Testimony of Cary Coglianese
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Before the
U.S. Senate Committee on Homeland Security and Government Affairs
Subcommittee on Regulatory Affairs and Federal Management

Hearing on "Reviewing Independent Agency Rulemaking"

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Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee, I appreciate your invitation to appear before you today to testify about potential improvements to the regulatory process at independent agencies. By way of background, I am the Edward B. Shils Professor of Law and Professor of Political Science at the University of Pennsylvania, where I also serve as the founding Director of the Penn Program on Regulation. I am currently a public member of the Administrative Conference of the United States as well as a member of the Committee on Performance-Based Safety Regulation of the National Academies of Sciences, Engineering, and Medicine. The focus of my research and teaching throughout my career has been on issues of administrative law and government regulation, with a particular emphasis on the empirical study of regulatory policymaking. In addition to authoring or co-authoring over a hundred scholarly articles or book chapters related to regulation, I have edited or co-edited seven books, including most recently *Achieving Regulatory Excellence* (forthcoming 2016), *Does Regulation Kill Jobs?* (2013), and *Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation* (2012).[1]

Analysis and Agencies

> *"Analysis is both a tool for making important decisions – 'thinking ahead' – and crucially a way of 'looking back' to see whether decisions made in the past have been good ones."*[2]

Two types of analysis inform regulatory decision-making: one type, prospective analysis, takes place before new regulations are adopted and informs how they are designed; the other type, retrospective evaluation, takes place afterwards and measures what impacts they have had. These two types of analysis are interrelated. Prospective analysis clarifies the goals of a new regulation and identifies expected outcomes; this in turn informs the subsequent process of retrospective evaluation by identifying benchmarks against which the regulation's actual effects

[1] I testify in my individual capacity and not on behalf of any organization with which I am or have been affiliated.
[2] Coglianese (2013a).

can be assessed. Conversely, when retrospective evaluation shows how well a regulation has (or has not) worked in actuality, it informs prospective analysis of whether to retain or modify that regulation, as well as how to design other regulations. Both types of analysis – prospective and retrospective – are essential ingredients for smart decision making about how to deliver high-quality regulatory outcomes (Coglianese & Bennear 2005; Coglianese 2013a).

All agencies can improve both kinds of analysis. Particular concern has emerged recently about so-called independent agencies producing weak or insufficient analysis. This concern coincides with a number of major independent agencies pursuing more active and consequential regulatory agendas in recent years, whether it is the Federal Communications Commission adopting its recent Open Internet regulation or the Securities and Exchange Commission and the Commodity Futures Trading Commission promulgating major new regulations under the 2010 Dodd-Frank financial reform legislation. Litigants, as well as some judges and commentators, have criticized independent regulators for failing to produce adequate prospective analysis in support of their regulations.[3] Similar concerns about independent agencies' retrospective analyses would not generally be actionable in court, so they are less salient, but there seems little reason to think that independent agencies are doing better than other agencies when it comes to evaluating their rules after the fact.

What constitutes an "independent agency" can itself be open to discussion. Although independence has long been understood in terms of structural features related to the appointment of agency heads – for-cause removal restrictions, fixed terms, and, with multi-member agencies, bipartisan distribution requirements (Verkuil 1988) – researchers have more recently treated structural independence as a matter of degree, rather than as a binary characteristic (Datla & Revesz 2013; Lewis & Selin 2015; Carrigan & Poole 2015). For present purposes, I will assume a simple binary definition of an independent agency: namely, any of 19 agencies specifically listed in the Paperwork Reduction Act's (PRA) definition of an "independent regulatory agency."[4] All other agencies I will call "executive agencies." The independent agencies listed in the PRA do not uniformly share the same structural features. Most have agency heads protected by for-cause removal limitations, for example, but some do not (Office of the Comptroller of the Currency, Office of Financial Research). Moreover, some agencies headed by administrators

[3] For recent litigation raising challenges to independent financial regulators' analyses – challenges that have not always proven successful – see Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005); Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 2006); American Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 923 (D.C. Cir. 2009); Business Roundtable and Chamber of Commerce v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); Int'l Swaps & Derivatives Ass'n v. CFTC, 2012 U.S. App. LEXIS 1282 (D.C. Cir. Jan. 20, 2012) (per curiam); Inv. Co. Inst. v. CFTC, 891 F. Supp.2d 162, 190 (D.D.C. 2012), aff'd, 720 F.3d 370 (D.C. Cir. 2013); Sec. Indus. & Fin. Mkts. Ass'n v. United States CFTC, 67 F.Supp. 3d 373, 384, 390, 437–38, (D.D.C. Sept. 16, 2014). Similar objections were raised, unsuccessfully, in litigation challenging the FCC's Open Internet decision-making, arguing that, as Crovitz (2016) has put it, "the FCC skipped the economic analysis."

