

# CAN FISCAL BUDGET CONCEPTS IMPROVE REGULATION?

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*Despite efforts to ensure that new regulations provide net benefits to citizens, the accumulation of regulations threatens economic growth and well-being. As a result, Congress is exploring the possibility that applying fiscal budgeting concepts to regulation could bring more accountability and transparency to the regulatory process. This Essay examines the advantages and challenges of applying regulatory budgeting practices and draws some preliminary conclusions based on successful experiences in other countries.*

INTRODUCTION.....	259
I. U.S. REGULATORY PRACTICES.....	261
II. APPLYING FISCAL BUDGET CONCEPTS TO REGULATION.....	264
III. ADVANTAGES OF A REGULATORY BUDGET.....	266
IV. ANALYTICAL ISSUES WITH A REGULATORY BUDGET.....	268
V. OTHER COUNTRIES' EXPERIENCES WITH REGULATORY OFFSETS.....	270
A. The Netherlands.....	271
B. The United Kingdom.....	272
C. Canada.....	274
CONCLUSION.....	276
APPENDIX: MEASURES OF REGULATORY ACTIVITY.....	278

## INTRODUCTION

Regulations are the primary vehicles by which the United States government implements statutory laws and agency objectives. Also called administrative laws, they are specific standards or instructions concerning what individuals, business, and other organizations can or

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cannot do.<sup>1</sup> Despite efforts to ensure that new federal regulations provide net benefits to citizens, the accumulation of regulations threatens economic growth and wellbeing.<sup>2</sup> As a result, Congress is exploring the possibility that applying fiscal budgeting concepts to regulation could bring more accountability and transparency to the regulatory process.<sup>3</sup> This Essay examines the advantages and challenges of applying these regulatory budgeting practices and draws some preliminary conclusions based on successful experiences in other countries.

Taxes, and subsequent spending, are one way the federal government redirects resources from the private sector to accomplish public goals.<sup>4</sup> Regulation of private entities—businesses, workers, and consumers—is another. Like the programs supported by taxes, regulations provide benefits to Americans.<sup>5</sup> However, the costs associated with regulatory programs are not subject to the same checks and balances that govern fiscal spending (for example, proposed budgets that require congressional appropriations). As the Organisation for Economic Cooperation and Development (“OECD”) observes, “[W]hile governments are required to account in detail for their fiscal spending, regulatory costs or ‘expenditures’ are still largely hidden and there is still no accountability for the total amount of regulatory expenditure which a government requires.”<sup>6</sup>

Because regulatory costs are less visible (regulations have been called a “hidden tax”),<sup>7</sup> and because they are assumed to fall on businesses (even though individual consumers and workers ultimately bear

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1. SUSAN E. DUDLEY & JERRY BRITO, GEORGE MASON UNIV., MERCATUS CTR., *REGULATION: A PRIMER* 1 (2d ed. 2012), [http://mercatus.org/sites/default/files/RegulatoryPrimer\\_DudleyBrito\\_0.pdf](http://mercatus.org/sites/default/files/RegulatoryPrimer_DudleyBrito_0.pdf).

2. MICHAEL MANDEL & DIANA G. CAREW, PROGRESSIVE POLICY INST., *REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY-VIABLE APPROACH TO U.S. REGULATORY REFORM* (2013), [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](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).

3. See *Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on the Budget*, 114th Cong. (2015) (unpublished hearing).

4. DUDLEY & BRITO, *supra* note 1, at 5; David Levi-Faur, *Regulation and Regulatory Governance*, in *HANDBOOK ON THE POLITICS OF REGULATION* 3, 4 (David Levi-Faur ed., 2011).

5. See, e.g., OFFICE OF MGMT. & BUDGET, *REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES* (2014), [https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014\\_cb/2014-cost-benefit-report.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/2014-cost-benefit-report.pdf).

6. Nick Malyshev, *A Primer on Regulatory Budgets*, 2010 OECD J. ON BUDGETING 69, 70.

7. Wendy L. Gramm, *Regulatory Review Issues, October 1985–February 1988*, 63 ADMIN. L. REV. 27, 28 (2011).

them),<sup>8</sup> regulatory tools may seem preferable to direct spending programs for accomplishing policy objectives.<sup>9</sup> Without a more transparent accounting of regulatory costs, efforts to constrain their growth will be hampered.

Other countries are applying budgeting tools to improve regulatory transparency and accountability, and these approaches impose some constraints on growing regulatory burdens. As discussed in Part V, *infra*, the Netherlands,<sup>10</sup> the United Kingdom,<sup>11</sup> and Canada<sup>12</sup> have adopted requirements to offset the costs of new regulations by removing or modifying existing rules of comparable or greater effect. This Essay explores how such a practice might work in the United States.

## I.

### U.S. REGULATORY PRACTICES

In the United States, individual regulations are constrained by (1) their enabling legislation,<sup>13</sup> (2) the Administrative Procedure Act, which requires agencies to provide public notice and seek comment before issuing new regulations,<sup>14</sup> and (3) executive requirements that agencies conduct regulatory impact analysis (primarily benefit-cost analysis, or “BCA”).<sup>15</sup> Presidents of both parties for more than forty

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8. Cf. William A. Pizer & Raymond Kopp, *Calculating the Costs of Environmental Regulation* 40 (Res. for the Future, Working Paper No. 03-06, 2003), <http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-03-06.pdf> (arguing that “private compliance costs may be only a fraction of the social cost of regulation”).

9. Jeff Rosen, *Putting Regulators on a Budget*, 27 NAT’L AFF. 42, 43 (2016) (“And in an environment in which the president is unable to persuade Congress to enact his priorities, it should be no surprise when regulation and its costs continue to increase. The regulatory process effectively provides the president with a way around congressional resistance to his agenda and its cost. Particularly when one form of resource allocation (spending) is limited by Congress while the other form (regulation) is not, there is a hugely skewed incentive to use regulation as the chief instrument of a more activist government.”).

10. See *Customised Solutions to Regulatory Burden on Business*, GOV’T NETH., <https://www.government.nl/topics/reducing-the-regulatory-burden/contents/regulatory-burden-on-businesses/customised-approach-to-reducing-regulatory-burden> (last visited Apr. 10, 2016).

11. See Ana Maria Zarate Moreno, *Regulatory Pay as You Go: Lessons from Other Countries*, GEO. WASH. REG. STUD. CTR. (July 15, 2015), <http://regulatorystudies.columbian.gwu.edu/regulatory-pay-you-go-lessons-other-countries>.

