

Recommendations for Improving the Regulatory Process

Response to the Senate Homeland Security and Governmental Affairs Committee's Letter Requesting Input on its Regulatory Improvement Effort¹

The George Washington University Regulatory Studies Center is pleased to respond to the request by Senate Homeland Security and Government Affairs Committee Chairman Johnson, Ranking Member Carper, Subcommittee Chairman Lankford, and Ranking Member Heitkamp for recommendations for improving the regulatory process. The Center commends the Committee for initiating this regulatory improvement effort. Regulation is one of the primary vehicles by which federal policy is formulated, and it affects every household, employee, and business in the United States.

The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. An academic center of the Trachtenberg School of Public Policy and Public Administration, we are a network of scholars from around the globe with experience and credibility on regulatory matters who conduct objective, empirically-based analysis of regulatory policies and practices.

This document summarizes the key insights from some of our research, and provides citations to relevant background documents that provide further detail. Suggestions are divided into six categories relating to regulatory impact analysis, judicial review, congressional oversight, retrospective review, public input, and risk assessment.²

¹ Letter available at: <http://www.hsgac.senate.gov/media/majority-media/-senators-initiate-regulatory-improvement-effort>.

² The suggestions presented here reflect the views of the authors of the cited works, and do not represent official positions of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

Improved Analysis for Decision-Making

Presidents of both parties for over 30 years have supported ex ante impact analysis of regulations. Despite enjoying bi-partisan support, however, these requirements are not codified in statute. Codifying these requirements could have several advantages.³ ([Dudley 2013, p. 8](#))

- First, such legislation would lend Congressional support to the nonpartisan principles of Executive Orders 12866 and 13563. Many existing authorizing statutes ignore or explicitly prohibit analysis of tradeoffs, leading to regulations with questionable benefits that divert scarce resources from more pressing issues. Thus, Congress might also want to consider how to address language in existing legislation that precludes reliance on sound decision criteria or hinders Administrative Procedure Act (APA) procedures.
- Second, legislation could apply these requirements to independent agencies (which Administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President).

Regulatory impact analyses are often developed after decisions are made and used to justify, rather than inform, them. Changing this pattern may require procedural as well as analytical changes.

- Congress might consider requiring agencies to conduct earlier “back of the envelope” analyses that consider a wide range of alternatives.⁴ ([Carrigan & Shapiro 2014](#)) For regulations with particularly significant effects, advanced notices of proposed rulemaking could be valuable for soliciting input from knowledgeable parties on a range of possible policy options.⁵ ([Dudley & Wegrich 2015](#))
- Agencies should present evidence that the identified problem requires a federal regulatory solution, as well as an objective evaluation of alternative solutions. To this end, it is essential that analytical requirements not be limited to conducting benefit-cost analysis, but rather should include the broader philosophy and principles articulated in E.O. 12866. Legislation could require that regulatory decisions be based on the identification of a compelling public need (a material failure of private markets), an

³ Susan E. Dudley, “Reducing Unnecessary and Costly Red Tape through Smarter Regulations,” Testimony before the United States Congress Joint Economic Committee (June 26, 2013): 8,

http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=f61eebb7-333c-40e6-a110-44c20d97eaa1.

⁴ Christopher Carrigan and Stuart Shapiro, “What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis,” George Washington University Regulatory Studies Center Working Paper (2014), <http://regulatorystudies.columbian.gwu.edu/whats-wrong-back-envelope-call-simple-and-timely-benefit-cost-analysis>.

⁵ Susan E. Dudley and Kai Wegrich. “Regulatory Policy and Practice in the United States and European Union.” The George Washington University Regulatory Studies Center Working Paper (2015) <http://regulatorystudies.columbian.gwu.edu/achieving-regulatory-policy-objectives-overview-and-comparison-us-and-eu-procedures>.

objective review of alternatives (including the alternative of not regulating), and an understanding of the distributional impacts of different approaches.⁶ ([Dudley 2013 pp. 9-10](#))

- The [Office of Information & Regulatory Affairs](#) (OIRA) is responsible for reviewing draft regulatory proposals and their supporting analysis. Yet, its staffing has been declining while regulatory agency staffing has increased. Providing OIRA more resources could improve regulatory review and, ultimately, regulatory outcomes.⁷ ([Vesey 2011](#); [Drat 2011](#); [Shapiro & Morrall 2013](#))

Judicial Review

Judicial oversight provides an important Constitutional check, but courts defer to agency expertise when evaluating regulatory records, and requirements in presidential executive orders are not enforceable by law.

