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Implementing a Two-for-One Regulatory Requirement in the U.S.

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Abstract

President-elect Trump committed to "a requirement that for every new federal regulation, two existing regulations need to be eliminated" or what could be called a "two-for-one" requirement. The implementation of such a regulatory "pay as you go" process raises a number of issues including: what constitutes a "new regulation"; how offsets should be measured; estimating and managing additional analytic and administrative workload; enforcement; and how to increase the likelihood such a policy survives the next presidential transition. This working paper presents the advantages and disadvantages of various options for implementing a two-for-one policy, and also discusses the role of regulatory benefits estimates in such a system.

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[1] This working paper reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

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Introduction

President-elect Trump has committed to "a requirement that for every new federal regulation, two existing regulations need to be eliminated"[3] or what could be called a "two-for-one" requirement. This Working Paper addresses implementation issues regarding this policy by examining its scope; what to measure; workload; durability; and the role of regulatory benefits.

The idea of offsetting new regulations by removing old regulations, also called regulatory "pay as you go" or PAYGO,[4] has the potential to provide "more regulatory balance" to the constant "churn of new red tape" and "help simplify or eliminate outdated rules and procedures."[5] Similar requirements have been adopted by Canada, the United Kingdom and Australia.

It is important to recognize these other countries adopted regulatory PAYGO schemes as only one element of broader regulatory initiatives that include, for example, specific regulatory reduction targets, stronger *ex ante* and *ex post* benefit-cost reviews, and/or improved inventories of existing regulations. Except for discussing target setting, this Working Paper does not address other potential elements of a broader regulatory initiative.[6] It would be important for the Trump administration to consider its overall goal(s) regarding federal regulations and how two-for-one may fit into a larger effort.

That said, some of the regulatory PAYGO topics covered in this paper would also be relevant for other potential regulatory reforms. For instance, a majority in the U.S. House of Representatives has already endorsed the consideration of a number regulatory budgeting and reform proposals which would entail, for instance, determining the proper measurement of regulatory cost and identifying organizations that might provide independent cost estimates.[7]

The Scope of New Regulation to be Offset

The first question that may need to be answered in implementing a two-for-one requirement is "what constitutes a new regulation that needs to be offset?" A "new regulation" could be defined as broadly as capturing revised agency guidance or enforcement policies, or it could be quite narrow, including only "mega rules" that impact the economy by $1 billion or more. A very

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3 Donald Trump, "Donald Trump's Contract with the American Voter," p. 1, https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf

4 Senator Mark R. Warner, "To revive the economy, pull back the red tape," *Washington Post,* December 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html

5 Mark R. Warner, "Regulatory PAYGO," at http://www.warner.senate.gov/public/index.cfm/regulatory-paygo

6 For instance, it also does not address questions that are beyond the administration's control, such as placing regulatory cost caps in new legislation.

7 See section 605(b) of H. Con. Res. 125, 114th Congress (2016), http://budget.house.gov/uploadedfiles/fy2017_legislative_text.pdf

broad scope could require the review and offset of thousands of regulatory actions each year while a very narrow definition could involve a few actions a year.

The tradeoffs regarding economic impact and administrative workload are obvious. The more proposed actions that need to be offset, the greater the incentives for reducing regulatory burden, but also the greater the amount of additional analyses required to assess what offset is needed and then generate that offset within a reasonable time period. Too broad a scope could overwhelm the two-for-one system, but too narrow a scope may result in too little a reduction in regulatory burden.

Table 1. Historical Frequency of Regulations by Type

Type of final regulation	Approximate number of final actions per year
All regulatory and regulatory-like actions including agency guidance, interpretations, directives, memoranda, bulletins, etc.	>7,000?
All "notice and comment" regulations (also called "Section 553" regulations) issued pursuant to the Administrative Procedure Act	3,600
"Significant" regulations submitted to the Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866	320
"Major" rules submitted to the Government Accountability Office as defined by the Congressional Review Act	75
"Economically significant" rules requiring a regulatory impact analysis be submitted to OIRA under Executive Order 12866 and OMB Circular A-4	60
"High-impact" or "mega rules" that are estimated to cost $1 billion or more per year	3

Notes: The number of final actions are ten year averages based on data from three sources*:* Clyde Wayne Crews Jr., "Mapping Washington's Lawlessness 2016: A Preliminary Inventory of 'Regulatory Dark Matter'," Competitive Enterprise Institute, *Issue Analysis* 2015 No. 6, December 2015, p. 8; Maeve P. Carey, "Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register*," Congressional Research Service, 4 October 2016, pp. 6 and 8; and Sam Batkins, "A Review of High-Impact, Billion-Dollar Rules," American Action Forum *Insight*, 22 November 2016. "Significant" rules are defined in Section 3(f)(1-4) of Executive Order 12866. "Major" rules are defined in Section 804(2) of the Congressional Review Act. "Economically significant" rules are defined in Section 3(f)(1) of Executive Order 12866 and are similar to "major" rules (see the answer to question #1 at The White House, "Regulatory Impact Analysis: Frequently Asked Questions"). The definition of "high-impact" rule is consistent with section 2 of the Regulatory Accountability Act of 2015 (H.R. 185) passed by the U.S. House of Representatives in January 2015.

To give a sense of possible cutoff points and consequent additional workload and missed opportunities for compulsory reductions, Table 1 above shows different classifications of final regulatory actions and the typical frequency with which they have been issued over the last ten years.

These historic averages may overestimate the number of new regulations in the future because regulatory offset policies appear to dampen the flow of new regulations[8] and the president-elect has indicated he would "issue a temporary moratorium on new agency regulations that are not compelled by Congress or public safety."[9]

As discussed below, there are a number of ways to reduce or manage the additional workload a two-for-one requirement may create, including slowly phasing in a progressively broader scope of new regulations and/or using simpler metrics to measure regulatory burden. In addition, there are other ways to manage the scope of what must be offset by, for instance, just focusing on regulations that affect small businesses, exempting all regulations that have statutorily mandated deadlines, or forgoing regulations from independent agencies. The administration could also decline to establish criteria and simply identify which rules must be offset on an *ad hoc* basis. However, the scope is eventually determined, the administration will need to weigh the change in additional work against the lost, or gained, opportunity for regulatory burden reduction, the effect on the incentives of regulators, and the likelihood of a similar process being retained by the next administration.