12. See *id.*

13. See U.S. CONST. art. 1, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”).

14. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

15. Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alterna-

years have supported ex ante impact analysis of regulations as a way to make agencies weigh the likely positive and negative consequences of regulations before they are issued.<sup>16</sup>

Though reliable estimates of regulatory costs are lacking, proxy measures such as those presented in Appendix Figures 1–5 suggest that, despite these constraints, the scope and reach of regulation in the United States have been growing.<sup>17</sup> As of 2016, there are more than seventy federal agencies, which together employ almost 300,000 people to write and implement regulation.<sup>18</sup> Every year, they issue thousands of new regulations, which now occupy more than 175,000 pages of regulatory code.<sup>19</sup>

Executive Order 12,866,<sup>20</sup> issued by President Bill Clinton in 1993 and reinforced by both George W. Bush<sup>21</sup> and Barack Obama,<sup>22</sup> continues to guide the development and review of regulations today. Executive Order 12,866 expresses the philosophy that regulations should (1) address a “compelling public need, such as material failures of private markets,” (2) be based on an assessment of “all costs and benefits of available regulatory alternatives, including the alternative of not regulating,” and (3) “maximize net benefits” to society unless otherwise constrained by law.<sup>23</sup>

While the ex ante BCA required by these executive orders is important, it is worth noting that these analyses are conducted by the agencies themselves, and agencies face incentives to demonstrate that

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tives, including the alternative of not regulating.”), *reprinted in* 5 U.S.C. § 601 app. at 89–93.

16. See Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 CASE W. RES. L. REV. 1027 (2015).

17. The GW Regulatory Studies Center’s “Reg Stats” page provides various measures of regulatory activity. *Reg Stats*, GEO. WASH. UNIV. REG. STUD. CTR., <http://regulatorystudies.columbian.gwu.edu/reg-stats> (last visited Apr. 2, 2016).

18. SUSAN DUDLEY & MELINDA WARREN, REGULATORS’ BUDGET INCREASES CONSISTENT WITH GROWTH IN FISCAL BUDGET: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2015 AND 2016 (2015), <http://regulatorystudies.columbian.gwu.edu/2016-regulators-budget-increases-consistent-growth-fiscal-budget>. Note that “agencies that primarily perform taxation, entitlement, procurement, subsidy, and credit functions are excluded from this report,” so these figures exclude staff developing and administering regulations in the Internal Revenue Service, the Centers for Medicaid and Medicare Services, etc. *Id.* at 14.

19. OFFICE OF THE FED. REGISTER, TUTORIALS, HISTORY, AND STATISTICS, <https://www.federalregister.gov/learn/tutorials> (last visited Apr. 2, 2016).

20. Exec. Order No. 12,866, 3 C.F.R. at 638.

21. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY IMPACT ANALYSIS (2003).

22. Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 103–04 (2014).

23. Exec. Order No. 12,866, § 1(a), 3 C.F.R. at 638.

the benefits of their desired actions exceed the costs.<sup>24</sup> 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.<sup>25</sup>

The Paperwork Reduction Act of 1980 (“PRA”) complements these procedural and analytical regulatory requirements.<sup>26</sup> Designed to reduce the administrative burden that the federal government imposes on private businesses and citizens,<sup>27</sup> it requires agencies to receive approval from the Office of Information and Regulatory Affairs (“OIRA”) in the Office of Management and Budget (“OMB”) before collecting new information from the public.<sup>28</sup> As the central clearinghouse for all collections of information, OMB produces an annual *Information Collection Budget* report (“ICB”) to Congress.<sup>29</sup> The 2014 ICB estimates that the public spent 9.45 billion hours responding to federal information collections, which was “a net decrease of 14 million burden hours, or less than one percent, from the estimated 9.47 billion hours that the public spent responding to federal information collections in FY 2012.”<sup>30</sup>

Though called a “budget,” the ICB is reported in hours, rather than dollars, and there are no consequences for increasing regulatory burdens, nor are there incentives to offset new requirements by removing existing burdens.<sup>31</sup> The main mechanism for constraining growth

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24. Stephen Breyer observed that “well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results.” STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11 (1993). Breyer attributes this problem to a combination of public perceptions, congressional actions, and uncertainties inherent in understanding and predicting risks. These external factors exacerbate the problem of “tunnel vision,” a phrase he uses to describe how agencies single-mindedly pursue a particular goal to a point that “the regulatory action imposes high costs without achieving significant additional safety benefits.” *Id.*

25. Susan E. Dudley, *OMB’s Reported Benefits of Regulation: Too Good to Be True?*, REG. MAG., Summer 2013, at 26.

26. Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521 (2014)).

27. 44 U.S.C. § 3501(1) (2014) (“The purposes of this subchapter are to . . . minimize the paperwork burden for individuals, small businesses, educational and non-profit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.”).

28. *Id.* § 3504(a)(1)(B)(i).

29. *Id.* § 3514.

30. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT FOR FY 2014*, at ii (2014).

31. See *id.*; see also Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Chief Info. Officers 1 (Feb. 23, 2012) (describing the goals of

in burdens is the centralized review and approval by OMB.<sup>32</sup> While not an explicit benefit-cost balancing statute, the PRA's goals are "to help ensure that information collections by the Federal Government yield the greatest possible public benefit" and "to enhance the productivity, efficiency, and effectiveness of government programs by improving the quality and use of data."<sup>33</sup>

These legislative and executive practices and policies are largely aimed at new regulations, though Executive Order 12,866 and subsequent executive orders encourage agencies to evaluate existing regulations.<sup>34</sup> President Obama's Executive Order 13,563 asks agencies to develop and submit to OIRA plans "under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed."<sup>35</sup> Executive Order 13,610 directs agencies to prioritize "initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens."<sup>36</sup> OMB guidance advises agencies that impose high paperwork burdens to "attempt to identify at least one initiative, or combination of initiatives, that would eliminate two million hours or more in annual burden."<sup>37</sup> It asks other agencies to "eliminate at least 50,000 hours in annual burden."<sup>38</sup> These retrospective review guidelines have met with limited success, however, largely because they did not change underlying incentives.<sup>39</sup>

## II.

### APPLYING FISCAL BUDGET CONCEPTS TO REGULATION

Despite central oversight and requirements for public input and BCA, the growth in new regulations continues (see Appendix, Figures

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the Paperwork Reduction Act in terms of "burden hours" rather than financial costs, and observing that "paperwork burdens have grown over the past decade").

32. OMB must not only approve any new information collection, but also reapprove all collections at least every three years. See OFFICE OF MGMT. & BUDGET, *supra* note 30, at iii.

33. *Id.* at 1.

34. Exec. Order No. 12,866, § 1, 3 C.F.R. 638, *reprinted in* 5 U.S.C. § 601 app. at 89–90 (2014).

35. Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 103–04 (2014).

36. Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012).

37. Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep'ts & Agencies 3 (June 22, 2012).

38. *Id.*

39. *Reducing Unnecessary and Costly Red Tape Through Smarter Regulations: Hearing Before the Joint Econ. Comm.*, 113th Cong. 32–46 (2013) (statement of Susan E. Dudley, Director, George Washington University Regulatory Studies Center).

