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A SYMPOSIUM ON REGULATORY BUDGETING

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For a Regulatory Budget: Successful Polices Should Be Made Permanent

SENATOR JAMES LANKFORD

Since I arrived in the Senate in 2015, I have published the *Federal Fumbles*, which is a report highlighting wasteful federal spending against the backdrop of soaring federal debt and deficits. When I started, the national debt was over $18 trillion. On January 31, 2022, we surpassed $30 trillion for the first time in U.S. history.[1] In fact, we incurred $2.8 trillion additional debt in Fiscal Year 2021. To put that in context, our federal tax receipts in Fiscal Year 2021 were over $4 trillion, but we spent over $6.8 trillion.[2] COVID emergency funding is included in our massive deficit, but it is just another reminder that our nation has no fiscal margin.

Our national debt is familiar – we can find it easily with a quick search engine query, it also sometimes just shows up as we go about our daily routines. It is reported on news programs and discussed in editorials and commentary (though it should be discussed much more often). You can even find it on a ticker at many bus stops in DC, the sum forever counting up, and up, and up. We also see how much we pay in taxes. Many Americans may try to avoid looking at their paystubs, at least the part that deducts state and federal taxes, but it is there. Of course, every April we get to write a check to the IRS. We strive to improve our personal financial health and yet, as a nation, we recognize these visible taxes amount to trillions of dollars. What is much more difficult to find, and is rarely discussed, is the hidden tax imposed on every American in the form of federal regulations.

The burden imposed by our federal income taxes is directly comparable to the burden imposed by the hidden tax of federal regulations. Studies calculate the annual federal regulatory burden to be in the trillions of dollars. One study found the annual burden to be $4 trillion, which translates to $13,000 per person.[3] This not just a number on paper, this burden shows up as we buy food at the grocery store, pay for gas at the pump, and do the dozens of little transactions as we go about our daily lives. The same study found our economy would be 25% larger if not for the excessive regulatory weight.[4] I am not anti-government or anti-regulation, but our Republic requires an engaged Congress fulfilling its constitutional responsibility.

I grew up as the younger brother of a very smart older brother. It had its advantages, but it also had its major drawbacks. We played lots of board games (chess, Risk, Monopoly, and Battleship mostly), card games of all types, and an endless number of random made up on the spot outside games. Almost every game we played my brother had played before. He taught me the rules and guided me through it the first time, but at some point, I noticed that the rules were strangely inconsistent. In fact, sometimes they flat out changed from day to day. In short, my brother cheated. He told me he didn't, but I know he did. You better believe I called him out on it. But, when he

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[1] TREAS. DEPT, HISTORICAL DEBT OUTSTANDING - ANNUAL 2000 - 2021 (2021), https://fsapps.fiscal.treasury.gov/dts/files/22013100.pdf.

[2] *See, How Much Money Did the Federal Government Collect and Spend in 2021?*, DATA LAB, TREAS. DEPT., https://datalab.usaspending.gov/americas-finance-guide/ [https://perma.cc/6D3M-6RXD].

[3] Bentley Coffey, Patrick A. McLaughlin & Pietro Peretto, *The Cumulative Cost of Regulations*, 38 REV. OF ECON. DYNAMICS 1, 2 (2020).

[4] *See id.*

made the rules before the game, called the balls and strikes during the game, and also played the game, I had no chance to win the game.

Early in my life, I learned the value of a written rule book for each game, and a Mom that could interpret the rules when my brother and I disagreed on what the rules meant, which was often. Before you judge my older brother for his propensity to dictate the outcome of each game to his benefit, admit it, you did the same thing to your younger sibling. Those of us who were the baby of the family all remember the moment when we discovered the written rule book in the box. It was a really good day.

According to our Constitution, no one in our country can write the laws of our nation except Congress, because Article I begins with the simple but clear statement, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[5] The rule book for our nation is written by Congress, interpreted by the courts, and carried out by the Executive branch, at least in theory. What would happen if the Executive Branch had the opportunity to write the rules, interpret the rules, and enforce the rules? Insert my older brother here.

How did our constitutional republic become a government where more "laws" are made by regulators in the Executive branch than by the democratically elected representatives in the legislative branch?[6] More importantly, what can be done to reverse course?

As this symposium persuasively argues, a regulatory budget is necessary and effective in reining in runaway federal regulators. It is practical, and most importantly proposes a real incentive for regulators to conduct meaningful retrospective review to determine what existing regulations are effective and still necessary and which should be repealed. In order to fully flesh out the solution, we need to understand how exactly we reached this point, where our regulatory burden equals that of our income tax.

I

Administrative agencies have come to possess aspects of all three branches of government – when Congress cannot pass legislation to solve a specific problem, it creates a vague statute delegating authority to agencies to solve the issue, and then lobbies the Executive branch to issue a rule; when the President wants a specific policy, agencies issue a rule; and when that rule is challenged, judges defer to the agency, which allows the fox to watch the hen house.

The Constitution identifies three functions of governmental power and assigns those functions to specific branches through the vesting clauses. As the framers explained, the Executive branch "not only dispenses the honors, but holds the sword of the community[;]" the Legislative branch "not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated[;]" and the Judiciary, intended to be "the least dangerous" branch, possesses "merely judgement."[7] This separation of powers is, "the great security against a gradual

[5] U.S. CONST. art. I, § 1.

[6] CLYDE W. CREWS, JR., COMPETITIVE ENTER. INST, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (2021).

[7] THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

concentration of several powers in the same department…"[8] Having received the blessings of liberty, we have an interest and duty to ensure the separation of powers is not just theoretical, but practical.

