rather than industry categories. Many of these agencies have power to regulate across all industries, although their jurisdiction is limited to one aspect of business activity.

Since the 1970s, there has been a strong and consistent effort to reform or eliminate economic regulations where competition adequately serves the public interest. Thus, the CAB and the ICC have been terminated, the Securities and Exchange Commission (SEC) no longer regulates brokers' commission rates, and the FCC is beginning, somewhat fitfully, to let competition replace rate regulation. As Figure 1 shows, the staffing of federal economic regulatory agencies is dwarfed by the much larger array of inspectors, reviewers, and other officials of federal agencies engaged in social regulation.

However, there has been no sustained effort to reduce social regulations. On the contrary, the recent tendency has been to expand

**Figure 1**  
**Staffing of Federal Regulatory Activity, 1970-1998**  
 Full-time Equivalent Personnel



SOURCE: Center for the Study of American Business, Washington University. Derived from the *Budget of the United States Government* and related documents, various fiscal years.

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the scope of this activity. Much existing social regulation is inefficient, often capricious, and extremely expensive. Nonetheless, CED does not believe wholesale deregulation is an appropriate response to the shortcomings of social regulation. Rather, we advocate improvements in the way these government units function that would secure the social benefits the public seeks at a lower cost.

We believe that providing better information and more relevant analysis to policy makers in some of the most controversial areas of public policy will improve the results substantially. Making more and better information available also provides a middle ground between those who seem to wish to expand regulations almost uncritically and those who seem to want to eliminate regulation entirely.

Our review concludes that all new regulatory efforts and all efforts to reform existing regulatory programs should be guided by four broad principles:

- Regulation is warranted only when markets do not work as well as regulation to protect citizens and consumers.
- Regulatory authority should not be exercised capriciously, and the delegation of such authority by Congress to regulatory bodies should be limited to ensure this.
- Congress and the regulatory agencies should publicly and objectively evaluate *in some form* the expected benefits and costs of proposed major regulatory efforts, using disinterested, professional scientific advice. Such evaluations should also be applied periodically to major existing regulations.
- Where feasible and effective, regulations should be applied with a "soft touch" that allows flexibility of response, including the use of market incentives, in lieu of command-and-control directives.

Our major findings and recommendations are summarized below.

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**FINDINGS**

1. The American people overwhelmingly—and correctly—believe that government regulation is needed to achieve many important economic and social goals. Regulations spring directly from the desire for clean air, drinkable water, safe workplaces, reliable financial markets, improved medicines, and competitive industries. Government regulation is therefore a large and necessary presence in the American economy.

2. Nevertheless, the current regulatory system produces too few benefits at excessive cost. This is not well understood by the public, since the main costs of regulation are hidden from public view. Those costs show up only indirectly in the form of higher prices, diminished product variety, lower rates of innovation and productivity growth, and reduced job oppor-

tunities.<sup>2</sup> A more efficient regulatory system would be *both* more effective *and* less costly.

3. A seemingly endless stream of litigation and administrative appeals that predictably delay and make uncertain many regulatory decisions has added to the burden of the regulatory environment.<sup>3</sup>

4. Defects in our basic regulatory laws are the major shortcoming in the American regulatory system. Many of these statutes limit or

2. Neal S. Zank, *Measuring the Employment Effects of Regulation* (Westport, Conn.: Greenwood Publishing, 1996); Richard K. Vedder, *Federal Regulation's Impact on the Productivity Slowdown* (St. Louis, Mo.: Washington University, Center for the Study of American Business, 1996); Murray Weidenbaum, *The Future of Business Regulation* (New York: Amacom, 1980).

3. For a graphic example involving the American Lung Association and EPA, see J. W. Anderson, "New Air Quality," *Resources* (Fall 1997) p. 8.



prevent the regulatory agencies from even considering costs in the preparation of new regulations; other regulatory laws do not allow the agencies to use economic analysis to evaluate regulatory benefits and burdens or to seek the most effective, least-cost method of achieving accepted regulatory goals.<sup>1</sup> This cluster of problems relates to the fact that Congress itself, in the crucial stage of writing regulatory statutes, neither performs nor uses the modest but basic methods of professional analysis that the Executive Branch agencies now routinely have available to them.

5. There is a lack of generally accepted standards of measurement of regulatory impacts and reliable data on which such measurements could be based.

6. Every president from Gerald Ford to Bill Clinton has tried to reduce the high cost of achieving our regulatory goals. While substantial progress has been made in eliminating unneeded economic regulation, efforts to reform social regulation have been disappointing. In many cases, the president's jurisdiction does not extend to key regulatory agencies. (As noted above, a governing statute often inhibits the ability of an agency to respond to a pre-

sident's directive even if the agency is inclined to do so.) In addition, many regulatory agencies seem to be institutionally opposed to the systematic regulatory review that we believe is needed.

7. Current efforts to effect meaningful regulatory reform are severely hampered by distrust on both sides of the regulatory debate. Individuals committed to the resolution of health, safety, and environmental problems are suspicious of any effort that is seen as possibly obstructing or delaying their objectives. Individuals committed to the reduction of "big government" decry those who would proceed rapidly to address such problems with costly or ill-designed remedies. To reconcile these two polar extremes, or at least to narrow the gap between them, CED believes that better information, based on sound science and analysis, is needed in the regulatory process.

8. Congress far too often grants overly broad authority to regulators because it cannot or will not resolve major conflicts over objectives in its legislation, leaving the resolution of such conflicts to the regulators. As a result, administrators have leeway to act in a capricious fashion.

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## SUMMARY OF RECOMMENDATIONS

1. Each congressional committee should be required, when writing a regulatory statute, to articulate the expected benefits and costs of the regulatory program in the report accompanying the legislation. The committee should affirm that these benefits justify the program in light of its estimated costs. To the extent feasible, this articulation would include a monetary evaluation of costs and benefits as well as a description of other advantages and disadvantages of the regulatory proposal. Congress should also create a statutory requirement that it use cost-benefit analysis in its consideration of regulatory legislation.\* Congress could not

consider regulatory legislation unless a cost-benefit analysis was available and the Committee had affirmed that the regulatory program was justified by its benefits.

2. Congress should eliminate or amend provisions in existing regulatory statutes that prevent or limit regulatory agencies from considering costs or comparing expected benefits with costs when designing and promulgating regulations. Regulations that seek to reduce health or safety risks should be based on scientific

1. See Paul R. Portney, statement to the Senate Committee on Government Affairs, February 8, 1995, p. 8.

\*See memorandum by JOHN DIEBOLD, (page 34).

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risk assessment and should address risks that are real and significant rather than hypothetical or remote.

3. Congress should establish its own professional, nonpartisan regulatory analysis organization to provide it with reliable data, including the required estimates of benefits and costs. This organization could be a separate agency or a part of the Congressional Budget Office (CBO). This new organization also should establish a program to evaluate the costs and efficacy of *existing* regulatory programs; each year, it should analyze a limited number of current major regulatory programs. (*Major* means those that impose annual costs in excess of \$100 million on society.)<sup>5</sup>

4. Congress should legislate provisions for regulatory review by the Office of Information and Regulatory Affairs (OIRA), a unit of the Office of Management and Budget (OMB), similar to those contained in the executive orders promulgated by Presidents Reagan and Clinton.

5. Congress also should codify in a single statute a requirement that regulatory agencies analyze the impact of significant regulatory initiatives *before* they are undertaken. Such an analysis of expected benefits and costs, standardized to the degree deemed appropriate by

OIRA, should be made a routine part of the drafting of new regulations by the Executive Branch and independent agencies and should be made public.<sup>6</sup>

6. On an established timetable that could range from five to ten years, each regulatory agency should be required to publish the objectives of its significant regulatory programs, and such stated objectives should be confirmed by legislative action.

7. We substantially underinvest in the information required for effective regulatory analysis and should significantly increase our efforts and resources to acquire it.

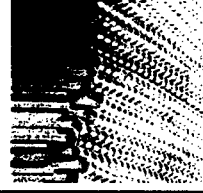
8. Congress should also require OIRA to continue on an annual basis its report on the costs and benefits of federal regulations, with supporting detail by agency and program. When regulatory cost data become more fully developed, Congress should establish on an experimental basis a regulatory budget for one or two major regulatory agencies.<sup>6</sup>

5. See, for instance, proposed bill H.R. 1704, *Congressional Office of Regulatory Analysis Creation Act*, introduced May 22, 1997, by U.S. Representative Sue Kelly.

6. For an illustrative example, see Harvey James, Jr., *Estimating OSHA Compliance Costs* (St. Louis, Mo.: Washington University, Center for the Study of American Business, October 1996).

<sup>5</sup>See memorandum by JOHN DIEBOLD, (page 34).

## II. **Why Comprehensive Reform Is Necessary**



We begin with a fundamental agreement. The American people overwhelmingly believe that there is a legitimate need for government regulation to achieve many economic and social goals of high priority to the nation.<sup>7</sup> There are many areas in which regulation is accepted without question. Airline safety is an obvious example; the public is reassured by the licensing of pilots. Similarly, restrictions on child labor in the United States are no longer controversial. Agencies such as the EPA, EEOC, the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and OSHA may be viewed as bureaucratic and burdensome "alphabet soup" by those subject to their rulings, but the public at large strongly supports continuing government involvement in their areas of responsibility. Shortcomings in market outcomes or the conduct of business often generate or increase public support for government intervention in private-sector decision making.

However, the process of regulation — the way in which a national priority or concern is translated into a specific rule — is not widely understood. It does not begin when a government agency issues a ruling. Rather, it starts much earlier, when Congress passes a law establishing a regulatory agency and giving it a mandate to issue rules governing some activity. The writing of the specific statute, which has been largely ignored by most organized efforts at regulatory reform, is usually the most important action in what can be an extended rule-making process. Defects in the enabling legislation cannot be cured by the regulatory

agency concerned or anywhere else in the Executive Branch.

Regulations are promulgated by agencies in response to laws passed by Congress to address some perceived market failure or to achieve a social goal. Regulatory proceedings are not, for the most part, mere matters of procedure and conformance. Rather, they spring from the desire for clean air, drinkable water, safe workplaces, reliable financial markets, improved medicines, and competitive industries.

Yet, achieving these desirable results is far more complicated than is commonly understood. It is not simply a matter of Congress proclaiming worthy goals or an executive branch agency promulgating rules to that effect. The regulatory process is fundamentally bureaucratic, with all the powers and shortcomings associated with government. Even at its best, regulation is a blunt and imperfect tool. Far too often, it is not at its best and imposes costs that far outweigh the benefits achieved, often unnecessarily.

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### **HOW REGULATION SHOULD BENEFIT THE PUBLIC**

#### **THE POWER OF MARKETS**

In some cases, we may become so used to regulation that we forget the value of marketplace competition in protecting consumers. For decades, regulation by the ICC was accepted by

7. "Our Regulated Society," *The Wirthlin Report*, November 1992, pp. 1-3.

the trucking industry as a fact of life. But since the effective dismantling of these controls in the early 1980s, thousands of additional firms have entered this market, and the cost of transporting goods in the United States has been reduced by billions of dollars a year.<sup>8</sup> The demise of the ICC goes un mourned.

Substantial progress has been made in deregulating some key sectors of the economy — notably transportation, communication, and financial services — in which competition does an effective job of protecting consumer interests. The United States has enjoyed large productivity gains in these sectors relative to other industrial economies because it has successfully challenged the traditional approach of selecting regulation or public ownership for utilities and related industries and opted instead for the “radical” solution of competition. The problem today is that economic deregulation too often bogs down in controversy and litigation before the appropriate amount of deregulation has been achieved.