[4] 44 U.S.C. 3502(5). These agencies are: "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency."

who do enjoy for-cause removal protection are not included in the PRA's list (Social Security Administration).[5] Still, the congressionally-approved definition in the PRA is highly relevant to the subject of prospective and retrospective regulatory analysis, as the main executive orders that require the preparation of certain analyses or reports apply to executive agencies but not to agencies listed as independent in the PRA.

I now turn to a consideration of what we can infer about the state of prospective and retrospective analysis at independent agencies. It is harder than it might seem to say definitively how deficient are the analyses at these agencies, as a general matter. However, one can reasonably assume they are far from optimal, and thus I then turn to considerations related to possible legislative action that might help agencies improve their analysis. I begin with prospective analysis, considering what we can infer about its general quality at independent agencies and then discussing reform issues. I follow with a similar treatment of retrospective analysis.

Prospective Analysis

> *"[W]ith businesses rapidly advancing in precision and analytic sophistication, government will only be able to fulfill its responsibilities by becoming more optimizing itself."*[6]

Although administrative law scholars sometimes pine for a bygone era when so-called informal rulemaking was truly informal (if such a day ever truly existed), the process of making new regulations today involves numerous procedural steps and the building of what can sometimes be an extensive administrative record (Seidenfeld 2000). New rules are always susceptible to judicial review under the Administrative Procedure Act's arbitrary and capricious standard, which effectively compels agencies to justify their rules based on evidence and reasoning.[7]

For major new rules, administrative procedures demand that agency officials define the problem they seek to solve, offer justifications for their new regulations, consider alternatives, and estimate the anticipated benefits and costs of both their preferred actions as well as other alternatives. The Unfunded Mandates Reform Act (UMRA)[8] and Executive Order 12,866[9] impose these sorts of analytical requirements when agencies plan to issue rules having certain kinds of annual economic effects in excess of $100 million (or higher for UMRA, due to inflation adjustments). Under Executive Order 12,866, agencies must clear their benefit-cost analyses of new rules through the White House Office of Information and Regulatory Affairs (OIRA). The executive order further states that, "recognizing that some costs and benefits are

[5] Admittedly, the PRA's enumerated list is not intended to be exclusive; it can encompass "any other similar agency designated by statute as a Federal independent regulatory agency or commission." 44 U.S.C. §3502(5). What is "similar" is hardly self-evident, though, given that the 19 agencies are not identical in their structural features.
[6] Coglianese (2016).
[7] 5 U.S.C. § 706(2)(A). See *Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29 (1983)
[8] 2 U.S.C. § 1532.
[9] As reaffirmed by Executive Order 13,563.

difficult to quantify," each agency shall "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

Additional analytical requirements can be found in other statutes. The Regulatory Flexibility Act requires analysis when rules are expected to impose substantial impacts on small businesses.[10] The Paperwork Reduction Act calls for estimates of costs and time associated with any paperwork requirements found in new regulations.[11] The National Environmental Policy Act demands that federal agencies analyze the environmental impacts of major actions that will affect the environment.[12] The Congressional Review Act requires agencies to report to Congress and the Comptroller General on new rules that would have an annual economic effect above the $100 million threshold and to provide a copy of any benefit-cost analysis prepared for those rules.[13]

Procedural requirements such as these sensibly call for agencies to engage in analysis before adopting new rules. Just as it is true for other consequential endeavors, it is better for regulators to "look before they leap" (Partnoy 2012:243). Conducting prospective analysis can help reduce the possibility of mistakes, unintended consequences, and wasted resources.

Most, but not all, of the analytical requirements applicable to new rulemaking must be followed by *all* regulatory agencies. However, the main analytical requirements calling for agencies to conduct benefit-cost analyses of major rules do not apply to independent agencies. The definition of an agency under UMRA "does not include independent regulatory agencies,"[14] and, as indicated earlier, the terms of Executive Order 12,866 do not apply to agencies listed as independent regulatory agencies under the Paperwork Reduction Act.[15]