The federal government's structure remains substantively unchanged, but the distinctions of function between the executive and legislative branches have blurred over the past century. This is a problem worth addressing. "[E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law."[9] Yet Congress has passed more and more legislation granting the Executive branch wide latitude to regulate as it sees fit. Those regulations read a lot like legislation, and regulators progressively write like legislators. In simple terms, if it walks like a duck and quacks like a duck, maybe it is a duck.

For example, the Clean Air Act directs the EPA to regulate air pollutants as the agency finds "appropriate" and "necessary."[10] Dodd-Frank directs the SEC to issue regulations that are "in the public interest."[11] The Occupational Safety and Health Act directs OSHA to set standards that are "reasonably necessary and appropriate."[12] The Executive branch is more than happy to take these broad grants of authority and insert its own preferences at its own convenience.[13]

I want to be clear: these examples are not meant as an attack on policies per se. They are not bad objectives — we certainly want clean air and water, safe workplaces, and honest banking. But, our Constitution was not designed to allow Congress to delegate to the Executive branch anything the President believes is necessary and appropriate. Just think for a moment how different the opinions of the last four presidents were about any number of issues. In our Republic, the president executes the law, he does not write it. If a president can write and carry out any policy, he has the ability to control every industry. Would you want the last four presidents to control every industry? How about the next four?

As Congress has ceded legislative authority to federal agencies, the judiciary has also abdicated its role through various deference canons. Running counter to Chief Justice Marshall's directive that it is "emphatically the province and duty of the judiciary to say what the law is,"[14] broad deference allows agencies, not Congress, to determine what statues and regulations actually mean.

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[8] THE FEDERALIST NO. 51, at 318 (James Madison) (Clinton Rossiter ed., 2003).

[9] Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

[10] 42 U.S.C. § 7412(n)(1)(A).

[11] 15 U.S.C. § 78(C)(f).

[12] 29 U.S.C. § 652(8).

[13] Or try. Thankfully we have a Supreme Court willing to find some limits when an Administration attempts to breathe new and novel life into an old statute. But even in *NFIB v. OSHA*, it was only Justice Gorsuch's concurrence that directly addresses the unbelievably broad authority Congress gave to OSHA in 1970. Justice Gorsuch correctly points out that if the statute really did give OSHA the authority they claimed, which was to require every business with 100 or more employees to implement a COVID-19 vaccination or testing regime, then that would "likely constitute an unconstitutional delegation of legislative authority."

[14] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The first and most well-known of the deference canons is *Chevron*[15] – specifically, step two, which obscures the traditional understanding of the separation of powers by giving Executive agencies the power to interpret the meaning of statutory ambiguities.

The so-called "*Chevron* deference" has fundamentally altered how agencies regulate. Instead of simply carrying out the directives of Congress, agencies can seek out ambiguities in the law so that they can address problems as they see fit. They do so knowing that courts will likely defer to their interpretation, regardless of congressional intent.

This abdication of judicial power runs counter to the standard of review laid out in the Administrative Procedure Act. The APA gives courts clear direction to "decide all relevant questions of law" and "interpret constitutional and statutory provisions."[16]

Chevron deference ignores this directive. Instead of courts using their judgment to independently "decide all relevant questions of law," pursuant to *Chevron* deference, courts cede their judicial obligation to decide questions of law in favor of any reasonable agency interpretation.

Auer deference[17] – or perhaps now we should call it *Kisor* deference[18] – takes a similar approach, but for agency interpretation of its own rules.

Simply put, if a law or regulation is vague, who gets to interpret it? Should the Supreme Court say if a law is vague, or should the agency do what they choose so long as it is reasonable? Or, should the courts say a vague law is meaningless and make Congress do its homework again?

The Constitution gives all legislative powers to Congress. The Supreme Court does not have the Constitutional authority to tell an agency "this law is vague, so do whatever you want with it." Instead, the judicial function requires that an overly vague law be unexecutable unless and until Congress clarifies the executive action it is mandating. In other words, if a judge cannot determine what a law says, it says nothing until Congress fixes the law to say something. Poetry might have multiple interpretations, but the law should only have one.

Anyone who has watched Congress work will be able to identify a major problem with this issue. Congress is already not accomplishing what they are supposed to, why slow the system down even more?

You will often hear, when there is a problem, "someone has to do something." Our nation now instinctively looks to the Executive branch to figure "something" out. As the Executive branch creates new policy to solve a new problem based on a novel interpretation of an old law, Congress gets a pass from the hard work of legislating, judges wash their hands of their responsibility, and the American people are shut out of the process. Laws give people input and stability, Executive decisions create uncertainty, frustration, and political chaos. Judges should not give the Executive branch discretion to do whatever it chooses so long as the law does not strictly forbid it.. They should limit the power of the Executive branch agencies to only what the law clearly allows. The Legislative branch should be forbidden to give away powers that the Constitution requires it to wield. Congress will do its job when it has to, but until it has to, Congress will chicken out on the

[15] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[16] 5 U.S.C. § 706.
[17] Auer v. Robbins, 519 U.S. 452 (1997); *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[18] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

hard and messy choices. This is precisely why immigration reform, energy policy, national debt, environmental rules, navigable waters, and thousands of other issues are hanging out there. The people responsible for solving them give away their responsibility to someone who really does not have the authority to settle it. This leaves our nation drifting. The Constitution is clear that all legislative powers reside in Congress, and Congress should be the first to defend the constitutional boundaries between the Executive and Legislative branches.