The administration will also need to consider whether there should be categorical exemptions from two-for-one for political, practical or other reasons. For instance, the United Kingdom exempts from its "one-in, three-out" requirement regulations that: have only an indirect impact on business; implement international commitments; address civil emergencies (such as the outbreak of a disease); or address systemic financial risk.[10] Regardless of categorical exemptions, the administration will likely want to retain the ability to waive specific regulations in the event of unforeseen circumstances although it may consider setting a high bar for such exemptions (e.g., requiring the president's explicit approval) to reduce such waivers from becoming too frequent.

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[8] Australian Government Productivity Commission, "Identifying and Evaluating Regulation Reforms," December 2011, p. xv, http://www.pc.gov.au/inquiries/completed/regulation-reforms/report/regulation-reforms.pdf

[9] Donald J. Trump for President, "Regulations" at https://www.donaldjtrump.com/policies/regulations accessed 5 December 2016.

[10] This list is not exhaustive. See U.K. Department for Business, Innovation and Skills, *Better Regulation Framework Manual: Practical Guidance for UK Government Officials*, March 2015, section 1.9.9., https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf

Scope and Timing of Offsets

Determining how new rules should be offset raises questions regarding where such offsets can come from and when the offsets must take place. In general, these decisions trade off greater accountability and institutional simplicity against more flexibility and regulatory efficiency.

Scope of Offsets

Two-for-one could hold the agency issuing a new regulation primarily responsible for finding the necessary offset within its own stock of existing regulations. Conversely, two-for-one could allow offsets to come from any regulatory burden reduction action regardless of agency.

Limiting the scope of offsets to the agency creating a new burden provides much stronger incentives within agencies to more carefully consider whether a new regulation is necessary, minimize the new regulation's burden, and identify those existing rules that are most ripe to be reduced or eliminated. This is particularly valuable since it is the officials in issuing agencies who are best equipped to do all three of those tasks. They know where the bodies are buried.

There is also an institutional simplicity to requiring each agency to "pay for" its own new rules. Without such an expectation, some third party, such as the Office of Information and Regulatory Affairs (OIRA), would need to decide who must take what actions to offset each new rule. It might be possible to avoid this problem by allowing agencies to "bank and trade" offsets. For instance, the Department of Transportation could take burden reduction actions now and use them later to offset increased costs in their own new rules (bank them), or trade them to, say, the Department of Labor who may need offsets now with the expectation that the Department of Labor would help the Department of Transportation offset its new rules at some point in the future.

There are, however, distinct advantages to allowing a much broader scope for offsets. It makes sense, for instance, to prioritize deregulatory actions across government so that those offsets that offer the greatest net benefits, or those that help a group of particular interest to the administration, such as small businesses or the manufacturing sector, are done first. While nothing prevents the administration from acting immediately on burden reduction proposals, independent of two-for-one, it may make sense to better engage the PAYGO requirement in eliminating the most unnecessary regulations first. The resources dedicated to implementing two-for-one can best be utilized by directing them at those actions that may do the most good. A central office, such as OIRA, could collect, prioritize and manage these priorities. A broader scope may especially make sense if the administration requests ideas from the public on how to reduce regulatory burden and wants to quickly act on some of those proposals first.

Further, taking pressure off agencies reduces the policy distortions created by imperfect metrics (discussed below) since the rule writers will not necessarily have to find offsets to their own

rules. Likewise, it lessens incentives for bad behavior, such as agencies attempting to regulate outside the system (e.g., through guidance) or secretly hoarding deregulatory ideas until they are needed.[11] Finally, broadening the scope of offsets avoids putting small or newer agencies that may not have a large stock of existing regulations (e.g., the Small Business Administration) in an untenable position should they need to write a new rule.

Despite these potential disadvantages, Canada, the United Kingdom, and Australia all put the initial onus on agencies to find and implement offsets for new regulations they issue, but all three also allow the banking and trading of offsets.

When considering the scope of offsets it is important to remember burden reduction does not rely on two-for-one. Nothing prevents the president from setting a burden reduction target and meeting that target through independent deregulatory actions.[12] Thus, regardless of the scope of allowed offsets, the president could still hold agency heads accountable for achieving their portion of an overall target, and/or have the heads compete to see who can achieve the greatest reduction in their regulatory stock.[13] Such a hybrid target/two-for-one approach may offer the advantages of greater agency accountability along with more regulatory efficiency. Regardless, regulatory PAYGO provides a compelling mechanism for hitting a government-wide burden reduction target and, after the target is achieved, a means of continuing to cap regulatory burden in the long-term.

Timing of Offsets

New regulations and changes to existing regulations take time, typically at least a year and often longer (excluding possible subsequent court challenges).[14] Once the offset for a new rule is identified it may well be necessary to allow time for the necessary action(s) to be promulgated, even as the new regulation moves ahead. However, extending the time period too long delays the relief offered by the offset and, consequently, potential economic growth. If the period is too short, the scope of offsets available and their quality is reduced.

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[11] These disadvantages were considered so strong that in 2011 the Australian Productivity Commission suggested a PAYGO requirement be delayed. See Australian Government Productivity Commission *supra* note 8, at p. 59.

[12] The discussion of targets in this paper is limited to regulatory burden reduction. However, the administration may also want to consider setting targets that measure economic opportunity such as country rankings published by the World Bank (at http://www.doingbusiness.org/rankings) or The Heritage Foundation/*Wall Street Journal* economic freedom index (at http://www.heritage.org/index/).

[13] For instance, the Calvin Coolidge administration created a "Two Percent Club" to encourage agency heads to save at least 2 percent of their budget each year. See Amity Shlaes, Coolidge, New York, NY: HarperCollins (2013), p. 331.

[14] Susan E. Dudley, "Regulatory Reset: How easy is it to undo regulation?" The George Washington University Regulatory Studies Center *Commentary*, November 30, 2016 at https://regulatorystudies.columbian.gwu.edu/regulatory-reset-how-easy-it-undo-regulation (accessed December 5, 2016).