It is therefore helpful to recall the advantages as well as the limits of reliance on the market mechanism. Marketplace competition is not an effective way of directing people to follow very specific courses of action. Control of automobile traffic provides an example. Traffic lights, stop signs, and similar command-and-control devices are an accepted part of everyday life. However, for producing changes in behavior that are less specific or that differ among individuals or organizations, economic incentives can be useful. For example, lower fees for toll bridges and toll highways during off-peak hours can reduce the road congestion facing the command-and-control traffic system at peak hours of usage. Likewise, a statutory or administrative command-and-control apparatus can set a specific level of air or water purity that society strives to achieve, but effluent fees generally can achieve this same level at lower cost than conventional prescribed regulatory control mechanisms.

The marketplace does not function perfectly. But the relevant question in any given

instance is whether it works better than regulation. The answer can be yes or no, depending on the type of regulation, the state of technology, and other factors.

#### BALANCING COSTS AND BENEFITS

When a reasonable case can be made that regulation is required to supplement or replace the market, its objective should be to find a favorable balance between the advantages and disadvantages of regulatory intervention. Even when a proposed regulation appears to provide a favorable balance, there are often opportunities to achieve the same or better results at a lower cost.

Critics of regulation must keep in mind the many instances in which regulations, sometimes with very large costs, have served the public interest. Thus, EPA’s two-decade-old regulation requiring refiners to stop adding lead to gasoline was an effective way to eliminate hazardous lead particles from exhaust fumes. The costs were substantial: the rule required refiners to adopt more expensive refining techniques, since lead had been a low-cost octane booster. But these costs were exceeded by the important public health gains that resulted from lower levels of lead in the environment.<sup>9</sup>

When officials make a reasoned decision to accept or reject a regulation, or indeed any other proposal, they are doing a benefit-cost analysis, whether they recognize it or not. Benefit-cost analysis is no more than a method to organize and discipline that decision process. In such a process, decision makers explore alternatives for achieving objectives, thereby minimizing the cost to society of reaching them. Although formal cost-benefit analyses have been performed for many years in evaluating other aspects of government activity, notably public works investments, their application to regula-

8. Council on Competitiveness, *Legacies of Regulatory Reform* (Washington, D.C.: U.S. Government Printing Office, 1992), p. 19; *Economic Report of the President, 1997* (Washington, D.C.: U.S. Government Printing Office, 1997), p. 190.

9. David Ballien and Joan Claybrook, “Regulations That Work,” *Washington Monthly*, April 1986, pp. 51-52.

tion is still controversial. Better public explanation of the need for the analysis is obviously necessary.

Debates over a regulatory proposal follow a standard pattern: Proponents focus on the seriousness of the problem to be addressed and the good their change will accomplish; opponents point to the costs, burdens, and other shortcomings of the proposal.

Usually, both sides have a point, and neither should be ignored. Good public policy requires identification and evaluation of the full range of advantages and disadvantages of proposals for change, be they regulatory or other uses of government power. That, at its heart, is the role of benefit-cost analysis. It is not a mechanical application of accounting and statistics, but a method for helping decision makers evaluate a new law or rule. Contrary to widespread misconception, decision makers, not benefit-cost analysis, would continue to make regulatory decisions. But those decisions would be better informed.

The fact that a given regulation imposes a burden, even a large one, is not sufficient reason to oppose it; the advantages of the regulation may far outweigh the disadvantages. Similarly, just because the same regulation may generate some desirable benefit is not cause to endorse it; there may be a far more effective way of obtaining the benefit. A useful evaluation must consider the balance between the two.

Unfortunately, not all regulatory decision making is clear cut. One important difficulty is the widespread existence of hidden and indirect costs. For example, while the FDA keeps unsafe or ineffective drugs off the market, it also delays the introduction of new and better pharmaceutical products. The *visible* impacts of these two consequences, however, are very uneven. The adverse side effects produced by some medicines are very visible. In contrast, a patient whose illness lingers because a better drug is delayed by the government's review process is unlikely to be aware of that fact; the cost to the patient remains invisible. In such

instances, bureaucratic delays can be literally fatal. Recently, the FDA has made significant progress in expediting reviews, but it is apparent that far more can be done.<sup>10</sup>

In many areas of regulation, opportunities abound for benefiting one segment of the society at the expense of the rest — and for doing so in a stealthy fashion. Such hidden subsidies arise particularly in traditional economic rule making, where regulators sometimes impose lighter costs on some interest group or region, with the result that heavier costs are borne by others subject to the regulation. Examples range from lower utility prices in rural areas to disproportionately low landing fees for owners of light aircraft.

The use of cross subsidies is a particularly pernicious case of such misguided regulatory action. Before the elimination of the CAB, airlines that wished to fly longer, more profitable routes such as Los Angeles to New York were required to offer shorter, unprofitable service to smaller cities. The cross-country flyers thus were effectively "taxed" in the form of higher prices to subsidize those flying shorter distances. Now the FCC is using a hidden tax on all long distance telephone calls to finance Internet access in classrooms across the country. CED believes that such programs, whatever their merits, should be financed broadly and transparently, not by hidden taxes on consumers of particular services.

The costs imposed by regulation are also often broader than many people realize. In addition to specific equipment that may have to be added to an automobile or to a production line to meet a federal requirement, the government directive may also have powerful indirect influences. A case in point is the value of time that people must spend waiting in line for permits and inspections or filling out forms. Figure 2 summarizes the estimated paperwork

10. Kenneth Katin and Jeffrey Brown, "A Drug Lag Update," *Drug Information Journal*, 29 (1995): 361-373; Joseph Di Masi, "Trends in Drug Development Costs, Times, and Risks," *Drug Information Journal*, 29 (1995): 375-384.

burden imposed by the federal government in fiscal year 1996. If we value the time of those filling out the forms very conservatively at the national average hourly earnings of about \$16 per hour, the cost of the 6.8 billion hours consumed was about \$110 billion. Since those actually performing much of the paperwork are likely to have earnings substantially above the average, the actual economic cost was no doubt even higher.<sup>11</sup>

But the impact on consumers can be even less transparent, especially since regulations often have unintended consequences. Take the case of a federal requirement that the household ladder be made safer. Such an action not only increases the cost of the product, but may

make it more difficult to use. As a result, many families may forgo purchasing this more expensive and less convenient item and stand on boxes or table tops instead. The unintended adverse result, the reduction of safety in the home, would not be apparent from reading the proposed rule.

In another ironic example, the current narrow tolerance standards on pesticide residue on fresh fruits and vegetables do more than merely increase the costs of nutritious foods. A diet rich in fruits and vegetables may reduce cancer rates far more than would eliminating trace pesticides on those foods. As a result of the tight standards, many low-income persons in particular do not eat sufficient fruits and vegetables because they have become too costly. On balance, cancer rates may actually be higher because pesticide restrictions are too rigid.<sup>12</sup> Clearly, the rhetorical claim that onerous regulation is always justified because "lives are more important than dollars" is too simplistic. In this case, it is simply wrong.

For many of these reasons, estimating precise benefits and costs of individual rules is difficult and thus quite controversial. (See "Advantages and Disadvantages of Benefit-Cost Analysis," page 10.) These difficulties are accentuated by the fact that few widely accepted standards are available to guide reviews of proposed regulations. For example, how do you measure an extension of working life? How clean should the air be?

Because of these difficulties, some analysts believe that benefit-cost analyses have severe limitations.<sup>13</sup> Rather than serving as the prime

**Figure 2**  
**Estimated Paperwork Burden Imposed on Businesses and Individuals by the Federal Government, Fiscal 1996**  
(in millions of hours)

Department or Agency	Burden
Treasury (primarily IRS)	5,347
Defense	258
Securities and Exchange Commission	189
Health and Human Services	168
Labor	154
Federal Trade Commission	146
Agriculture	112
Environmental Protection Agency	100
Transportation	91
Education	60
Justice	35
Housing and Urban Development	32
Social Security Administration	27
All other	129
<b>Total</b>	<b>6,848</b>

SOURCE: U.S. Office of Management and Budget, *Information Management Plan of the Federal Government* (Washington, D.C.: U.S. Government Printing Office, 1996), p. 10.

11. The Tax Foundation uses the average labor cost of the IRS and Price Waterhouse of \$42.40 in estimating the total compliance cost of federal taxes at \$225 billion. OMB has used an hourly cost of \$26.50 derived from Hopkins in estimating paperwork costs imposed by the independent regulatory agencies. See Tax Foundation, *Compliance Costs of Alternative Tax Systems II* (Washington, D.C.: March, 1996) 5; OMB, *Report to Congress on the Costs and Benefits of Federal Regulations*, (Washington, D.C.: Office of Management and Budget, 1997), p. 30.

12. Robert W. Hahn, ed., *Risks, Costs, and Lives Saved* (New York: Oxford University Press, 1996), p. 27.

13. See Lester B. Lave, "Benefit-Cost Analysis: Do the Benefits Exceed the Costs?" in *Risks, Costs, and Lives Saved*, Ed. Hahn, pp. 104-134.

#### ADVANTAGES AND DISADVANTAGES OF BENEFIT-COST ANALYSIS

Benefit-cost analysis is not an abdication of human judgment, but the vigorous application of that judgment. While its techniques may sound arcane, they are widely used and routinely taught in economics courses. It is not unreasonable to ask that they be generally understood by those in positions to make \$100 million policy decisions. The basic concepts are not difficult.

Benefit-cost analysis involves several technical procedures. The most important are (1) defining the scope of benefits and costs, (2) estimating the value ("willingness to pay") to individual members of society of such benefits as reductions in risk to life and health and increases in amenities and recreational opportunities, and (3) "discounting" future benefits and costs to present values so that they can be usefully compared.

Benefits should be broadly defined and not limited to favorable effects that can be quantified. They may include significant identifiable but nonquantifiable benefits, such as increased freedom of choice for consumers and enhanced opportunities for public enjoyment of the environment. When some important aspect of a benefit cannot be quantified, the proposal should describe the benefit in some detail, explaining why it is important.

Sometimes difficulty in quantifying benefits does not reflect measurement shortcomings so much as deficiencies in the necessary underlying technical or scientific information. For example, EPA's internal guidance for the preparation of benefit-cost analyses recognizes that valuing reduced health risks is difficult because of uncertainties about the relationship between different pollution levels and corresponding health effects.

Similarly, costs are broader than out-of-pocket expenditures by those directly subject

to the rule-making process. Total economic costs can include the value of time that people spend waiting in line for permits, poorer health resulting from the delay in bringing new therapeutic drugs onto the market, and the inconvenience, or worse, resulting when products are forced off the market by burdensome regulatory procedures.

Benefit-cost analysis does involve uncertainties and opportunities for subjective judgments. The most important difficulty may be that individual interests and preferences vary widely. Different people attach different values to (and are willing to pay different amounts for) cleaner lakes or safer automobiles. Such variations arise inevitably from differences in income, occupation, age, abilities, health status, and tastes. Any estimate of society's benefits and costs from a uniform government rule will, to some extent, obscure these differences.

However, these and related criticisms of benefit-cost analysis miss the central point: The problems arise not from the measurement of benefits and costs, but from the nature of regulation itself. To say that individual preferences differ in ways a single benefit-cost assessment cannot capture is the same as saying that a uniform government rule will necessarily be too strict and costly for some people and too lenient and cheap for others. Averaging and approximation are inevitable when government regulates. The question is how to strike the best balance. Benefit-cost analysis is not intended to provide a final answer, but to frame the debate in a useful and productive way.