Independent agencies, and the decades of jurisprudential churn in dealing with them, also illustrates the complexity of the challenge. These agencies were conceived to accomplish varied missions, but have one thing in common—they were structured to be independent from the influence of the President. Too often this intent has meant that these agencies are also independent of oversight, transparency, and political accountability.

Independence from the influence of the President is not tantamount to independence from oversight, transparency, and accountability. Independent regulatory agencies take regulatory action just like Executive branch agencies. They promulgate rules, issue guidance, and enforce their rules—all of which have the same effects as regulations advanced by Executive branch agencies. Accordingly, independent regulatory agencies should be held to the same procedural standards and oversight. Congress created every independent agency in law, so Congress should have the authority and responsibility of oversight.

I and twenty of my colleagues in the Senate wrote, back in March of 2020,[19] "centralized review of independent agencies has a long history of support from former Office of Information and Regulatory Affairs Administrators of both parties, the Administrative Conference of the United States, and the American Bar Association."[20] Everyone needs oversight.

Regulations, whether issued by the Executive branch or independent agencies, should be based in law. The Executive branch is charged with executing the laws. It is not a fourth branch of government that bypasses our constitutional structure. Independent agencies are not independent from accountability, and a key aspect of accountability is centralized review by OIRA. I have encouraged every administration and every nominee to posts in the Office of Management and Budget to fully review regulations from independent agencies.

II

Once Congress agrees on a law, what process should agencies use to implement the regulatory policy?

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[19] Press Release, Sen. Lankford, LANKFORD, JOHNSON CALL FOR OVERSIGHT OF INDEPENDENT AGENCIES' UNCHECKED REGULATIONS (Mar. 5, 2020).

[20] *See* Susan Dudley & Sally Katzen, *One Trump-Era Notion Biden May Want to Embrace*, WALL ST. J. (Jan. 3, 2021), https://www.wsj.com/articles/one-trump-era-notion-biden-may-want-to-embrace-11609710056 [https://perma.cc/V4JJ-FTJ4]; INST. FOR POL'Y INTEGRITY, STRENGTHENING REGULATORY REVIEW: RECOMMENDATIONS FOR THE TRUMP ADMINISTRATION FROM FORMER OIRA LEADERS (2016) (includes endorsements by Christopher C. DeMuth, Sally Katzen, John Graham, and Susan Dudley); Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5207 (Feb. 2, 1989); Benefit-Cost Analysis at Independent Regulatory Agencies, 78 Fed. Reg. 41352 (Jun. 13, 2013); Letter from the ABA Sec. of Admin. L. and Regul. Prac. to the White House Off. of Info. and Reg. Affs. (2009); ABA Section of Admin. L. and Regul. Prac., *Improving the Administrative Process: Report to the President-Elect of the U.S.*, 2016 A.B.A. SEC. OF ADMIN. L. REGUL. PRAC.

For 76 years the Administrative Procedure Act (APA) has served as the primary statute governing the regulatory process. The basic structure of the law is sound and has served us well for decades, but a lot has changed since 1946. If you only read the text of the APA it would be nearly impossible to understand the complexity of the rulemaking process. Although a well intentioned and a transformative piece of legislation that set guardrails for the administrative process, the APA's weaknesses have become clear over time.

As outlined above, when Congress chooses to delegate legislative authority to the Executive branch, presidential administrations are more than happy to run with it. The only question they ask is "how quickly can we act?" When Executive branch agencies create a new rule, the APA subjects them to a number of requirements, like public input. Unfortunately, the APA has multiple exceptions that allow for agencies to ignore or bypass these requirements, including enabling the circumvention of the public input requirement of notice and comment.

Agencies publish 3,000 to 4,000 rules each year, most years.[21] However, the Government Accountability Office (GAO) has found that about 35 percent of major rules and 44 percent of nonmajor rules are issued without a notice of proposed rulemaking inviting public comment before the rule takes effect.[22]

The "good cause exception"[23] was added to the APA to be used in very narrow and specific situations. As GAO points out, "In the 1946 Senate Judiciary Committee Report on the APA, the Senate Judiciary Committee described the grounds for a good cause exception to include both situations where an agency's mission would be hampered by notice and comment and where public comment would serve no useful purpose."[24] There are circumstances where notice and comment is impossible or not practical, such as when agencies must issue rules on a statutorily or judicially imposed deadline, or when there is a true emergency. Of course, agencies get to decide when it is an emergency or when they do not have enough time. Well intentioned exceptions can be abused by ambitious, impatient bureaucrats with unconstitutional administrative agendas.

Lately, agencies have just skipped the rulemaking process and released new "guidance" to institute new substantive policy.

From 2015 to 2021, I was the Chairman of the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, which devoted a significant amount of time to studying the use and abuse of guidance documents.[25]

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[21] CLYDE W. CREWS, JR., COMPETITIVE ENTER. INST., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (2021).

[22] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012).

[23] 5 U.S.C. § 553(b)(B).

[24] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012) (citing: ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 79-248, at 200 (1946)).

[25] *Examining the Use of Agency Regulatory Guidance Before the Subcomm. on Regul. Affs. and Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affs.*, 114th Cong. (2015); *Examining the Use of Agency Regulatory Guidance, Part II Before the Subcomm. on Regul. Affs. and Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affs.*, 114th Cong. (2016); *Continued Review of Agency Regulatory Guidance, Part III Before the Subcomm. on Regul. Affs. and Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affs.*, 114th Congress (2016).

Guidance is an important tool to give the public clarity on the meaning of regulations and statutes. The APA acknowledges that agency guidance is useful by exempting it from its notice and comment requirements. Therefore, when an agency chooses to issue a guidance document in lieu of rulemaking, it may, for example, publish it on its website, effective immediately.