As a result, it should not be surprising that independent regulatory agencies have lately come in for considerable criticism for failing to conduct extensive benefit-cost analyses of many of their rules. As Copeland (2013:4) notes in a report prepared for the Administrative Conference of the United States, "studies indicate that independent regulatory agencies often do not quantify or monetize regulatory benefits, and often quantify and monetize only paperwork costs." Revesz (2016:14) observes that when it comes to producing cost-benefit analyses of their rules, executive agencies are "more proficient," and "[t]he less successful agencies are independent and outside the purview of OIRA review." The evidence supporting such claims typically derives from the reports that independent agencies submit to the Comptroller General pursuant to the Congressional Review Act about their major rules and underlying analyses. For example, Copeland (2013:4) reported that, of 22 major rules issued by independent agencies in 2012, "[o]nly one rule contained any quantitative benefit information." OIRA compiles this information in its annual reports to Congress and, as it has noted in its latest such report,

[10] 5 U.S.C. § 601 et seq.
[11] 44 U.S.C. § 3501 et seq.
[12] 42 U.S.C. § 4321 et seq.
[13] 5 U.S.C. § 801 et seq.
[14] 2 U.S.C. § 1502.
[15] Section 3 (b) of the Order states: "'Agency,' unless otherwise indicated, means any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10)." The provisions of the Paperwork Reduction Act have been re-numbered, so that the definition of independent regulatory agencies is now found at 44 U.S.C. § 3502(5).

"[i]ndependent agencies still have challenges in providing monetized estimates of benefits and costs of regulation" (OIRA 2015). Other commentators have reached much the same conclusion on the basis of similar evidence (e.g., Fraas & Lutter 2011a; Ellig & Fike 2013).

Despite this consensus about independent agencies' analytical deficiencies, it is difficult to assess exactly how well or poorly independent agencies are doing in analyzing their rules, at least judging simply from the mere fact that these agencies report to the Comptroller General that some – or even many – of their rulemakings do not include quantified or monetized estimates of benefits or costs. When researchers have looked in-depth at the specific materials prepared by independent agencies in individual rulemakings, they have sometimes found that agencies have given more considerable attention to the benefits or costs of their rules than the summaries they share with the Comptroller General might suggest (e.g., Fraas & Lutter 2011b; Copeland 2013). More importantly, there is lacking any clear benchmark against which to measure the quantity and quality of benefit-cost analyses produced by any regulator. For how many rules exactly is it reasonable to expect independent agencies to have produced monetized estimates of benefits and costs? Comparisons with the level of quantification or monetization in analyses produced by executive agencies may not be appropriate, as what constitutes quality analysis will be specific to the problem a regulator is addressing and the relevant data available. It is well recognized that quantification or monetization of regulatory impacts is not always possible due to a lack of underlying data or other research that could be used to support such estimates. Estimating the benefits of homeland security regulations, for example, has proven more difficult than for other regulations. Executive Order 12,866 expressly "recogniz[es] that some costs and benefits are difficult to quantify," and a few scholars have even argued that it is much more difficult to quantify the effects of financial regulation (Coates 2014; Gordon 2014), a domain dominated by independent regulators.[16] In addition, research indicates that agencies produce less thorough analysis for rules that must be completed under tight statutory deadlines (McLaughlin & Ellig 2011), and we know that many of the rules that independent regulators have issued recently under the Dodd-Frank Act have faced such deadlines (Copeland 2013: 110). Without controlling for factors such as these, comparisons of independent agencies' analyses with those of other agencies will be, at best, incomplete and, at worst, misleading.

Still, it seems reasonable to assume that independent agencies could do a better job in analyzing the benefits and costs of their new regulations. As Bubb (2015:50) has suggested, it may be that benefit-cost analysis "plays little role in financial regulation not because it is especially challenging but rather because institutional structures do not produce incentives for financial regulators to develop and employ" such analysis. If this is correct, then what steps might Congress be able to take to change those institutional structures so that independent agencies would have more of an incentive to improve their prospective regulatory analysis? Three main options could be considered and are discussed below:[17]

[16] Other scholars have contested the view that benefit-cost analysis of financial regulation is more difficult (e.g., Posner & Weyl 2013; Revesz 2016).

[17] The options discussed below all contemplate general changes to administrative procedures. It bears noting that, if Congress wished to take a more incremental approach, it could always target just one or more individual agencies. To some extent, the organic statutes of individual agencies already vary in that they direct some agencies to consider – and others not to consider – costs when making regulatory decisions (Copeland 2013).

1. *Make no legislative changes, at least for now*.