SOURCE: Based on testimony of Christopher DeMuth, American Enterprise Institute, and Paul Porneas, Resources for the Future, before the Senate Committee on the Judiciary, February 8, 1995, with modifications by CED.

basis for regulatory decisions, such analysis, in this view, should serve broader purposes such as thinking systematically about social issues, forcing the collection of relevant data, and especially, clarifying the implications of decisions. For example, rather than serving as the basis for determining whether a hazardous product should be banned, benefit-cost analysis would be used to examine the various effects resulting from such an action, thereby providing valuable new information to the policy maker. In the process, the analysis may stimulate efforts to develop alternative approaches to the problem, which may or may not involve regulatory powers. But, however used, a careful calculation of benefits and costs provides an essential discipline to improve the current arbitrary procedure.

To avoid problems inherent in placing monetary values on human lives, benefit-cost analysis sometimes can be structured in terms of lives themselves. Sodium nitrite, which is used to preserve food, is a mild carcinogen. Its use creates the possibility that a limited number of people will develop cancer. On the other hand, a far larger number of people would die of botulism if nitrites were not used as a preservative in meat. A comparison of the costs and benefits of restricting the use of nitrites in meats indicates that more lives are saved by its continued use. This type of comparison was the basis for the FDA's sensible decision not to ban nitrites in meat and, instead, merely to urge a reduction in their use.<sup>14</sup>

The recent experiences with air bags demonstrate that neither the benefits nor the costs of regulation need be measured in dollars but can refer to human lives. The National Highway Traffic Safety Administration issued air bag standards based on automobile tests that made no distinctions about the occupant's age, sex, or height. As a result, children under the age of ten have experienced a net increase in fatality risk because of air bags. At least 40 children in that age group have been killed by air bags in crashes that otherwise would not typically have been fatal.<sup>15</sup>

Where benefits are especially hard to measure but certain to exist, it is important to have reliable cost data to determine the most cost-effective measures. Choosing between regulatory methods by comparing their costs to customers and producers is a more limited approach than cost-benefit analysis but can still be very useful. Cost-effectiveness approaches have been applied successfully to areas ranging from defense procurement to health programs.

### BARRIERS TO BALANCING BENEFITS AND COSTS

The political appeal of regulation creates an obstacle to the dispassionate scrutiny of attractive-sounding proposals. After all, who can oppose a standard that is described as providing the consumer with safer products? Regulation usually is politically popular because it enables legislators and regulators to claim credit for its benefits, such as ridding the society of some hazard, while ignoring the heavy but hidden or widely diffused costs of compliance. Those costs appear in no government budget. Instead, they are buried invisibly in the higher prices of goods and services paid by those same consumers and voters.

As a related matter, one serious problem in any effort to reform regulation is that the mere suggestion of change is likely to generate emotional counterattacks. The most carefully constructed and well-grounded analysis can antagonize citizen groups, who jump to the conclusion that wetlands are about to be paved over or national forests sold to the highest bidder. Any successful and comprehensive reform must have a perspective that is not threatening to widespread citizens concerns. Reform must therefore transcend the technicalities of benefit-cost analysis and speak clearly to basic public goals.

14. P. J. Wingate, "Reason to Applaud: FDA Handling of Nitrite Problem," *Wall Street Journal*, September 8, 1978, p. 16; Richard C. Clelland, Richard J. Hukes, Evelyn J. Bowers, and Anne B. Clelland, "Dietary Nitrite and the Public Interest," *Wharton Magazine*, (Summer 1981): 48-55.

15. John D. Graham and Maria Segura-Gomez, "Air Bags: Benefits and Risks," *Risk & Perspective* (July 1997): p. 2.



Nevertheless, despite the most careful preparation, reformers must be ready for vehement criticism from defenders of the status quo. Of course, when benefit-cost analysis is used to justify large government water projects, local beneficiaries rarely challenge the calculations. But when the analysis does not support the position of active interest groups, the analysis quickly comes under attack.

A final barrier to careful analysis is the common and erroneous perception that the costs of government regulation are of little concern because they are simply "paid by business." In general, those costs are ultimately borne by the individual workers and consumers who make and purchase the products and services produced under regulation. Moreover, much of the rule making extends to all employers, be they profit or nonprofit, in the public sector or in the private sector. Regulation can be as burdensome for a school or hospital as for a steel mill or a chemical plant. In addition, because there are substantial economies of scale in complying with many regulations, smaller enterprises are often disproportionately afflicted. In the case of paperwork, for example, each firm, regardless of size, may have to fill out the same form.

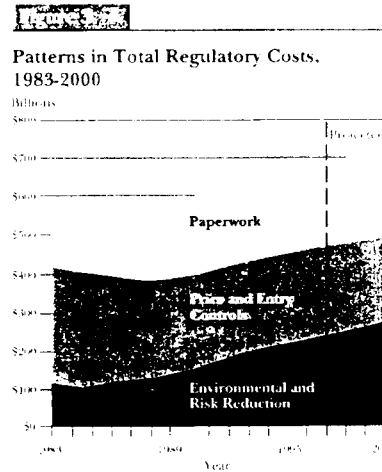
**WHEN REGULATION FAILS**

It is heartening to realize that changes in the regulatory process do not have to start at square one. The appropriate question no longer is, "Are you for or against environmental or workplace regulation?" That question has long been answered. The relevant questions relate to how those regulatory mandates are carried out — to the degree of rule making and the specific approaches directed by a statute or a government agency. Our review has convinced us that greater social benefits could be achieved with the same resources now committed to complying with regulations. In this regard, regulatory failure in the public sector can be as costly as market failure in the private sector.

**REGULATION'S COSTS**

Leaving aside for the moment the question of benefits, the dollar costs of regulation are too large to be ignored. In the aggregate, the costs of government regulations exceed the budgetary cost of all federal domestic discretionary programs. One widely used estimate indicates that complying with federal regulation cost \$67.7 billion (or over \$3,000 per capita) in 1996 and will cost \$72.1 billion in the year 2000 (see Figure 3).<sup>16</sup> Moreover, those regulatory costs fall disproportionately on small business; the burden of compliance for firms with fewer than 20 workers in 1992 was about 90

16. These estimates include each year's cost of regulatory changes being adopted. In environmental contexts, impacts are wide. The measured impacts are also quite broad, including both direct resource use and health impacts. See Thomas D. Hopkins, *Regulatory Costs in the U.S.* (St. Louis, Mo.: Washington University Center for the Study of American Business, 1996), p. 10.



SOURCE: Thomas D. Hopkins, *Regulatory Costs in the U.S.* (St. Louis, Mo.: Washington University Center for the Study of American Business, 1996).

percent higher per employee than for companies with 500 or more workers.

It is often noted that regulation impairs economic growth.<sup>17</sup> It is estimated that when the Clean Air Act of 1990 is fully implemented in 2005, it (in combination with other environmental regulation) will have reduced the nation's capital stock by four percent, increased the cost of capital by five percent, and reduced the real gross domestic product (as conventionally measured) by more than three percent.<sup>18</sup>

Many people find it hard to comprehend such important but abstract and aggregate effects. For this reason, the more micro analysis presented in Figure 4, page 14 may be helpful. This table shows how a business firm becomes subject to more and more regulation as it grows in size. Hiring a fifteenth employee, for example, means that the firm must comply with Title VII of the Civil Rights Act and the Americans With Disabilities Act. Hiring five more people subjects the employer to the Age Discrimination Act, the Older Worker Benefit Protection Act, and COBRA (requiring the continuation of medical benefits for up to 18 months upon termination). Expanding the firm's labor force by still another five workers brings it under the purview of the Health Maintenance Organization Act and the Veterans Reemployment Act. Some companies have stated that they refrain from increasing employment specifically to avoid becoming subject to the next level of regulation.

When the entire body of federal regulation is examined — something that is rarely done in the executive, legislative, or judicial branches — it becomes apparent that the resulting burden is enormous. The typical business firm in this country is subject to regulation of virtually every aspect of its activity. For every box on its organizational chart, from the board of directors down to first-line management, there is at least one government agency, and often more, with the power to shape, review, change, or veto the company's decisions. In the new, global marketplace, complying with this vast

array of rules handicaps American companies that compete against foreign firms with different and often much lower cost structures.

Regulatory costs, of course, are only half the equation. Were it evident that the benefits of most of the vast array of current regulations justified their economic costs, we should consider these costs well spent. But this does not appear to be the case. Although the recent OMB *Report to Congress on the Costs and Benefits of Federal Regulations* estimates that the total annual benefits of all federal regulations in 1997 exceeded their cost, this tells us little about whether the *marginal* regulatory interventions adopted recently provide net benefits, which is the relevant question.<sup>19</sup> It is widely acknowledged that the net benefits from many regulatory activities are subject to sharply diminishing returns. Benefits may greatly exceed costs for early interventions, but subsequent actions tend to produce smaller benefits at sharply rising costs. In such circumstances, as a careful survey of environmental economics noted in 1992, "It will be quite easy...to enact new, more stringent regulations that impose large costs on society, well in excess of the benefits."<sup>20</sup>

Recent analysis of major environmental regulations reinforces these concerns. A study using the government's own regulatory impact

17. Over 40 percent of the decline in productivity growth in manufacturing during the 1970s has been attributed to environmental and jobs-aiding regulation. See Wayne Gray, "The Cost of Regulation: OSHA, EPA and the Productivity Slowdown," *American Economic Review*, (December 1987): 998-1006. Recent studies of selected industries show even larger effects. See Wayne Gray and Ronald Shadbegian, *Environmental Regulation and Manufacturing Productivity at the Plant Level* (Washington, D.C.: U.S. Bureau of the Census, 1995) and Paul MacAvoy, *Industry Regulation and the Performance of the American Economy* (New York: W.W. Norton & Co., 1992).

18. Dale W. Jorgenson and Peter J. Wilcoxon, "Environmental Regulation and U.S. Economic Growth," *RAND Journal of Economics* (Summer 1990): 314-340.

19. *Report to Congress on the Costs and Benefits of Federal Regulations* (Washington, D.C.: Office of Management and Budget, 1997), p. 33.

20. Maureen L. Coppper and Wallace E. Oates, "Environmental Economics: A Survey," *Journal of Economic Literature* (June 1992), p. 7-99.



### Federal Regulation and U.S. Business

Number of Employees	Law or Regulation	Key Provisions
1 or more	Fair Labor Standards Act Selective Service Act Equal Pay Act Immigration Reform Act ERISA	Overtime and minimum wage To rehire discharged veterans To avoid discrimination in wages Documentation Standards for pensions
4 or more	Immigration Reform Act	To avoid discrimination against legal aliens
10 or more	Occupational Safety and Health Act	Job safety standards
15 or more	Civil Rights Act Americans With Disabilities Act	To avoid discrimination with regard to race, color, etc. "Reasonable accommodations"
20 or more	Age Discrimination Act COBRA	Protection against age bias Medical benefits
25 or more	Health Maintenance Organization Act Veterans Reemployment Act	Requires HMO option Covers military service
50 or more	Family and Medical Leave Act Affirmative Action Program	12 weeks of unpaid leave Covers recipients of government contracts
100 or more	Workers Adjustment and Retraining Notification Act (WARN)	60-day notice of large layoffs

SOURCE: CED, various sources.

analyses (RLAs) reveals that only 38 of the 83 major regulations analyzed by five major agencies from 1990 to 1995 met a benefit-cost standard, and only 23 of 54 final rules did so (see Figure 5, page 15).<sup>21</sup>

#### REGULATION AS AN OBSTACLE TO INNOVATION AND COMPETITION

The innovation, cost reductions, and competition that result from rapidly changing technology and markets may be impeded by outmoded statutes and regulations. Thus, the

reliance by the Department of Agriculture on continuous inspections instead of on modern sampling techniques has discouraged or delayed the adoption of new food safety technologies. Another example is new medical soft-

21. The analysis monetized costs and benefits where possible when the agency analysis had not done so. The agencies found monetized benefits greater than costs for only 17 rules in total and 9 final rules. The large variation in agency methodology and data indicate the need for a standardized methodology, stronger Executive Branch review, and the non-partisan regulatory analysis organization to assist Congress that are called for in this report.