But the benefit of guidance—that it bypasses notice and comment and therefore can be quickly issued—comes with a catch: guidance may not impose legal obligations on the agency or on the parties it regulates beyond those inherent in the rule it clarifies. Guidance must clearly flow from an existing regulation, and the regulations must flow from clear law; at least that is how it is supposed to work.

It should not be controversial to require agencies to simply label guidance as non-binding, provide the public a process for leaving feedback on a guidance, ensure all guidance documents are online and easily accessible, and conduct cost-benefit analysis, but it is. Guidance that is really a new rule may be terribly convenient for an Executive agency, it is just not legal.

III

Without question, the regulatory process needs significant reform to restore the balance of power in our government and to provide economic certainty to every American business, no matter how small. Debate over regulatory reform in Congress follows a frustrating pattern: outrage that an administration took a specific regulatory action leads to a discussion on how to prevent that exact action from happening again. Rarely do we look to the process that allowed such an action to occur in the first place.

Since I have been in the Senate, only a few regulatory reform bills have even made it out of committee, in either chamber, much less to a vote in the Senate. The closest thing to regulatory reform has been overturning specific rules using the Congressional Review Act procedure created in 1996.[26] For instance, Congress overturned the Bureau of Consumer Financial Protection's "Auto Lending" rule[27] and the Department of the Interior's "Stream Protection" rule[28] with a simple vote in 2017, but it was only a temporary patch on those particular issues. Congress must revisit the entire federal rulemaking process and not just hope that a future administration will practice self-restraint. My Small Business Regulatory Flexibility Improvement Act would reform the Regulatory Flexibility Act to require agencies take into account the full costs and cumulative impact their rules have a on a small business. Senator Portman's Regulatory Accountability Act would make needed reforms to the Administrative Procedure Act such as increased scrutiny of the most impactful rules, and Senator Paul's REINS Act would require agencies to get approval from Congress before issuing the most costly rules. All three of these bills would dramatically improve the accountability and certainty in rule making. But to really force government to consider the cost to taxpayers for each new rule, a regulatory budget would have to be implemented. Fortunately, we have an example of how a regulatory budget could work.

From 2017 to January 2021, Executive Order (EO) 13771 put a cap on regulatory costs and made agencies consider and offset the full impact of a new regulation before allowing its issuance. The

[26] Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 801-808.
[27] Act of May 21, 2018, Pub. L. No. 115-172.
[28] Act of Feb. 16, 2017, Pub. L. No. 115-5.

concept of Executive Order 13771 was straightforward: for every new regulation issued, two existing regulations had to be eliminated and no new regulatory costs could be placed on American citizens.[29] The 1-in-2-out standard received a lot of attention—especially since OIRA reported taking *5.5* deregulatory actions for every 1 new regulatory action—but the cost cap was the real teeth of the EO.[30]

The non-partisan think tank, American Action Forum, estimated the regulatory budget from 2017 to 2020 saved $164.7 billion for the taxpayers.[31] This is an impressive number, but it is not just theoretical. It amounted to real savings for American families. In 2020, the Council of Economic Advisors estimated that the more deliberate issuance of new regulations accompanied by the repeal of outdated and unnecessary regulations raised household incomes by $3,100 per year.[32] This is not about eliminating all regulations; that would be irresponsible and counterproductive. It is a straw man argument to say that a regulatory budget is secretly about purging all federal regulations. Instead, this idea is based on a substantive policy question. If a regulation does not make our workers or consumers safer and competition more fair, why are we raising the price of producing any product on people with limited incomes?

A regulatory budget can create an environment where regulated entities are not afraid of their government. Business and industry can plan long term capital investment and be innovative without fear of a regulator playing "gotcha." The American Action Forum stated this succinctly: "The reduced growth in new regulatory costs in turn signaled to businesses that they did not have to worry about a lot of new regulatory requirements and associated costs, and instead could focus on operating and growing."[33] The National Federation of Independent Business's quarterly survey of small businesses showed a sharp rise in business optimism starting in January 2017 that remained high until the onset of the COVID-19 pandemic in 2020.[34]

A regulatory budget is not a perfect solution, but it is necessary in our imperfect world. Anyone who says that every regulation ever issued by any agency of the federal government is still essential has not reviewed the federal register. Forcing agencies to conduct retrospective review of older regulations to make sure they are still essential, meaningful, and cost effective is entirely reasonable. Requiring agencies to evaluate the cost of regulation on American consumers before they add more restrictions is also entirely reasonable.

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[29] Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

[30] [OFF.] OF MGMT. & BUDGET, EXEC. [OFF.] OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf [https://perma.cc/6FRC-3UVK].

[31] Dan Bosch, *The Legacy of the Regulatory Budget*, AM. ACTION F. (Feb. 17, 2021) https://www.americanactionforum.org/insight/the-legacy-of-the-regulatory-budget/ [https://perma.cc/5FTW-S9GJ].

[32] Council of Econ. Advisers, Exec. [Off.] of the President, A Regulatory Reform Agenda That Benefits All Americans, (OCT. 22, 2020), https://trumpwhitehouse.archives.gov/articles/regulatory-reform-agenda-benefits-americans/ [https://perma.cc/TPW8-WFGP].

[33] Dan Bosch, *The Legacy of the Regulatory Budget*, AM. ACTION F. (Feb. 17, 2021) https://www.americanactionforum.org/insight/the-legacy-of-the-regulatory-budget/ [https://perma.cc/5FTW-S9GJ].

