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May 15, 2017
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Bringing Accountability to Regulation: Doing More Good than Harm

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If reasonable minds can agree that the goal of regulation is to enhance, not undermine, societal well-being, then the *Regulatory Accountability Act* (RAA), S. 951, can bring the most important statutory change to the regulatory process since the enactment of the Administrative Procedure Act over 70 years ago. The RAA would do so by elevating to binding law the eminently reasonable principle required by presidential directives for over 35 years: in designing major rules, federal regulators should conduct benefit-cost analysis to consider important tradeoffs and design regulations to do more good than harm.

Benefit-cost analysis, despite its limitations, is the best tool to ensure that regulations do more good than harm.[2] There is longstanding bipartisan consensus on this point: every President since Ronald Reagan has required regulatory agencies to use benefit-cost analysis by Executive order. As the Clinton Administration put it:

> "[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive, and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of

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[2] See, e.g., John D. Graham and Paul R. Noe, "A Reply to Professor Sinden's Critique of the 'Cost-Benefit State,'" RegBlog, University of Pennsylvania Law School (Sept. 27, 2016); Jonathan S. Masur & Eric A. Posner, "Against Feasibility Analysis," 77 U. Chicago L. Rev. 657 (2010).

capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.

The only way we know how to distinguish between regulations that do good and those that do harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits."[3]

The RAA specifically would require regulatory agencies issuing major rules – including the independent regulatory commissions – to consider a reasonable number of regulatory alternatives and to select the alternative that has benefits which justify the costs and that is the "most cost-effective" rule, unless "the additional benefits of the more costly rule justify the additional costs of that rule." The bill also would require regulations to be based on "the best reasonably available scientific, technical or economic information." These common sense requirements would ensure that any major regulatory actions – including deregulation (which must proceed through rulemaking) – would enhance societal well-being.

The RAA also has solid bipartisan support from an impressive group of thought leaders in the Senate, including Senators Rob Portman (R-OH), Heidi Heitkamp (D-ND), Orrin Hatch (R-UT) and Joe Manchin (D-WV).

Unfortunately, reason does not always prevail in Washington, DC. Critics of the RAA have made dire claims, including that the bill would overload the agencies with analytic work, block needed safeguards on issues such as drinking water, food, toxic substances, and so forth, and raise a dangerous specter of judicial review.

In fact, the RAA codifies current practice for executive agencies who traditionally have reported to the President, so it should not add significantly to their current workload. To the extent that independent agencies are not conducting benefit-cost analysis for rules that have annual impacts of $100 million or more, there is a strong consensus that it is high time they do so.[4] Moreover, important rules that can save lives and protect our health and environment are the very rules that can pass benefit-cost analysis with flying colors. Such rules may indeed be expensive, but unsurprisingly, they can deliver benefits well beyond their costs.[5]

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[3] Office of Management and Budget, Office of Information and Regulatory Affairs, Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997), at p. 10.

[4] See, e.g., American Bar Association, Section of Administrative Law and Regulatory Practice, "Improving the Administrative Process: A Report to the President-Elect of the United States" (2016), at pp. 9-10 (urging the President to "bring the independent regulatory commissions within the requirements for cost-benefit analysis, OMB review and retrospective review of rules").

[5] See, e.g., John D. Graham, "Saving Lives Through Administrative Law and Economics," 157 U. Pa. L. Rev. 395 (2008); Economic Analyses at EPA, Richard D. Morganstern, Editor, Resources For the Future Press (1997) (providing case studies on EPA's use of benefit-cost analysis and finding that it resulted in reduced regulatory costs and often increased benefits as well); U.S. Environmental Protection Agency, "EPA's Use of Cost-Benefit Analysis: 1981-1986," EPA-230-05-87-028 (Aug. 1987), p. 5-2 ("the return to

Finally, it should be expected that the requirements in the bill would be subject to judicial review. That is what happens when Congress enacts legislation. It is important that judicial review be available for this most fundamental and rational requirement of regulators to ensure that regulations do more good than harm. As an alumnus of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), I wholeheartedly support the longstanding presidential requirements for benefit-cost analysis. However, I also believe that a judicially enforceable benefit-cost test is needed because the status quo is inadequate for many reasons, including the institutional limitations of the agencies and OIRA (such as bureaucratic turf battles, failure to utilize both internal and external expertise, bias, and the mismatch between the vast volume of regulation and OIRA's shrinking resources), as well as political dysfunctions (including inconsistent support for OIRA by varying administrations, interest group rent-seeking, and presidential electoral politics).[6] Scholars have shown that the courts are quite capable of competently reviewing agency use of benefit-cost analysis.[7] Indeed, benefit-cost balancing is so fundamental to rational decision making that the courts already have shifted toward requiring agencies to do more good than harm, even in the absence of Congressional action.[8]

It is time for Congress to act. As a matter of good government, the *Regulatory Accountability Act* is much-needed and long overdue.

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society from improved environmental regulations is more than one thousand times EPA's investment in cost-benefit analysis").

[6] John D. Graham and Paul R. Noe, "Beyond Process Excellence: Enhancing Societal Well-Being," in Achieving Regulatory Excellence, Brookings Institution Press, Washington, DC, 2017, pp. 72 - 87.

[7] See, e.g., Caroline Cecot and W. Kip Viscusi, "Judicial Review of Agency Benefit-Cost Analysis," 22 George Mason Law Review 575 (2015); Jonathan S. Masur & Eric A. Posner, "Cost-Benefit Analysis and the Judicial Role," University of Chicago Law School, Coase-Sandar Working Paper Series in Law and Economics (Feb. 7, 2017).

[8] See, e.g., Jonathan Masur, "The Regulatory Accountability Act, Or: How Progressives Learned to Stop Worrying and Love Cost-Benefit Analysis," Notice & Comment Blog, Yale Journal on Regulation and ABA Section of Administrative Law & Regulatory Practice (May 4, 2017); Jonathan S. Masur & Eric A. Posner, "Cost-Benefit Analysis and the Judicial Role," supra; John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," RegBlog, University of Pennsylvania Law School (April 26, 2016); Cass R. Sunstein, The Cost-Benefit State: The Future of Regulatory Protection, American Bar Association, Section of Administrative Law and Regulatory Practice, Chicago, IL (2002).