1–5, *infra*), and with it concerns that we have reached a point of diminishing returns.<sup>40</sup> As important as BCA is for developing regulations,<sup>41</sup> it may not provide sufficient discipline for ensuring that tradeoffs are realistically considered. The application of fiscal budgeting concepts to regulation holds the potential to bring more accountability and transparency to the regulatory process.<sup>42</sup> Two administrative law experts have observed:

The regulatory budget is premised on the view that the transfer of private resources by regulation is no less a cost imposed by government than the collection and expenditure of private resources through the tax and spending powers. But while government expenditures are constrained by the ability to tax and borrow, regulatory costs are subject to no built-in limitations. By creating a systematic limitation on regulatory costs, a regulatory budget would counteract the tendency by agencies to treat private resources as a “free good.”<sup>43</sup>

Operationally, a regulatory budget would share similarities with the fiscal budget. A bill introduced in the 113th Congress would have established an office responsible for estimating total regulatory costs, and required Congress annually to establish regulatory cost caps.<sup>44</sup> According to Christopher DeMuth, who was to become the second Administrator of OIRA, writing in 1980:

Each year (or at some longer interval), the federal government would establish an upper limit on the costs of its regulatory activi-

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40. Eric J. Gouvin, *A Square Peg in a Vicious Circle: Stephen Breyer’s Optimistic Prescription for the Regulatory Mess*, 32 HARV. J. ON LEGIS. 473, 475 (1995) (reviewing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993)) (“Essentially, the problem is that regulators do not know when to stop. Using fitting examples from the regulation of polychlorinated biphenyls, asbestos, and benzene, Justice Breyer shows how targeting the last ten percent not only costs too much, but might even create more safety hazards than it cures.”).

41. *Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on the Budget*, 114th Cong. (2015) (unpublished hearing) (prepared statement of Richard J. Pierce, Jr., Professor, George Washington University School of Law), <http://www.hsgac.senate.gov/download/?id=56FAFB42-8F15-453A-8241-ABBDF7226354>.

42. *Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on the Budget*, 114th Cong. (2015) [hereinafter *Dudley Statement*] (unpublished hearing) (prepared statement of Susan E. Dudley), <http://www.hsgac.senate.gov/download/?id=09E9477E-3C70-45C9-9A07-65F96D86DBA2>.

43. Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 838–39 (2014).

44. S. 2153, 113th Cong. §§ 614(a), 617 (2014); *see also* H.R. 5184, 113th Cong. §§ 652(a), 655 (2014).

ties to the economy and would apportion this sum among the individual regulatory agencies. This would presumably involve a budget proposal developed by OMB in negotiation with the regulatory agencies, approved by the President, and submitted to Congress for review, revision, and passage. Once the President had signed the final budget appropriations into law, each agency would be obliged to live within its regulatory budget for the time period in question. The budget would cover the total costs of all regulations past and present, not just new ones.<sup>45</sup>

The idea of a "regulatory budget" is not new.<sup>46</sup> In 1980, President Jimmy Carter's *Economic Report of the President* discussed proposals "to develop a 'regulatory budget,' similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits."<sup>47</sup> The *Report* noted analytical problems with developing a regulatory budget, but concluded that "tools like the regulatory budget may have to be developed" if governments are to "recognize that regulation to meet social goals competes for scarce resources with other national objectives" and set priorities to achieve the "greatest social benefits."<sup>48</sup>

### III.

#### ADVANTAGES OF A REGULATORY BUDGET

By making more transparent the private sector resources needed to achieve regulatory objectives, a regulatory budget would encourage policy officials in the legislative and executive branches, as well as the public, to consider regulatory priorities and tradeoffs.<sup>49</sup> This transparency would also strengthen political accountability and discipline.<sup>50</sup> Expected benefits would be considered up front (when

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45. Christopher C. DeMuth, *The Regulatory Budget*, REG. MAG., Mar.-Apr. 1980, at 30-31.

46. Rosen and Callanan provide a concise review of previous research and efforts. Rosen & Callanan, *supra* note 43, at 848-53.

47. COUNCIL OF ECON. ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 125 (1980).

48. *Id.* at 126.

49. Because regulation can confer benefits on some groups at the expense of others, entrenched interests can be very influential in the development of new regulations, and these interests are often reluctant to have agencies review and modify existing regulations. If a regulatory budget made more transparent the impacts of different regulatory approaches, it could force a more open evaluation of priorities and tradeoffs. *Accord Dudley Statement*, *supra* note 42, at 4.

50. *Id.* Legislators would be held accountable for whether actual outcomes were worth the regulatory costs expended, especially when considered against alternative approaches to achieving desired outcomes.



lawmakers issue legislation or new regulations), and elected officials would have to consider how much achieving particular goals are worth.<sup>51</sup>

A pure regulatory budget would require an explicit consideration of the aggregate economic costs of regulation.<sup>52</sup> This transparency would “afford policymakers and the public a more complete picture of the economic footprint of regulation.”<sup>53</sup> Resources would likely be better allocated because policy makers would have incentives to find the most cost-effective ways of achieving policy goals, not only among alternative forms of regulation, but also among different vehicles for addressing a problem.<sup>54</sup> It might reduce “the increasing tendency of government to pursue its objectives through regulation rather than taxing and spending—even when regulation is otherwise less desirable—*because* regulation is less constrained.”<sup>55</sup>

By constraining the private sector resources that can be committed to achieving regulatory mandates, a regulatory budget could impose internal discipline on regulatory agencies, perhaps lessening the need for case-by-case oversight. By focusing on the costs of regulations and allowing agencies to set priorities and make tradeoffs among regulatory programs, it might remove some of the contentiousness surrounding BCA and presidential oversight.<sup>56</sup> As DeMuth has posited, “Faced with a budget constraint, the agencies would measure the costs and benefits of individual regulatory proposals in order to further their own organizational interests rather than to satisfy the minimum requirements of an executive order or judicial review.”<sup>57</sup>

A regulatory budget constraint would also encourage evaluation of existing rules’ costs and effects. As noted above, despite broad sup-

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51. DeMuth, *supra* note 45, at 31.

52. 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.” MANDEL & CAREW, *supra* note 2, at 19.

53. Rosen & Callanan, *supra* note 43, at 842.

54. Dudley Statement, *supra* note 42.

55. DeMuth, *supra* note 45, at 37–38.

56. See generally Lisa Heinzerling & Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002) (arguing that BCA is perilous in major environmental legislation and rulemaking); see also Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998) (suggesting that emphasis on BCA and efficiency, even including social costs, leaves important programs vulnerable because the regulatory state is not a purely rational actor); Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433 (2008) (outlining the perils of a singular focus on BCA, and proposing a new regulatory review structure and process).