[34] William C. Dunkelberg & Holly Wade, *Small Business Economic Trends*, NAT'L FED'N OF INDEP. BUS. (JAN. 2022), https://assets.nfib.com/nfibcom/SBET-Jan-2022-Final.pdf [https://perma.cc/99NH-8DA2].

Regulatory restraint should not be a partisan issue. It was not in the past. Democratic Senator Lloyd Bentsen proposed the Federal Regulatory Budget Act in 1978 which was intended to "force agencies to choose the least costly way of achieving regulatory goals."[35] The push for a regulatory budget has been championed by OMB veterans[36] and senior government officials for decades.[37] It was a plank in the 2012 Republican presidential platform[38] and has gone through numerous iterations in bills introduced in both the House and the Senate.[39] Even Europe, not exactly a bastion of government restraint, has found success with a regulatory budget.[40] But until Executive Order 13771, a regulatory budget had never been implemented in the United States. Now we know it can be done and it can reduce the cost of living for everyday Americans by lowering the cost of unnecessary regulations on the products we buy. I do not know a single family who would not want an additional $3,100 per year in their pocket. This stimulus does not take from one taxpayer to give to another. It allows families keep their own money by spending less on necessities like vehicles, consumer goods, and healthcare.

It is important to remember that guidance flows from a regulation and must be derived directly from clear statutory language from Congress. An agency cannot create guidance or a regulation because "someone should do something." That someone is Congress and that something is a law. Judges need to stand by the law, not whoever is faster at "doing something." If Congress gave clear directives and regulators took all costs into account, the resulting regulations would be necessary and narrowly tailored. But clearly they are not. Actions implemented by one administration can be eliminated by the next. I will continue to urge my colleagues to pass real regulatory reform, starting with a proven successful regulatory budget.

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[35] 124 CONG. REC. 33,959 (1978).

[36] Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Review Preceding OIRA's Founding,* 63 ADMIN. L. REV. 37 (2011).

[37] Jeff Rosen, *Putting Regulators on a Budget*, NAT'L AFFS. (2016) https://www.nationalaffairs.com/publications/detail/putting-regulators-on-a-budget [https://perma.cc/RS95-KZ78].

[38] Tevi Troy, *Measuring the Drapes*, NAT'L AFFS. (2013) https://www.nationalaffairs.com/publications/detail/measuring-the-drapes [https://perma.cc/7ZAZ-NMSA].

[39] *See* Regulatory Accountability Act, S. 3208 116th Cong. (2020); National Regulatory Budget Act of 2014, S. 2153 113th Cong. (2014).

[40] Jeffery A. Rosen & Brian Callanan, *The Regulatory Budget Revisited,* 66 ADMIN. L. REV. 835, 856-859 (2014).

The Regulatory Budget in Theory and Practice: Lessons from the U.S. States

JAMES BROUGHEL*

This article provides a novel theoretical basis for a regulatory budget and compares the theory of regulatory budgeting with the implementation of these programs in U.S. states and the federal government during the Trump administration. The first half of the article is devoted to explaining how the cost analysis accompanying some regulatory budgets can be understood as measuring a form of allocative efficiency that corresponds with long-run social welfare. This welfare measure is different from what cost-benefit analysis measures, which is also sometimes confusingly characterized as a measure of efficiency. The second half of the paper evaluates real-world regulatory budgets implemented in U.S. states and compares them to the theoretical basis for a regulatory budget discussed in the earlier part of the article. A theoretically attractive regulatory budget will prevent regulations from being adopted unless they are cost saving (i.e., have negative costs), but states' regulatory budgets have typically been based on much simpler metrics than cost, and therefore fall short of this theoretical benchmark. At the same time, states' regulatory budgets have been more comprehensive than, for example, the incremental cost budget adopted during the Trump administration. The article concludes that governments should consider the tradeoffs inherent in regulatory budgeting. The simpler regulatory budgets found in states have had more success constraining the overall volume of rules, but without cost analysis, their theoretical basis is less compelling and the full scope of what reforms are accomplishing is not as transparent as it could be. In general, both the states and the federal government have much to learn from one another about the blending of theory and practice in regulatory budgeting.

I. INTRODUCTION

In January 2017, then-President Donald Trump signed Executive Order 13771,[1] creating the first federal regulatory budget in U.S. history. The executive order was perhaps most famous for its one-

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[1] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

in, two-out regulatory pay-as-you-go (PAYGO) provision, whereby two regulations would need to be eliminated for each new one implemented. A lesser-known, but arguably more important, provision of the order was that the Office of Management and Budget (OMB) would begin a process whereby regulatory agencies would receive annual cost allocations not to be exceeded with the agency's annual rulemakings. The overall cost cap for agencies was initially set at zero but would fall below zero in subsequent years,[2] meaning many federal agencies would be required to identify net cost savings through their regulatory actions.

Before the Trump administration's actual implementation of a regulatory budget, interest in regulatory budgeting likely peaked in the United States in the late 1970s and early 1980s. Robert Crandall of the Brookings Institution has been credited as "probably the first proponent" of a regulatory budget.[3] Democratic Senator Lloyd Bentsen introduced the Federal Regulatory Budget Act of 1978,[4] which would have created a role for Congress in setting regulatory cost allocations for agencies, akin to the role it plays in making fiscal appropriations.