- Congress could consider subjecting regulatory impact analysis to judicial review and/or altering the deference courts grant to agencies.⁸ ([Dudley 2015](#)) Judicial review could be valuable, not because the courts have a particular expertise in regulatory analysis, but because agencies tend to take more seriously aspects of their mission that are subject to litigation. Like executive and Congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis. ([Dudley 2013](#)) On the other hand, requiring judicial review may make RIAs more detailed but less accurate or useful, so Congress should consider tradeoffs, especially with respect to review of analyses conducted early in the decision process. ([Carrigan & Shapiro 2014](#))
- Courts have interpreted the Regulatory Flexibility Act's (RFA) requirements to assess economic impact as applying only to direct compliance costs. This interpretation has

⁶ Susan E. Dudley, "Reducing Unnecessary and Costly Red Tape through Smarter Regulations," Testimony Before the United States Congress Joint Economic Committee (June 26, 2013): 9-10, http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_06_26_Dudley_JEC_statement.pdf.

⁷ Kathryn Vesey, "OIRA Celebrates 30th Anniversary," George Washington University Regulatory Studies Center (2011), https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628_oira_staffing.pdf. See also, Collin Drat, "Who's Regulating the Regulators?," George Washington University Regulatory Studies Center (2011), https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110630_drat_reg_staffing1.pdf; and Stuart Shapiro and John Morrall, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?," *Administration & Society* (2013): 0095399713498745.

⁸ Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," forthcoming in *65 Case Western Reserve Law Review* (2015) http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_Exec-Discretion-Reg-Accountability_20150121.pdf.

been a burden for small businesses, which often bear indirect costs from regulation. Congress might consider amendments to the RFA to explicitly include indirect impacts.⁹ ([Dudley, Engage 2011](#))

Congressional Oversight

Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient. Congress may want to consider legislation that would strengthen its own ability to oversee regulation.

- Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation. Importantly, such an office would serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.¹⁰ ([Dudley 2015](#))
- Regulatory expertise in Congress may be particularly important during presidential transitions, when regulatory activity tends to increase.¹¹ ([Dudley, ALR 2011](#))

Retrospective Review

Agencies seldom look back to evaluate whether existing regulations are achieving their intended effects. While long-standing executive orders require agencies to conduct retrospective review of their rules, these initiatives have been met with limited success largely because they did not change underlying incentives.¹² ([Dudley, HSGAC 2011](#))

- One major impediment is that agency rules are not designed for review at the outset. Our forthcoming paper on this issue finds that none of the economically significant rules proposed in 2014 included a plan for retrospective review, and none were written and designed to facilitate review of their impacts.¹³ ([Miller 2015](#)) While retrospective review

⁹ Susan E. Dudley, “Prospects for Regulatory Reform in 2011,” *Engage* 12, no. 1 (2011): 7-15, http://regulatorystudies.columbian.gwu.edu/files/downloads/regreform_dudley_workingpaper_20110405.pdf.

¹⁰ Susan E. Dudley, “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future,” forthcoming in *65 Case Western Reserve Law Review* (2015) http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_Exec-Discretion-Reg-Accountability_20150121.pdf.

¹¹ Susan E. Dudley, “Observations on OIRA’s Thirteenth Anniversary,” *63 Administrative Law Review* 113 (2011) <http://heinonline.org/HOL/Page?handle=hein.journals/admin63&id=1093>.

¹² Susan E. Dudley, Testimony before the Homeland Security and Governmental Affairs Committee, United States Senate, “Federal Regulation: A Review of Legislative Proposals, Part II,” (July 20, 2011), http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf.

¹³ Sofie E. Miller, “Evaluating Retrospective Review of Regulations in 2014” forthcoming from the George Washington University Regulatory Studies Center (2015) <http://regulatorystudies.columbian.gwu.edu/retrospective-review-comment-project>.

will require agency resources, this could be done by reallocating some resources currently devoted to ex ante review. Shifting resources from ex ante analysis to ex post review would not only help with evaluation, but would improve our ex ante hypotheses of regulatory effects.¹⁴ ([Dudley 2013](#))

- Congress could consider several options for encouraging better retrospective review, including establishing an independent body to make recommendations and using budgetary tools.¹⁵ ([Dudley HSGAC 2011](#))
- Going forward, Congress should consider drafting laws that allow implementing rules to be designed in ways that encourage competition and allow for [experimentation](#). These need not be randomized controlled trials in the scientific sense, but rather natural experiments where the outcomes of different policies and test regulatory hypotheses can be observed.¹⁶ ([Dudley 2014](#))

Public Input

In many respects, the process of developing regulations in the United States is a model of transparency, as it institutionalizes a wide array of opportunities for stakeholder participation.¹⁷ ([Balla 2011](#)) However, the opportunity for public comment comes late in the regulatory development process, after agencies have invested heavily in a specific approach. Furthermore, public comment is largely oriented toward the provision of information and, as a result, does not do as much as it could to maximize deliberative engagement in the regulatory process.¹⁸ ([Balla & Dudley 2014](#))

- Regulatory procedures could take advantage of new technologies that harness the wisdom of dispersed knowledge and facilitate stakeholder participation that is deliberative in orientation. ([Balla & Dudley 2014](#)) A collaborative wiki, for example, might provide opportunities for individuals to build upon one another's contributions, by adding,

¹⁴ Susan E. Dudley, "A Retrospective Review of Retrospective Review," The George Washington University Regulatory Studies Center Regulatory Policy Commentary. (May 07, 2013) <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf>.