57. DeMuth, *supra* note 45, at 36.

port, initiatives to require ex post evaluation of regulations have met with limited success,<sup>58</sup> largely because they did not change underlying incentives. If the issuance of new regulations were contingent on finding a regulatory offset, agencies would have incentives to evaluate both the costs and effectiveness of existing programs.<sup>59</sup>

#### IV.

##### ANALYTICAL ISSUES WITH A REGULATORY BUDGET

While a regulatory budget holds considerable appeal for making regulatory policy more transparent, accountable, and cost-effective, the analytical problems associated with it are non-trivial. The task of gathering and analyzing information on the costs of all existing regulations in order to establish a baseline budget would be enormous,<sup>60</sup> and the resulting numbers not very reliable. Even defining what should be considered “costs” would be challenging. Estimating the opportunity costs of regulations is not as straightforward as estimating fiscal budget outlays, where past outlays are known and future outlays generally can be predicted with some accuracy.<sup>61</sup> Since the late 1990s, OMB has been compiling agency estimates of the costs and benefits of major regulations with mixed results.<sup>62</sup>

An incremental approach, such as a “regulatory PAYGO,”<sup>63</sup> would avoid some of these difficulties while retaining many of the benefits of a regulatory budget, as the experiences of other countries highlighted below shows. Under a regulatory PAYGO or “one-for-one” approach, regulatory agencies would be required to eliminate an outdated or duplicative regulation before issuing a new regulation of

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58. *Federal Regulation: A Review of Legislative Proposals, Part II: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2011) (statement of Susan E. Dudley).

59. *Federal Regulation: A Review of Legislative Proposals, Part I: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2011) [hereinafter *Hearings Part I*] (statement of Sen. Mark Warner).

60. Since 1976, the federal government has issued more than 375,000 regulations. OFFICE OF THE FED. REGISTER, CODE OF FEDERAL REGULATIONS, ACTUAL PAGE BREAKDOWN 1975–2014, <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.xls> (last visited Feb. 29, 2016) (noting that identifying regulatory requirements and the costs associated with compliance would be a daunting task).

61. *Dudley Statement*, *supra* note 42.

62. Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB’s Reported Benefits of Regulation*, 47 BUS. ECON. 165, 166–67 (2012).

63. *Hearings Part I*, *supra* note 59, at 2 (statements of Sen. Mark Warner & Sen. Robert Jones Portman, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs).

the same approximate economic impact.<sup>64</sup> Unlike the regulatory budget approach, this system would only require agencies to estimate costs for regulations being introduced (which they should already do) and when offsetting regulations they propose to remove.

Nevertheless, deciding what “costs” to include in estimating budgets or offsets will necessarily require judgment. Canada’s “One-for-One Rule,” for example, focuses on direct administrative-burden costs on businesses, similar to the Paperwork Reduction Act, although the burdens are assigned dollar values.<sup>65</sup> The United Kingdom’s “One-in, Two-out” program attempts to include all net costs on businesses.<sup>66</sup>

Understanding the full social costs of 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?

Even regulations for which costs appear to be straightforward, such as corporate average fuel economy standards that restrict the fleet of vehicles produced, depend on assumptions about consumer preferences and behaviors that may not reflect American diversity. 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.<sup>67</sup> Judgments as to the credibility of such estimates,<sup>68</sup> as well as determinations as to how

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64. See, e.g., DEP’T FOR BUS., INNOVATION & SKILLS, URN 11/P96A, ONE-IN, ONE-OUT: STATEMENT OF NEW REGULATION (2011) [hereinafter ONE-IN, ONE-OUT], [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31617/11-p96a-one-in-one-out-new-regulation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31617/11-p96a-one-in-one-out-new-regulation.pdf).

65. TREASURY BD. OF CAN. SECRETARIAT, BACKGROUNDER—LEGISLATING THE ONE-FOR-ONE RULE [hereinafter BACKGROUNDER], <https://www.tbs-sct.gc.ca/ttrap-parfa/0129bg-fi-eng.asp> (last modified May 22, 2015).

66. ONE-IN, ONE-OUT, *supra* note 64.

67. According to these agencies, under the recently proposed standards for heavy-duty trucks, “the buyer of a new long-haul truck in 2027 would recoup the investment in fuel-efficient technology in less than two years through fuel savings.” Press Release, Env’tl. Prot. Agency, EPA, DOT Propose Greenhouse Gas and Fuel Efficiency Standards for Heavy-Duty Trucks (June 19, 2015), [http://yosemite.epa.gov/opa/adm\\_press.nsf/0/7C555190101CFCAD85257E69004A444F](http://yosemite.epa.gov/opa/adm_press.nsf/0/7C555190101CFCAD85257E69004A444F).

68. For a discussion of this question, see Brian F. Mannix & Susan E. Dudley, *The Limits of Irrationality as a Rationale for Regulation*, 34 J. POL’Y ANALYSIS & MGMT. 705, 707 (2015); see also Brian F. Mannix & Susan E. Dudley, *Please Don’t Regulate My Internalities*, 34 J. POL’Y ANALYSIS & MGMT. 715, 716 (2015).

negative costs should be treated under a regulatory budget, will have to be made.

According to DeMuth:

Clearly, a workable budgeting 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.<sup>69</sup>

Congress would probably need to establish regulatory burden baselines in new authorizing legislation. Providing an entity outside of the executive branch (such as the Congressional Budget Office or Government Accountability Office) with the resources and mandate to (1) estimate the regulatory costs associated with executing new legislation, and (2) evaluate and critique agency estimates of regulatory costs could be critical to the success of a regulatory budget or PAYGO.<sup>70</sup>

How a budget or an offset requirement would affect agencies’ incentives for estimating costs is uncertain. In developing a baseline estimate of the costs of existing regulations, agencies may have incentives to overstate costs, particularly for regulations they may want to trade in exchange for new initiatives.<sup>71</sup> In considering regulatory offsets, should *ex ante* estimates of costs be used, or *ex post*? Perhaps *ex ante* cost estimates adjusted based on actual experience would be the most practical and reliable approach.<sup>72</sup>

## V.

### OTHER COUNTRIES’ EXPERIENCES WITH REGULATORY OFFSETS

Other countries, such as the Netherlands,<sup>73</sup> the United Kingdom,<sup>74</sup> and Canada,<sup>75</sup> have addressed some of these challenges and initiated programs that require new regulatory costs to be offset by removal of existing regulatory burdens. The United States can learn some lessons from their experiences.

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69. DeMuth, *supra* note 45, at 40.

70. Dudley Statement, *supra* note 42.

71. *Id.*

72. This approach might stimulate a comparison of predicted and actual regulatory costs, which would have the added advantage of informing and improving future regulatory impact estimates.

73. *Customised Solutions to Regulatory Burden on Business*, *supra* note 10.