WILL CONGRESS ...

### Benefit-Cost Analysis of Federal Regulations

	Agency*					
	Total	CPSC	MSHA	NHTSA	OSHA	EPA
Number of regulations	83	1	1	6	11	61
Monetized benefits exceed costs	38	1	1	5	10	21

\*CPSC - Consumer Product Safety Commission; MSHA - Mine Safety & Health Administration; NHTSA - National Highway Traffic Safety Administration; OSHA - Occupational Safety and Health Administration.

SOURCE: OMB, R. Hahn, *Risks, Costs, and Lives Saved*, p. 218.

ware that models the reaction of cancerous tumors when treated with a specific dose of radiation. The FDA has ruled that this software must be approved as a "medical device." As a result, even a slight change in computer code requires time-consuming and expensive reapproval. Yet, the FDA regulations on medical devices surely did not contemplate the inclusion of medical computer software.<sup>22</sup>

The extensive reviews to which many new products are subjected in the United States inevitably raise the cost of product innovation and increase the uncertainty of its financial success. Many companies bypass these barriers to innovation by establishing research laboratories and production facilities abroad. Pharmaceutical and medical equipment firms provide striking illustrations.<sup>23</sup> This movement overseas should stimulate the proponents of tough regulation to take a hard look at their approach. Companies moving to the Netherlands, for example, are not seeking a weak or ineffective regulatory environment, but one that is more flexible and efficient.

Ironically, older companies that have mastered the intricacies of government rules often

find that regulatory barriers can be useful in keeping out new competition. In these circumstances, the regulatory battle can become a struggle between the "ins" and the "outs." A classic product of such a struggle is the provision in the Clean Air Act that mandates the use of expensive scrubbers even if the utility uses expensive "clean" coal. That provision was championed by the regions producing cheaper but dirtier coal, which had to be scrubbed to meet the Clean Air requirements. The universal requirement for scrubbers was far more a regional cross-subsidy from clean to dirty coal producers than a true environmental action. Unfortunately, the beneficiaries of regulatory action often are aware that markets work all too well, and they therefore support the continuation of regulations that restrain their competition.

### THOUGHTLESS OR OUTMODED RULES

Examination of these larger economic effects should not preclude consideration of the arbitrary and thoughtless nature of certain individual regulations. A case in point is the order by regulators requiring a Kansas City bank to put a braille keypad on a drive-through ATM — to be installed on the driver's side.<sup>24</sup> Yet another example is a federal law prohibiting home builders from installing toilets that hold more than 1.6 gallons of water. This statutory provision, instead of conserving water, often requires using two or three flushes to get the job done — quite apart from the question of

22. *Public Policy in the Information Age: Investigation and Conclusion* (Washington, D.C.: Computer Systems Policy Project, 1996), 36.

23. Pietro Nivola, "Beside Outsourcing: More Bad News From Business Regulation," *Brookings Policy Brief* No. 5, Washington, D.C.: Brookings Institution, July 1997, p. 3. "U.S. Medicine's Companies Turning to Europe to Accelerate Product Commercialization," *Netherlands Investment News*, Spring 1994, p. 4.

24. Bonar Meuninger and Dan Mangahas, "Regulatory Overkill Is Pushing America's Businesses to the Brink," *Kansas City Business Journal*, November 18-24, 1994, pp. 1, 52.

why water should be singled out among consumer goods for regulation.<sup>25</sup>

Of more serious economic impact are the rules of the Department of Agriculture requiring farmers to dispose of millions of pounds of peaches, nectarines, and other good fruit because they are smaller than federal standards permit. As a result, food that could be sold or given away to the needy is left to rot. Sadly, these examples of appalling regulations are not unique.

In many instances, contemporary regulatory activity is a vestige of responses to problems that have long since passed. A clear example is the Davis-Bacon Act, which prescribes "prevailing" wages on government construction contracts that are generally above the market wages received by other workers in construction jobs. The statute, which was enacted in the depths of the Great Depression, was designed to prevent sweatshop conditions in the building trades. Sixty years later, the original justification has long since disappeared, but the statute and its regulations survive in full force. No sound economic reason to continue such wage regulation has been articulated.

Another striking example of the persistence of obsolete rules is found in the administration of the Resource Conservation and Recovery Act (RCRA). EPA's Office of Solid Waste (which administers RCRA) originally placed silver on its toxic characteristic list because silver was so listed by EPA's Office of Drinking Water. However, in January 1991, the Office of Drinking Water eliminated the standard for silver because it determined that silver in drinking water had no adverse effects on humans. Yet, silver remains on RCRA's list of toxic substances. Such examples dramatically illustrate the need for periodic review of regulations to ensure that their original purpose remains valid and a more efficient process for eliminating, correcting, and simplifying those that require it.

## INSUFFICIENT OR DEFICIENT ANALYSIS

Although the most critical part of the regulatory process occurs when Congress enacts statutes under which regulatory agencies operate, this crucial legislative stage is completely exempt from any requirement to examine the potential impact or effectiveness of the proposed law. None of the recent legislative proposals to enact generic regulatory reform contained any provision for Congress to include such reviews in its deliberations.

It is easy to identify regulatory programs that have serious deficiencies and elicit widespread objections. But the problem is more fundamental than suggested by lists of silly regulations. No one sets out deliberately to create burdensome and ineffective rules. Many of the underlying statutes have created huge and unnecessary costs because Congress did not sufficiently analyze the problems and the proposed solutions before taking action. Powerful examples are asbestos removal and Superfund legislation. The shortcomings of these laws are too serious to be brushed off by a general appeal to the universal desire for a healthy environment.

It is useful to remind Congress that it passed a sweeping law that led cities and states to spend nearly \$20 billion removing asbestos from public buildings, although EPA concluded, after some research, that ripping out asbestos was an expensive and dangerous mistake because the removal effort increased the asbestos fibers circulating in the air.<sup>26</sup> Obviously, the analysis should have preceded the legislation. Similarly, the congressionally enacted Superfund law has turned out to be a costly bonanza for lawyers because the bill effectively

25. Rob Staggelborg, "Small Businesses Flashed With Ideas on Regulations," *St. Louis Business Journal*, August 28, 1995, p. 17A.

26. William K. Stevens, "Study Asserts Intact Asbestos Poses Little Risk for Most Inside Buildings," *New York Times*, 29 September 1991, p. 18; David Stopp, "Removing Asbestos Doesn't Guarantee Substance Is Gone," *New York Times*, 22 March 1993, p. F6.

emphasized the determination of liability rather than the reduction of pollution.<sup>27</sup>

Compounding the problem, many regulatory statutes, especially in the areas of environment and job safety, prohibit or severely restrict any use of economic analysis in the Executive Branch's rulemaking process. For example, in two related decisions the Supreme Court interpreted the underlying statute as precluding the use of cost-effectiveness criteria in the development of OSHA regulations.<sup>28</sup>

Along the same lines, the Clean Air Act has been interpreted to prohibit EPA from considering costs of any kind, much less using benefit-cost analysis, in setting air-quality criteria. However, while the Toxic Substances Control Act authorizes EPA to impose controls on a chemical if it poses an "unreasonable risk of injury to health or the environment," it also requires that EPA take account of the economic disadvantages of eliminating or restricting the availability of the chemical.<sup>29</sup>

These limits placed by statutes on Executive Branch review place the agency heads in an impossible situation. The situation is now worse than the quandary that faced an incoming administrator of the EPA in the late 1970s: "He found his hands were tied. Of approximately 125 regulations under development, all but a few were specifically required by a statute or by a court order interpreting a statute."<sup>30</sup>

Thus, it is often futile for the president to direct a regulatory agency to choose the most cost-effective approach. This is especially the case when the governing statute closely prescribes the specific actions to be taken, which may be far from the most cost-effective approach. The byzantine requirements and timetables of the almost 800 pages of the Clean Air Act Amendments illustrate the problem. It was easy to forecast that the Clean Air Act would create a litigation bonanza. Serious analysts inside and outside the government quickly noted the enormous burdens that would be imposed by many of the detailed provisions, and especially by unrealistic timetables and deadlines.

Analysts at Resources for the Future showed in 1990 that the pending Clean Air Act Amendments would flunk the simplest benefit-cost test: the high end of the range of estimated annual benefits (\$6 to \$25 billion) was below the low end of the range of annual costs (\$29 to \$36 billion).<sup>31</sup> Analysis done at the President's Council of Economic Advisers came to the same conclusion. Although critical to the bill being debated, this basic analysis was ignored in the rush to enact the legislation because there was no requirement that Congress consider any such analysis.<sup>32</sup>

Another regulatory shortcoming results from proliferation of uncoordinated and overlapping statutory authority and administrative rule making. A dozen federal agencies, ranging from the Department of Labor to the Nuclear Regulatory Commission (NRC), have different definitions of hazardous substances and different inspection standards for packaging these substances. Each refuses to accept the standard of another as legitimate. As a result, compliance is needlessly difficult.

One universal shortcoming of standard rule making is apparent. Each statute or rule is promulgated in isolation, as if no others ex-

27. John J. Fialka, "Superfund Ensnares Thousands of Small Firms in a Legal Nightmare," *Wall Street Journal*, March 19, 1987, p. A-21; Richard L. Stroup, "Superfund: Regulation vs. Rights," *PHC Reports*, December 1995, p. 11; Robert W. Hahn, "Rethinking Superfund From the Bottom Up," Testimony before the U.S. House of Representatives, Subcommittee on Commerce, Trade, and Hazardous Materials, Washington, D.C., June 22, 1995.

28. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) and *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981).

29. Testimony of EPA Administrator Carol Browner before U.S. Senate, Committee on Environment and Public Works, 12 February, 1997, quoted in Stephen Haeuber and Kenneth Chilton, *EPA's Case for New Ozone and Particulate Standards* (St. Louis, Mo.: Washington University, Center for the Study of American Business, 1997), p. 18.

30. John Quarles, "Runaway Regulation? Blame Congress," *Washington Post*, 20 May, 1979, p. B-8.

31. Paul R. Portney, "Economics and the Clean Air Act," *Journal of Economic Perspectives*, Fall 1990, p. 179.

32. See Robert W. Hahn, "Regulatory Reform: What Do the Government's Numbers Tell Us?" in Robert W. Hahn, ed., *Risks, Costs, and Lives Saved* (Washington, D.C.: AFI Press, 1996), 225-229.

isted. As noted above, when EPA sets standards under the Clean Air Act, by law it may consider only health as a criterion in setting permissible pollution levels, with no regard to costs. Neither can it consider alternative, more effective approaches to improving health, nor even the other forms of pollution generated by compliance. The problem is illustrated graphically by the artificial lakes of sludge generated by the scrubbers required to clean the air.

