

University of Pennsylvania Law School

ILE

INSTITUTE FOR LAW AND ECONOMICS

A Joint Research Center of the Law School, the Wharton School,
and the Department of Economics in the School of Arts and Sciences
at the University of Pennsylvania

RESEARCH PAPER NO. 17-38

**Improving Regulatory Analysis at
Independent Agencies**

Cary Coglianese

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:

<https://ssrn.com/abstract=3038874>

Improving Regulatory Analysis at Independent Agencies

Cary Coglianese*

Each year, independent regulatory agencies—such as the Federal Communications Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission—issue highly consequential regulations. When they issue their regulations, however, they do not have to meet the same requirements for analysis that apply to other agencies. Consequently, courts, policymakers, and scholars have voiced serious reservations about a general lack of high-quality prospective analysis of new regulations at independent agencies. These agencies’ track records with retrospective analysis of their existing regulations raise similar concerns. In this article, I approach the quality of regulatory analysis at independent agencies as a policy problem, assessing the current quality and offering possible solutions Congress could adopt to improve these agencies’ regulatory analysis. I present three options for improving prospective analysis by independent agencies: continuing to allow courts to encourage better analysis; subjecting independent agencies to the same White House review that currently applies to executive agencies; and amending the Unfunded Mandates Reform Act (UMRA) to impose a requirement for analysis but not White House review. The UMRA option would best balance the desire to improve prospective regulatory analysis at independent agencies with prevailing norms of autonomy that surround these agencies. In addition to improving prospective analysis, independent agencies should seek to produce more rigorous retrospective analysis of their existing regulations, both to improve the substantive performance of their existing regulations and to learn better what to expect when analyzing new regulations. I thus offer options for improving retrospective analysis by independent agencies, each of which could be adopted without undermining autonomy norms. Ultimately, to see independent regulatory agencies better fulfill their public missions, their leaders must make still smarter regulatory decisions—and the first step toward smarter decisions is to improve regulatory analysis.

Over the last fifteen years, a group of seventeen major independent agencies—including the Federal Communications Commission and the Securities and Exchange Commission—collectively issued nearly 5,000 federal regulations.¹ Yet not one of these rules has been subject

* Edward B. Shils Professor of Law and Professor of Political Science, Director, Penn Program on Regulation, University of Pennsylvania Law School. I am grateful for research support provided by Justin Berg. This paper is forthcoming in the *American University Law Review*. It draws on the author’s testimony before the U.S. Senate Committee on Homeland Security and Government Affairs Subcommittee on Regulatory Affairs and Federal Management.

¹ The Paperwork Reduction Act defines “independent agency” by listing nineteen federal agencies: “the Board of

to the usual legislative or presidential requirements for regulatory analysis that executive branch agencies must follow when developing new rules. The Unfunded Mandates Reform Act (UMRA)² as well as in Executive Order 12,866³ specifically exempt independent agencies from the normal requirements for regulatory impact analysis. Perhaps not surprisingly, then, over 40 percent of major regulations from independent agencies reportedly come into existence in the absence of any information on the anticipated costs or benefits of these new rules.⁴

All agencies can find ways to improve their analysis of their regulations, but particular concern has emerged in recent years about weak or insufficient analysis at independent regulatory agencies.⁵ Such concern coincides with much more active and consequential regulatory agendas at a number of major independent agencies during the years of the Obama

Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency.” 44 U.S.C. § 3502(5). A search in the Federal Register using Lexis yielded 4,848 final rules issued by these listed agencies from 2002-2016. The search yielded no final rules issued by two of these agencies: Interstate Commerce Commission (which no longer exists) and the Office of Financial Research.

² 2 U.S.C. §§ 1531-1538.

³ Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011). Executive Order 12,866, adopted by President William J. Clinton, was reaffirmed by President Barack Obama in Exec. Order No. 13,563 § 1(b), 3 C.F.R. 215 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 102–02. To date, both executive orders have been retained by President Donald J. Trump.

⁴ An analysis by the Office of Management and Budget of major regulations issued between 2005-2014 by thirteen independent agencies found that 84 out of 143 major regulations (59%) issued by 13 independent agencies contained at least “some” information about costs or benefits—a necessary but quite minimal criterion for sound analysis. Office of Management and Budget, 2015 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act 97-98 (2015) (Appendix C), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

⁵ See, e.g., Joseph P. Mohorovic, *Improving Regulatory Analysis at Independent Agencies*, REG. REV. (Jan. 10, 2017), <https://www.theregreview.org/2017/01/10/mohorovic-improving-regulatory-analysis-independent-agencies/> (arguing that “the kind of cost-benefit analysis required of executive branch agencies would lead to better rules at CPSC and other independent agencies.”); Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. REG. 545 (2017) (“Compared to Executive Branch agencies, independent agencies, like the major financial regulatory agencies, lack the capacity to do cost-benefit analyses of acceptable quality.”).

Administration, as illustrated by the Federal Communications Commission's adoption of its Open Internet regulation⁶ and the Securities and Exchange Commission's and the Commodity Futures Trading Commission's promulgation of major new regulations under the 2010 Dodd-Frank financial reform legislation.⁷ Litigants, as well as some judges and commentators, have criticized independent regulators for failing to produce adequate analysis before adopting new regulations, with some agencies' rules being remanded by courts for further analysis.⁸

Most concern to date has focused on prospective regulatory analysis, which takes place before new regulations are adopted and informs how they are designed and written. But another type of analysis matters too: retrospective analysis, which takes place after an agency promulgates a rule and seeks to measure its impacts. These two types of analysis are interrelated. Prospective analysis clarifies the goals of a new regulation and identifies expected outcomes; this in turn informs the subsequent process of retrospective analysis by identifying benchmarks against which the regulation's actual effects can be assessed. Conversely, when retrospective analysis shows how well a regulation has (or has not) worked, it informs future prospective analysis of the question whether to retain or modify that regulation, as well as how

⁶ Protecting and Preserving the Open Internet, 47 C.F.R. pt. 8 (2015).

⁷ See, e.g., Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, <https://www.sec.gov/spotlight/dodd-frank.shtml#> (detailing the final rules adopted by the SEC under the sixty-seven mandatory rulemaking provisions of the Dodd-Frank Act); Dodd-Frank Final Rules, Final Guidance, Final Exemptive Orders, and Other Final Actions, <http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankFinalRules/index.htm> (presenting the CFTC's seventy-nine finalized rules, orders, and guidance actions under the Dodd-Frank Act).

⁸ For recent litigation raising challenges to independent financial regulators' analyses, see *Int'l Swaps & Derivatives Ass'n v. CFTC*, 2012 U.S. App. Lexis 1282 (D.C. Cir. Jan. 20, 2012) (per curiam); *Business Roundtable and Chamber of Commerce v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *American Equity Inv. Life Ins. Co. v. SEC*, 572 F.3d 923 (D.C. Cir. 2009); *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Cir. 2006); *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *Sec. Indus. & Fin. Mkts. Ass'n v. United States CFTC*, 67 F.Supp. 3d 373, 384, 390, 437–38, (D.D.C. Sept. 16, 2014); *Inv. Co. Inst. v. CFTC*, 891 F. Supp.2d 162, 190 (D.D.C. 2012), *aff'd*, 720 F.3d 370 (D.C. Cir. 2013). Not all these challenges were successful. Similar objections were raised, unsuccessfully, in litigation challenging the FCC's Open Internet decision-making, arguing that, as Crovitz has put it, "the FCC skipped the economic analysis." L. Gordon Crovitz, *'Economics-Free' Obamanet: The White House and FCC acted on pure ideology. Cost-benefit analysis? What's That?*, Wall St. J., Jan. 31, 2016, <http://www.wsj.com/articles/economics-free-obamanet-1454282427>.

to design other regulations. Both types of analysis—prospective and retrospective—are essential ingredients for smart decision making about how to deliver high-quality regulatory outcomes.⁹ Although litigation and scholarly work has so far centered on the adequacy of prospective analysis at independent agencies, there is little reason to think that independent agencies are doing better than other agencies when it comes to evaluating their rules after the fact.