Banking deregulatory actions (doing them before they are needed as offsets) is obviously one way to avoid any delay. This would entail the administration immediately acting on priority measures that reduce regulatory burden without necessarily knowing what new regulations they may offset. Nonetheless, it would inevitably be necessary to allow agencies some time to offset new regulations especially if the new regulation had to be issued with little notice, was compelled by court order, and/or the offset required more careful consideration and analysis.

The Canadian, United Kingdom, and Australian systems have adopted various time periods, with some flexibility, for the completion of offsets. The Canadian system, the only one of the three regulatory PAYGO requirements set in law, allows a 24-month period after a new rule is finalized for it to be offset.[15] The United Kingdom urges ministries to offset new regulations "as quickly as possible"[16] offering a "fast track" process for some deregulatory measures.[17] Overall, the United Kingdom expects agencies to have adequately offset all new regulations within each parliaments' five-year term.[18] Australia expects offsets to be implemented within a year (the "relevant reporting period") of new regulation, but this is negotiable.[19]

Metrics: Two of What for One of What?

A two-for-one regulatory requirement begs the question how "two" and "one" will be measured: "two" of what will offset "one" of what? There are at least four different metrics that could be used:

- number of regulations;
- administrative burden of regulations on businesses and other entities;
- direct compliance burden on business; or
- cost to society.

These alternatives are not exhaustive, but they span the range of likely options and include the measures adopted by other countries. It will be noted all of these metrics attempt to measure

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[15] Timothy Folkins, "The One-for-One Rule: Measuring and Controlling the Growth of Administrative Burden Costs on Business in the Canadian Federal Regulatory System," Treasury Board of Canada presentation to the Society for Benefit Cost Analysis 8th Annual Conference and Meeting, March 17, 2016, p. 7, https://benefitcostanalysis.org/sites/default/files/public/E1%203%20Folkins%20SBCA%20Presentation%202016%20March.pdf

[16] U.K. Department for Business, Innovation and Skills, *supra* note 10 at paragraph 1.1.15.

[17] *Id*. subsection 1.3.

[18] *Id*. paragraph 1.2.19

[19] Australian Department of the Prime Minister and Cabinet, Office of Best Practice Regulation, "Regulatory Burden Measurement Framework," February 2016, p. 7, https://www.dpmc.gov.au/sites/default/files/publications/reg-burden_measure-framework.pdf

regulatory burden, not regulatory benefits. The role of benefits in regulatory PAYGO is addressed in another section below.

Two Regulations Eliminated for Every New Regulation Added

If we take the commitment literally, which may well be a mistake,[20] President-elect Trump pledged to eliminate two "existing regulations" for every "new federal regulation" created. Putting aside regulatory guidance, interpretation and other so-called regulatory "dark matter,"[21] for the purposes of counting new regulations, the Congressional Research Service defines a new "regulation" as a document published in the final rules section of the *Federal Register*.[22]

Such a metric is very easy to measure. If the Administration adopted a policy of eliminating two existing regulations for every new federal regulation, we should then expect that every final rule showing up in the *Federal Register* that creates a new regulatory requirement would be offset by two final rules showing up in the *Federal Register* that eliminate some existing regulatory requirement. (Note it typically takes a regulatory action to eliminate a previous regulatory action.)

This metric, however, has obvious drawbacks. Primarily it does nothing to measure the regulations' relative effects on society or the economy. Under a two-for-one scheme that simply offsets one new regulation with two deregulatory regulations, a new expensive regulation could be offset by two trivial regulations that have little or no effect on reducing regulatory burden. For instance, an extremely expensive new Environmental Protection Agency (EPA) regulation could be offset by EPA ever so slightly expanding the criteria for waivers or exemptions from existing rules (e.g., waiving, for the first year, pesticide registration fees for small chemical company start-ups[23]). On this basis alone, such a measure may not be credible.

Along these lines, it should be noted that the Canadian province of British Columbia (BC) has found some success in counting "regulatory requirements" in its effort to reduce regulatory burden. This is defined as "an action or step that must be taken, or piece of information that must be provided in accordance with government legislation, regulation, policy or forms, in order to access services, carry out business or pursue legislated privileges." BC has not established a

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[20] Salena Zito, "Taking Trump Seriously, Not Literally," *The Atlantic*, September 23, 2016 at http://www.theatlantic.com/politics/archive/2016/09/trump-makes-his-case-in-pittsburgh/501335/

[21] Clyde Wayne Crews Jr., "Mapping Washington's Lawlessness 2016: A Preliminary Inventory of 'Regulatory Dark Matter'", Competitive Enterprise Institute, *Issue Analysis 2015* No. 6, December 2015, https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington's%20Lawlessness.pdf

[22] See Maeve P. Carey, "Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register*," Congressional Research Service, October 4, 2016, p. 5, https://fas.org/sgp/crs/misc/R43056.pdf .

[23] The current exemptions from registration fees can be found at 40 C.F.R. 152.412.

standard method for measuring such requirements but relies on the *ad hoc* judgement of a "minister of deregulation."[24] The administration could mimic such a measure by counting the number of "restrictive words," such as "must" or "shall," that would be added to the *Code of Federal Regulation* by a new rule. This would be very easy to implement (a count of such words in existing regulations has already been done[25]) but may be open to manipulation by regulators carefully avoiding or minimizing their use of the targeted words.

Two Hours of Paperwork Eliminated for Every Hour of Paperwork Added

Canada measures administrative cost on businesses to determine whether regulatory costs have been offset as part of its "one-for-one" system. Administrative cost, or what Canada calls "red tape," encompasses the burden placed on companies to comply with information requirements imposed by regulations.[26] This includes the costs of collecting, storing and/or reporting data—in short, the cost of filling out paperwork.[27]

Unlike just counting the number of regulations, using the cost of additional paperwork at least measures some of the burden regulations impose on the economy. In addition, the U.S. government already closely measures and tracks the paperwork burden imposed by the federal government not only on businesses, but also on nonprofit organizations, state and local governments and the public.[28] Choosing this metric for two-for-one would greatly simplify implementation since almost all of the necessary data, as well as the method, capacity, and legal authority to measure paperwork burden, is already in place.