Ironically, the governing statute at times requires ignoring important potential benefits of regulation. For example, under the Community Right-to-Know Act (a section of the law that established the Superfund), companies must publicly report the amount of their emissions each year. Such information has led many companies to step up their pollution control efforts. However, government agencies are exempt from the reporting requirement, even though some of them are the biggest polluters in the nation. The benefits achieved by the Community Right-to-Know Act would be increased if its requirements were extended to the public sector. This leads to a more general point. The costs and potential benefits of government regulation are not restricted to business; they extend to the nonprofit sector of the economy as well as to portions of the public sector.

One glaring deficiency is the inherently limited scope of Executive Branch review of regulations. This review has been established by executive order rather than statute, so that a future president may eliminate these reviews. Of more immediate concern, however, is the fact that independent regulatory agencies are generally exempt from this process, although they may voluntarily choose to follow some of the procedures. In practice, this means that large bodies of federal regulation are beyond the purview of reform efforts—those of the FCC, Federal Energy Regulatory Commission (FERC), FTC, International Trade Commission (ITC), National Labor Relations Board (NLRB), NRC, SEC, and Federal Reserve Board.

Many regulators, whether subject to presidential directive or not, appear to be out of sympathy with reform, or at least very suspicious of the results of economic analysis of their programs. Out of habit and protective instinct, the agencies follow bureaucratic, inefficient procedures within a legalistic mind-set that has been called "the death of common sense."<sup>33</sup> It will take a basic change in the culture of federal regulatory agencies, and of their congressional and private-sector supporters, to develop an atmosphere that welcomes new regulatory approaches in lieu of simply expanding existing regulations.

Moreover, experienced government officials are proficient at offering lip service to circulars issued by OMB to implement presidential policies. The ritual presentation of some perfunctory economic analysis enables agencies to ignore the spirit of the effort while still meeting formal requirements. When the General Accounting Office (GAO) examined the 23 regulatory analyses performed by EPA under the Clean Air Act from 1991 to 1995, it found that 12 did not assign dollar values to estimated benefits, 6 did not make the required comparison of alternatives, and 8 did not specify key economic assumptions such as the discount rate.<sup>34</sup>

#### HEAVY HAND AND SOFT TOUCH

If there is any lesson that we have learned in recent decades, it is that regulation is a powerful remedy that should be used only in situations where markets do not work adequately. Given the huge amount of regulation in force today, a compelling case can be made for economizing on regulation. Like any strong medicine, regulation should be used carefully and with full attention to its adverse side effects.

33. Philip K. Howard, *The Death of Common Sense* (New York: Random House, 1996).

34. See testimony of E. Ate Stevens of the General Accounting Office to the U.S. Senate Committee on Governmental Affairs, Washington, D.C., September 12, 1997.

The appropriate regulatory response to serious shortcomings of the marketplace or society lies within a range of alternatives along a spectrum, with the reporting of information at one end and traditional directive rule making at the other. Intermediate positions include a variety of mechanisms which involve the use of the price system, such as pollution taxes and emissions trading.

In many instances, regulatory objectives can be achieved without resorting to traditional command-and-control interventions. For instance, a requirement for disclosure of information of point source pollution from industrial plants or surgical procedure success rates from hospitals, can often produce the desired changes in behavior and outcomes by informing consumers and citizens groups. Each organization will have both an incentive to seek improvements and the flexibility to achieve them in the most cost-effective manner. While information disclosure is obviously not adequate to deal with all problems, it should be considered a first step, or the lightest touch of a government agency addressing a regulatory problem.

Command-and-control regulation creates an appearance of certainty and fairness. The result is decreed; everyone must obey the rule. Yet, the results are often disappointing. Consider the numerous times that Congress has postponed the effective date of some tough new environmental rule after experience has shown that attaining the narrowly defined goal is infeasible. In contrast, relying on the market provides less apparent certainty because it is difficult to forecast specific outcomes. Yet, the direction of change is generally clear. For example, raising landing fees at a major metropolitan airport will divert some traffic to less congested nearby airports, but to an undetermined degree. If implemented, incentives

subsequently can be adjusted in light of new information to achieve desired results. Such adjustments are much more difficult to make under a command-and-control regime.

Other flexible approaches can also play a useful role. For example, tradable permits represent an alternative way of attaining a desired level of environmental cleanup at lower costs than the more traditional method of relying on quantitative controls (see "Using Tradable Permits," page 20). The more incentive-oriented economic approaches also encourage the development of new technologies that can achieve society's objectives with less disruption and delay or more effectively. We must recognize, however, that even these incentive approaches are normally accompanied by a substantial regulatory component. For example, the government sets specific allowable pollution levels in the trading of sulfur dioxide permits.

The regulatory shortcomings cited here are becoming more apparent as our society spends many billions of dollars annually to secure limited improvements. When combined with the high overall cost of regulation, they underscore the need for reform.

To restate a fundamental but overlooked point — economists breathe the same air and drink the same water as everyone else. Their criticism of the government's response to public concerns about worker safety, the environment, and similar issues does not imply that those legitimate public concerns should be ignored. It rather suggests — and this may be the most compelling reason for this CED statement — that the American people deserve better results from the resources, time, and effort devoted to government regulation. Our air ought to be cleaner, our water purer, and our workplaces safer, at the same time that our consumer living standards are higher.



### USING TRADABLE PERMITS

Emissions trading is the major concession to economics in the Clean Air Act Amendments of 1990. The approach relies on the fact that individual companies can usually devise less costly ways of reducing their pollution through changes tailored to their specific situations than government regulators can by using across-the-board requirements. The Act's emissions trading policy for sulfur dioxide emissions is an attempt to take advantage of this fact by creating markets in de facto "rights to pollute." Trading of emissions rights concentrates air pollution control efforts on those emissions sources that are cheapest to control, thereby reducing overall costs. If one company can reduce emissions more cheaply than another, both can benefit if the former purchases emissions rights from the latter.

Emissions trading can result in substantial economic gains, in the form of reduced compliance costs for business, with almost no negative effect on the environment. The basic unit of currency for emissions trading is the one-ton emission reduction credit. Credits are created when pollution sources such as public utilities reduce their emissions below the levels allowed by their permits. These reductions can be achieved in a variety of ways: burning cleaner fuel, installing new control equipment, or shut-

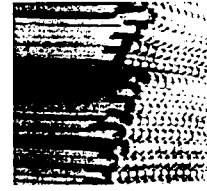
ting down a polluting facility altogether. Emissions allowances may be bought, sold, or banked like any other commodity. If a utility holds surplus allowances, it may sell them to units whose emissions levels exceed their allowance supply, or it may save them for use in future years.

The market for pollution credits has been developing. The volume peaked at 16.7 million credits traded in 1995 and has generally been in the range of 8 to 10 million a year. The typical price per ton-credit has declined substantially, from \$600 in 1990 to \$110 in 1997. Overall, the usefulness of this approach has been demonstrated quite clearly.

Illinois Power saved \$91 million by purchasing allowances instead of installing scrubbers, and Wisconsin Electric Power saved almost \$90 million by avoiding the need for scrubbers. This positive trend is continuing. Duke Power has projected savings of \$300 million. Clearly, the new flexibility in the air pollution control law has eased the burden of complying with EPA standards. In 1997, the New York State government found an interesting use for the pollution credits it possessed. It offered them as an attraction to a glass manufacturer who wanted to build a new factory in the state.

### III.

## Previous Attempts at Reform



Past efforts to reform the process of writing regulatory laws and implementing regulations have failed or fallen short. This has been due principally to lack of public support or insufficient oversight on the part of the legislative and Executive Branch leadership. In this policy statement, we recommend innovations in the regulatory process that will promote important social goals as well as economic efficiency and long-term growth. A brief examination of previous attempts at reform provides a useful background for these recommendations.<sup>37</sup>

#### LESSONS FROM THE PAST

Since 1974, every president has attempted to improve the regulatory process. President Ford launched a bipartisan effort to improve economic regulation, particularly with respect to rate regulation of the transportation and financial industries. President Jimmy Carter continued that effort with the elimination of the CAB, the reduction of restrictions imposed by the ICC, and creation of intense price competition in the financial industry. Each of these presidents also established a formal system to review new government regulations before they were issued. Important lessons can be learned from their successes as well as their failures.

President Ford's concerns about the inflationary impact of federal activities, especially regulation, marked the beginning of an organized, comprehensive effort at regulatory reform. His Executive Order 11821 established procedures for preparing Inflation Impact Statements to illuminate the economic impact

of regulatory proposals. The statements were prepared by the various executive agencies and reviewed by the Council on Wage and Price Stability (CWPS).

President Ford focused on four reforms: (1) measuring and considering the benefits and costs of proposed regulations, (2) reducing the backlog and delays in regulatory proceedings, (3) suggesting changes in legislation under which regulatory programs operate, and (4) ensuring that consumer interests prevail in regulatory proceedings. (Because the so-called independent agencies are not subject to the jurisdiction of presidential executive orders, Ford and his staff tried to coax them into following the spirit, if not the letter, of his directive.) With some exceptions, the agencies paid only lip service to this initiative. Nevertheless, this general approach to regulatory review has continued under successive administrations, with revisions in the details reflecting experience gained in conducting the reviews.

To formalize regulatory review, President Carter issued Executive Order 12044, replacing Ford's Inflation Impact Statement with a new Regulatory Analysis. For all new regulations with an estimated economic impact of \$100 million or more, presentation of a Regulatory Analysis was required prior to the publication of the regulation in the *Federal Register*.

<sup>37</sup> The cause of regulatory reform has been advanced in recent years by a variety of detailed analyses that deal with some, but not all, of the issues discussed in this statement. See *Federal Statute Regulation* (Washington, D.C.: The Business Roundtable, 1995) and *An Agenda for Federal Regulation Reform* (Washington, D.C.: American Enterprise Institute and Brookings Institution, 1997).

Each Analysis included a description, an identification of alternative ways of achieving the policy goal, and an analysis of the economic impact of the regulation. A rudimentary cost-effectiveness test was also required to enforce the requirement that "the least burdensome of acceptable alternatives has been chosen."

By the end of the 1970s, some agencies appeared to be warming to the concepts advocated by regulatory reformers. In order to quantify the benefits of regulatory actions, OSHA began employing economists in 1978. Although OSHA was not required by statute to consider benefits and costs when developing regulations, it attempted to do so. (However, the Supreme Court ruled in 1981 that the law required OSHA to use feasibility rather than cost-benefit analysis as a basis for regulation.)

On balance, the 1970s will be remembered for an outpouring of federal rules and an expansion of regulatory agencies. The employee head count at federal regulatory agencies rose from fewer than 70,000 in 1970 to almost 122,000 in 1980. More substantial progress toward regulatory process reform came later, when cost-benefit analyses became mandatory (at least nominally) for Executive Branch agencies and were incorporated into the regulation-design process.

Although the reform efforts of Presidents Ford and Carter encouraged weighing the costs and benefits of proposed regulations, the final authority for rule promulgation remained with the regulating agency. There was no requirement to refrain from promulgating a regulation whose costs exceeded its benefits.

Economic impacts were not systematically considered during the design of a regulation nor during the preceding legislative process. No president, of course, could unilaterally correct such a fundamental legislative shortcoming. In addition, independent regulatory agencies, such as the FTC, were not subject to presidential directives. The federal agencies that were subject to presidentially ordered regulatory review generally viewed cost-benefit analysis merely as the final hurdle to clear after they

had completed the regulation design.