74. ONE-IN, ONE-OUT, *supra* note 64.

75. BACKGROUND, *supra* note 65.

### A. *The Netherlands*

The Netherlands is considered a leader in Europe and throughout the world for its efforts to reduce the administrative burdens of its regulations.<sup>76</sup> According to the World Bank, “The programme’s innovative design—a twenty-five percent target reduction in regulatory costs, a link between regulatory reforms and the budget cycle, and the establishment of ACTAL (the Dutch Advisory Board on Administrative Burden) as an independent watchdog of the reforms—lies behind the success.”<sup>77</sup>

The establishment of net quantitative burden reduction targets has been a central feature of the Dutch policy, along with the use of the Standard Cost Model (“SCM”)<sup>78</sup> method for estimating administrative costs. Between 2003 and 2007, the policy achieved a net reduction in administrative burdens of twenty percent.<sup>79</sup> The Netherlands cabinet set a second target of twenty-five-percent net administrative burden reduction across ministries for the period of 2007 to 2011.<sup>80</sup> Schout and Sleifer note that the agenda was broadened in 2007 to include compliance costs (“i.e., information costs plus costs related to investments need to comply with the rules”).<sup>81</sup> Currently, the government is working toward a goal to save \$2.5 billion in regulatory burden costs between 2012 and 2017.<sup>82</sup> The latter will be achieved “through the introduction of new regulations linked to the revision or scrapping of existing rules.”<sup>83</sup>

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76. ORG. FOR ECON. CO-OPERATION & DEV., *BETTER REGULATION IN EUROPE: THE NETHERLANDS* 88 (2010).

77. WORLD BANK GRP., *REVIEW OF THE DUTCH ADMINISTRATIVE BURDEN REDUCTION PROGRAMME (2007)*, <http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Special-Reports/DB-Dutch-Admin.pdf>.

78. *See* STANDARD COST MODEL NETWORK, *THE INTERNATIONAL STANDARD COST MODEL MANUAL* 8–9 (2005).

79. JEROEN NIJLAND, *EUROPEAN INST. OF PUB. ADMIN. SCOPE, THE DUTCH APPROACH I* (2008).

80. REGULATORY REFORM GRP., *ACTION PLAN REDUCTION RED TAPE FOR BUSINESSES, THE NETHERLANDS 2007–2011*, at 3 (2008).

81. *See* Adriaan Schout & Jaap Sleifer, *Expertise at the Crossroads of National and International Policy Making: A Public Management Perspective*, in *THE ROLE OF “EXPERTS” IN INTERNATIONAL AND EUROPEAN DECISION-MAKING PROCESSES: ADVISORS, DECISION MAKERS OR IRRELEVANT ACTORS?* 361, 377 (Monika Ambrus et al. eds., 2014).

82. *Regulatory Burden on Business*, GOV’T NETH., <https://www.government.nl/topics/reducing-the-regulatory-burden/contents/regulatory-burden-on-businesses> (last visited Mar. 28, 2016).

83. EUROPEAN COMM’N, *REINDUSTRIALISING EUROPE: MEMBER STATES’ COMPETITIVENESS REPORT 2014*, at 278 (2014), [http://ec.europa.eu/growth/industry/competitiveness/reports/ms-competitiveness-report/index\\_en.htm](http://ec.europa.eu/growth/industry/competitiveness/reports/ms-competitiveness-report/index_en.htm).

Established by decree, the independent ACTAL advises the government and the Parliament on reducing regulatory burdens. It provides (1) *ex ante* opinions on legislation, focusing on all forms of costs borne by business, citizens, and professionals, (2) regulatory burden audits, (3) strategic advice on the stock of existing legislation, and (4) other opinions that can improve the Dutch approach for reducing regulatory burden.<sup>84</sup> Though not an explicit offset (as in the United Kingdom and Canada), the quantitative targets for net burden reductions have proved to be an effective mechanism (lacking in the United States) for creating awareness of the costs of regulation, while providing incentives to individual government agencies to find ways to reduce burdens.<sup>85</sup>

### B. *The United Kingdom*

In January 2011, the United Kingdom commenced its “One-in, One-out” policy, requiring any increases in the cost of regulation to be offset by deregulatory measures of at least an equivalent value.<sup>86</sup> The policy requires publication of biannual Statements of New Regulation (“SNR”), which list completed and upcoming regulatory and deregulatory measures. According to the seventh SNR, “at the close of One-in, One-out on 31 December 2012, this ambition had been exceeded; and the total annual net cost to business has been reduced by around £963 million.”<sup>87</sup> Starting January 2013, the U.K. government moved to “One-in, Two-out” (“OITO”), requiring for “every pound of cost which new domestic regulation imposes on business, two pounds of cost must be removed through deregulation.”<sup>88</sup> As a result of both requirements, from January of 2011 to July of 2015 the annual net regulatory costs borne by businesses decreased by £2,189 million.<sup>89</sup>

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84. ACTAL ADVISORY BD. ON REG. BURDEN, BROCHURE 3 (2012), <http://www.actal.nl/wp-content/uploads/Brochure-ACTAL-Eng.pdf>.

85. Schout & Sleifer, *supra* note 81, at 376 (“It is important to realize that these objectives are net targets so that administrative costs arising from new regulations have to be compensated by reducing administrative costs elsewhere.”).

86. ONE-IN, ONE-OUT, *supra* note 64, at 3.

87. DEP’T FOR BUS., INNOVATION & SKILLS, THE SEVENTH STATEMENT OF NEW REGULATION 7 (2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271446/bis-13-p96b-seventh-statement-of-new-regulation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271446/bis-13-p96b-seventh-statement-of-new-regulation.pdf).

88. DEP’T FOR BUS., INNOVATION & SKILLS, THE NINTH STATEMENT OF NEW REGULATION 13 (2014) [hereinafter THE NINTH STATEMENT], <https://www.gov.uk/government/publications/one-in-two-out-ninth-statement-of-new-regulations>.

89. *Id.* at 5.

The United Kingdom's regulatory burden offset programs were the first national systems to focus on total direct compliance cost,<sup>90</sup> rather than just the administrative burden.<sup>91</sup> They complement other U.K. "better regulation" initiatives, including ex ante requirements that departments (1) demonstrate that non-regulatory means cannot achieve policy objectives, (2) provide analysis demonstrating that the net benefits of a regulatory approach are clearly larger than alternative approaches, and (3) devise implementation plans that are "proportionate; accountable; consistent; transparent and targeted."<sup>92</sup> According to the U.K. government's *Principles of Better Regulation*, "There will be a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made."<sup>93</sup>

A cabinet subcommittee, the Reducing Regulation Committee ("RRC"), is responsible for the United Kingdom's deregulation policy, including providing final clearance for rules subject to OITO.<sup>94</sup> In addition, an independent Regulatory Policy Committee ("RPC")—whose members include "eight experts on regulation from different backgrounds in business, trade unions, public policy and academia, including two specialist economists"—provides expert opinions to de-

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90. The *Better Regulation Framework Manual* states that "[o]nly direct impacts on business should be scored for OITO," and defines a direct impact as one "that can be identified as resulting directly from the implementation or removal/simplification of the measure." DEP'T FOR BUS., INNOVATION & SKILLS, *BETTER REGULATION FRAMEWORK MANUAL: PRACTICAL GUIDANCE FOR UK GOVERNMENT OFFICIALS* § 1.9.33–.34 (2015) [hereinafter *FRAMEWORK MANUAL*], [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/421078/bis-13-1038-Better-regulation-framework-manual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421078/bis-13-1038-Better-regulation-framework-manual.pdf). This is in addition to "subsequent effects that occur as a result of the direct impacts, including behaviour change," which are considered indirect and "are not scored for OITO." *Id.* § 1.9.35.