The purpose of this article, then, is to gauge what we know about how independent agencies are performing both types of analysis and to offer steps that Congress might take to encourage improved regulatory analysis at such agencies. In my analysis, I have in mind primarily the agencies that Congress has stipulated to be independent in its definition of the term in the Paperwork Reduction Act (PRA),¹⁰ but I recognize that what constitutes an independent agency can itself be open to discussion. Agency independence has long been understood in terms of structural features related to the appointment of agency heads—for-cause removal restrictions, fixed terms, and, with multi-member agencies, bipartisan distribution requirements.¹¹ Agencies with these features have generally been considered independent, while those lacking them are instead considered executive agencies, as they are under the closer oversight of the White House. More recently, though, some scholars have properly recognized structural independence as more of a matter of degree, rather than as a binary characteristic (that

⁹ Cary Coglianese, *Thinking Ahead, Looking Back: Assessing the Value of Regulatory Impact Analysis and Procedures for its Use*, 3 KLRI J. OF L. & LEGISLATION 5 (2013); Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in DAVID MOSS AND JOHN CISTERMINO, EDS., *NEW PERSPECTIVES ON REGULATION* (2009); Cary Coglianese & Lori S. Benneer, *Program Evaluation of Environmental Policies: Toward Evidence-Based Decision Making*, in *DECISION MAKING FOR THE ENVIRONMENT: SOCIAL AND BEHAVIORAL SCIENCE RESEARCH PRIORITIES* (Gary D. Brewer & Paul C. Stern, eds., 2005); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. J. 1111 (2002).

¹⁰ See *supra* note 1.

¹¹ Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L. J. 257 (1988).

is, either independent or not).¹² Other commentators have acknowledged that *de jure* structural independence is but one possible, even if not always sufficient, means to the achievement of *de facto* independent judgment about how best to advance a statutory mandate and deliver public value.¹³

Even the independent agencies listed in the PRA do not uniformly share the same structural features. Most have agency heads protected by for-cause removal limitations, for example, but some do not (e.g., Office of the Comptroller of the Currency and the Office of Financial Research). Moreover, some agencies headed by administrators who do enjoy for-cause removal protection are not included in the PRA's list (e.g., Social Security Administration).¹⁴ Despite all these nuances, the list of agencies stipulated in the PRA to be independent proves particularly relevant to this article's treatment of prospective and retrospective regulatory analysis—because existing regulatory analysis requirements apply to executive agencies but not to agencies listed as independent in the PRA.

In the two parts of this article that follow, I turn first to a consideration of what we can infer about the quality of these independent agencies' prospective and retrospective analyses,

¹² Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487 (2015); Christopher Carrigan & Lindsey Poole, *Structuring Regulators:*

The Effects of Organizational Design on Regulatory Behavior and Performance, Research Paper for Penn Program on Regulation's Best-in-Class Regulator Initiative (2015), <https://www.law.upenn.edu/live/files/4707-carriganpoole-ppr-researchpaper062015pdf>.

¹³ See, e.g., Carrigan & Poole, *supra* note 16; Cary Coglianese, *Listening, Learning, and Leading: A Framework for Regulatory Excellence* 42 (2015), <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreportpdf>; Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. REG. 257 (2015); OECD, *CREATING A CULTURE OF INDEPENDENCE: PRACTICAL GUIDANCE AGAINST UNDUE INFLUENCE* (2017),

<http://dx.doi.org/10.1787/9789264274198-en>. See generally Geoffrey P. Miller, *The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L. J. 215 (1988).

¹⁴ Admittedly, the PRA's enumerated list is not intended to be exclusive; it can encompass "any other similar agency designated by statute as a Federal independent regulatory agency or commission." 44 U.S.C. § 3502(5). What is "similar" is hardly self-evident, given that the nineteen agencies are not identical in their structural features.

suggesting that it is harder than it might seem to say definitively how deficient are the analyses at these agencies. However, on the not unreasonable assumption that independent agencies' analyses are far from optimal in their current level of rigor and completeness, I next turn in each part of this article to possible legislative actions that might help encourage agencies to improve their analysis. I begin with prospective analysis in the first part, followed with a similar treatment of retrospective analysis in the second part.

I. Prospective Analysis

Although administrative law scholars sometimes pine for a bygone era when so-called informal rulemaking was truly informal (if such a day ever truly existed), the process of making new regulations today involves numerous procedural steps and the building of what can sometimes be an extensive administrative record.¹⁵ New rules are always susceptible to judicial review under the Administrative Procedure Act's arbitrary and capricious standard, which effectively compels agencies to justify their rules based on evidence and reasoning.¹⁶

For the most significant new rules, administrative procedures demand that agency officials explicitly define the problem they seek to solve, offer justifications for their proposed regulations, consider alternatives, and estimate the anticipated benefits and costs of both their preferred actions as well as other alternatives. UMRA¹⁷ and Executive Order

¹⁵ Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FL. ST. UNIV. L. REV. 533-546 (2000).

¹⁶ General consideration of evidence and attention to both benefits and costs of regulation are necessary for an agency to avoid a judicial remand under the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). *See also* Motor Veh. Mfrs. Assn v. State Farm Ins., 463 U.S. 29 (1983); Michigan v. EPA, 576 U.S. (2015).

¹⁷ 2 U.S.C. § 1532.

12,866¹⁸ impose precisely these sorts of analytical requirements when agencies plan to issue rules having certain kinds of annual economic effects in excess of \$100 million (or higher for UMRA, due to inflation adjustments).¹⁹ Under Executive Order 12,866, agencies must clear their benefit-cost analyses of new rules through the White House Office of Information and Regulatory Affairs (OIRA). The executive order further states that, “recognizing that some costs and benefits are difficult to quantify,” each agency shall “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”²⁰

Additional analytical requirements can be found in other statutes. The Regulatory Flexibility Act requires analysis when rules are expected to impose substantial impacts on small businesses.²¹ The Paperwork Reduction Act calls for estimates of costs and time associated with any paperwork requirements found in new regulations.²² The National Environmental Policy Act demands that federal agencies analyze the environmental impacts of major actions that will affect the environment.²³ The Congressional Review Act requires agencies to report to Congress and the Comptroller General on new rules that would have an annual economic effect above the \$100 million threshold and to provide a copy of any benefit-cost analysis prepared for those rules.²⁴

¹⁸ Exec. Order 12,866, § 2(f)(1).

¹⁹ These requirements also do not apply to executive agency actions that are not formally rules but nevertheless may serve “quasi-regulatory” purposes. See John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity without OMB and Cost-Benefit Review*, 37 HARV. J. L. & PUB. POL. 425 (2014).

²⁰ Exec. Order 12,866, 3 C.F.R. 638 (1994).

²¹ 5 U.S.C. § 601 et seq.

²² 44 U.S.C. § 3501 et seq.

²³ 42 U.S.C. § 4321 et seq.

²⁴ 5 U.S.C. § 801 et seq.

Procedural requirements such as these sensibly expect agencies to engage in analysis before adopting new rules. Just as it is true for other consequential endeavors, it is better for regulators to “look before they leap”.²⁵ Conducting prospective analysis can help reduce the possibility of mistakes, unintended consequences, and wasted resources.²⁶

Most, but not all, of the analytical requirements applicable to new rulemaking must be followed by *all* regulatory agencies. However, the main analytical requirements calling for agencies to conduct prospective benefit-cost analyses of major rules do not apply to independent agencies.²⁷ The definition of an agency under UMRA “does not include independent regulatory agencies,”²⁸ and, as indicated earlier, the terms of Executive Order 12,866 expressly do not apply to agencies listed as independent regulatory agencies under the Paperwork Reduction Act.²⁹

As a result, it should hardly be surprising that independent regulatory agencies have come under considerable criticism for failing to conduct extensive or adequate benefit-cost

²⁵ See FRANK PARTNOY, WAIT: THE ART AND SCIENCE OF DELAY (2012).