   Due to the process of judicial review, as well as the heightened salience today to the need for independent agencies to improve their regulatory analysis, independent regulators appear to be taking some steps to improve their institutional capacity for producing quality analysis. The Securities and Exchange Commission, for example, has taken some notable strides to strengthen its economic staff in the wake of the *Business Roundtable* decision (Kraus & Raso 2013). The disadvantage of waiting longer, of course, is that independent agencies are continuing to implement rules now, rules that will have important consequences for the economy and could be in place for a long time.

2. *Codify the requirements of Executive Order 12,866 for independent agencies*.

   Fascinating debates have surrounded the question of whether Presidents can legally apply the requirements in Executive Order 12,866 to independent agencies. For more than thirty years, Presidents have been reluctant to assert oversight over the regulatory actions of independent agencies. By contrast, Congress would face no similar legal questions if it were to codify the requirements of Executive Order 12,866 and apply them to independent agencies.

   This option would have the advantage of creating symmetry in the analytical requirements for regulation by both executive agencies and independent agencies. As regulations affect the public and the economy regardless of whether they are issued by executive or independent agencies, it has been anomalous that benefit-cost analysis requirements have applied only to rules issued by executive agencies. Legislatively imposing those requirements on independent agencies would cure that anomaly, providing independent agencies with the same institutional structures and incentives for producing quality prospective analysis as executive agencies.

   Although subjecting independent agencies to the same requirements for producing regulatory analysis as executive agencies could be easily justified on the grounds of sound regulatory management, applying the entirety of Executive Order 12,866 to independent agencies would make a significant alteration in the policy autonomy that has long been afforded to these agencies. Executive Order 12,866 does not merely call for agencies to conduct prospective analysis; it creates an institutional review process that gives the OIRA Administrator, and ultimately the President, oversight and gate-keeping influence over agencies' regulatory decisions. As Executive Order 12,866 expressly states in numerous places, the regulatory review process is one that aims at ensuring regulation will be consistent with the "President's priorities." In addition, under Section 6(a)(3)(A) of the order, the OIRA Administrator can ultimately determine which rules will be deemed significant and thus subjected to the regulatory analysis and review provisions of the order. In addition, Section 8 of the order precludes an agency from publishing a rule while it is still under review at

OIRA, and Section 7 establishes a process through which conflicts between OIRA and the agency can be elevated to the President for resolution.

Legislatively applying the entirety of Executive Order 12,866 to independent agencies would thus also apply these institutional provisions, making for a major shift in the norms and practices of autonomy that have long prevailed for regulatory decision making by independent agencies. To the extent that this operational autonomy remains valued, Congress should not apply wholesale to independent agencies the institutional mechanisms in Executive Order 12,866. One alternative approach could be to follow the model of the Paperwork Reduction Act, which does subject independent agencies to OIRA oversight of their information collection efforts but which also expressly allows independent agencies to override OIRA's decisions.

Even with such a change, Congress should also consider the institutional capacity of OIRA to handle the additional oversight that this option would entail. OIRA possesses a very tiny staff compared with the many executive agencies it oversees. Legislation that would thrust responsibility on OIRA for overseeing the regulatory actions of at least another 19 independent agencies would necessitate a substantial increase in the funding for and size of OIRA.

3. *Eliminate UMRA's exemption for independent agencies*.

Another opportunity to remove an asymmetry in analytical requirements imposed on independent agencies vis-à-vis executive agencies would be to remove the exemption contained in UMRA. This option would have the distinct advantage of avoiding questions about intruding on independent agencies' policy autonomy raised by the possibility of legislatively imposing Executive Order 12,866 on these agencies. UMRA simply imposes a legal obligation on agencies to produce a statement of costs and benefits of rules covered by the Act; this obligation to produce such a statement is judicially enforceable, but the Act precludes courts from ruling on the *adequacy* of the agencies' analysis.

One small potential downside might be that UMRA's analytic requirements do not apply to as many rules as the Executive Order 12,866. UMRA's threshold applies to rules that impose $100 million or more in annual *costs*, rather than economic *effects* (costs and benefits). Plus, the $100 million amount in UMRA adjusts over time for inflation, so today the threshold is much higher. Still, if UMRA's scope were a concern, Congress could adjust the threshold to make it comparable to the one in Executive Order 12,866.

Perhaps the larger concern about eliminating UMRA's exemption for independent agencies would be whether it would provide enough of an institutional incentive for agencies to produce quality analysis. Although this option lacks the institutional "peer review" role of OIRA, agencies' benefit-cost analyses prepared under the Act would still be included as part of the agency record and thus reviewable by courts

under the general arbitrary and capricious standard in the Administrative Procedure Act. A further advantage of this approach would be that independent agencies could no longer claim that benefit-cost analysis is not required of them, which could help in shifting organizational norms within these agencies about the value of producing quality prospective regulatory analysis.