At that time, there was considerable support for a regulatory budget throughout the U.S. federal government. President Jimmy Carter's 1980 Economic Report of the President references a regulatory budget as a potential means of improving priority setting.[5] The Joint Economic Committee of Congress issued a subsequent report endorsing a regulatory budget.[6] Thereafter, OMB circulated a draft Regulatory Cost Accounting Act in 1980.[7] Later, in 1992, John Morrall III, an OMB official, wrote a report for the Organisation for Economic Co-operation and Development endorsing a regulatory budget.[8]

These early proponents of regulatory budgets were noticeably bipartisan. This may have stemmed from the fact that addressing the economic stagflation of the 1970s was a bipartisan concern, and regulations were perceived as a possible contributor to that problem.[9] Democratic President Carter was responsible for deregulating trucking and airlines and for abolishing a federal agency, the Civil Aeronautics Board.[10] Although some bipartisan support for a regulatory budget has continued since the 1970s, that support has most recently grown more tepid. In the early 2010s, Virginia Senator Mark Warner, a Democrat, called for a regulatory PAYGO system, which would have required the economic impact of new regulations be offset by eliminating costs from existing

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[2] *Id.* at (2)(b).

[3] *See* JOHN F. MORRALL III, OFF. OF MGMT. & BUDGET, OECD REGULATORY MANAGEMENT AND REFORM SERIES NO. 2, CONTROLLING REGULATORY COSTS: THE USE OF REGULATORY BUDGETING, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 11 (1992); Robert Crandall, *Federal Government Initiatives to Reduce the Price Level*, *in* CURING CHRONIC INFLATION 165–204 (A. Okun and G. Perry eds., 1978).

[4] S. 3550, 95th Cong. (1978).

[5] COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT 125–26 (1980).

[6] JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96–44, at 52–54 (1979).

[7] OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REGULATORY COST ACCOUNTING ACT OF 1980 (1979).

[8] MORRALL III, *supra* note 3.

[9] *See* Crandall, *supra* note 3; *see generally* Thomas Hopkins & Laura Stanley, *The Council on Wage and Price Stability: A Retrospective*, 6 J. BENEFIT-COST ANALYSIS 400 (2015).

[10] *See* James Broughel & Robert W. Hahn, *The Impact of Economic Regulation on Growth: Survey and Synthesis*, 16 REG. & GOVERNANCE at 451 (2022).

regulations.[11] Outside of the United States, a broad array of countries, including Canada and the United Kingdom,[12] experimented with regulatory budgeting in the years leading up to Executive Order No. 13771 and since. However, most recent regulatory budget legislation introduced in Congress has come from Republican sponsors.[13]

In the U.S. context, a regulatory budget appears to have grown more controversial over time, perhaps because a regulatory budget is sometimes viewed as a competitor to cost-benefit analysis (CBA),[14] which has gained prominence over the past half century.[15] A regulatory budget involves placing a cap of some form on the overall volume of regulations or on some subset of regulations (such as new regulations). Sometimes the cap is placed on regulatory costs, meaning regulations may not proceed if their costs exceed some level (which could be positive, negative, or zero). In such cases, cost estimates or similar analyses are generally needed to determine whether regulations exceed the cap. In response, critics of regulatory budgets argue that regulatory budgets ignore benefits.[16] Supporters of the regulatory budget, meanwhile, tend to respond that whereas a regulatory budget does often involve analysis of costs, benefits of regulations are still considered because the net benefits estimated in CBA determine the priority in which regulations are implemented.[17]

This article takes a different view of the justification for a regulatory budget. Far from being a problem, it is an advantage that the cost analysis accompanying some regulatory budgets downplays the benefits side of the CBA ledger because the outcomes occurring in markets (which, out of convention, are often tallied on the cost side of the CBA ledger, with nonmarket outcomes on the benefits side) tend to be the determinants of whether a project improves allocative efficiency and social welfare over the long term. However, the linkages between efficiency, social welfare, and the factors considered in a cost analysis are not well understood, so this article seeks to explain these relationships in more detail. The paper begins by elaborating on the theoretical basis for a regulatory budget, starting with a discussion of its chief alternative, CBA. Next, the article reviews recent attempts to implement regulatory budgets in the U.S. states and considers how these efforts align with the theory of regulatory budgeting discussed in the first part of the paper.

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[11] *See* Sen. Mark R. Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html; *see also* Sen. Mark Warner, *Regulatory PAYGO*, https://www.warner.senate.gov/public/index.cfm/regulatory-PAYGO (last visited Sept. 1, 2021).

[12] *See* Can. Pub. Gen. Act 2015 C20; UK DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, BETTER REGULATION FRAMEWORK MANUAL (2015); *see also* Andrea Renda, *Regulatory Budgeting: Inhibiting or Promoting Better Policies*, in this series.

[13] *See* Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 849–55 (2014) (surveying regulatory budget legislation introduced over the years).

[14] *See generally* MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH (2020).

[15] Numerous executive orders from presidents of both major political parties have confirmed the place of cost-benefit analysis in policymaking over the past 50 years. *See* Exec. Order No. 12991, 46 Fed. Reg. 13193 (Feb. 17, 1981); Exec. Order No. 12866, 58 Fed. Reg. 190 (Sept. 30, 1993); Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

[16] *See* LIVERMORE & REVESZ, *supra* note 14; *see also* Cass Sunstein, *On Neglecting Regulatory Benefits*, 72 ADMIN. L. REV. 445 (2020); Sally Katzen, *Cost-Benefit Analysis Without the B: How Rewriting OIRA's Past Threatens Its Future*, 11 J. BENEFIT-COST ANALYSIS 49 (2020); Richard Pierce, Jr., *The Regulatory Budget Debate,* 19 N.Y.U. J. LEGIS. & PUB. POL'Y, 249 (2016).