²⁶ See, e.g., Susan E. Dudley, *Make “Independent” Regulatory Agencies More Accountable to the Public*, FORBES (May 9, 2017), <https://www.forbes.com/sites/susandudley/2017/05/09/make-independent-regulatory-agencies-more-accountable-to-the-public/#2f050d607d63>. Even those who express concern over an undue emphasis on benefit-cost analysis in the regulatory process recognize the value in prospective analysis of some kind. See, e.g., Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335 (2011).

²⁷ On occasion, of course, an independent agency’s organic statute may require it to conduct a benefit-cost analysis. Such is the case, for instance, with the Consumer Product Safety Commission which must prepare “[a] description of the potential benefits and potential costs of [any new product safety] rule.” 15 U.S.C. § 2058(f).

²⁸ 2 U.S.C. § 658. See 2 U.S.C. § 1502 (incorporating definition in section 658 into UMRA). The enacted version of UMRA does not define the words “independent regulatory agencies,” but the conference committee report indicates that they were intended to mirror the definition in the Paperwork Reduction Act, which appears to be the only other place in the U.S. Code where these words are defined. Report of the Committee of the Budget, U.S. Senate, on S. 1 (Jan. 12, 1995), <https://www.congress.gov/congressional-report/104th-congress/senate-report/2/1>.

²⁹ Section 3 (b) of the Order states: “‘Agency,’ unless otherwise indicated, means any authority of the United States that is an ‘agency’ under 44 U.S.C. § 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(10).” The provisions of the Paperwork Reduction Act have been re-numbered, so that the definition of independent regulatory agencies is now found at 44 U.S.C. § 3502(5).

analyses of many of their rules. As Curtis Copeland notes in a report prepared for the Administrative Conference of the United States, “studies indicate that independent regulatory agencies often do not quantify or monetize regulatory benefits, and often quantify and monetize only paperwork costs.”³⁰ Legal scholar Richard Revesz observes that when it comes to producing cost-benefit analyses of their rules, executive agencies are “more proficient,” and “[t]he less successful agencies are independent and outside the purview of OIRA review.”³¹

The evidence supporting such claims typically derives from the reports that independent agencies submit to the Comptroller General pursuant to the Congressional Review Act about their major rules and underlying analyses. For example, Copeland reported that, of 22 major rules issued by independent agencies in 2012, “[o]nly one rule contained any quantitative benefit information.”³² OIRA compiles this information in its annual reports to Congress and, as already noted, it has found that “[i]ndependent agencies still have challenges in providing monetized estimates of benefits and costs of regulation”.³³ Other commentators have reached much the same conclusion on the basis of similar evidence.³⁴

Despite this consensus about independent agencies’ analytical deficiencies, it is difficult to assess exactly how well or poorly independent agencies are doing in analyzing their rules, at least judging simply from the mere fact that these agencies report to the Comptroller General

³⁰ Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies*, Report to the Administrative Conference of the United States (April 30, 2013), <https://www.acus.gov/sites/default/files/documents/-Copeland%20Final%20BCA%20Report%204-30-13.pdf>.

³¹ Revesz, *supra* note 5.

³² Copeland, *supra* note 36.

³³ 2015 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

³⁴ See, e.g., Art Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, 63 ADMIN. L. REV. 213 (2011); Jerry Ellig & Rosemarie Fike, Regulatory Process, *Regulatory Reform, and the Quality of Regulatory Impact Analysis*, Mercatus Center Working Paper No. 13-13 (July 2013).

that some – or even many – of their rulemakings do not include quantified or monetized estimates of benefits or costs. When researchers have looked in-depth at the specific materials prepared by independent agencies in individual rulemakings, they have sometimes found that agencies have given more considerable attention to the benefits or costs of their rules than the summaries they share with the Comptroller General might suggest.³⁵ More importantly, there is a lack of any clear benchmark against which to measure the quantity and quality of benefit-cost analyses produced by *any* regulator. For how many rules exactly is it reasonable to expect independent agencies to have produced monetized estimates of benefits and costs? The answer is probably not all rules.

It is well recognized that quantification or monetization of regulatory impacts is not always possible because of lack of data, fundamental uncertainty, or insuperable conceptual challenges in quantifying or monetizing particular values.³⁶ Estimating the benefits of homeland security regulations, for example, has proven more difficult than for other regulations because of the ex ante low probability of the underlying problem and the likelihood of strategic, adaptive responses by terrorists to any regulatory interventions.³⁷ Taking account of challenges like these, Executive Order 12,866 expressly “recogniz[es] that some costs and benefits are difficult to quantify.”³⁸

³⁵ Art Fraas & Randall Lutter, *The Challenges of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4*, 3 ANN. REV. OF RESOURCE ECON. 71 (2011); Copeland, *supra* note 36.

³⁶ Kenneth J. Arrow, et al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, 272 SCI. 221, 222 (Apr. 12, 1996) (acknowledging that “not all impacts can be quantified”).

³⁷ Tanya Xu, *How Should We Measure Terrorism Risk?*, REG. REV. (Aug. 25, 2016), <http://www.TheRegRev.org/2016/08/25/xu-how-should-we-measure-terrorism-risk/>.

³⁸ Exec. Order 12,866, 3 C.F.R. 638 (1994).

Trying to assess the quality of independent agencies' prospective analyses by comparing their level of quantification or monetization with analyses produced by executive agencies will be at best highly suggestive, as what constitutes quality analysis will be specific to the problem a regulator is addressing and the relevant data available. Some scholars have argued that it is much more difficult to quantify the effects of financial regulation,³⁹ a domain dominated by independent regulators.⁴⁰ In addition, research indicates that agencies produce less thorough analysis for rules that must be completed under tight statutory deadlines,⁴¹ and we know that many of the rules that independent regulators have issued recently under the Dodd-Frank Act have faced such deadlines.⁴² Without controlling for factors such as these, comparisons of independent agencies' analyses with those of other agencies will be incomplete and could even prove to be misleading.

Still, it seems reasonable to assume that independent agencies—like, presumably, most agencies—could do a better job in analyzing the benefits and costs of their new regulations.⁴³ As Ryan Bubb has suggested, it may be that benefit-cost analysis “plays little role in financial regulation not because it is especially challenging but rather because institutional structures do not produce incentives for financial regulators to develop and employ” such analysis.⁴⁴ If this

³⁹ John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882 (2014); Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Regulation in Financial Regulation*, 43 J. LEGAL STUD. S351 (2014).

⁴⁰ Other scholars have contested the view that benefit-cost analysis of financial regulation is more difficult. *See, e.g.*, Eric Posner & E. Glen Weyl, *Benefit-Cost Analysis for Financial Regulation*, 103 AM. ECON. REV.: PAPERS & PROCEEDINGS 393 (2013); Revesz, *supra* note 5.

⁴¹ Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. 179 (2011).

⁴² Copeland, *supra* note 36.

⁴³ *See* Robert W. Hahn & Patrick M. Dudley, *How Well Does the U.S. Government Do Benefit-Cost Analysis?*, 1 REV. ENVTL. ECON. & POL. 192 (2007) (examining over seventy regulatory impact analyses across three administrations and finding substantial quality shortfalls).

⁴⁴ Ryan Bubb, *The OIRA Model for Institutionalizing CBA of Financial Regulation*, 78 L. & CONTEMP. PROBS. 47

is correct, then we should consider what steps Congress might be able to take to change those institutional structures so that independent agencies would have more of an incentive to improve their prospective regulatory analysis. Three main options could be considered.⁴⁵

1. *Make no legislative changes, at least for now.* Due to the demands that courts have already started to impose on independent regulatory agencies,⁴⁶ as well as the generally heightened salience of the issue of regulatory analysis at independent agencies (including the prospect of legislative change), independent regulators appear to be taking some steps to improve their institutional capacity for producing quality analysis. The Securities and Exchange Commission, for example, has made notable strides in strengthening its economic staff in the wake of the *Business Roundtable* decision.⁴⁷ The first option for Congress, then, would be simply to wait before doing anything further, as the quality of prospective analysis at independent agencies is likely to improve, at least to some degree, on its own over time. The disadvantage of waiting longer, of course, is that independent agencies are continuing to implement rules now, rules that will have important consequences for the economy and could be in place for a long time.