In contemplating which step to take, members of Congress should focus on what will promote improvements in prospective analysis and regulatory decision making, taking into account the values that Congress has long recognized in institutional autonomy for regulators in certain policy domains such as financial regulation. In addition to overarching consideration of the values served by both analysis and autonomy, members of Congress should also keep in mind several other considerations when deliberating about how to improve regulatory impact analysis at independent agencies:

- *Continue to recognize practical limits associated with conducting benefit-cost analysis*. Currently, Executive Order 12,866 and UMRA recognize that full quantification and monetization of benefits and costs will not be always feasible for all regulations. Any further legislative action should similarly recognize these feasibility concerns and continue to allow agencies the discretion to adopt appropriate regulations even if all impacts cannot be quantified or monetized.

- *Take into account specific legislative mandates applicable to individual agencies*. Some agencies' organic statutes preclude them from considering costs when making certain regulatory decisions. Congress should approach any new legislation imposing general analytic requirements mindful of any implications such action might have for these individual statutory requirements.

- *Recognize that conducting quality analysis demands resources*. As Shelley Metzenbaum and Gaurav Vasisht (2017) write in a forthcoming book of mine on regulatory excellence, "[f]unding adequacy has a direct and profound impact on whether a regulator can be effective." If Congress takes steps to mandate additional analysis, it should also ensure that agencies have the resources needed to fulfill any such mandate effectively.

- *Do not expect perfection*. Even with mandates, regulatory analysis will not always be completed well nor will it always influence regulatory decisions to the extent that it should. Despite OIRA's oversight of executive agencies, there remains substantial variation in these agencies' compliance with best practices of economic analysis of regulations. What I wrote over a dozen years ago remains true today: "The available empirical research indicates that simply mandating analysis does not eliminate inefficiency, and it may not even significantly reduce it" (Coglianese 2002).

The Administrative Conference of the United States has reinforced several of these considerations, recommending to Congress, should it impose new requirements on independent agencies, that "it should recognize that agencies need (a) the flexibility to scale the analyses to the significance of the rules and (b) the resources to satisfy such requirements" (ACUS 2013).

Retrospective Evaluation

> *"[A]ny policy process that takes analysis and deliberation seriously* before *decisions are made should also take seriously the need for research* after *decisions are made."*[18]

Over the last five years, the Obama Administration has taken a number of steps to build a "culture of retrospective review and analysis throughout the executive branch" (Sunstein 2011a). In early 2011, President Obama issued Executive Order 13,563 proclaiming that the nation's regulatory system "must measure, and seek to improve, the actual results of regulatory requirements." That order directed executive agencies to develop a plan for "periodic[] review [of] existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome." In response, over the last five years, executive agencies have reportedly undertaken more than 800 retrospective reviews and eliminated over 70 "regulatory provisions" (Shelanski 2016). According to OIRA Administrator Howard Shelanski (2016), these efforts have "achieved an estimated $37 billion in cost savings, reduced paperwork, and other benefits for Americans over five years."[19] Examples of such cost-savings all stem from executive agencies (e.g., Shelanski 2013; 2014; 2015; 2016; Sunstein 2012; 2013), such as the now-famous EPA "spilled milk" regulation which effectively exempted certain milk storage containers from particular EPA oil spill rules (Coglianese 2012).

But what have *independent* regulatory agencies accomplished in terms of retrospective review? In July 2011, President Obama issued Executive Order 13,579 stating, among other things, that "each independent regulatory agency should develop and release to the public a plan" for retrospective review of its existing significant regulations. The Council of Economic Advisors (CEA) (2012) reported that, as of November 2011, a total of 21 independent agencies had developed retrospective review plans. This included all the major regulatory agencies designated as independent under the Paperwork Reduction Act. CEA claimed that these plans reflected "substantial efforts to reduce burdens" by independent agencies, highlighting in particular review efforts taken or currently underway at seven independent agencies (CFTC, FTC, Fed, FERC, OCC, FDIC, and FCC). Although most of the efforts at these seven agencies were described as still at an early stage, the CEA report indicated that the FCC had "eliminated 190 rules, many of which are no longer needed as a result of technological advances" (Ibid.:10).[20]

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[18] Coglianese & Bennear (2005:247).