Two procedural reforms were enacted by Congress in the last year of the Carter Administration. The Regulatory Flexibility Act of 1980 required rule-making agencies to write regulations in a manner that would minimize burdens on small business. Compliance was minimal; many agencies simply attached a perfunctory statement to new rules to meet the law's formal requirements.

The second and far more useful procedural law was the Paperwork Reduction Act of 1980, which took effect after President Carter left office. The act created the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget to supervise enforcement of the law's objective of reducing federal reporting requirements. Early in 1981, President Reagan used an executive order to expand OIRA's mission to encompass review of regulations promulgated by Executive Branch agencies.

Regulatory reform was a basic component of President Reagan's economic agenda. One of his most important actions was the establishment of the Task Force on Regulatory Relief, chaired by Vice President George Bush, to oversee the reform effort. Executive Order 12291, issued in 1981, stated, "Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society." The presidential directive required agencies to prepare a regulatory impact analysis for each "major rule" pending, subject to review by OIRA. A federal agency could not publish a notice of proposed rule making until an OIRA review was complete and its concerns had been addressed.

Executive Order 12291 had two real powers: It required regulatory agencies to demonstrate that the benefits of a proposed regulation exceeded the costs, and it gave OIRA power to delay rule making until regulatory agencies had appropriately addressed broader economic concerns. Another strength of the order was that it allowed OIRA to identify any rule as a major rule.

The regulatory review process during the Reagan Administration had a substantial impact, as indicated by the large number of proposed regulations returned, changed, or withdrawn. The Department of Labor was especially affected. From 1981 to 1989, over 40 percent of its regulations failed, at least initially, to obtain OIRA approval. At the statutory level, President Reagan's major accomplishment was the avoidance of new regulation. He neither proposed nor authorized a new regulatory agency or new major regulatory program. With respect to procedural reforms, the Reagan Administration promoted an effort to accelerate FDA drug approvals and revisions in the enforcement procedures of EPA and OSHA.

President George Bush deviated little from President Reagan's reform program. The Council on Competitiveness, which replaced the Task Force on Regulatory Relief in 1989, was also headed by the Vice President. Like the Task Force, the Council was authorized to review regulations with the aim of eliminating those that inhibited U.S. competitiveness, and it intervened in many specific regulatory matters. The Council on Competitiveness's procedures were frequently criticized, especially those permitting businesses to oppose pending regulations in special *ex parte* presentations. Presidential review of regulatory decisions was also questioned on constitutional grounds. The president's response emphasized that the Constitution empowers the president to see that laws are "faithfully executed."

The incoming Clinton Administration in 1993 rescinded the existing executive orders on regulatory review and abolished the Council on Competitiveness. Nevertheless, regulatory reform continued to have a significant place on the agenda, as President Clinton replaced the Reagan-Bush directives with Executive Order 12866. President Clinton reaffirmed OMB (via OIRA) as the central agency to review proposed regulations. However, the new executive order made the process more accessible to the public by requiring OIRA to identify publicly its recommended changes for regu-

latory actions. Under the order, OMB retains no formal power to hold up rule making or to require a demonstration that the estimated benefits of a regulation exceed its costs; regulatory agencies have to find only that the benefits of the intended regulation "justify" its costs.<sup>36</sup>

President Clinton's executive order requires agencies to do many sensible things in drafting rules. They must identify alternative ways of meeting government objectives, consider benefits and costs, and use market-based alternatives and performance standards. The elimination of thousands of pages of environmental and pharmaceutical regulations is a positive result of that effort. However, many of the eliminations were perfunctory, covering regulation of products no longer sold. New regulations have been added at such a rapid rate that they more than offset the reductions.<sup>37</sup>

Like its predecessors, the Clinton Administration has issued extended formal guidelines on performing and using economic analysis, but recent rule making often appears to have honored them more in the breach than in the observance. For example, in the case of EPA, the largest regulatory agency, only 6 of 45 "significant" rules issued from April to September 1994 contained the required determination that the benefits justified the costs, only 3 were based on a compelling public need, and only 9 considered alternative approaches to regulating. Of the other 177 EPA rules issued during that period (including those not considered to be significant), none was supported by a determination that the benefits justified the costs.

Meanwhile, the aggregate federal rule-making list has grown. The April 1997 semi-annual regulatory plan (an innovation instituted in the Carter Administration) requires

36. A determination that the benefits "justify" the costs does not require that measured benefits in fact exceed the costs.

37. During the year beginning July 1, 1995, EPA increased its contribution to the Code of Federal Regulations by about 300 pages. See testimony of L. Nye Stevens, Director of Federal Management and Workforce Issues, General Government Division, General Accounting Office, to U. S. Senate Committee on Governmental Affairs, Washington, D.C., September 25, 1996, p. 14.

1,466 pages merely to list short summaries of the regulatory actions that the federal departments and agencies are working on, including 225 entries by EPA alone. The staff of federal regulatory agencies has also grown, it totaled 124,915 in 1996, a 26 percent increase from the 1985 low. At the same time, as shown in Figure 6 there has been a recent significant slowdown in the pace of regulatory review by OMB.<sup>15</sup> Insufficient power for direct oversight, review, and systematic analysis of all regulatory programs allows the current situation to persist.

On balance, the formal systems of review put in place by presidents from Ford through Clinton helped convince often reluctant officials of the agencies to analyze the implications of their rules before issuing them. That approach has been somewhat successful in getting regulators and their supporting interest groups to consider the costs and the benefits

they generate for society. Also, the public has begun to realize that regulations have disadvantages as well as advantages. For example, when EPA in 1996 issued for comment preliminary new rules governing ozone and particulate matter emissions (smog and soot, to use everyday terms), the news media pointed out the higher gasoline prices and utility bills, as well as health benefits expected to result from them. Such balanced coverage is fairly new on the environmental policy front.

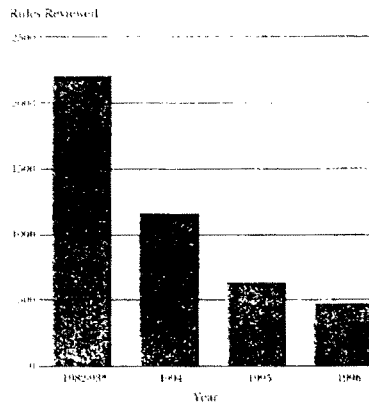
**RECENT CONGRESSIONAL ACTION**

Over the years, a number of bills have been introduced in Congress to legislate generic regulatory reform. In 1995, the proposed Comprehensive Regulatory Reform Act, which required each regulatory agency to show a detailed cost-benefit analysis prior to issuing a new rule, failed by one vote in the Senate. CBO estimated the cost of complying with the proposed Act at a modest \$180 million a year.

Not all provisions of the proposed generic reform bills would have truly improved the regulatory process. In many instances, the requirements imposed by these proposals would have greatly complicated rule making. Although these requirements would likely have slowed down issuance of new rules, they also would have made it more difficult to simplify or eliminate existing ones.

Under some of these proposals, nongovernment, scientific peer review panels would be given power to delay issuance of new regulations if the panels disagreed with the underlying science. Although attractive in concept, such a change would give considerable public power to those neither elected nor appointed. Nevertheless, we believe that government decision makers should be encouraged to use sci-

**Figure 6**  
**OMB Review of Agency Rules**



\* Annual average  
SOURCE: Office of Management and Budget

15. Figure 6 covers both regulations classified as "economically significant" and other regulations. The number of economically significant regulations reviewed declined from 138 in fiscal 1991 to 200 in each of the two following years.

entific analysis, including the results of such panels, in their own deliberations.

Some of the proposed reform bills would require detailed analysis of any regulation imposing annual costs of \$25 million or more (or an average of \$500,000 per state); other versions would set the threshold at \$50 million. The benefit-cost ratio of performing the innumerable studies required by such a low threshold would not be favorable. The federal government does not possess the analytical resources that would be required, and such a provision would swamp any reform effort in an overwhelming paperwork burden. In 1981, when prices were substantially lower, President Reagan focused the effort on those rules generating costs of \$100 million or more a year. This underscores the point that the administrative feasibility of regulations and the regulatory process deserves far more consideration than it has received to date.

Nevertheless, some important changes have been legislated in recent years. The Unfunded Mandates Reform Act of 1995 requires federal agencies to prepare written assessments of the costs and benefits of significant regulatory actions that may result in the expenditure by state and local governments or the private sector of at least \$100 million annually. Independent regulatory agencies were exempted, as were a few politically sensitive programs such as civil rights. The new law requires that the agency consider a "reasonable" number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome alternative that achieves the proposed rule's objectives. The law also requires that the Congress have a CBO cost estimate before taking action on such legislation.

Pursuant to the Regulatory Accounting Act of 1996, OMB issued in September 1997 a report on the costs and benefits of federal regulations.<sup>39</sup> The report, prepared by OIRA, estimates the total benefits and costs of federal regulation but provides little supporting detail by agency or program. Congress has now required OMB to issue another such report by

September 30, 1998. As noted in Chapter IV, this report, if extended to include the necessary detail, could become the genesis of a regulatory budget. A major stumbling block to a regulatory budget to date has been the absence of an adequate database.

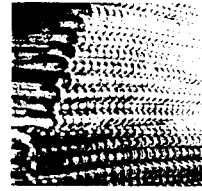
A promising generic reform statute, the Small Business Regulatory Enforcement and Fairness Act (SBREFA), was passed in late 1996. Among its numerous provisions is one establishing a procedure for congressional review of major rules (those involving annual costs of \$100 million or more) before they become effective.<sup>40</sup> Congress is given 60 days from the publication of the final rule in the *Federal Register* to review and reject it, subject to presidential veto. SBREFA also requires each regulatory agency to submit to Congress and the GAO, before the rule takes effect, a complete copy of any cost-benefit analysis. Congress has not yet used the provisions of SBREFA to challenge any major regulatory proposal.

While potentially very useful, the new law, like the presidential executive orders, focuses on the middle stage of the regulatory process, when the agencies issue rules, rather than the birth stage, when Congress passes the basic regulatory statutes. It will take a strong follow-up effort by congressional leaders to ensure that government agencies take these tough new provisions seriously. To achieve the benefits envisioned by the framers of this legislation, hearings should be scheduled on every major regulatory proposal that a regulatory agency sends to Congress, and the agencies' justifications for new regulations should be subjected to rigorous congressional examination. This would require increased analytical capacity for Congress, as recommended in Chapter IV.

39. Office of Management and Budget, Office of Information and Regulatory Analysis, *Report to Congress on the Costs and Benefits of Federal Regulation* (Washington, D.C.: U.S. Government Printing Office, 1997).

40. Alternatively, a major rule is defined as one that OMB finds likely to result in a "major" increase in costs or prices or which will have "significant" adverse effects on employment, productivity, innovation, or competitiveness.

## IV. CED's Recommendations



CED believes that Congress, acting with a strong bipartisan consensus, must create and institutionalize a more sensible and lasting statutory basis for governing regulatory programs. It should do so by establishing a reasonable framework for carrying out regulatory efforts and by rewriting statutes that seriously affect existing regulatory programs. The recommendations presented in this chapter should be applied both when considering new regulations (such as those required to implement any global climate change treaty) and when reviewing the existing body of regulatory laws and rulings.