2. *Codify the requirements of Executive Order 12,866 for independent agencies.* Scholars have raised the question of whether Presidents may legally apply the requirements in Executive Order 12,866 to independent agencies, while Presidents themselves have been reluctant for the

(2015).

⁴⁵ The options discussed below all contemplate general changes to administrative procedures. It bears noting that, if Congress wished to take a more incremental approach, it could always target just one or more individual agencies. To some extent, the organic statutes of individual agencies already vary in that they direct some agencies to consider—and others not to consider—costs when making regulatory decisions. See Copeland, *supra* note 36.

⁴⁶ Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. REG. 289 (2013)

⁴⁷ *Id.*; Jerry Ellig, *Systematic Study Shows Improvement in SEC Economic Analysis*, REG. REV. (Mar. 20, 2017), <https://www.theregreview.org/2017/03/20/ellig-systematic-study-shows-improvement-sec-economic-analysis/>.

past thirty years to do so.⁴⁸ By contrast, Congress would face no similar legal questions if it were to codify the requirements of Executive Order 12,866 and apply them to independent agencies.

This option would have the advantage of creating symmetry in the analytical requirements for regulation by both executive agencies and independent agencies. After all, regulations affect the public and the economy regardless of whether they are issued by executive or independent agencies. Legislatively imposing those requirements on independent agencies would cure an anomaly in the law, providing independent agencies with the same institutional structures and incentives for producing quality prospective analysis as executive agencies.

Although subjecting independent agencies to the same requirements for producing regulatory analysis as executive agencies could be easily justified on the grounds of sound regulatory management, applying the entirety of Executive Order 12,866 to independent agencies would make a significant alteration in the policy autonomy that has long been afforded to independent agencies. Executive Order 12,866 does not merely call for agencies to conduct prospective analysis; it creates an institutional review process that gives the OIRA Administrator, and ultimately the President, oversight and gate-keeping influence over agencies' regulatory decisions. As Executive Order 12,866 expressly states in numerous places, the regulatory review process is one that aims at ensuring regulation will be consistent with the "President's priorities."⁴⁹ In addition, under Section 6(a)(3)(A) of the order, the OIRA Administrator can ultimately determine which rules will be deemed significant and thus

⁴⁸ See, e.g., Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Power: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1258 (1981) (noting that "[m]ore difficult questions would surely be posed if the President were to extend all the provisions of Executive Order No. 12,291 to agencies, the heads of which are not removable at his discretion").

⁴⁹ Exec. Order No. 12,866, 3 C.F.R. 638 (1994), §§ 2(a), 2(b), 3(f)(4), 4, 4(a), 4(c)(1)(A), 4(c)(5), 5, 5(a), 6(a)(3)(B)(ii), 6(b).

subjected to the regulatory analysis and review provisions of the order.⁵⁰ In addition, Section 8 of the order precludes an agency from publishing a rule while it is still under review at OIRA, and Section 7 establishes a process through which conflicts between OIRA and the agency head can be elevated to the President for resolution.⁵¹

Legislatively applying the entirety of Executive Order 12,866 to independent agencies would not only compel such agencies to adhere to the Order's principles for sound regulatory analysis, but it would also apply these institutional provisions, raising three concerns. First, the wholesale application of Executive Order 12866 to independent agencies headed by multimember bodies would be problematic because the procedures in Executive Order 12866 are drafted to apply to "the agency head."⁵² Although it is conceivable that the term "the agency head" would apply to the entire multi-member bodies that constitute many independent agencies,⁵³ the Order's procedures are most naturally intended for agencies headed by a single administrator because a multi-member body could not engage in the kind of back-and-forth contemplated by, and that characterizes the practice of, regulatory review under Executive Order 12866. If the entire multimember body constitutes the agency "head," then the normal White House review process would become extremely cumbersome. Presumably an independent agency would need to convene meetings with all commission members and each time comply with various Government in the Sunshine Act requirements,⁵⁴ simply to determine an agency

⁵⁰ *Id.* § 6(a)(3)(A).

⁵¹ *Id.* §§ 7–8.

⁵² *See, e.g.*, Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), §6(b)(2)(C) and §6(b)(3); *see also id.* at §7 (conflict resolution process described in terms of involvement by "the relevant agency head" and "the head of the issuing agency").

⁵³ *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010) ("As a constitutional matter, we see no reason why a multimember body may not be the 'Hea[d]' of a 'Departmen[t]' that it governs.").

⁵⁴ 5 U.S.C. § 552b.

position on feedback from OIRA over the adequacy of the agency's regulatory impact analysis.⁵⁵ Normally, the OIRA review process involves a working interchange or dialogue between an agency head (or designee) and the OIRA Administrator (or designee), a process which as a practical matter may not apply well to multimember bodies.

Legislatively applying the entirety of Executive Order 12,866 to independent agencies would also signal a major shift in the norms and practices of autonomy that have long prevailed for regulatory decision making by independent agencies. To the extent that this operational autonomy remains valued, Congress should not apply wholesale to independent agencies the institutional mechanisms in Executive Order 12,866. One alternative approach could be to follow the model of the Paperwork Reduction Act, which does subject independent agencies to OIRA oversight of their information collection efforts but which also expressly allows independent agencies to override OIRA's decisions.⁵⁶ A proposed Independent Agency Regulatory Analysis Act, introduced by Senator Rob Portman, would take a related but slightly different approach. It would authorize a President to extend the analysis requirements of Executive Order 12,866 to independent agencies and to require them to submit their analyses to OIRA for review; however, the agency would not be bound by the statute or Order to respond to any feedback from OIRA. The agency's analysis and OIRA's feedback would, however, become part of the administrative record on judicial review, thus effectively requiring the agency to give a reason for any departure from what OIRA recommends.

Even with changes such as these, Congress should still consider the institutional implications of assigning or authorizing White House review of agencies' regulatory analyses. It

⁵⁵ It is highly doubtful that White House officials would want to conduct their meetings with multimember commissions in the open.

⁵⁶ Paperwork Reduction Act, 44 U.S.C. §3507(f).

would still result in some palpable shift in longstanding norms of agency independence and it would also present institutional challenges for OIRA. OIRA possesses a very tiny staff compared with the many executive agencies it oversees.⁵⁷ Legislation that would thrust responsibility on OIRA for overseeing the regulatory actions of perhaps as many as twenty additional regulatory agencies would necessitate a substantial increase in the funding for and size of OIRA.

3. *Eliminate UMRA's exemption for independent agencies.* A third response to the asymmetry in analytical requirements imposed on independent agencies vis-à-vis executive agencies would be to remove the exemption contained in UMRA.⁵⁸ This option would have the distinct advantage of avoiding any questions or concerns about the White House intruding on independent agencies' policy autonomy, as would be raised by legislatively imposing Executive Order 12,866 on these agencies. It would also obviate any need to increase the funding and size of OIRA, as compliance with UMRA's benefit-cost analysis requirement does not involve OIRA. UMRA simply imposes a legal obligation on agencies to produce a statement of costs and benefits of rules covered by the Act; this obligation to produce such a statement is judicially enforceable, but the Act precludes courts from ruling on the *adequacy* of the agencies' analysis.⁵⁹

One small potential downside of this approach might be that UMRA's analytic requirements do not apply to as many rules as the Executive Order 12,866. UMRA's threshold applies to rules that impose \$100 million or more in annual *costs*, rather than economic *effects*

⁵⁷ Robin Bravender and Emily Yehle, *Wonks in Embattled Regulatory Office are Mysterious – But “Not Nefarious,”* E&E NEWS (Feb. 18, 2014) (“OIRA has a staff of about 44 people.”).

⁵⁸ 2 U.S.C. §1502 (incorporating definition of “agency” in 2 U.S.C. § 658 which “does not include independent regulatory agencies”). Currently at least three bills in Congress would eliminate this exemption from UMRA: S. 686 – Unfunded Mandates Accountability Act of 2017; S. 1523 - Unfunded Mandates Information and Transparency Act of 2017; and H.R. 50 - Unfunded Mandates Information and Transparency Act of 2017.