91. For example, the Canadian program appears to focus on the cost of the time that businesses must spend to comply with reporting requirements, and the U.S. Paperwork Reduction Act of 1980 focuses on the hours spent responding to government information requests. *Compare* Red Tape Reduction Act, S.C. 2015, c 21 (Can.), with OFFICE OF MGMT. & BUDGET, *supra* note 30, at 2.

92. THE NINTH STATEMENT, *supra* note 88, at 12. Note that the United Kingdom's ex ante requirements for regulatory impact analysis are similar to those of Executive Order 12,866. The United Kingdom has adopted regulatory offset programs to encourage review of existing regulations in addition to its requirements that new regulations be analyzed. *See id.*

93. *FRAMEWORK MANUAL*, *supra* note 90, at 4.

94. DEP'T FOR BUS., INNOVATION & SKILLS, *PRIMARY AUTHORITY: A GUIDE FOR OFFICIALS* 3, 12 (2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/348664/14-1058-pa-guide-for-officials.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/348664/14-1058-pa-guide-for-officials.pdf).

partments and the RRC.<sup>95</sup> The RPC must validate the net cost to business of any regulation that is included in the OITO account.”<sup>96</sup>

European Union regulations and directives affecting U.K. businesses and citizens are not covered by OITO, unless implementation of a European directive goes beyond meeting the minimum requirements defined at the E.U. level.<sup>97</sup> The U.K. Business Task Force recommended that “[t]he European Commission . . . introduce a one-in, one-out principle for European legislation, and offset any new burdens on business by reducing burdens of an equivalent value elsewhere”;<sup>98</sup> however, this does not appear likely in the near term.<sup>99</sup>

### C. Canada

Canada launched its “One-for-One” rule in April 2012 and in April 2015 passed the Red Tape Reduction Act,<sup>100</sup> thus establishing it in law. Similar to the U.K. approach, the Canadian rule provides that new regulatory changes that increase administrative burdens must be offset with equal burden reductions elsewhere.<sup>101</sup> Further, for each new regulation that imposes administrative burden costs, cabinet min-

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95. REGULATORY POLICY COMM., *ASSESSING REGULATION: AN INDEPENDENT REPORT ON THE EVIDENCE AND ANALYSIS SUPPORTING REGULATORY PROPOSALS 7* (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/252697/assessingregulationrpcnov2012report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252697/assessingregulationrpcnov2012report.pdf).

96. BETTER REGULATION EXEC., *WRITTEN EVIDENCE SUBMITTED BY THE BETTER REGULATION EXECUTIVE* (2014), [http://data.parliament.uk/writtenevidence/committee\\_evidence.svc/evidencedocument/regulatory-reform-committee/better-regulation/written/10905.html](http://data.parliament.uk/writtenevidence/committee_evidence.svc/evidencedocument/regulatory-reform-committee/better-regulation/written/10905.html).

97. REGULATORY POLICY COMM., *supra* note 95, at 7, 11.

98. PRIME MINISTER’S OFFICE & DEP’T FOR BUS., INNOVATION & SKILLS, *CUT EU RED TAPE: REPORT FROM THE BUSINESS TASKFORCE 12* (2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/249969/TaskForce-report-15-October.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249969/TaskForce-report-15-October.pdf).

99. President Barroso of the European Commission remarked:

EU rules are not wrong or burdensome by definition as some tend to believe. On the contrary: when some people think that ideas like “one in—one out” would be a great achievement, we often do “one in—28 out.” This is something we have to explain: very often, a single European regulation replaces 28 different regulations, namely in the single market.

Press Release, José Manuel Durão Barroso, President, European Comm’n, Remarks by President Barroso Following the “Smart Regulation in the EU” Conference (Oct. 14, 2014), [http://europa.eu/rapid/press-release\\_SPEECH-14-691\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-691_en.htm).

100. Red Tape Reduction Act, S.C. 2015, c 21 (Can.).

101. *See Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on the Budget*, 114th Cong. (2015) [hereinafter *Clement Statement*] (unpublished hearing) (statement of Hon. Tony Clement, President, Treasury Board of Canada), [http://www.budget.senate.gov/repUBLICan/public/index.cfm?a=files.Serve&File\\_id=5700108e-7dd2-4a3b-ae71-3eefd545c9ec](http://www.budget.senate.gov/repUBLICan/public/index.cfm?a=files.Serve&File_id=5700108e-7dd2-4a3b-ae71-3eefd545c9ec).



isters must remove at least one regulation.<sup>102</sup> The One-for-One rule targets administrative burdens on businesses, and in this sense may be less comprehensive than the Dutch or U.K. offset programs, which apply to a broader category of compliance costs.<sup>103</sup> Per regulators, “Administrative burden includes planning, collecting, processing and reporting of information, completing forms and retaining data required by the federal government to comply with a regulation. This includes filling out license applications and forms, as well as finding and compiling data for audits and becoming familiar with information requirements.”<sup>104</sup>

While the types of burdens included are similar to those covered by the U.S. Paperwork Reduction Act, there are two important differences. First, Canada relies on the SCM model to monetize the administrative burdens,<sup>105</sup> which reinforces the financial impact of the requirements. More importantly, the offset requirement imposes a constraint on the growth in administrative burdens, increasing accountability and providing concrete incentives to weigh costs and benefits of new and existing requirements and to reduce burdens.<sup>106</sup>

Each department must count the requirements imposed by regulations, and the counts across all covered departments are summed to derive the government-wide Administrative Burden Baseline (“ABB”).<sup>107</sup> These counts are updated annually to include newly introduced or amended regulations that add or eliminate administrative burden requirements. Regulatory changes not covered by One-for-One are nevertheless counted and included in the ABB.<sup>108</sup>

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102. See Red Tape Reduction Act, S.C. 2015, c 21 (Can.); see also *One-for-One Rule*, GOV'T CAN. (Sept. 21, 2015), <http://www.tbs-sct.gc.ca/rtrap-parfa/fofo-upu-eng.asp>.