[17] *See* John D. Graham, *A Future for Federal Regulatory Budgeting?*, 11 J. BENEFIT-COST ANALYSIS 55 (2020); *see also* Anthony Campau, *Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial U.S. Experience and Recommendations for the Future*, in this series.

In general, the theory and practice of regulatory budgeting diverge in significant ways. Former President Donald Trump's experiment with regulatory budgeting was more theoretically ideal in some respects than what has been going on in the states, due to an innovative form of cost analysis his administration implemented across the federal government. However, the Trump regulatory budget was also limited in terms of its scope because many regulations were allowed to escape the cost constraint.[18] By comparison, state regulatory budgets have tended to rely on much simpler metrics than cost, representing a deviation from the theoretical basis for a regulatory budget discussed in this article. But state regulatory budgets also tend to be cumulative, or nearly so. Thus, the regulatory caps imposed in states apply to the total stock of existing regulations or something close to the total stock, while the federal government took an incremental approach focused on new regulations only. Overall, the states appear to be having more success constraining and even reducing the overall volume of rules, suggesting simpler metrics sometimes work better at preventing regulatory accumulation. However, from a theoretical standpoint, this simpler approach creates a tension between an ideal regulatory budget in theory and the implementation of a successful regulatory budget in practice, because the theoretical basis for the simpler state regulatory budgets is less compelling.

This article is organized as follows. Section 2 offers a novel theoretical justification for a regulatory budget. The section begins by explaining why CBA, in practice, does not measure Kaldor-Hicks efficiency but rather is best understood as a social welfare function approach with roots in competitive general equilibrium theory. The social welfare function that forms the basis for CBA is then contrasted with one consistent with allocative efficiency, which is much closer to what the cost analysis accompanying regulatory budgets measures. Section 3 describes a series of recent regulatory budgeting reforms in the U.S. states. The section shows how these experiments deviate significantly from the theoretical basis for a regulatory budget discussed in section 2, because almost none of these efforts attempt to systematically measure the cost of regulations. Nevertheless, owing to the challenge of producing credible cost estimates for the entire stock of a government's existing regulations, the simpler metrics that states have adopted have some advantages over more complicated metrics like cost. Section 4 discusses lessons learned from the state and federal experiments with regulatory budgeting and concludes that the two levels of government have much to learn from each other. The states should move toward adopting cost analysis similar to that of the Trump administration, while the federal government should expand the scope of its regulatory budget to be cumulative rather than incremental, which may require the use of simpler metrics in some contexts. Section 5 concludes that although President Joe Biden subsequently dismantled Trump's regulatory budget,[19] the states will likely continue to move forward with and build on their reforms, and a future federal administration will almost certainly want to revive a regulatory budget given its strong theoretical foundations and its many significant advantages over competing tools like CBA.

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[18] *See* James Broughel & Laura Jones, *Effective Regulatory Reform: What the United States Can Learn from British Columbia* (Mercatus Ctr. at George Mason U., Research Paper, 2018).

[19] Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 25, 2021).

II. THE REGULATORY BUDGET IN THEORY

In this section, the welfare basis of CBA is considered and compared with the welfare basis for a regulatory budget. The confusing role of the term "efficiency" is discussed in both contexts.

A. The Cost-Benefit Analysis Social Welfare Function

The normative basis for regulatory budgeting cost analysis can be seen most clearly by first reviewing what its main alternative, CBA, measures and then comparing how the two forms of analysis are distinct from one another and how they are related. Sometimes, CBA is said to measure allocative efficiency.[20] However, this turns out to be misleading. Those making such claims are often referring to a particular notion of efficiency in economics known as Kaldor-Hicks efficiency.[21] However, this is not the only basis for CBA; in fact, there is no consensus among economists as to what CBA measures.[22] One group of economists would have CBA measure Kaldor-Hicks efficiency, while another, probably larger, group of economists would have CBA evaluate projects on the basis of an individualistic social welfare function in which society has a utility function similar to an individual's utility function.[23]

The two approaches sound different, but in terms of the actual production of an economic analysis, the analyst follows similar steps with both methods. The analyst begins by identifying and quantifying the beneficial and harmful impacts of a particular policy, regulation, or other action. He or she then attaches monetary values to those impacts based on a measure of individuals' willingness to pay for or accept those outcomes. These values are then entered into a utility function in order to calculate a present value of benefits and costs.[24] The critical difference between the two approaches hinges on how they interpret the utility function. From the perspective of those who see CBA evaluating Kaldor-Hicks efficiency, the utility function can be written as

$$U = \int_{t=0}^{\infty} \beta U(c_t) dt, \tag{1}$$

where the utility of the agent equals a continuous sum of discounted utilities. Utility is a function of consumption, c, and β is a discount factor equal to $e^{-\rho t}$. The parameter ρ is the rate at which the agent discounts future utility. A common utility function used by economists is

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[20] *See* John Graham, *Saving Lives Through Administrative Law and Economics,* 157 U. PA. L. REV. 395 (2008); *see also* Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153 (2000).

[21] J.R. Hicks, *The Foundations of Welfare Economics,* 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

[22] James Broughel, *The Mighty Waves of Regulatory Reform: Regulatory Budgets and the Future of Cost-Benefit Analysis*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 206 (2019).