⁵⁹ 2 U.S.C. §1571.

(costs and benefits).⁶⁰ Plus, the \$100 million amount in UMRA adjusts over time for inflation, so today the threshold is much higher.⁶¹ Still, if UMRA's somewhat more limited scope were a concern, Congress could simply adjust the threshold to make it comparable to the one in Executive Order 12,866.

The larger question about eliminating UMRA's exemption for independent agencies would be whether it would provide enough of an institutional incentive for agencies to produce better quality analysis. Although eliminating the UMRA exemption would lack the institutional "peer review" role of OIRA, agencies' benefit-cost analyses prepared under the Act would still be included as part of the agency record and thus reviewable by courts under the general arbitrary and capricious standard in the Administrative Procedure Act.⁶² A further advantage of removing the UMRA exemption would be that independent agencies could no longer claim that benefit-cost analysis is not required of them, which could help in shifting organizational norms within these agencies about the value of producing quality prospective regulatory analysis.

This third option—removing UMRA's exemption—offers a middle ground between doing nothing and involving OIRA in overseeing independent agencies' regulatory develop-

⁶⁰ 2 U.S.C. § 1532 (required economic impact statement for rules that would demand an "expenditure" by the private sector of \$100 million or more).

⁶¹ *Id.*

⁶² Under §1571(a)(2) of the Unfunded Mandates Reform Act, if an agency fails to complete a required "statement" of costs and benefits for a qualifying rule, "a court may compel the agency to prepare such written statement." §1571(a)(3) states that "the inadequacy or failure to prepare such statement...shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule." In other words, UMRA authorizes the courts to compel the preparation of a cost-benefit analysis, but courts cannot, on the basis of UMRA, remand a rule because the agency failed to prepare such an analysis or because a court finds the agency's analysis to be inadequate. However, §1571(a)(4) provides further that "[a]ny information generated [in developing a cost-benefit analysis statement under UMRA] that is part of the rulemaking record for judicial review under the provisions of any other Federal law may be considered as part of the record for judicial review conducted under such other provisions of Federal law" (emphasis added). Thus, although courts cannot pass on the adequacy of an agency's "statement" under UMRA, they can review the underlying "information" upon which the statement is based when reviewing agency rules under 5 U.S.C. §706(2)(A), the arbitrary and capricious standard in the Administrative Procedure Act.

ment. Especially in light of the limitations in any assessment of the current level of adequacy of regulatory analysis at independent agencies, as well as the reality that even OIRA review has not cured all inadequacies in regulatory analysis at executive agencies, a middle-ground approach would presumably be the most prudent strategy to take, if Congress decided it needed to take action. Removing the UMRA exemption would not disrupt existing norms of independence nor would it demand the development of significant new review capacity at OIRA. It would nevertheless move forward toward greater legal parity between independent agencies and executive agencies with respect to regulatory analysis.

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

- *Continue to recognize practical limits associated with conducting benefit-cost analysis.* Currently, Executive Order 12,866 and UMRA recognize that full quantification and monetization of benefits and costs will not be always feasible for all regulations.⁶³ Any further legislative action should similarly recognize these feasibility

⁶³ See Exec. Order 12,866, 3 C.F.R. § 6(a)(3)(C)(i) (1994) (requiring an assessment of “benefits anticipated from the regulatory action ... together with, *to the extent feasible*, a quantification of those benefits”) (emphasis added); see also Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1532(a)(3)–(4) (1995) (mandating a written statement estimating the quantified costs and benefits of a significant regulatory action to the extent “that accurate estimates are reasonably feasible”).

concerns and continue to allow agencies the discretion to adopt appropriate regulations even if all impacts cannot be quantified or monetized.

- *Take into account specific legislative mandates applicable to individual agencies.* Some agencies' organic statutes preclude them from considering costs when making certain regulatory decisions. Congress should approach any new legislation imposing general analytic requirements mindful of any implications such action might have for these individual statutory requirements.
- *Recognize that conducting quality analysis demands resources.* As Shelley Metzenbaum and Gaurav Vasisht have written, “[f]unding adequacy has a direct and profound impact on whether a regulator can be effective.”⁶⁴ If Congress takes steps to mandate that independent agencies undertake additional analysis, it should also ensure that these agencies have the resources needed to fulfill any such mandate effectively.
- *Do not expect perfection.* Even with mandates, regulatory analysis will not always be completed well nor will it always influence regulatory decisions to the extent that it should. Despite decades of experience with OIRA's oversight of executive agencies, there remains substantial variation in these agencies' compliance with best practices of economic analysis of regulations.⁶⁵ What I wrote over a dozen years ago undoubtedly remains true today: “The available empirical research indicates that sim-

⁶⁴ Shelley H. Metzenbaum & Gaurav Vasisht, *What Makes a Regulator Excellent? Mission, Funding, Information, and Judgment*, in *ACHIEVING REGULATORY EXCELLENCE* (Cary Coglianese, ed., 2017).

⁶⁵ Hahn & Dudley, *supra* note 49.

ply mandating analysis does not eliminate inefficiency, and it may not even significantly reduce it”.⁶⁶

The Administrative Conference of the United States has reinforced these considerations in recommending to Congress, should it impose new requirements on independent agencies, that it “recognize that agencies need (a) the flexibility to scale the analyses to the significance of the rules and (b) the resources to satisfy such requirements.”⁶⁷ Any effort to eliminate independent agencies’ exemptions from requirements to conduct regulatory analysis should be approached thoughtfully and with attention to the need to support the conditions and capacities that agencies will need to ensure that they prepare sound analysis and take its results seriously.

II. Retrospective Analysis

Over its final five years, the Obama Administration took a number of steps to build what it characterized as a “culture of retrospective review and analysis throughout the executive branch.”⁶⁸ In early 2011, President Obama issued Executive Order 13,563 proclaiming that the nation’s regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.”⁶⁹ That order directed executive agencies to develop a plan for “periodic[] review [of] existing significant regulations to determine whether any such regulations should be

⁶⁶ Coglianese, *supra* note 9.

⁶⁷ Administrative Conference of the United States, Recommendation 2014-5: Retrospective Review of Agency Rules (Dec. 4, 2014), https://www.acus.gov/sites/default/files/documents/Recommendation%252020145%2520%2528-Retrospective%2520Review%2529_1.pdf.

⁶⁸ Cass R. Sunstein, *Memorandum on Retrospective Analysis of Existing Significant Regulations* (April 25, 2011), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf>.

⁶⁹ Executive Order 13563: Improving Regulation and Regulatory Review (January 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome.”⁷⁰

In response, over the last five years, executive agencies have reportedly undertaken more than 800 retrospective reviews and eliminated over 70 “regulatory provisions”.⁷¹ According to then-OIRA Administrator Howard Shelanski, these efforts “achieved an estimated \$37 billion in cost savings, reduced paperwork, and other benefits for Americans.”⁷² His examples of such cost-savings all stemmed from executive agencies,⁷³ such as the now-famous EPA “spilled milk” regulation which effectively exempted certain milk storage containers from particular EPA oil spill rules.⁷⁴ But what have *independent* regulatory agencies accomplished in terms of retrospective analysis of their stock of regulations?

⁷⁰ *Id.*

⁷¹ Howard Shelanski, *Retrospective Review, by the Numbers* (Aug. 31, 2016), <https://www.whitehouse.gov/blog/2016/08/31/retrospective-review-numbers-0>.

⁷² *Id.* A review of the Obama Administration’s lookback initiative commissioned by the Administrative Conference of the United States suggests that many of these cost-savings came in the form of administrative changes, such as switching to electronic filings, rather than making substantive regulatory changes. Joseph E. Aldy, *Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy*, report prepared for the Administrative Conference of the United States (2014), <https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf>. I asked a research associate to review a random sample of fifty retrospective reviews completed as of July 2015, and in slightly more than three-fourths of the reviews that resulted in changes, the changes were of an administrative or paperwork variety. Reducing unnecessary paperwork burdens is no doubt to be applauded, but streamlining administrative processes seems not as squarely centered on improving “the actual results of regulatory requirements” Executive Order 13,563, 76 C.F.R. 3821 (2011).