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[24] Ministry of Small Business and Red Tape Reduction, British Columbia, "Regulatory Reform Policy," June 2016, http://www2.gov.bc.ca/assets/gov/government/about-the-bc-government/regulatory-reform/pdfs/final_regulatory_reform_policy_-_aug_2016.pdf

[25] Patrick A. McLaughlin and Jake Jares, "Five-letter words and legal language," *The Hill*, February 5, 2016 at http://thehill.com/blogs/pundits-blog/uncategorized/268265-five-letter-words-and-the-legal-language

[26] The Canadian requirement defines "administrative burden" as "anything that is necessary to demonstrate compliance with a regulation, including the collecting, processing, reporting and retaining of information and the completing of forms." See Government of Canada, "Annual Report on the Application of the One-for-One Rule: 2014-15," at http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/araofor-raarupu-eng.asp .See also the "International Standard Cost Model Manual" which describes how these costs are calculated at http://www.oecd.org/gov/regulatory-policy/34227698.pdf

[27] This is a general description. For instance, the costs of complying with government labeling requirements are also counted since they are an obligation to provide information.

[28] See U.S. Office of Management and Budget, "Information Collection Budget of the United States Government 2014" at https://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf . Cost is currently most commonly measured in hours but is also often monetized. See Curtis W. Copeland and Vanessa K. Burrows, "Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates," Congressional Research Service Report, 15 June 2009, pp. 12-13, http://graphics8.nytimes.com/packages/pdf/nyregion/2009/records/paperworkreductionreportbycrs.pdf

A further advantage of this approach is enforcement. As a means of reducing paperwork burden, the Director of the Office of Management and Budget could immediately begin reducing paperwork requirements in existing rules as they come up for renewal[29] by asserting his or her duty to "minimize the Federal information collection burden."[30] Consequently, regulated entities would almost immediately enjoy relief from some paperwork burdens.[31]

However, focusing solely on reducing paperwork burden is far from ideal. Administrative costs are only a small part of the overall cost of most regulations. For instance, only a fraction of the total cost of EPA's Clean Power Plan, which the president-elect has committed to "scrap" because of its economic effects,[32] is due to paperwork burden.[33] Thus, by using this metric regulators could still issue new extremely costly rules while only having to offset a fraction of the total new cost.

Worse, such an approach could have a perverse effect. Regulatory options that favor the disclosure of information in lieu of more stringent constraints (e.g., a requirement to list a potentially harmful ingredient on a product label vs. banning the ingredient) can be much less economically disruptive and is preferred as a regulatory alternative.[34] Yet this metric would penalize regulations that increase such administrative burdens over other alternatives that impose other types of regulatory costs. Ignoring these other regulatory costs would encourage regulators to adopt potentially more, not less, burdensome rules, especially, as noted above, if regulators are responsible for finding the offset for their own new rule.

It should be noted that, while this perverse incentive exists, it does not seem to have, as yet, happened in other countries where there has been a great deal of focus on reducing paperwork burden. A review of deregulatory actions taken in Canada and the United Kingdom, for instance, shows that most offsets exploit new information technology (e.g., replace more burdensome hard copy forms with electronic submission) and/or regulatory simplification (such as redesigning forms, reducing the amount of data collected on a form, changing reporting or inspection

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[29] 44 U.S.C. 3507(h)(2).

[30] 44 U.S.C. 3504(c)(3).

[31] Federal agencies cannot penalize entities for not providing information to be used by a federal agency if the information collection has not been approved by OMB. See 44 U.S.C. 3512(a). This does not apply to information collections used for the purpose of third party disclosure. See *Dole v. United Steelworkers*, 494 U.S. 26 (1990).

[32] President Elect Donald J. Trump, "Energy Independence" at https://www.greatagain.gov/policy/energy-independence.html accessed December 5, 2016.

[33] EPA estimated paperwork costs of no more than approximately $60 million a year. Total annual costs are estimated in the billions. See US EPA, "Regulatory Impact Analysis for the Clean Power Plan Final Rule," October 23, 2015, pp. ES-8 and 7-7, https://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf

[34] Executive Order 13563 section 4 and OMB Circular A-4, p. 9, https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf

frequency, etc.). There appear to be many opportunities for such improvements and they can be "powerful – because they reduce costs for business while maintaining protections."[35]

Just looking at the change in paperwork may also result in misleading the public regarding the actual net impact new regulations have on the economy. For instance, for the period 2014-2015 the Canadian government claims to have reduced "annual net administrative burden to business" by approximately C$2.7 million[36] but this does not reflect changes in other regulatory costs, including non-administrative compliance costs, which could have increased on net.

Finally, the small businesses in the Canadian provincial government of British Columbia have found that focusing on cutting "red tape" "does not address a critical component of what is often felt by citizens as red tape: poor government service (confusing language on forms, long waits [sic] times etc. [sic])."[37]

Two Dollars of Compliance Cost Reduced for Every Dollar of Compliance Cost Added

As a part of its "One-in, Three-out" policy, the United Kingdom measures the "direct net cost on business and voluntary organisations."[38] Australia uses a similar measure. These are costs and benefits that are "directly attributable to the policy or intervention."[39] They include all the administrative (paperwork) costs measured by the Canadian system (described above) plus the costs of buying equipment, modifying facilities, and/or hiring more staff to comply with the new rule. Because some rules may result in both direct costs and direct benefits to businesses, the United Kingdom nets these out. For instance, a new rule might impose a smoking ban on restaurants resulting in owners having to purchase and post new signs (a direct cost) but the rule also means they no longer have to buy or maintain ashtrays (a direct benefit). Assuming the costs are greater than the benefits, the United Kingdom would subtract the direct benefits from the direct costs to determine the direct net cost that would need to be offset. (Potential difficulties of determining what benefits can be used to offset costs in a process that focuses solely on managing regulatory costs are discussed below.)

This metric offers advantages over the Canadian system in that the direct cost of a new regulation comes closer to reflecting the economic impact of a rule than simply measuring

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[35] Jitinder Kohli, personal communication with the author, December 4, 2016.

[36] Government of Canada, *supra* note 26.

[37] Canadian Federation of Independent Business, "The British Columbia Regulatory Reform Model in Brief," p. 2.