[19] A review of the Administration's lookback initiative commissioned by the Administrative Conference of the United States suggests that many of these cost-savings came in the form of administrative changes, such as switching to electronic filings, rather than making substantive regulatory changes (Aldy 2014:52). I asked a research associate to review a random sample of fifty retrospective reviews completed as of July 2015, and in slightly more than three-fourths of the reviews that resulted in changes, the changes were of an administrative or paperwork variety. Reducing unnecessary paperwork burdens is no doubt to be applauded, but streamlining administrative processes seems not as squarely centered on improving "the actual results of regulatory requirements" (Executive Order 13,563).

[20] Undoubtedly this sounds like a major achievement in regulatory reduction, but it is hard to imagine that the FCC's actions could be attributable to any serious retrospective review conducted in just the four months following the

The rigor and depth of agencies' analytic efforts in these retrospective reviews, whether conducted by executive or independent agencies, was generally quite limited. According to a report commissioned by the Administrative Conference of the United States, "[t]he vast majority" of executive agencies' efforts lacked "formal retrospective analysis, such as ex post estimates of benefits, costs, or efficacy" (Aldy 2014:52). What we know about the independent agencies' efforts makes them look still less substantial. Most of the plans submitted by independent agencies basically described existing, routine practices of consulting with the public and keeping abreast of developments in the regulated industry. The Nuclear Regulatory Commission (NRC), for example, took two and a half years to approve a final retrospective review "plan" that compiled existing principles and practices that guide NRC rulemaking activities.[21] Much as with the executive agencies, few, if any, of the independent agency plans could be said to contain truly robust "formal retrospective analysis."

It is also difficult to assess independent agencies' progress over time. Anyone who is interested in executive agencies' progress can go to the White House website and find status reports submitted twice each year. But no such repository exists of the status or accomplishments at independent agencies. Indeed, it is not even clear if these agencies have followed through at all on their initial plans. Executive Order 13,563 – the one that Executive Order 13,579 imposed on independent agencies – only called for agencies to produce an initial plan. Regular progress reports were called for only in a subsequent memorandum from the OIRA Administrator as well as a subsequent presidential order (Executive Order 13,610), both of which were directed just to executive agencies.

The Obama Administration's regulatory lookback initiative aimed, laudably, to build a culture of retrospective review through the "continuing process of scrutiny of existing rules" fostered by the presidential requirement of regular progress reports (Sunstein 2011b). It remains to be seen, of course, to what extent the Administration's lookback initiative has contributed to any enduring cultural shift at any agency. Whatever positive, lasting change the initiative has had, though, presumably such effect has been most attenuated at independent regulatory agencies.

Much more could be done to foster a governmental culture that takes retrospective analysis of regulations seriously at independent agencies – and at executive agencies. One desirable cultural shift would entail refocusing and broadening the rationale for retrospective review. As Aldy (2014:34) aptly notes, burden reduction has been a "common theme" of the Obama Administration's lookback initiative, as well as similar efforts in earlier administrations. Instead of just focusing on reducing regulatory costs or burdens, retrospective review can help agencies overall create better-designed and better-implemented regulations (Coglianese & Bennear 2005). Smarter regulations not only can be more cost-effective but also can deliver greater overall benefits.

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signing of Executive Order 13,579. The timing of the FCC's actions suggests that either these revocations were already in progress before that order was issued, or that the rules that were eliminated were so obviously outmoded that removing them was an inconsequential housekeeping matter.

[21] See U.S. Nuclear Regulatory Commission, Final Plan for Retrospective Analysis of Existing Rules, http://www.nrc.gov/docs/ML1400/ML14002A441.pdf.

Retrospective review can provide valuable information that can be used to inform future regulatory decisions. Multiple regulatory agencies, executive and independent, face similar challenges, whether it is in regulating to promote private security efforts to protect key infrastructure or to foster a "safety culture" within high-hazard industrial operations. Such common challenges could be fruitfully illuminated by regulatory impact evaluation of rules implemented by regulators working in related areas. Learning how different types of regulatory strategies – such as market-based instruments, management-based regulation, behavioral nudges, or performance standards – have performed in one regulatory domain can be useful in designing regulations in other, similar domains. Furthermore, by comparing the results of rigorous retrospective evaluations of individual rules' costs and benefits with the prospective estimates that agencies make of these costs and benefits, agencies and their analysts can learn how to improve the regulatory impact analysis that takes place when new rules are being designed (Coglianese & Bennear 2005).

What concrete steps might Congress take to help agencies better realize retrospective review's full potential for deepening regulatory knowledge and improving regulatory decision-making? Three possibilities merit consideration with respect to both executive and independent agencies:

1. *Codify and extend requirements for agencies to report regularly on plans and progress with respect to strategically focused retrospective reviews*.