### BASIC GUIDELINES FOR REFORM

To guide our examination of government rule making, it is useful to keep in mind four basic standards for justifying and evaluating regulation:

*1. Regulation is warranted only when markets do not work as well as regulation to protect citizens and consumers.*

We must begin from the premise that a worthy objective does not necessarily create a need for regulation. Government regulation is a large and necessary presence in the American economy, and the American people overwhelmingly and correctly believe that it is needed to achieve many important economic and social goals. But the ability of competitive markets to protect the public is very powerful. The burden is on those who would replace the

market with regulation to show with solid information and careful analysis that the public would benefit.

*2. Regulatory authority should not be exercised capriciously, and the delegation of such authority by Congress to regulatory bodies should be limited to ensure this.*

Small businesses are especially vulnerable to arbitrary actions by regulators. The Wisconsin toy producer who went out of business following an erroneous report by the Consumer Product Safety Commission is a classic example; the agency had refused to correct its error in a timely fashion even after acknowledging the mistake.<sup>41</sup> In other agencies, officials lack the authority to correct an error quickly, even when they would like to do so. For example, the EPA admitted it erred in listing the household antibiotic Bacitracin as an "extremely hazardous" substance. However, the agency was precluded from deleting that erroneous listing without going through the same burdensome process that it does in listing a very hazardous product.<sup>42</sup>

41. Murray L. Weidenbaum, "The Madly Tax Case," *Business, Government, and the Public*, 3 ed., ed. Murray L. Weidenbaum (Englewood Cliffs, N.J.: Prentice-Hall, 1990), pp. 394-399; see also U.S. Comptroller General, *Business of Law Firms and Certain Other Professions: A Review* (Washington, D.C.: U.S. General Accounting Office, 1975) and "CPSC Mistake Leaves Company Grieving for Its Life," *Industry Week* 4 (November, 1974), p. 54.

42. "Despite an Error, Omission kept on Hazardous List," *New York Times*, 29 September, 1987, p. 14.

*3. Congress and the regulatory agencies should publicly and objectively evaluate in some form the expected benefits and costs of proposed major regulatory efforts, using disinterested, professional scientific advice. Such an evaluation also should be applied periodically to major existing regulations.*

Government decision makers involved in the regulatory process necessarily perform cost-benefit analyses when they make judgments about programs, whether they know it or not. It is vital that they think hard and analytically about these programs, using sound information. The regulatory process would be improved if decision makers relied more heavily on sound science, including peer review of the technical basis for new regulations. Too often, regulators are influenced more by emotional and widely publicized fears and claims of interest groups than by professional analysis. As a result, priorities of federal agencies frequently do not reflect the relative seriousness of the hazards and risks to which the public is subjected.<sup>4</sup>

*4. Where feasible and effective, regulations should be applied with a "soft touch" that allows flexibility of response, including the use of market incentives, in lieu of command-and-control directives.*

A regulatory system based on incentives to "do the right thing" can be both more effective and less costly. In pollution control, this means changing people's incentives so that not polluting is cheaper or easier than polluting. This approach also is far less onerous when government is dealing with the average citizen than the more traditional approach, which imposes highly specific directives and then emphasizes seeking out wrongdoers for punishment. On occasion, simply setting performance standards may suffice, with the private sector having the

flexibility to use the most cost-effective approach.

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#### A NEW ROLE FOR CONGRESS

The basic focus of regulatory reform should be shifted. Virtually all regulatory reforms that have been initiated focus on improving the way in which government agencies write regulations to carry out laws already enacted. Although this activity is useful, it ignores the fact that the key decisions occur when Congress writes an Occupational Safety and Health Act or an amendment to the Food, Drug, and Cosmetics Act or any other important regulatory law, usually with hundreds of pages of detailed specifications.

**CED believes that each congressional committee should be required, when writing a regulatory statute, to articulate the expected benefits and costs of the regulatory program in the report accompanying the legislation. The committee should affirm that these benefits justify the program in light of its estimated costs.** Such an articulation, and the cost-benefit analysis informing it, should be required to permit consideration of the legislation on the floor of Congress. To the extent feasible, this articulation would include a monetary evaluation of costs and benefits as well as a description of other advantages and disadvantages of the regulatory proposal.

The way those statutes are written frequently precludes the agencies from even considering the most cost-effective approaches. Key provisions of the Occupational Safety and Health Act, the Federal Food, Drug, and Cosmetics Act, the Clean Air Act, the Safe Drinking Water Act, and the Superfund Act implicitly or explicitly prohibit the regulators from considering economic impacts when setting standards. It is impossible for regulators to strike any sensible balance between the costs they impose

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<sup>4</sup> See, for example, *Unregulated Business: A Comprehensive Assessment of Unregulated Problems*, Washington, D.C., U.S. Environmental Protection Agency, 1987.



and the benefits they generate when the basic regulatory laws prohibit costs from being considered at all.<sup>44</sup>

We also recommend that Congress eliminate provisions in existing regulatory statutes that prevent or limit regulatory agencies from considering costs or comparing expected benefits with costs when designing and promulgating regulations. Regulations that seek to reduce health or safety risks should be based on scientific risk-assessment and should address risks that are real and significant rather than hypothetical or remote.

Because Congress is the birthplace of regulation, the most essential reform is for that body to take the medicine that it wants to administer to the Executive Branch. Congress should create a statutory requirement that it use cost-benefit analysis in its consideration of regulatory legislation. Congress needs to determine, on the basis of reliable data and analysis, whether the regulatory objective it seeks is a "book worth the candle." This is not a statistical question of whether the precise dollar benefit estimate exceeds the cost estimate. Rather, the intent is that Congress make an informed judgment that the benefits are worth the costs of the regulatory laws they are enacting. Such a judgment, and its rationale, should be made an explicit part of the law's legislative history.

In writing such legislation, Congress should relate new regulatory proposals to existing federal laws and regulations to prevent different agencies from working at cross-purposes. (In this effort Congress would have the assistance of the new regulatory analysis organization described below.) It should recognize the large array of state and local rules and ordinances and attempt to minimize the conflicts and overlap that can readily occur in our federal system. Finally, legislators need to respect the limits of regulatory efficacy in an imperfect world. Despite the urgings of various interest groups, there are directives and prohibitions that will not work even if an army of regulatory geniuses is available to carry them out.

We recommend that, from time to time,

**Congress enact a statute making technical corrections of provisions of regulatory legislation that are widely recognized as inappropriate or generating unintended negative consequences.**

The successful experience with the technical correction of tax laws provides a good model for such a process. (Of course, these problems could be minimized in the first instance if regulatory laws were written in clear and simple English.) In response to the *Report of the National Commission on Restructuring the Internal Revenue Service*, the House has passed a bill that provides procedures for the review of tax legislation being considered by the Congress to reduce its complexity.<sup>45</sup> That approach creates a useful precedent for the enactment of the proposals in this policy statement.

#### A NEW REGULATORY ANALYSIS CAPABILITY FOR CONGRESS

CEA recommends that Congress establish its own professional, nonpartisan regulatory analysis organization to provide it with reliable data, including the required estimates of benefits and costs. This organization could be a separate agency or a part of the Congressional Budget Office (CBO). This new organization also should establish a program to evaluate the costs and efficacy of existing regulatory programs: each year it should analyze a limited number of current major regulatory programs. (Major means those that impose annual costs in excess of \$100 million on society.)

The CBO provides a good precedent for such an organization. In carrying out their respective functions, it would be helpful if OIRA and its new congressional counterpart would develop a cooperative attitude on exchanging statistical and technical information, consistent

44. See *Forbes, Statement to the Senate Committee on Governmental Operations, N.Y., To Reform the Regulatory Process*, p. 3.

45. H.R. 2675, *Internal Revenue Service Restructuring and Reform Act of 1997*, introduced October 21, 1997, by U.S. Representative Bill Archer. At time of publication, this measure had been passed by the House and was under Senate consideration.

*U.S. Environmental Protection Agency*

with the separation of powers between legislative and executive branches, and similar to existing cooperation between CBO and OMB on budget matters.

The two regulatory analysis groups can draw on the experiences of OMB and CBO in serving the key decision makers on the budget. In the case of budget proposals, each committee proposal for new spending must be accompanied by an estimate of costs before it can be considered on the floor. The corresponding requirement in the case of regulation would be the inclusion of the statement affirming that the expected benefits justify the regulatory program in light of its estimated costs.

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#### AN ENHANCED ROLE FOR REGULATORY AGENCIES

The current efforts of government agencies to examine the impacts of proposed regulations before they issue them need to be strengthened. The following recommendations are designed to enhance the role of the regulatory agencies, including the independent commissions.

**We believe that Congress should legislate provisions for regulatory review by OIRA similar to those contained in the executive orders promulgated by Presidents Reagan and Clinton. In addition, Congress should codify in a single statute a requirement that regulatory agencies analyze the impact of significant regulatory initiatives before they are undertaken. Such an analysis of expected benefits and costs, standardized to the degree deemed appropriate by OIRA, should be made a routine part of the drafting of new regulations by the Executive Branch and independent agencies and should be made public.**

Difficulties in estimating costs and benefits should not deter efforts to analyze the impact of regulations before they are issued. For example, uncertainty about the dollar benefits of air pollution control is not primarily a problem of statistical measurement. Rather, it may mainly

reflect the unpleasant fact that we are unsure, for example, how many asthma attacks will be prevented or how much agricultural crop damage will be avoided by a specific emissions reduction. Such uncertainty should be recognized in the analysis, but should not be used as an excuse to proceed without analysis. **Furthermore, in making decisions and setting priorities based on risk, agencies should use best estimates rather than worst-case projections of risk.** For example, OSHA has based occupational cancer risks on the unrealistic assumption that a hypothetical worker is exposed to the risk eight hours every day, five days a week, for 50 weeks a year for 45 years. Similarly, the EPA sometimes assumes that an individual is exposed to emissions at a distance of 200 meters from the factory, 24 hours a day, every day for 70 years.<sup>46</sup>

**Finally, on an established timetable that could range from five to ten years, each regulatory agency should be required to publish the objectives of its significant regulatory programs, and such stated objectives should be confirmed by legislative action.** This process would ensure a review of the rationale for regulatory programs, making it less likely that agencies like the ICC would outlive their useful lives by so many years.

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#### INVESTING IN BETTER INFORMATION FOR DECISION MAKING

Good regulation requires good information. There is a lack of generally accepted standards for the measurement of regulatory impacts and of reliable data on which such measurements could be based. The absence of a common statistical base to display and compare benefits and costs of different types of regulation is a serious barrier to improvement.

<sup>46</sup> Richard B. Belzer, "The Peril and Promise of Risk Assessment," *Regulation* (Fall 1991): 40-45; John D. Graham, "Improving Chemical Risk Assessment," *Regulation* (Fall 1991): 16-17.

It is sometimes argued that regulatory review itself is costly and burdensome. We believe exactly the opposite is true. The fact is that we substantially *underinvest* in needed information and should significantly increase our efforts to provide the resources to acquire it. Government regulatory activities involve hundreds of billions of dollars annually in benefits and costs. Moreover, the unelected decision makers who impose those costs usually have little knowledge of their magnitude. Government agencies and OMB now spend \$50 million or less each year to determine whether resources are being devoted to the right problems, whether benefits of regulations exceed their costs, and whether regulatory objectives could be met at less expense.<sup>17</sup> Expenditures of many times this amount on such activities would be fully justified. The objections by special interests to using facts and analysis in regulatory decision making are understandable, but not very convincing.