⁷³ See, e.g., Howard Shelanski, *Regulatory Lookback Eliminates Major Paperwork Burden* (Aug. 8, 2013), <https://www.whitehouse.gov/blog/2013/08/08/regulatory-lookback-eliminates-major-paperwork-burden>; Howard Shelanski, *Reducing Costs and Burdens: Further Progress in Regulatory Lookback Effort* (May 7, 2014), <https://www.whitehouse.gov/blog/2014/05/07/reducing-costs-and-burdens-further-progress-regulatory-lookback-effort>; Howard Shelanski, *Retrospective Review: July 2015 Lookback Reports* (Aug. 14, 2015), <https://www.whitehouse.gov/blog/2015/08/14/retrospective-review-july-2015-lookback-reports-0>; Howard Shelanski, *Retrospective Review, by the Numbers* (Aug. 31, 2016), <https://www.whitehouse.gov/blog/2016/08/31/retrospective-review-numbers-0>; Cass R. Sunstein, *Smarter Regulation: Reducing Cumulative Burdens* (Mar. 20, 2012), <https://www.whitehouse.gov/blog/2012/03/20/smarter-regulation-reducing-cumulative-burdens>; Cass R. Sunstein, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013).

⁷⁴ Cary Coglianese, “Taking Regulation Seriously,” *REG. REV.* (Jan. 28, 2012), <http://www.TheRegReview.org/2012/01/28/taking-regulation-seriously/>.

In July 2011, President Barack Obama issued Executive Order 13,579 stating that “each independent regulatory agency should develop and release to the public a plan” for retrospective review of its existing significant regulations.⁷⁵ Eleven days later, OIRA Administrator Cass Sunstein sent the heads of independent agencies a memorandum in which he offered expressly non-binding “guidance” on the President’s order, noting that “[a]gencies may well find it useful to engage in a retrospective analysis of the costs and benefits ... of regulations chosen for review.”⁷⁶ He emphasized that “[s]uch analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments [or, prospective analysis] which can be used to enhance the agency’s analytic capability.”⁷⁷

The Council of Economic Advisors (CEA) reported that, as of November 2011, a total of 21 independent agencies had developed retrospective review plans as called for by the executive order.⁷⁸ This included all the major regulatory agencies designated as independent under the Paperwork Reduction Act. CEA claimed that the independent agencies’ plans reflected “substantial efforts to reduce burdens” and it highlighted review efforts taken or currently underway at seven independent agencies (CFTC, FTC, Fed, FERC, OCC, FDIC, and FCC).⁷⁹ Although most of the efforts at these seven agencies were described as still at an early stage, the

⁷⁵ Executive Order 13579: Regulation and Independent Regulatory Agencies (July 11, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/07/11/executive-order-13579-regulation-and-independent-regulatory-agencies>.

⁷⁶ Memorandum from Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, to the Heads of the Independent Regulatory Agencies, Executive Order 13,579, “Regulation and Independent Agencies” 5 (July 22, 2011), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-28.pdf>.

⁷⁷ *Id.*

⁷⁸ Council of Economic Advisers, *Smarter Regulation Through Retrospective Review* (May 10, 2012), https://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf.

⁷⁹ *Id.*

CEA report indicated that by that time the FCC had already “eliminated 190 rules, many of which are no longer needed as a result of technological advances.”⁸⁰

The rigor and depth of agencies’ analytic efforts in these retrospective reviews, whether conducted by executive or independent agencies, proved generally quite limited. According to a report commissioned by the Administrative Conference of the United States, the “vast majority” of executive agencies’ efforts lacked “formal retrospective analysis, such as ex post estimates of benefits, costs, or efficacy”.⁸¹ What we know about the independent agencies’ efforts makes them look still less substantial. Most of the plans submitted by independent agencies basically described existing, routine practices of consulting with the public and keeping abreast of developments in the regulated industry. The Nuclear Regulatory Commission (NRC), for example, took two and a half years to approve a final retrospective review “plan” that basically compiled existing principles and practices that guide NRC rulemaking activities.⁸² The Consumer Product Safety Commission (CPSC) took nearly five years before it approved a brief document that did little more than describe a process to follow, and questions for staff to consider, in selecting existing rules to review.⁸³ Much as with the executive agencies, few, if

⁸⁰ *Id.* at 10. Undoubtedly this sounds like a major achievement in regulatory reduction, but it is hard to imagine that the FCC’s actions could be attributable to any serious retrospective review conducted in just the four months following the signing of Executive Order 13,579. The timing of the FCC’s actions suggests that either these revocations were already in progress before that order was issued, or that the rules that were eliminated were so obviously outmoded that removing them was an inconsequential housekeeping matter.

⁸¹ Aldy, *supra* note 78.

⁸² See U.S. Nuclear Regulatory Commission, Final Plan for Retrospective Analysis of Existing Rules, <http://www.nrc.gov/docs/ML1400/ML14002A441.pdf>.

⁸³ U.S. Consumer Product Safety Commission, RCA: Plan for Retrospective Review of Existing Rules (Apr. 1, 2016), <https://www.cpsc.gov/content/rca-plan-for-retrospective-review-of-existing-rules>.

any, of the independent agency plans could be said to contain truly robust “formal retrospective analysis.”⁸⁴

It is far from clear whether independent agencies made any progress over time in improving their retrospective analyses. Anyone interested in *executive* agencies’ progress could go to the White House website and find status reports submitted twice each year.⁸⁵ But no such repository ever existed of the status or accomplishments at independent agencies. Indeed, it is not even clear whether these agencies ever followed through at all on the initial plans they submitted. Executive Order 13,563 – the one that Executive Order 13,579 imposed on independent agencies – only called for agencies to produce an initial plan.⁸⁶ Regular progress reports were called for only in a subsequent memorandum from the OIRA Administrator⁸⁷ as well as a subsequent presidential order,⁸⁸ both of which were directed just to executive agencies.

The Obama Administration’s regulatory lookback initiative aimed, laudably, to build a culture of retrospective review through the “continuing process of scrutiny of existing rules” fostered by the presidential requirement of regular progress reports.⁸⁹ It remains to be seen, of course, to what extent the Administration’s lookback initiative has contributed to any enduring

⁸⁴ Overall, a Senate Committee found in 2015 that agency retrospective review “efforts had resulted in few completed reviews since the 2011 executive orders and that better data and more planning would allow agencies to conduct better reviews.” Senate Committee on Homeland Security and Governmental Affairs, Report on S. 1817 Smarter Regs Act of 2015 4 (June 20, 2016), <https://www.congress.gov/114/crpt/srpt282/CRPT-114srpt282.pdf>.

⁸⁵ Retrospective Review of Regulations, <https://obamawhitehouse.archives.gov/omb/oira/regulation-reform>.

⁸⁶ Exec. Order 13,563.

⁸⁷ Cass. R. Sunstein, *Memorandum on Implementation of Retrospective Review Plans* (Oct. 26, 2011), <https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/implementation-of-retrospective-review-plans.pdf>.

⁸⁸ Exec. Order 13,610, 77 Fed. Reg. 28469 (May 14, 2012).

⁸⁹ Sunstein, *supra* note 93.

cultural shift at any agency. Although the Trump Administration has not made retrospective analysis a centerpiece of its regulatory agenda, some commentators have suggested that Executive Order 13,771⁹⁰—which calls for executive agencies to eliminate existing regulations to offset the costs of new regulations—will provide additional incentives for agencies to evaluate existing regulations.⁹¹ Of course, whatever positive, lasting change the Obama lookback initiative or the Trump “one-in-two-out” requirement may have, presumably such effect has been only at most attenuated at independent regulatory agencies.

Clearly much more could be done to foster a governmental culture that takes retrospective analysis of regulations seriously at independent agencies – as well still at executive agencies. One desirable cultural shift would entail refocusing and broadening the rationale for retrospective review. As economist Joseph Aldy aptly notes in his report to the Administrative Conference of the United States (ACUS), burden reduction had been a “common theme” of the Obama Administration’s lookback initiative, as well as similar efforts in earlier administrations.⁹² Instead of just focusing on reducing regulatory costs or burdens, retrospective review should consider benefits as well in an effort to help agencies overall create better-designed and better-implemented regulations.⁹³ Smarter regulation not only can be more cost-effective but can also deliver greater overall benefits.