[38] U.K. Department for Business Innovation & Skills, "The Ninth Statement of New Regulation: Better Regulation Executive," December 2014, p. 54, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397237/bis-14-p96b-ninth-statement-of-new-regulations-better-regulation-executive.pdf

[39] HM Government, "IA Toolkit: How to do an Impact Assessment," August 2011, p. 20.

administrative (paperwork) cost. While this is a more complicated measure, the U.S. government already estimates the direct compliance costs and benefits for many of its most costly new regulations.[40] This is also how the Unfunded Mandates Reform Act directs the Congressional Budget Office to calculate the costs of mandates (subtracting the direct savings that would result from complying with the mandate from the direct costs).[41]

Nonetheless, using direct compliance cost comes with its own set of challenges. First, while better than just measuring paperwork cost, this method omits the indirect costs of regulations. Indirect, or secondary, costs occur when people change their behavior in response to compliance with a regulation. For instance, the federal government required much more stringent screening of airplane passengers after the attacks of 9/11. The costs of the additional screeners, screening equipment and airport facility modifications were all direct compliance costs borne by airports and airlines. There were, however, also a number of significant secondary costs. For example, since airlines had to pay for the additional screeners, airfares went up. The higher fares convinced some people to drive to their destination or simply forgo their travel. The loss these people suffered was an indirect cost of regulation. Likewise, passengers had to spend much more time waiting in line to pass through security. This lost time was also an indirect cost. When added up, the indirect costs of increased airline passenger screening may well be larger than the direct costs by a few billion dollars a year.[42]

Similar to just measuring paperwork cost, measuring direct costs could cause a distortion in regulatory policies resulting in the selection of regulatory alternatives that have lower direct compliance costs but higher costs overall. For instance, banning certain substances or activities typically has lower direct compliance costs, but much higher indirect costs, than attempting to regulate the use of a substance or an activity by, say, setting performance standards.

Two Dollars of Total Cost Eliminated for Every Dollar of Total Cost Added

The most meaningful regulatory cost measure would be total social cost or, more specifically, "opportunity cost." According to OMB Circular A-4,

> "Opportunity cost" is the appropriate concept for valuing both benefits and costs. The principle of "willingness-to-pay" (WTP) captures the notion of opportunity cost by measuring what individuals are willing to forgo to enjoy a particular benefit. In general, economists tend to view WTP as the most appropriate measure of opportunity cost, but an individual's "willingness-to-accept" (WTA) compensation

[40] Executive Order 12866 paragraph 6(a)(3).

[41] See the definition of "direct costs" under section 101 of Public Law 104–4 at https://www.gpo.gov/fdsys/pkg/PLAW-104publ4/pdf/PLAW-104publ4.pdf

[42] See Jerry Ellig, "What Are the Indirect Costs of Regulation?" Mercatus Center Expert Commentary at https://www.mercatus.org/expert_commentary/what-are-indirect-costs-regulation accessed December 5, 2016.

> for not receiving the improvement can also provide a valid measure of opportunity cost.[43]

This measure captures both the direct and indirect costs imposed on all entities. This is the standard used when the U.S. currently performs a regulatory impact analysis on proposed economically significant rules (typically rules expected to have impacts of $100 million or more annually) and, to varying extent, on significant rules. This standard reflects the desire of each president, Democrat and Republican, since 1981, to have important rules analyzed using "the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[44]

However, even for fairly straightforward regulations, measuring costs can be tough to do with accuracy. Susan Dudley has noted:

> Understanding the full social costs of a regulation is difficult, if not impossible; and some regulatory impacts will be harder to estimate than others. What are the costs associated with homeland security measures that infringe upon airline travelers' privacy? What are the costs of regulations that prevent a promising, but yet unknown, product from reaching consumers?[45]

Two-for-One's Additional Workload

Implementation of two-for-one will entail extra work. In terms of additional tasks, this policy would require, at the very least:

- identification of new regulations;
- calculating the necessary offsets;
- analyzing and generating adequate offsets;
- keeping an account of new regulations and their offsets;
- validation/monitoring of agencies;
- reporting of two-for-one results.

The level of additional workload could be trivial or very high, depending on the characteristics of the process. The two biggest factors are the scope of what new regulations need to be offset and the metric used to measure offsets. Table 2 below provides a relative estimate of the additional work necessary to run a two-for-one system depending the options selected for these two factors.

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[43] OMB Circular A-4 section 2 under "Developing Benefit and Cost Estimates," https://www.whitehouse.gov/omb/circulars_a004_a-4

[44] Executive Order 13563 section 1(c).

[45] Susan E. Dudley, *Can fiscal budget concepts improve regulation?,* New York University Journal of Legislation and Public Policy, 2016, Vol. 19 Issue 2, p. 269.

Table 2. Relative Workload of Different Two-for-One Options

		Scope of regulations that need to be offset					
		Mega	**Econ. Significant**	**Major**	**Significant**	**§553 APA Regs**	**Regs + 'Dark Matter'**
Metric used for offset	**# Regs**	Trivial	Trivial	Trivial	Very Low	Low	Low
	Paperwork (hours or $$)	Very Low	Very Low	Very Low	Very Low	Low	High
	Direct Cost	Low	Low	Low	Medium	High	Very High
	Total Cost	Low	Medium	Medium	High	Very High	Very High

The Tradeoffs of Higher Workloads

As the table shows, there are significant implementation benefits of leveraging the existing paperwork review process under the Paperwork Reduction Act and/or the benefit-cost reviews required under Executive Order 12866. However, each also comes with drawbacks noted above. For instance, measuring paperwork misses a significant amount of regulatory burden. Adopting total, or full, social cost as a metric avoids this problem but only a relatively small number of all rules are currently analyzed for cost, and such analysis is not easy to perform.

While almost all regulations are currently reviewed for paperwork burden, the U.S. only consistently estimates the direct and total social costs of new economically significant rules (typically rules that have an effect on the economy of $100 million or more).[46] This means that in any given year, cost analyses are completed for less than 1 percent of all final rules,[47] although these rules are expected to be the ones that make up the bulk of new regulatory costs. The president-elect's two-for-one policy could avoid the additional workload of costing out a lot of new regulations by limiting the policy to those significant rules that are already analyzed, but that would also mean most new federal rules would not be subject to being offset.

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[46] Executive Order 12866 paragraph 3(f)(1).