   The practices that have emerged over the last five years for executive agencies under Executive Orders 13,563 and 13,610 provide a sustained foundation upon which agencies could be encouraged to build during the next administration and beyond. To ensure continuation of these practices, Congress could productively codify similar planning and progress reporting requirements – and extend them to independent regulatory agencies – so as to ensure that regular, strategic efforts of regulatory evaluation remain implemented.

   If Congress were to take any such action, it should broaden the purpose of retrospective review beyond the worthwhile objectives of streamlining and burden reduction, which have almost exclusively characterized retrospective review efforts in the past. In the Regulatory Flexibility Act, Congress has already required both executive and independent agencies to undertake mandatory periodic reviews of all rules imposing significant economic impacts on small businesses. The purpose of such reviews is quite narrowly "to minimize any significant economic impact of the rules upon a substantial number of such small entities."[22] Instead of focusing only on burden reduction, as important as that can be, new legislation could encourage retrospective analysis that promotes smarter, more strategic regulatory decisions – analysis that measures and potentially increases benefits in addition to finding cost reductions. In other words, the purpose should be, as in Executive Order 12,866, to support a better system of regulation "that protects and improves ... health, safety, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society."

[22] 5 U.S.C. § 610.

Presumably any legislation codifying the current practice under Executive Order 13,563 would give agencies both the discretion and responsibility to determine what rules to review, along with when and how to review them, as these decisions will depend on each agency's overall priorities and available resources.[23] Although Executive Order 13,563 seeks to "promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome," any legislation should approach retrospective review less narrowly and encourage agencies to review other types of rules when doing so would advance legislative and administrative priorities. For example, agencies might appropriately analyze rules that were issued under conditions of high uncertainty about their costs or benefits, or rules that rely on common assumptions or present common problems of interest to regulators (Coglianese 2013b).[24]

Maintaining OIRA's current role in simply overseeing agency reporting about retrospective review would make sense for several reasons. First, it could help ensure that OIRA staff can benefit from the knowledge generated from agencies' backward looks. Second, since OIRA coordinates the Paperwork Reduction Act, keeping its staff apprised of agencies' data needs may streamline any information requests that are needed to evaluate existing rules. Third, OIRA could incorporate overall progress and key findings from agencies' retrospective reviews into its annual reports to Congress on the benefits and costs of regulation. (Currently, these reports only provide *estimated* or *forecasted* benefits and costs of regulation.) Finally, OIRA could be encouraged or authorized to issue non-binding "evaluation prompts" to agencies, identifying specific rules that would benefit from careful retrospective study (Coglianese 2013b). OIRA is especially well-positioned to identify rules or issues where evaluation findings could help improve prospective regulatory impact analysis, and making suggestions to independent agencies about evaluations to undertake would not intrude on such agencies' core policy autonomy.

2. *Require agencies to include a structured evaluation plan as part of their* Federal Register *notices when promulgating new major final rules*.

   In principle, a well-developed RIA could provide some of the information evaluators would need to piece together an evaluation strategy at a later date, but, as noted, RIAs are not always of uniform quality. Moreover, the exercise of completing even a brief, standardized evaluation plan at the time of a rule's establishment can discipline and sharpen decision-makers' thinking.

   Such required plans need not be onerous (Coglianese 2013b). At a minimum, they simply need to include: (a) a description of concrete criteria, indicators, or proxies of

[23] If Congress seeks to direct an agency to evaluate a specific regulation or set of regulations, it always can do so through other legislation, as it already does from time to time. In such cases, Congress may also need to consider appropriating additional funding to support the desired evaluation research.

[24] As a CEA (2012) report has noted, "[r]etrospective analysis is an important complement to prospective analysis. In some cases, prospective analysis of costs and benefits will be highly uncertain; retrospective analysis can provide valuable additional information and ultimately lead to better regulations." ACUS (2014:9-10) contains a further list of helpful considerations that agencies may take into account when prioritizing retrospective analysis.

regulatory impacts (benefits as well as costs); (b) known existing data that could be used to measure the rule's impacts, or a statement of the type of new data that would be needed to measure the rule's impacts; (c) an estimated time period after which the rule's impacts should begin to be observable and evaluation would be appropriate; and (d) sources of variation and possible research strategies or designs, whether experimental or quasi-experimental, that could take advantage, at the appropriate time, of that variation to try to draw inferences of the rule's impacts. OIRA could establish guidelines for appropriate research designs and other plan features (Coglianese 2013b).