¹⁵ Susan E. Dudley, Testimony before the Homeland Security and Governmental Affairs Committee, United States Senate, "Federal Regulation: A Review of Legislative Proposals, Part II," (July 20, 2011), http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf.

¹⁶ Susan E. Dudley, "The Utility of Humility," The George Washington University Regulatory Studies Center Regulatory Policy Commentary. December 9, 2014, <http://regulatorystudies.columbian.gwu.edu/utility-humility>.

¹⁷ Steven J. Balla, "Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States," Draft Report to the Administrative Conference of the United States (2011), <https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf>.

¹⁸ Steven J. Balla and Susan E. Dudley, "Stakeholder Participation and Regulatory Policymaking in the United States," A report prepared for the *Organisation for Economic Co-operation and Development* (2014).

editing, updating, and correcting information and interpretations.¹⁹ ([Dudley & Gray 2012](#))

- Whenever possible, legislative and regulatory approaches should be designed to encourage innovation and learning. Regulation that forces substitution away from products that consumers' actions reveal they value hinders innovation, experimentation, and knowledge discovery. Innovation and learning depend on variation, cross-pollination of ideas, and are stifled by unilateral mandates.²⁰ ([Dudley 2014](#))
- Congress has authorized federal regulatory agencies to issue certain rules in final form without first undergoing public comment. These “direct final” rules have the force of law without the benefit of receiving input from the regulated public. Congress should avoid legislation that enables agencies to pursue major rulemakings without first seeking public comment.²¹ ([Miller 2012](#))
- The Unified Agenda is a semiannual publication of the Office of Management and Budget that provides the public with a chance to see which rules agencies will publish in the next year. However, the past few Agendas have featured completed regulatory actions that were being published for the first time in the Agenda, indicating that the regulated public was not given advance notice of these rules while there was still opportunity to participate in the rulemaking process. ([Miller 2013](#); [Dudley 2013](#); [Miller 2014](#))

More Transparent Risk Analysis

Policy decisions aimed at reducing health and environmental risks are heavily influenced by hidden normative judgments, opening the door to accusations of “politicized science,” “advocacy science,” or “junk science.”²² ([Dudley & Gray 2012](#)) Clearly distinguishing risk *assessment* (which involves scientific assessments about health or other effects) from risk *management* (which involves weighing policy alternatives based on scientific information) could improve regulatory policy.²³ ([Bipartisan Policy Center 2009](#))

²¹ For example, the Energy Policy and Conservation Act authorizes the Department of Energy to issue direct final rules setting energy efficiency standards for everyday household appliances, such as air conditioners and dishwashers. Read Sofie E. Miller’s comment on DOE’s direct final rule for dishwasher efficiency here: http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/DOE_EE_RE_2011_BT_STD_0060.pdf.

²² Dudley, Susan E., and George Gray. “Improving the Use of Science to Inform Environmental Regulation.” In *Institutions and Incentives in Regulatory Science*, edited by Jason Scott Johnston. Lanham, MD: Lexington Books, 2012.

²³ Bipartisan Policy Center, “Improving the Use of Science in Regulatory Policy” (2009) <http://bipartisanpolicy.org/library/science-policy-project-final-report/>.

- Some statutes directed at environmental risks have facilitated more rational regulatory policy than others by recognizing that risk management requires normative judgments that consider tradeoffs. For example, debates over drinking water standards are generally less acrimonious than debates over ambient air quality standards (which the Clean Air Act states should “protect public health” with an “adequate margin of safety.”) This is, in part, because the Safe Drinking Water Act allows explicit consideration of costs and benefits when setting standards, so the full burden of decision-making is not vested in the risk assessment. As a result, policy makers and interested parties may have less incentive to embed policy preferences in the risk assessment portion of the analysis, because they can debate them openly and transparently in the risk management discussion. (Dudley, forthcoming)
- The engagement of scientific advisory panels can provide a valuable source of information and peer review for agency science, but legislation could be clearer when establishing such panels to restrict their advice to matters of science, and not ask them to recommend specific regulatory policies. (Dudley, forthcoming)
- When providing statutory authority for regulation and evaluating proposed and final rules, Congress should be aware that a greater emphasis on understanding cause and effect would improve regulatory outcomes.²⁴ ([Lutter et al 2015](#)) Rather than estimating risk-reduction impacts based on models that assume causation, agencies should apply well-accepted statistical models to evaluate causal risk relationships.²⁵ ([Cox 2015](#))

²⁵ Cox, Louis Anthony Jr. “Public Comment on EPA’s National Ambient Air Quality Standards for Ozone.” The George Washington University Regulatory Studies Center (2015).
<http://regulatorystudies.columbian.gwu.edu/public-comment-national-ambient-air-quality-standards-ozone>

Additional Materials for Consideration by the Committee

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