[47] Susan E. Dudley, Brian F. Mannix, & Sofie E. Miller. "Public Interest Comment on the Office of Management and Budget's Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations." July 23, 2013, p. 2. Note this estimate is lower than one might impute from the figures in Table 1 because the table included regulations from independent commissions that do not generally release formal cost analyses. https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_OMB_Report_to_Congress_PIC.pdf

On top of the potential need to perform a benefit-cost analysis on many more new regulations, analyses would also have to be performed to estimate the reduced direct compliance costs of the new deregulatory proposals that would need to be generated to offset new regulations. Estimating only the direct costs and benefits of these additional regulations would be much easier than attempting to include indirect effects. That said, even if full cost was being measured, presumably the offsets would be smaller, less complicated rules and the analysis would presumably focus solely on regulatory costs—not benefits.

Another consideration is that current paperwork burden measurement and cost estimates may not be terribly accurate simply because they seldom have significant influence over current decisionmaking except at a fairly gross level (e.g., if costs clearly and significantly outweigh benefits). If these estimates become the basis for taking, or not taking, regulatory actions, it is likely methods and their execution will need to be significantly tightened and previously calculated figures may be found wanting.[48] The administration should anticipate a "shake out" period, and, perhaps, the retraining of analysts as they adjust to the need to produce more reliable estimates.

Ex ante vs *Ex post* Cost Estimates

Virtually all of the current estimates of regulatory cost, including paperwork burden, direct cost, and total cost are based on projections of what will happen (*ex ante*) not what actually has happened (*ex post*). This is despite repeated attempts over a number of decades to encourage agencies to measure the actual impact of their regulatory actions, also called retrospective review.[49] Retrospective review is an important element in an overall and bipartisan effort to move toward evidence-based policymaking[50]—to make sure regulations are having the impact government expected.

While desirable, increased *ex post* reviews face their own issues regarding increased workload. While there are potential solutions to this problem,[51] the administration will likely need to consider the tradeoffs of pursuing evidence-based regulation in a larger context, including the

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[48] For instance, while working at a federal agency, the author started using performance data, long reported to Congress and the public under the Government Performance and Results Act, to make management decisions. He was frequently told the data were too inaccurate to use as a practical management tool.

[49] Susan Dudley, "A Retrospective Review of Retrospective Review," The George Washington University Regulatory Studies Center, May 7, 2013, pp. 1-2, https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf

[50] See Marcus C. Peacock, Sofie E. Miller and Daniel R. Pérez, "Public Interest Comment to the Commission on Evidence-Based Policymaking," November 8, 2016, p. 5, https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Peacock%20et%20al.-Evidence-Based-Rulemaking_0.pdf

[51] *Id*. pp. 12-13.

availability, privacy, and use of government data as well as provisions of the Paperwork Reduction Act that may currently discourage *ex post* review. In particular, the administration may want to receive the recommendations of the Commission on Evidence-Based Policymaking, due to the president in the summer of 2017,[52] before making final decisions regarding greater *ex post* reviews.

Ways to Manage Higher Workload

Should the administration choose to pursue an option that results in a higher workload, there are a number of ways (listed below) to make this more manageable.

Phase In: If the administration wanted to select an option that entailed a significant increase in workload (toward the lower right corner of Table 2) it could incrementally move to that level by phasing in two-for-one. The easiest way to do this would be to progressively expand the scope of PAYGO from costlier to less costly rules, starting with, for instance, economically significant rules which are already subject to regulatory impact analyses (moving from left to right in Table 2). Another approach would be to start by focusing on only a few agencies and then expanding coverage to more agencies as the process becomes more routinized and capacity increases. For example, the Small Business Advocacy Review Panels required under the Small Business Regulatory Enforcement Fairness Act of 1996 were initially implemented only for EPA and Occupational Safety and Health Administration regulations before being adopted more broadly.[53]

Yet another alternative would be to phase in more demanding metrics over time, moving from measuring paperwork to, eventually, total cost (moving from top to bottom in Table 2). However, this may result in discontinuity in reporting the net results of the process and tracking longer term burden reduction targets.

Tailored cost estimates: The expense of performing the additional cost analyses could be reduced by considering what level of analysis is necessary to be adequately confident a new rule is being offset. In particular, if the cost of an analysis doubles to increase its accuracy another 10 percent, it may well not be worth the additional expense. Tailoring cost analysis to what is needed, rather than seeking something closer to perfection, may greatly reduce overall cost. As Chris Demuth has stated, a workable system "would have to rest on a practical compromise—some measure of 'expenditures by firms, consumers, and third parties' that was narrow enough to facilitate general agreement in particular cases but not so narrow as to stimulate massive cost substitution strategies by the agencies."[54] Performing "back of the envelope" analyses earlier in the process

[52] Public Law 114–140.

[53] Public Law 104–121 paragraph 244(a)(4).

[54] Christopher C. DeMuth, "The Regulatory Budget," *Regulation Magazine*, Mar.–Apr. 1980, p. 40.

may be all that is necessary for the purposes of calculating and validating many two-for-one offsets.[55]

Target first, two-for-one later: As suggested elsewhere in this document, the administration should consider adopting an overall regulatory burden reduction target by a date certain alongside a two-for-one PAYGO policy. However, the two could be implemented sequentially in order to give the administration more time to develop the capacity and resources to implement two-for-one. Assuming agencies could "bank" burden reductions for later use as offsets, setting and achieving a burden reduction target would involve some of the new tasks required for two-for-one, such as identifying and prioritizing deregulatory proposals, but it could delay some of the most difficult tasks such as measuring costs for a much larger set of new regulations. The Netherlands, for instance, has not adopted a regulatory offset requirement, but simply set, in 2003, a goal of reducing administrative burden on businesses by 25 percent by 2007.[56] (After achieving this, the government set yet more targets. They are currently working on a goal of reducing direct regulatory costs on businesses by €2.5 billion by 2017.[57]) Working immediately on a burden reduction target could quickly provide the economic relief sought by the president-elect while building a two-for-one process later could provide an ongoing declining regulatory cap in the long-term, after the target is achieved.