The "framework" requirement found in S. 1817, the Smarter Regs Act of 2015, operationalizes this proposal well. Whether or not agencies are required to conduct evaluations or follow their plans precisely, the process of developing such plans at the outset of a rulemaking process would help to reinforce an evaluation mindset with agency regulators, as well as provide guidance for future evaluation of the rule by outside evaluators and the public.[25]

3. *Invest in regulatory evaluation and related research in behavioral and regulatory sciences*.

Taking retrospective review seriously demands resources: time, personnel, and funding. And when it comes to resources, there are always tradeoffs. Over the past five years, the Obama Administration's lookback initiative took retrospective review seriously by generally favoring breadth (number of rules reviewed) over depth (the empirical rigor and sophistication of the underlying reviews). The average executive branch agency undertook about 30 reviews, or about 6 per year, although a few agencies reviewed over one hundred rules, or more than 20 per year. To reach these numbers in such a period of time, many reviews appear to have relied mainly on expert judgments, impressions, and assumptions; few, if any, reviews involved in-depth empirical evaluation of the kind needed to draw valid inferences about what impacts the regulation under review actually caused.

There is nothing intrinsically wrong with reviews taking a back-of-the-envelope form nor in building a portfolio of reviews that seeks breadth. One presumably does not need a randomized controlled experiment, after all, to surmise that replacing paper filings with electronic filings will save processing time and money. Yet a retrospective review portfolio devoid of any in-depth evaluation studies misses something vital: the ability to draw a causal connection between the regulation and various benefits and costs. To make such a causal inference requires comparing the world with the regulation to a counter-factual world without the regulation. Since the counterfactual cannot be directly observed, the evaluator must estimate it using careful research designs, such as randomized controlled experiments or various statistical techniques that effectively approximate randomized controls (Coglianese 2011).

[25] The idea of planning for evaluation at the outset also seems consistent with the Evidence-Based Policymaking Commission Act's goal of finding ways "to incorporate outcomes measurement ... and rigorous impact analysis into program design."

Such research can take some more time and effort to design and conduct. As a result, regulatory officials need to make choices based on available resources. Not every rule will necessarily require rigorous, in-depth evaluation. Banning the use of lead as an additive in gasoline, for example, might not demand a sophisticated evaluation to validate that such a rule caused observed declines in air concentrations of lead, especially if few or no other major sources of lead emissions exist.[26] In many instances, though, it will be important to determine what the actual benefits and costs of a rule have been. Those benefits and costs, if properly monetized, represent the value of the negative and positive impacts that the rule *has caused*. Axiomatically, the only way to know what difference a regulation is making – for good or for ill – is to conduct a careful, causally-oriented evaluation (Coglianese 2015).

Such rigorous evaluations require adequate resources. When these evaluations are targeted at major regulations, the needed resources will amount to only a tiny fraction of overall estimated costs and benefits of the rules themselves; thus, from the standpoint of overall social welfare, investing in evaluation is worthwhile if it can provide decision makers with options to lessen costs or increase benefits even modestly. Still, for government agencies, these costs can be quite palpable and constraining; Congress will need to ensure agencies have appropriate resources.

Congress could consider ways that resources available for other institutions – whether, for example, at the National Academies of Sciences, Engineering, and Medicine or through the National Science Foundation – might be dedicated to supporting regulatory evaluation. Other institutions can undertake or fund such research directly, or they could provide more fundamental research in behavioral sciences that indirectly helps to inform evaluation and improve regulatory decisions by enhancing our understanding of how and why different regulations have the effects they do.

Conclusion

The persistent challenge in the field of regulation is to improve the quality of regulatory decisions in order to enhance the public value they provide and minimize any unnecessary burdens that they may impose on economic activity. Through improved regulatory analysis, agency decision makers can make smarter decisions that improve outcomes for society. Improving regulatory analysis requires enhancing the incentives for regulatory decision makers to look carefully before they leap, as well as to ensure that they look backward after they have acted to find out how well their regulations are working. Improving regulation by independent agencies depends on improving their practice and use of both prospective and retrospective analysis.

[26] Even if there were other sources, the pathways from fuel combustion to air levels of lead may be sufficiently well-understood and the adverse health effects of lead so significant that even a modest reduction from the air would still dwarf any adverse effects of a ban. Gaining an understanding of those adverse effects better, however, could still necessitate causally-directed evaluation, such as if it were thought meaningful to know how the ban affected vehicle engines and their performance, as these outcomes are affected by many other factors.

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