As noted in Chapter III, OMB has been required to prepare reports on the costs and benefits of federal regulations for 1997 and 1998. **We recommend that this report be required annually and that it be extended to provide supporting detail by agency and program.**

In addition, we note that the useful annual census report on the costs of compliance with environmental regulation was recently eliminated. Such information is essential for effective regulatory review. **This report should be reinstated and its coverage extended to other major regulatory activities.**

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#### REGULATORY BUDGETS: INCENTIVES FOR THOUGHTFUL DECISION MAKING

The large aggregate costs imposed by federal regulation have led to proposals for regulatory budgets. The rationale is straightforward. Only the costs of operating regulatory agencies are included in the federal budget. The far

larger economic compliance costs imposed on the private sector are not. Consequently, when Congress, OMB, and department managers review a regulatory agency's annual performance, they are focusing on the tip of the regulatory iceberg.

Policy makers and the public would achieve a better understanding of regulatory burdens if it were possible to identify the economic costs generated by regulatory agencies. Such information would make clear the large public and private national resources devoted to regulatory purposes and would facilitate comparisons of the costs of alternative regulatory programs.

Like conventional fiscal budgets, regulatory budgets would display only the costs of programs, not their benefits or any calculations of "net benefits." These cost estimates, like those of fiscal budgets, would not in themselves provide decision makers with sufficient information to set budget priorities, especially in the aggregate. However, again like fiscal budgets, regulatory budgets, by presenting administrators or legislators with ceilings on total costs, would serve a useful disciplinary function. Decision makers faced with constraints have a stronger incentive to prioritize and therefore to perform the explicit or implicit comparisons of costs with benefits required for rational decision making.

As with the existing budget system, in which both OMB and Congressional appropriators present agency heads with fiscal ceilings, these constraints would encourage regulatory administrators to identify their most effective activities and give them priority in their requests for authorization or funding. In the process, they would obtain greater flexibility to manage regulatory programs. If they wanted to expand an

17. Economist Paul Portney presents a case for spending \$1 billion a year to analyze whether resources are being devoted to the right problems, whether the benefits of regulations exceed their costs, and whether the goals of federal regulatory programs could be met at less expense than is currently the case. "Portney Testifies on Regulatory Review," *Resources*, (Fall 1996): 29-31.

*OMB's Discretion*

existing regulatory effort or initiate a new one, they might have to identify lower-priority programs to be eliminated or cut back. **We recommend that when regulatory cost data become more fully developed, Congress establish on an experimental basis a regulatory budget for one or two major regulatory agencies.** Such a budget would place a ceiling on the costs that could be imposed by the agency's regulations.<sup>48</sup> Should this experiment prove successful, it might then be extended to a more comprehensive regulatory budget.

### JUDICIAL REVIEW

A related aspect of regulatory reform concerns the role of the judiciary. Judicial review of regulatory changes has both advantages and disadvantages. On the positive side, appeals to the judiciary provide an effective remedy for shortcomings in the conduct of regulatory agencies. However, resort to the courts can result from a very different motive—to slow down or sidetrack the performance of a legitimate and appropriate government activity. The accom-

panying box suggests a procedural reform to address this problem without losing the substantive benefits that flow from continued citizen access to the courts. (See "A Suggested Procedural Reform," below.)

### A GLOBAL PERSPECTIVE

The regulatory reforms just described will not be easy to enact or implement, but there is an urgent reason for ambitious and timely action. Many of our leading overseas competitors are undertaking substantial reforms of government regulation to improve the efficiency of their economies. The Netherlands, for example, employs an unusual combination of voluntary agreements involving the interested parties — business, government, and citizen

48. The ceiling might be applied only to rules for which the estimated costs exceed the estimated *quantifiable* benefits. Exempting rules that pass a quantifiable benefit-cost test would ensure that the cost ceiling "would not stop implementation of rules that clearly are expected to improve the well-being of the average citizen." See Robert Crandall, et. al., *An Agenda for Regulatory Reform* (Washington, D.C.: American Enterprise Institute and The Brookings Institution, 1997), p. 16.

### A SUGGESTED PROCEDURAL REFORM

Attorney Philip K. Howard, author of *The Death of Common Sense*, has offered an interesting suggestion concerning judicial review of rules of a procedural nature. Cleaning up rule books is delayed by years as agencies crawl through internal proceedings believing that, unless they can prove they were extremely attentive to public comments, a court might overturn their action. Mr. Howard proposes removal of this disincentive to action by eliminating judicial review over agency *processes* and substituting for them periods of delay.

For proposed changes to a minor rule, regulatory agencies would publish the proposed change in the *Federal Register*, wait 60 days, and then implement that change without any judicial review of the *process* for making the change. An aggrieved party could still sue over sub-

stance — for example, that the change does not comply with the government statute — but no longer could sue over how hard the agency had thought about it.

A similar process would be followed in the case of a change to a major rule, but a longer period (six to nine months) would be allowed between the publication of the change and its implementation. This extended period of time would allow those affected by the regulatory change to seek congressional action to overturn the rule or to modify the authorizing statute. Litigation over the lawfulness of the proposed modification would not be precluded.

These seemingly modest changes would allow agencies to operate more efficiently by eliminating the trial-like processes that now precede many changes in regulations.

groups. These agreements attempt to achieve integrated pollution control, coordinating air, water, and surface regulations, in an effort to achieve an extremely ambitious set of environmental quality goals. The United States has a huge stake in an effective, flexible, and responsive regulatory system that will allow it to maintain its competitive position and achieve stronger growth and more productive, higher-paying jobs.<sup>49</sup>

As a fundamental economic matter, the increased cross-border economic integration of business generates pressure for individual nations to reduce the regulatory burdens they impose. Large and rapid improvements in transportation and, especially, communication have enabled companies to operate more efficiently and profitably in far-flung locations. They can now move their operations more rapidly than in the past to political jurisdictions that are

more favorable with regard to costs and market opportunities. As a result, the interest groups favoring higher levels of regulation have been urging governments to standardize their regulatory policies. Such "deep integration" is most advanced in the case of the European Union.<sup>50</sup>

Recognizing that regulatory reform has now become an important international issue, the Organization for Economic Cooperation and Development (OECD) has recently prepared a set of common principles for reform.<sup>51</sup> (See

49. Robert Hersh, *A Review of Integrated Pollution Control Efforts in Selected Countries*, Discussion Paper 97-15 (Washington, D.C., Resources for the Future, 1997), pp. 26-49.

50. See the GED policy statement *U.S. Trade Policy Beyond the Uruguay Round* (1994).

51. "Regulatory Reform in the OECD," *International Economic Review* (April 1997): 11-14; "Regulatory Reform: A Plan for Action," *OECD Letter* (July 1997): 7.

#### OECD RECOMMENDATIONS FOR REGULATORY REFORM

The Organization for Economic Cooperation and Development (OECD) in 1997 developed the following eight recommendations to guide the regulatory reform efforts of its member governments. This OECD statement is consistent with the spirit and the details of the OECD report.

##### Regulatory Principles

1. Adopt and maintain only regulations whose costs are justified by benefits and that attain their objectives at lowest cost, taking into account nonregulatory approaches.
2. Promote competition and efficiency throughout the economy.
3. Eliminate regulatory barriers to trade and investment.

##### Regulatory Processes

4. Systematically review, update, and streamline existing regulations.

5. Estimate potential impacts and consult with affected parties before adopting new regulations.

6. Create engines of reform to oversee and promote regulatory reform.

##### Supporting Policies

7. Expand the scope and effectiveness of competition policy.
8. Identify important impacts on other public policy objectives, and develop coordinated reforms to reduce negative impacts while retaining the benefits of more efficient markets.

The OECD maintains that regulatory reform will increase productivity, lower prices, increase innovation, expand consumer choice, and ultimately raise economic growth. Member governments also see advantages to regulatory reform because it can harness the innovative forces of the private sector through the use of incentives at the same time that it improves social policy.

"OECD Recommendations for Regulatory Reform".) In view of the tendency of some American companies to move to Western Europe to take advantage of more flexible regulatory regimes, it would be prudent for U.S. policy makers to examine carefully their relatively enlightened systems for government regulation of business.

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### SOME FINAL THOUGHTS

Regulatory reform is not a program to turn the clock back by ignoring pollution, workplace hazards, and unsafe food and drugs. The problems of a complex, industrial, urban society are real and in some cases, such as food safety, may be increasing. Their importance, however, argues that they should be addressed efficiently, so that greater benefits can be secured from the resources we devote to them. The tasks that government properly undertakes should be performed well.<sup>32</sup> Our current regulatory process does not meet this elementary standard.

Our proposals for change may seem incongruous with the problems we describe. We propose, essentially, that more and better information from reliable sources be provided to and used by our regulatory decision makers. This does not sound very revolutionary. How-

ever, the consistent development and use of such information in this instance *would* be a far-reaching step.

Furthermore, it is essential that we develop and publicize such information if we are to achieve the bipartisan consensus for reform that is needed for progress. Surely, the history of regulatory reform has been fundamentally bipartisan. Each president in the past 24 years has advanced the cause. Congressional leaders of both parties have recently introduced important legislation, including the Regulatory Improvement Act recently proposed by Senators Carl Levin (D-Mich.) and Fred Thompson (R-Tenn.).

Our recommendations will be criticized by others because it will take time for them to have the impact we seek. However, our regulatory system has been developing since our nation's birth and will continue to evolve. It took many years for Congress to develop the internal procedures and the institutional capacity and reputation of CBO that have improved the effectiveness of the budget process. Real and sustained regulatory reform will require of us patience as well as dedication.

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32. See the following CED policy statements: *What Price Clean Air? A Market Approach to Energy and Environmental Policy* (1993) and *Redefining Government's Role in the Market System* (1979).

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**Memoranda of Comment,  
Reservation, or Dissent**

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Page 4. JOHN DIEBOLD, with which PETER A. BENJAMIN has asked to be associated

In addition, it would be useful to experiment with sunset provisions that go into effect if after a set number of years, objectives stated in the law or regulation are not achieved. It should be possible to state regulatory objectives in a way that allows review, after a set time period, to see if objectives have been met or if an entirely different form of regulation should be tried. Such provisions could well require hearings to review ineffective programs and perhaps suggest changes in programs before they could be renewed.

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Page 5. JOHN DIEBOLD, with which PETER A. BENJAMIN has asked to be associated

The criteria against which agency performance will be reviewed, as well as the time scale anticipated in the legislation, should also be specified *in advance*.

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**OBJECTIVES OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT**


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For more than 50 years, the Committee for Economic Development has been a respected influence on the formation of business and public policy. CED is devoted to these two objectives:

*To develop, through objective research and informed discussion, findings and recommendations for private and public policy that will contribute to preserving and strengthening our free society, achieving steady economic growth at high employment and reasonably stable prices, increasing productivity and living standards, providing greater and more equal opportunity for every citizen, and improving the quality of life for all.*

*To bring about increasing understanding by present and future leaders in business, government, and education, and among concerned citizens, of the importance of these objectives and the ways in which they can be achieved.*

CED's work is supported by private voluntary contributions from business and industry,

foundations, and individuals. It is independent, nonprofit, nonpartisan, and nonpolitical.

Through this business-academic partnership, CED endeavors to develop policy statements and other research materials that commend themselves as guides to public and business policy; that can be used as texts in college economics and political science courses and in management training courses; that will be considered and discussed by newspaper and magazine editors, columnists, and commentators; and that are distributed abroad to promote better understanding of the American economic system.

CED believes that by enabling business leaders to demonstrate constructively their concern for the general welfare, it is helping business to earn and maintain the national and community respect essential to the successful functioning of the free enterprise capitalist system.



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