103. TREASURY BD. OF CAN. SECRETARIAT, COUNTING ADMINISTRATIVE BURDEN REGULATORY REQUIREMENTS § 6.1, reprinted at *Counting Administrative Burden Regulatory Requirements*, GOV'T CAN. (Nov. 25, 2014), <http://www.tbs-sct.gc.ca/rtrap-parfa/abb-brfa/cabrr-derfa-eng.asp>.

104. *Id.* § 5.6.

105. Red Tape Reduction Regulations, SOR/2015-202, 149 C. Gaz. pt. II, at 2563, 2565 (Aug. 12, 2015) (referencing, in a Regulatory Impact Analysis Statement, the fact that the law was designed “to permanently control the growth of administrative burden costs that federal regulations impose on businesses”).

106. *Clement Statement*, *supra* note 101, at 2 (“We see a clear signal of a cultural shift taking place within our federal regulatory system—systematic and sustained control of red tape is now the new reality.”).

107. Treasury Bd. of Can. Secretariat, *Administrative Burden Baseline: Update 2015*, GOV'T CAN. (Jan. 29, 2016), <https://www.tbs-sct.gc.ca/ip-pi/trans/ar-lr/base-eng.asp>.

108. TREASURY BD. OF CAN. SECRETARIAT, *supra* note 103, § 3.

The One-for-One rule is an element of Canada's broader Red Tape Action Plan. In a 2012 Cabinet Directive on Regulatory Management, the government committed to:

1. "Protect and advance the public interest . . . as expressed by Parliament in legislation;"
2. "Advance the efficiency and effectiveness of regulation" using benefit-cost analysis;
3. "Make decisions based on evidence . . . ;"
4. "Promote a fair and competitive market economy . . . ;"
5. "Monitor and control the regulatory administrative burden . . . of regulations," especially on small business;
6. "Create accessible, understandable, and responsive regulation through engagement, transparency, accountability, and public scrutiny;"
7. "Require timeliness, policy coherence, and minimal duplication throughout the regulatory process," including internationally.<sup>109</sup>

As in the Netherlands and the United Kingdom, a high-level oversight body appears to be an important element of the program's success.<sup>110</sup> The Canadian Regulatory Affairs Sector of the Treasury Board is charged with ensuring that Canada's One-for-One rule is correctly implemented, and it must verify and approve both new regulations and credits.<sup>111</sup>

#### CONCLUSION

Despite analytical difficulties, a form of a regulatory budget has the potential to impose some needed discipline on regulatory agencies, generate a constructive debate on the real impacts of regulations, and ultimately lead to more cost-effective achievement of public priorities. Other countries, including the United Kingdom,<sup>112</sup> Canada,<sup>113</sup> the Netherlands,<sup>114</sup> and others,<sup>115</sup> have addressed some of the challenges

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109. TREASURY BD. OF CAN. SECRETARIAT, CABINET DIRECTIVE ON REGULATORY MANAGEMENT (2012).

110. Moreno, *supra* note 11.

111. As of this writing, the change in government does not appear to have altered the one-for-one policy.

112. DEP'T FOR BUS., INNOVATION & SKILLS, 2010 TO 2015 GOVERNMENT POLICY: BUSINESS REGULATION (2015).

113. BACKGROUNDER, *supra* note 65.

114. *Regulatory Burden on Business*, *supra* note 82.

115. Australia has undertaken initiatives to control the regulatory burden. Australia requires that "the cost burden of new regulation must be fully offset by reductions in existing regulatory burden." See AUSTL. GOV'T, DEP'T OF THE PRIME MINISTER & CABINET OFFICE OF BEST PRACTICE REGULATION, REGULATORY BURDEN MEASURE-

identified in this Essay and initiated programs that apply budgeting tools to constrain the growth in regulatory burdens.

While it will never be possible to estimate the real social costs of regulations with any precision, a regulatory budget or a more modest regulatory PAYGO should provide incentives for agencies, affected parties, academics, congressional entities, and nongovernmental organizations to improve the rigor of regulatory impact estimates.

As President Carter concluded in his Economic Report of the President in 1980:

The Nation must recognize that regulation to meet social goals competes for scarce resources with other national objectives. Priorities must be set to make certain that the first problems addressed are those in which regulations are likely to bring the greatest social benefits. Admittedly, this is an ideal that can never be perfectly realized, but tools like the regulatory budget may have to be developed if it is to be approached.<sup>116</sup>

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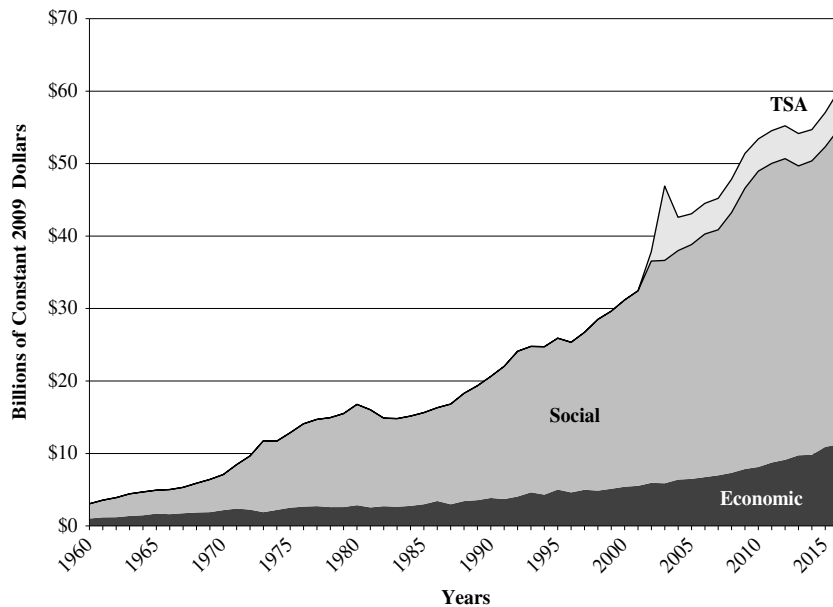
MENT FRAMEWORK (2016), [https://www.dpmc.gov.au/sites/default/files/publications/005\\_Regulatory\\_Burden\\_Measurement\\_Framework.pdf](https://www.dpmc.gov.au/sites/default/files/publications/005_Regulatory_Burden_Measurement_Framework.pdf).