Three Ways to Make Regulatory PAYGO Stick

Presidents have tremendous difficulty institutionalizing their reforms and policies.[58] If the president-elect wants to create a regulatory PAYGO requirement that outlives his Administration, he will need to start taking actions now that will increase its durability. Three steps could help increase the likelihood that a regulatory cap stays in place after President Trump leaves office.[59]

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[55] Chris Carrigan and Stuart Shapiro, "What's wrong with the back of the envelope?", *Regulation and Governance*, Vol. 10, Issue 1, April 2016. https://regulatorystudies.columbian.gwu.edu/what's-wrong-back-envelope-call-simple-and-timely-benefit%E2%80%93cost-analysis

[56] World Bank Group, "Review of the Dutch Administrative Burden Reduction Programme," February 2007, p. 4, http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Special-Reports/DB-Dutch-Admin.pdf

[57] Government of the Netherlands, "Reducing the regulatory burden" at https://www.government.nl/topics/reducing-the-regulatory-burden/contents/regulatory-burden-on-businesses

[58] Marcus Peacock, "Improving the Accountability of Federal Regulatory Agencies, Part II: Assessing Eight Government-wide Accountability Reforms," *The George Washington University Regulatory Studies Center*. https://regulatorystudies.columbian.gwu.edu/improving-accountability-federal-regulatory-agencies-part-ii-assessing-eight-government-wide

[59] For more background on why these three steps are so important, see Marcus Peacock, "Improving the Accountability of Federal Regulatory Agencies, Part III: What Reforms Work Best," *The George Washington University Regulatory Studies Center*. https://regulatorystudies.columbian.gwu.edu/improving-accountability-federal-regulatory-agencies-part-iii-what-reforms-work-best

1) Build on Existing Institutions

First, as tempting as it may be, the president should avoid building a large resource intensive process through purely administrative means unless he has a plan to eventually codify some sort of regulatory PAYGO in law.[60] This does not mean the president should avoid purely administrative process reforms, but these efforts should, as much as possible, build on existing institutions and accepted practices so they are viewed as incremental changes, not a break with accepted standards. The president should focus at least as much on improving and perfecting current regulatory policies, reviews, and institutions as in creating new ones. For instance, this may mean initially applying two-for-one to only economically significant rules and/or rules that particularly burden small businesses which Democrats and Republicans have historically agreed deserve special attention by both the Executive Branch[61] and Congress.[62] Successful experience with this smaller, but important, subset of regulations could better convince a majority of Congress, including at least 60 Senators, to codify elements of a PAYGO requirement in law.

2) Treat Agencies as Stakeholders

Second, when it comes to regulatory oversight and review, the president needs to treat agencies as interested stakeholders, not disinterested experts. Improvement in regulatory accountability should not solely rely on regulatory offices to implement the reforms but should consider expanding and increasing the involvement of more dispassionate organizations, such as OIRA, the White House Council of Economic Advisors, or the Bureau of Economic Analysis at the Department of Labor or, working with Congress, the Government Accountability Office (GAO) or the Congressional Budget Office, to fulfill the tasks necessary to implement regulatory PAYGO.[63] The president may also consider forming, with Congress, a temporary commission to help improve and design a more permanent regulatory PAYGO apparatus. Such a commission could help build the intellectual and bipartisan support needed to improve the durability of a regulatory cost cap.

It should be noted that these existing organizations all have different cultures, capabilities, and reputations. For instance, some may consider OIRA an impartial arbiter of regulatory policy. However, other commentators believe that a cynical skepticism of "regulatory programs has

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[60] For instance, the Canadian "one-for-one" rule was first implemented administratively in 2012 and codified in law in 2015. See Government of Canada, *supra* note 26.

[61] Executive Order 12866 section 4(d).

[62] See, for instance, The Regulatory Flexibility Act (Public Law 96-354).

[63] For more on the status of regulatory PAYGO and Congress see Susan Eckerly, "The Regulatory Cliff: Regulatory Reform Outlook," U.S. Senate Committee on the Budget *Budget Bulletin*, November 17, 2016, pp. 2-3, http://www.budget.senate.gov/imo/media/doc/Reg%20Reform%20BB[draft]111416.pdf and Paul Ryan, "A Better Way: Our Vision for a Confident America: The Economy," June 14, 2016, p. 11, https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Economy-PolicyPaper.pdf

become so ingrained in OIRA's culture that it cannot be purged."[64] The decision regarding what entity enforces or, at least, validates, the two-for-one policy needs to be thought through carefully, especially if there is a desire to create a process that survives President Trump.

3) Encourage Competition

Third, it would be highly advantageous if the president-elect's two-for-one policy could be managed to encourage competition among regulatory agencies such that it ultimately provides incentives to embrace, rather than avoid, greater accountability for regulatory costs. An open competition among regulatory agencies to achieve, for instance, the greatest reduction in costs while maintaining their regulatory benefits, could create an environment where regulators have strong incentives to actively improve the efficiency of regulations in their bailiwick.

In particular, agency incentives could be improved by setting out a specific target for regulatory cost reduction. A target clearly communicates to everyone what you are trying to achieve, and helps focus regulators on what they need to do by when to be successful. For instance, Australia, along with its "One-in, One-out" policy set an overall goal of reducing regulatory burden by A$3 billion over three years.[65]

The Trump Administration could immediately set out a goal of reducing regulatory costs imposed on society by a certain percent over a five-year period starting in 2016 and have the figures, including the baseline, monitored and validated by an independent source, such as GAO. The percentage would likely depend on the metric used to measure the cost of regulations, but two-for-one would be a means of achieving that goal.

The Role of Regulatory Benefits

It has been the policy of every president since Ronald Reagan that federal regulators, to the extent allowed by law, should draft regulations so that they maximize net benefits to society.[66] In other words, it is desirable to draft a regulation that may cost more if the expected increase in benefits are even greater than the increase in costs. As long as the additional benefits exceed the additional costs, society will probably be better off.

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[64] Thomas O. McGarity, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival*, New Haven, CT: Yale University Press (2013), p. 270.

[65] Commonwealth of Australia, *2015 Annual Red Tape Reduction Report*, 2016, p. 4, https://cuttingredtape.gov.au/sites/default/files/files/2015_annual_red_tape_reduction_report.pdf . The dollar reduction goal was achieved earlier than expected and is currently being revised.

[66] Executive Order 12866 section 1(a).