⁹⁰ Executive Order 13, 771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

⁹¹ See, e.g., Sofie E. Miller and Susan E. Dudley, *The Devil is in the Details of President Trump’s Regulatory Executive Order* (Feb. 1, 2017), <https://regulatorystudies.columbian.gwu.edu/devil-details-president-trump%E2%80%99s-regulatory-executive-order> (“Although many presidents have encouraged agencies to retrospectively review their regulations, President Trump’s EO may provide agencies with some of the strongest incentives for assessing the costs—and the benefits—of their existing rules.”).

⁹² Aldy, *supra* note 78.

⁹³ Coglianese & Benneer, *supra* note 9.

Retrospective review can provide valuable information that can be used to inform future regulatory decisions.⁹⁴ Multiple regulatory agencies, executive and independent, face similar challenges, whether it is in regulating to promote private security efforts to protect key infrastructure or to foster a “safety culture” within high-hazard industrial operations. Such common challenges could be fruitfully illuminated by regulatory impact evaluation of rules implemented by regulators working in related areas.⁹⁵ Learning how different types of regulatory strategies – such as market-based instruments, management-based regulation, behavioral nudges, or performance standards – have performed in one regulatory domain can be useful in designing regulations in other, similar domains. Furthermore, by comparing the results of rigorous retrospective evaluations of individual rules’ costs and benefits with the prospective estimates that agencies make of these costs and benefits, agencies and their analysts can learn how to improve the regulatory impact analysis that takes place when new rules are being designed.⁹⁶

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

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

⁹⁴ Cary Coglianese, *Measuring Regulatory Excellence*, in *ACHIEVING REGULATORY EXCELLENCE* 305-306 (Cary Coglianese, ed., 2017).

⁹⁵ Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 *YALE J. REG. ONLINE* 57, 65 (2013), <http://yalejreg.com/moving-forward-with-regulatory-lookback/>.

⁹⁶ Coglianese & Bennear, *supra* note 9.

executive agencies over the final five years of the Obama Administration under Executive Orders 13,563 and 13,610 provide a foundation upon which agencies could be encouraged to build. To ensure continuation of these practices, Congress could productively codify similar planning and progress reporting requirements – and extend them to independent regulatory agencies – helping to ensure that regular, strategic efforts of regulatory evaluation remain implemented.

If Congress were to take any such action, retrospective review practices could benefit from a broadening of their purpose beyond the worthwhile objectives of streamlining and burden reduction, which have almost exclusively characterized retrospective review efforts in the past. In the Regulatory Flexibility Act, Congress has already required both executive and independent agencies to undertake mandatory periodic reviews (at least every ten years) of all rules imposing significant economic impacts on small businesses.⁹⁷ The statute’s stated purpose for such reviews is narrow: “to minimize any significant economic impact of the rules upon a substantial number of such small entities.”⁹⁸ Instead, the statute could be amended to focus on more than just burden reduction, encouraging retrospective analysis that promotes smarter, more strategic regulatory decisions—analysis that measures and potentially increases benefits, in addition to finding cost reductions. In other words, evaluations under the Regulatory Flexibility Act could be designed to support, as in Executive Order 12,866, a better system of regulation “that protects and improves ... health, safety, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society.”

⁹⁷ Regulatory Flexibility Act, 5 U.S.C. § 610 (1980).

⁹⁸ *Id.* at § 610(a). Executive Order 13,563 contains a similar purpose: to “promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome.” Exec. Order 13,563, 76 Fed. Reg. 3821 (2011), §6(a).

Agency officials currently have considerable discretion over what rules to target for retrospective analysis and how to conduct that analysis. Presumably any legislation codifying Executive Order 13,563 would continue to allow agencies to have the discretion and responsibility to determine what rules to review, along with when and how to review them, as these decisions will depend on each agency's overall priorities and available resources.⁹⁹ Legislation, though, can help shape these priorities in a direction that promotes public value through genuine learning. For example, agencies might appropriately be encouraged to analyze rules that were issued under conditions of high uncertainty about their costs or benefits, or rules that rely on common assumptions or present common problems of interest to regulators.¹⁰⁰

Maintaining OIRA's current role in overseeing agency reporting about retrospective review—acting as a government-wide clearinghouse of sorts—would make sense for several reasons, even for independent agencies. First, it could help ensure that OIRA staff can benefit from the knowledge generated from agencies' backward looks. Such learning would inform OIRA staff members in their efforts to oversee executive agencies' prospective analyses. OIRA staff would also be well-positioned to articulate any government-wide best practices or

⁹⁹ If Congress seeks to direct an agency to evaluate a specific regulation or set of regulations, it always can do so through other legislation, as it already does from time to time. In such cases, Congress may also need to consider appropriating additional funding to support the desired evaluation research.

¹⁰⁰ Coglianesse, *supra* note 95. As a report issued by the Council of Economic Advisors has noted, “[r]etrospective analysis is an important complement to prospective analysis. In some cases, prospective analysis of costs and benefits will be highly uncertain; retrospective analysis can provide valuable additional information and ultimately lead to better regulations.” Council of Economic Advisors, *Smarter Regulation Through Retrospective Review* (May 10, 2012), https://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf. In addition, recommendations issued by the Administrative Conference of the United States (ACUS) contain a further list of helpful considerations that agencies may consider when prioritizing retrospective analysis. ACUS, Recommendation 2014-5: Retrospective Review of Agency Rules 9-10 (Dec. 4, 2014), https://www.acus.gov/sites/default/files/documents/Recommendation%25202014-5%2520%2528Retrospective%2520Review%2529_1.pdf. Such recommendations could be usefully codified as criteria for agencies to use when planning and conducting retrospective analysis.

other methodological guidelines for retrospective analysis, much as OIRA has done for prospective analysis with its Circular A-4.¹⁰¹

Second, since OIRA coordinates the Paperwork Reduction Act,¹⁰² keeping its staff apprised of independent and executive agencies' data needs may streamline any information requests that are needed to evaluate existing rules. Often the only way to conduct meaningful retrospective analysis will be to require reports or survey responses from individuals or organizations in the private sector, the very kind of "collection of information" by agencies that the PRA conditions on OIRA approval.¹⁰³

Third, OIRA could incorporate overall progress and key findings from agencies' retrospective reviews into its annual reports to Congress on the benefits and costs of regulation. Currently, these reports only provide *estimated* or *forecasted* benefits and costs of regulation, but Congress could also benefit from systematic reporting of *ex post* identification of regulatory benefits and costs.

Finally, OIRA could be encouraged or authorized to issue non-binding "evaluation prompts" to agencies, identifying specific rules that would benefit from careful retrospective study.¹⁰⁴ OIRA is especially well-positioned to identify rules or issues where evaluation findings could help improve prospective regulatory impact analysis, and making suggestions to independent agencies about evaluations to undertake would not intrude on such agencies'

¹⁰¹ Office of Management and Budget, Circular A-4 (Sept. 17, 2003), https://www.whitehouse.gov/omb/circulars_a004_a-4. Of course, independent agencies would need to have the good sense to refer to and rely on these best practices or guidelines, as absent any changes to requirements for prospective analysis they would not fall within the OIRA orbit. For a robust argument for such changes, precisely so that agencies that independent agencies can benefit from quality guidance from OIRA, see Revesz, *supra* note 5.

¹⁰² 44 U.S.C. § 3503.

¹⁰³ 44 U.S.C. § 3507.

¹⁰⁴ Coglianesse, *supra* note 95.

core policy autonomy. Such prompts could be stipulated by law to be completely non-binding for independent agencies—and even for executive agencies, for that matter. Indeed, even if all four suggestions above were implemented, the overall role contemplated for OIRA with respect to retrospective analysis would be largely one of information aggregation—OIRA as the recipient of reports and the facilitator of learning. None of these suggestions need disrupt prevailing norms of agency independence nor require any dramatic changes to OIRA’s resources or staffing levels.