116. COUNCIL OF ECON. ADVISORS, *supra* note 47, at 126.

APPENDIX:  
MEASURES OF REGULATORY ACTIVITY

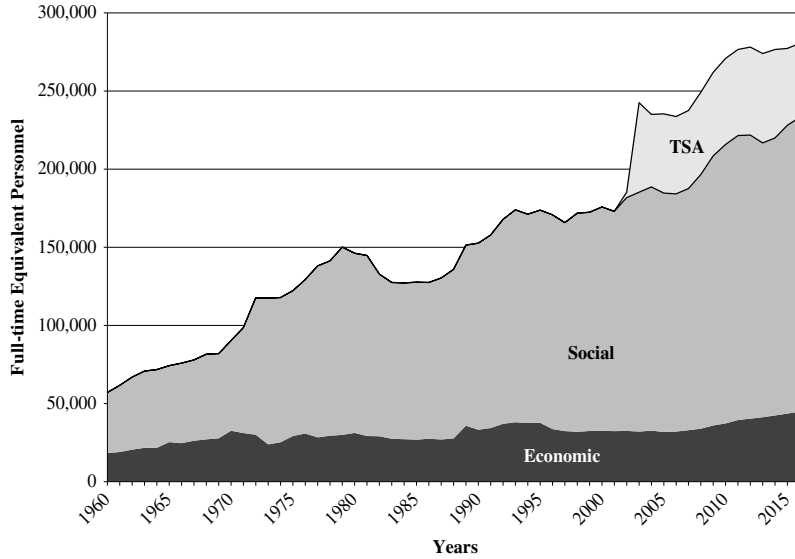
Unlike the fiscal budget, which tracks direct spending supported by taxes, there is no mechanism for keeping track of the off-budget spending generated through regulation. Thus, efforts to track regulatory activity over time often depend on proxies, such as the size of the budgets and staffing of regulatory agencies (Figures 1 and 2), the number of new regulations issued (Figure 3), the number of pages printed in the *Federal Register* (Figure 4), or the pages of federal regulatory code (Figure 5).

FIGURE 1: BUDGETARY COSTS OF FEDERAL REGULATION,  
ADJUSTED FOR INFLATION



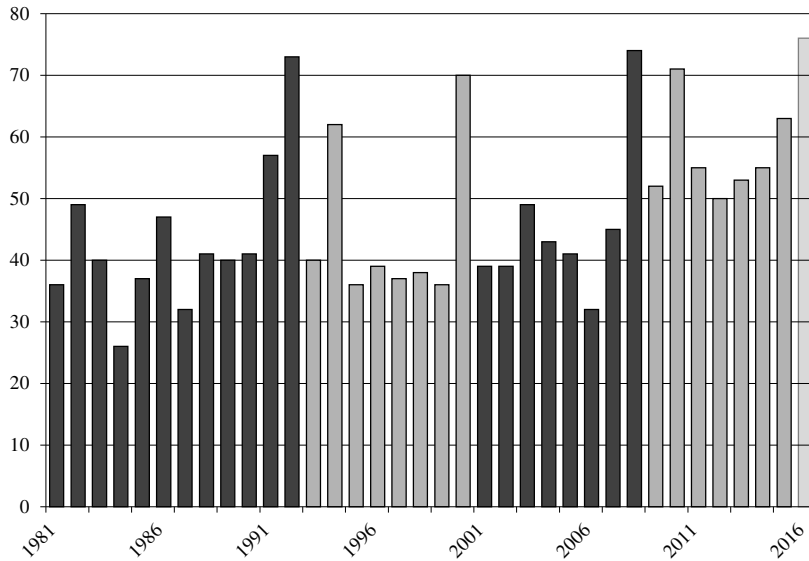
**Source:** Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center. Derived from the *Budget of the United States Government* and related documents, various fiscal years.

FIGURE 2: STAFFING OF FEDERAL REGULATORY AGENCIES



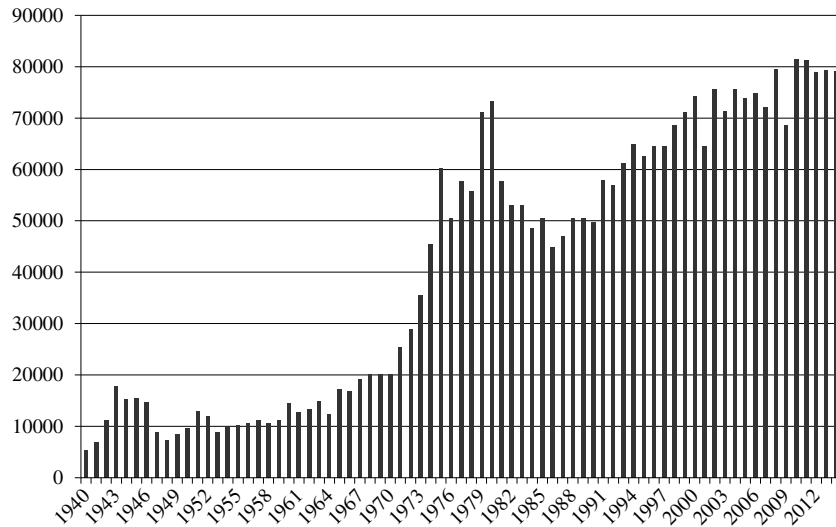
Source: Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center. Derived from the *Budget of the United States Government* and related documents, various fiscal years.

FIGURE 3: NUMBER OF FINAL ECONOMICALLY SIGNIFICANT RULES PUBLISHED BY “PRESIDENTIAL YEAR”



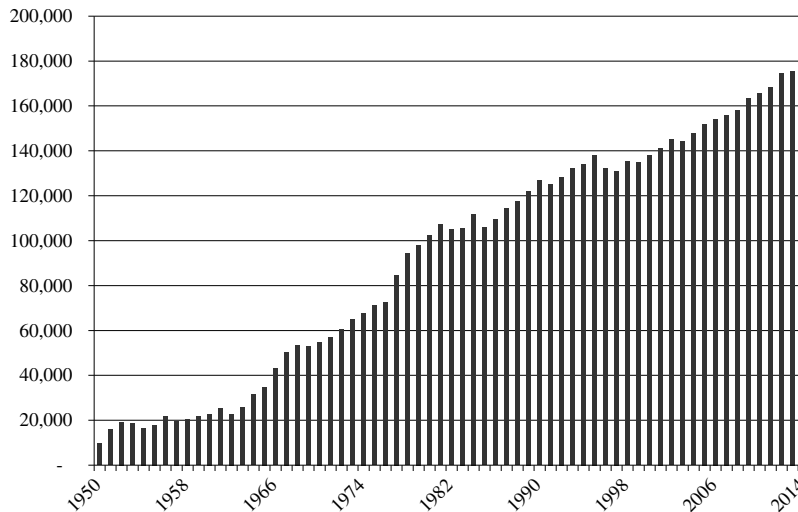
Source: RegInfo.gov: Number of final economically significant regulations concluded between January 20 and January 19 of the following year. The number of rules published during 2016 is estimated from the *Unified Agenda of Regulatory and Deregulatory Actions*.

FIGURE 4: FEDERAL REGISTER PAGES



Source: Office of the Federal Register, *Federal Register Pages Published, 1936–2014*, <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.xls> (last visited Mar. 1, 2016).

FIGURE 5: CODE OF FEDERAL REGULATIONS PAGES



Source: Office of the Federal Register, *Federal Register Pages Published, 1936–2014*, <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.xls> (last visited Mar. 1, 2016).