A regulatory cost cap, such as two-for-one, could be interpreted as being contrary to this goal.[67] Maximizing net benefits can incentivize regulators to adopt more costly regulations but a commitment to reducing regulatory costs, without considering benefits, incentivizes regulators to look for the least expensive alternative.

This need not be a conundrum if one believes there are significant opportunities for making the existing stock of regulation much more efficient. In drafting regulations, regulators can still pursue maximizing net benefits while the two-for-one requirement provides incentive for regulators to ferret out the least efficient existing regulations in the *Code of Federal Regulation* for elimination or overhaul. As long as there are ample opportunities to improve rules already on the books, the two-for-one requirement should not be a barrier to maximizing net benefits. The fact that Canada, Australia, and the Netherlands have or are achieving regulatory cost reduction targets well ahead of schedule bodes well for achieving such savings in the United States.

The Role of Benefits in Two-for-One

A more serious question is the extent to which benefits should be considered when measuring the necessary offsets in two-for-one. As noted above, the United Kingdom considers net direct costs in its regulatory offsets. That is, direct benefits to businesses are subtracted from net costs. At one extreme, it could be argued that two-for-one offsets should be measured as "net cost to society"—taking into account all the societal cost and benefits of the rule. Only rules that result in expected net costs to society, as few currently do, would need to be offset. An argument for this approach is that it better aligns with the goal of maximizing net benefits.

The answer to this question must be driven by the purpose of two-for-one. The countries that have implemented regulatory cost controls have done so because they are attempting to relieve society of what they consider unnecessarily burdensome federal regulations.[68] They are convinced their current body of regulations can be made less costly without reducing their benefits. By doing so, these governments believe they will reduce unemployment, increase wages, and generally improve economic growth. This seems to be the same view as the

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[67] Richard J. Pierce, Jr., "The Regulatory Budget Debate," *New York University Journal of Legislation and Public Policy*, Volume 19, Issue 2, pp. 251-252, http://www.nyujlpp.org/wp-content/uploads/2016/06/Pierce-Regulatory-Budget-Debate-19nyujlpp249.pdf

[68] As Mandel and Carew observe, "Regulatory accumulation imposes an unintended but significant economic cost to businesses and on the economy. This is true even if the underlying regulations have a net benefit to society." See Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform," Progressive Policy Institute *Policy Memo*, 2013, p. 19, http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf .

president-elect who has referred to "unnecessary regulations that kill jobs" and inflict "profound damage to our economy."[69]

Benefits Estimates Can be Extremely Uncertain and Unreliable

Regardless of the purpose of two-for-one there is at least one other reason to be wary of managing regulations based on calculations of net benefits. As noted above, measuring the total cost of a regulation can be quite difficult, yet this is typically easy compared to trying to accurately measure the benefits of many federal regulations.

By their very nature, federal regulations typically produce benefits that are not traded in a marketplace and, therefore, cannot be easily evaluated. Add to that the uncertainty surrounding the extent to which regulations may actually influence things like public health and the estimates become very speculative indeed. As Susan Dudley explains, "Regulatory benefit estimates, in particular, are highly uncertain, as these rely on hypothetical models and numerous assumptions that are rarely subjected to *ex post* evaluation for accuracy."[70] Adding benefits estimates to the calculation of regulatory offsets could result, for instance, in one large, potentially inaccurate, estimate overwhelming all other considerations.[71]

This does not mean benefits estimates should be jettisoned, far from it, more work needs to be done to reduce the uncertainty of such estimates and improve their validation. Several lines of progress appear to be doing just that including new analytical tools[72] and advances in evidence-based regulation.[73] But, in the meantime, policymakers need to be cautious not to lean on them too much.

The Incentive to Redefine Benefits as "Negative Costs"

Explicitly omitting benefits estimates from two-for-one does not mean regulatory agencies will not attempt to include them as a means of driving down estimated regulatory costs. In benefit-

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[69] President Elect Donald J. Trump, "Regulatory Reform" at https://www.greatagain.gov/policy/regulatory-reform.html accessed December 6, 2016.

[70] Susan E. Dudley, *supra* note 45, at p. 263

[71] See for instance, Susan E. Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics*, January 2012, https://regulatorystudies.columbian.gwu.edu/perpetuating-puffery-analysis-composition-ombs-reported-benefits-regulation

[72] See, for instance, Paul Glimcher, Agnieszka Tymula and Eva Woelbert, "Flexible Valuations for Consumer Goods as Measured by the Becker-DeGroot-Marschak Mechanism," *Journal of Neuroscience, Psychology, and Economics*, Volume 9, Number 2 (2016), pp. 65-77, and the George Washington University Regulatory Studies Center, "Causal Analytics Toolkit (CAT)" at https://regulatorystudies.columbian.gwu.edu/causal-analytics-toolkit-cat accessed December 6, 2016.

[73] Marcus C. Peacock, Sofie E. Miller and Daniel R. Perez, supra note 50.

cost analyses, regulatory benefits can be presented as "negative costs" and used, internal to the analysis, as a means of offsetting regulatory burden. Further, agencies may have a stronger incentive to manufacture questionable "negative costs" by, for instance, assuming regulations impose more rational decisions on consumers than they would make for themselves.[74] An example of this can be found in the "negative benefits" claimed in setting new corporate average fuel economy standards for motor vehicles in 2015. As Susan Dudley explains:

> The Environmental Protection Agency and the Department of Transportation estimate that these rules will have large negative costs (even if benefits were zero), because, according to the agencies' calculations, the fuel savings consumers will derive from driving more fuel-efficient vehicles will outweigh the increased purchase price.[75]

By focusing on regulatory costs, otherwise tricky questions regarding what may or may not count as a "negative cost" will need to be more squarely confronted and answered than has been done in the past.

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[74] Brian F. Mannix and Susan E. Dudley, "Please Don't Regulate My Internalities," *Journal of Policy Analysis and Management*, Volume 34, Issue 3 (Summer 2015), pp. 715-718. See also Sofie E. Miller, "The Questionable Benefits of Energy Efficiency Standards," The George Washington University Regulatory Studies Center *Commentary*, September 15, 2015 at https://regulatorystudies.columbian.gwu.edu/questionable-benefits-energy-efficiency-standards accessed December 6, 2016.

[75] Susan E. Dudley, *supra* note 45, at p. 269.