2. *Require agencies to include a structured, individual evaluation plan as part of their Federal Register notices when promulgating a new major rule.* In principle, a well-developed RIA will provide much helpful information that evaluators could use to organize an evaluation of a regulation at a later time. Still, as noted, RIAs are not always of uniform quality.¹⁰⁵ Moreover, the exercise of completing even a brief, standardized evaluation plan at the time of a rule’s establishment can discipline and sharpen decision-makers’ thinking.

Such required plans need not be onerous.¹⁰⁶ At a minimum, they simply need to include: (a) a description of concrete criteria, indicators, or proxies of regulatory impacts (benefits as well as costs); (b) known existing data that could be used to measure the rule’s impacts, or a statement of the type of new data that would be needed to measure the rule’s impacts; (c) an estimated time period after which the rule’s impacts should begin to be observable and evaluation would be appropriate; and (d) sources of variation and possible research strategies or designs, whether experimental or quasi-experimental, that could take advantage, at the appropriate time, of that variation to try to draw inferences of the rule’s impacts. As suggested, OIRA could establish

¹⁰⁵ See *supra* note 49.

¹⁰⁶ Coglianese, *supra* note 95.

guidelines for appropriate research designs and other plan features, which could be instructive to independent agencies, even if not binding.¹⁰⁷

In 2016, Senator Heidi Heitkamp (D-ND) introduced The Smarter Regs Act which would amend the Administrative Procedure Act to require that when agencies propose a major rule—that is, one with annual economic effects greater than \$100 million—they also “include a potential framework for assessing the major rule, which shall include a general statement of how the agency intends to measure the effectiveness of the major rule.”¹⁰⁸ The bill—which would apply to both executive and independent agencies—would then require agencies to follow through and conduct assessments of these major rules in accordance with the time interval and methods provided in the published framework.¹⁰⁹ Even without requiring these follow-on assessments, the mere process of developing evaluation plans at the outset of a rulemaking would help reinforce an evaluation culture within agencies as well as provide useful guidance for future evaluation of the rule by outside evaluators and the public.¹¹⁰

3. *Invest in regulatory evaluation and related research in behavioral and regulatory sciences.* Taking retrospective review seriously demands resources: time, personnel, and funding.¹¹¹ And when it comes to resources, there are always tradeoffs. Over the past five years, the Obama Administration’s lookback initiative took retrospective review seriously by generally favoring breadth (number of rules reviewed)

¹⁰⁷ *Id.*

¹⁰⁸ S. 1817 – Smarter Regs Act of 2015, <https://www.congress.gov/bill/114th-congress/senate-bill/1817?r=89>.

¹⁰⁹ *Id.*

¹¹⁰ Planning for evaluation at the outset would be consistent with the Evidence-Based Policymaking Commission Act of 2016’s goal of finding ways “to incorporate outcomes measurement ... and rigorous impact analysis into program design.” Public Law No. 114-140 (Mar. 30, 2016).

¹¹¹ *Cf.* COMMISSION ON EVIDENCE-BASED POLICYMAKING, THE PROMISE OF EVIDENCE-BASED POLICYMAKING 88 (2017) (“Federal departments must enhance their capacity for evidence building to support the growth of evidence-based policymaking.”), <https://www.cep.gov/content/dam/cep/report/cep-final-report.pdf>.

over depth (the empirical rigor and sophistication of the underlying reviews). The average executive branch agency reportedly undertook about 30 reviews, or about 6 per year, although a few agencies reviewed over one hundred rules, or more than 20 per year.¹¹² To reach these numbers in such a period of time, many reviews appear to have relied mainly on expert judgments, impressions, and assumptions. Few, if any, reviews involved in-depth empirical evaluation of the kind needed to draw valid inferences about what impacts the regulation under review actually caused.

The back-of-the-envelope nature of most of the Obama Administration's retrospective reviews is hardly an intrinsic flaw. Building a portfolio of reviews that achieves breadth over depth is certainly better than doing no looking back at all. Even quick glances back in the rearview mirror can be helpful. Moreover, an agency presumably does not need a randomized controlled experiment, for example, to surmise that replacing paper filings with electronic filings will save processing time and money. Yet a retrospective review portfolio devoid of any in-depth evaluation research misses a critical opportunity to draw a causal connection between regulations and intended as well as unintended benefits and costs.¹¹³ Regulations aim at causation. They seek to change behavior of regulated entities in ways that reduce or solve problems. To look back without making any causal inferences is to miss learning whether regulations are accomplishing what they are supposed to accomplish—as well as whether they might be causing new problems altogether.

¹¹² Aldy, *supra* note 78.

¹¹³ Coglianese, *supra* note 94, at 300.

Agencies need to conduct retrospective analysis that draws causal inferences about their regulation. They need to engage in evaluations that compare the world with a regulation to a counterfactual world without that regulation. Since the counterfactual cannot be directly observed, the evaluator must estimate it using careful research designs, such as randomized controlled experiments or various statistical techniques that effectively approximate randomized controls.¹¹⁴ Such research can take some more time and effort to design and conduct. As a result, regulatory officials need to make choices based on available resources.

Not every rule will necessarily require rigorous, in-depth evaluation. Banning the use of lead as an additive in gasoline, for example, might not demand a sophisticated evaluation to validate that such a rule caused observed declines in air concentrations of lead, especially if few or no other major sources of lead emissions exist.¹¹⁵ In many instances, though, it will be important to determine what the actual benefits and costs of a rule have been. Those benefits and costs, if properly monetized, represent the value of the negative and positive impacts that the rule *has caused*. Axiomatically, the only way to know what difference a regulation is making – for good or for ill – is to conduct a careful, causally-oriented evaluation.¹¹⁶

¹¹⁴ Cary Coglianese, *Measuring Regulatory Performance: Evaluating the Performance of Regulation and Regulatory Policy*, Report to the Organization of Economic Cooperation and Development (2011), https://www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf.

¹¹⁵ Even if there were other sources, the pathways from fuel combustion to air levels of lead may be sufficiently well-understood and the adverse health effects of lead so significant that even a modest reduction from the air would still dwarf any adverse effects of a ban. Gaining an understanding of those adverse effects better, however, could still necessitate causally-directed evaluation, such as if it were thought meaningful to know how the ban affected vehicle engines and their performance, as these outcomes are affected by many other factors.

¹¹⁶ Cary Coglianese, *Listening, Learning, and Leading: A Framework for Regulatory Excellence* (2015), <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreportpdf>.

Even when agencies are selective and strategic in choosing rules to assess retrospectively, conducting rigorous evaluations will require adequate resources. For some government agencies, these costs may be quite palpable and Congress will need to ensure agencies have appropriate resources. The needed resources, though, will almost always amount to only a tiny fraction of overall estimated costs and benefits of the rules themselves, especially when evaluations are targeted toward major regulations. From the standpoint of overall social welfare, investing in evaluation is worthwhile if it provides decision makers with options to lessen the costs or increase the benefits of major regulations even modestly.

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

Conclusion

Improving the quality of regulatory analysis remains an ongoing challenge for all agencies. When it comes to independent agencies, it is clear that requirements for high quality analysis—whether prospective or retrospective—do not apply to these agencies as they do to executive agencies. And yet the regulations that independent agencies adopt show no meaningful disparity in substantive significance that would justify existing exemptions from

analytic requirements. Independent agencies' regulations are in fact highly consequential to the economy and to overall societal well-being.

Closing the gap in the treatment of independent and executive agencies' analyses would be feasible using the options outlined in this article. By taking actions such as those presented here, Congress and the heads of independent agencies could improve their regulatory analysis and ultimately produce smarter regulatory decisions—even without causing any dramatic diminution in independent agencies' core autonomy. Taking steps like those discussed here would enhance the incentives for agency decision makers to look carefully before they leap, as well as to ensure that they look backward after they have acted to find out how well their regulations are working. Improving the quality of regulations issued by independent agencies ultimately depends on improving the quality of their practice and use of both prospective and retrospective analysis.