[23] Kenneth J. Arrow, W.R. Cline, Karl-Göran Mäler, Mohan Munasinghe, R. Squitieri, & J.E. Stiglitz. *Intertemporal Equity, Discounting, and Economic Efficiency, in* CLIMATE CHANGE 1995: ECONOMIC AND SOCIAL DIMENSIONS OF CLIMATE CHANGE 125–44, 138 (James P. Bruce, Hoesung Lee & Erik F. Haites eds., 1996). It should be noted that achieving Pareto efficiency, which is distinct from Kaldor-Hicks efficiency, is a consideration in the social welfare function-based version of CBA. This is one of the ways the term "efficiency" can create confusion.

[24] This step occurs in the analysis when benefits and costs are discounted at a consumption rate of interest. There are various competing theories of social discounting, but the main ones all involve a consumption rate of interest. *See* James Broughel, *Rehabilitating the Opportunity Cost of Capital in Cost-Benefit Analysis* (Sept. 21, 2021) (working paper) (on file with the Mercatus Center at George Mason University).

$U(c) = \frac{c^{1-\theta}}{1-\theta}$, where θ is the consumption elasticity of marginal utility and is usually assumed to be greater than 1.[25] A θ value greater than 1 implies concavity of the utility function, risk aversion, and diminishing marginal utility of consumption.[26]

The purpose of entering costs and benefits into this particular utility function is to identify whether the project passes the Kaldor-Hicks test.[27] A project passes this test if those who gain from the project gain by enough to compensate those who lose such that, at least in theory, everyone affected by the project could be made at least as well-off or better than they were before the project was implemented. In this framework, the use of the utility function in equation (1) is often implicit. It takes place via the practice of discounting. Because benefits and costs do not all occur in the same time period, they are discounted at the rate the agent would trade present for future consumption (known as the consumption rate of interest), which in turn is determined by the parameters in the agent's utility function. The present value of benefits and costs then determines whether a project's returns are sufficient to return the agent to its pre-project level of lifetime utility.

This interpretation of the role of the utility function in CBA is problematic for several reasons. First, market interest rates are commonly used as a proxy for the agent's discount rate,[28] presumably because according to economic theory, rational, optimizing agents will set their own personal rate of discount equal to the market interest rate they face.[29] However, the use of market interest rates to discount benefits and costs in a CBA is typically a mistake. First, markets may not be in equilibrium. Deviations between market interest rates and agents' personal discount rates would make it inappropriate to substitute market rates for agents' rates of time preference (which is what the discount rate reflects). Relatedly, individuals impose externalities on other individuals through their savings decisions, meaning market interest rates are not efficient. Finally, financial markets are incomplete. So even if one assumes an equilibrium is reached, and there are no savings externalities, the incompleteness of financial markets ensures the resulting equilibrium will be inefficient and, therefore, should not be the basis for a general discount rate in CBA.

An even greater problem for this method is that there are a multitude of individuals in society and a multitude of different market interest rates facing these individuals, meaning a unique discount rate is likely needed for each and every person affected by a policy. One cannot simply assume that all agents have the same rate of time preference or face the same market interest rate, such that their preferences can be collapsed together into a single utility function. Doing so

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[25] For a review of recent estimates of this parameter for society, nearly all of which are over 1, see Mark A. Moore & Aidan R. Vining, THE SOCIAL RATE OF TIME PREFERENCE AND THE SOCIAL DISCOUNT RATE 8–10 (Mercatus Ctr. at Geo. Mason Univ., Mercatus Symposium, 2018), https://www.mercatus.org/system/files/moore_and_vining_-_mercatus_research_-_a_social_rate_of_time_preference_approach_to_social_discount_rate_-_v1.pdf.

[26] Via Jensen's inequality, the expected value of two points on a concave function is less than the value of the function at the expected value of the two points.

[27] *See* Broughel, *supra* note 24.

[28] For example, government guidelines on social discounting use market interest rates as a basis for discounting. *See, e.g.*, Circular A-4, Regulatory Analysis, 68 Fed. Reg. 58,366 (Oct. 9, 2003).

[29] This characteristic of equilibrium is captured by the famous Ramsey equation, which states that in equilibrium, the market interest rate r will be equivalent to $\rho + \theta\ (\dot{c}(t))/c(t))$, the agent's rate of time preference. *See also* James Broughel, *The Tradeoffs between Energy Efficiency, Consumer Preferences, and Economic Growth*, *in* REGULATION AND ECONOMIC OPPORTUNITY: BLUEPRINTS FOR REFORM 237 (Adam Hoffer & Todd Nesbit eds., 2021).

abandons what economists call *methodological individualism*.[30] Methodological individualism says that the economist in his or her model assumes that only individuals act. In the words of economists Donald Boudreaux and Randall Holcomb, "[c]ollections of individuals cannot be fused or aggregated together into a super-individual about whom economists and political philosophers can usefully theorize."[31] Because society is not an individual and does not have preferences like an individual, equation (1) cannot be credibly used as a stand-in to describe multitudes of peoples' utility functions collectively.

Moreover, even if one accepts this fusing together of individuals, the agent in the model represents only the present generation of citizens.[32] So future generations are not granted any weight in CBA according to this approach, except perhaps to whatever extent current citizens decide to care for them through altruism. One could defend the exclusion of future preferences as a matter of standing (i.e., as a normative matter of whose preferences should get counted in analysis),[33] but this view seems ethically dubious at a minimum, and perhaps economically dubious as well.

It should not be a surprise, therefore, that many economists abandon the Kaldor-Hicks rationale for CBA. Indeed, elite economists are often quite clear that they believe the Kaldor-Hicks compensation principle "is no longer accepted."[34] As an alternative, these economists typically base CBA on a particular social welfare function that is sometimes called an "individualistic social welfare function."[35] The method's core advantages over the Kaldor-Hicks basis for CBA are twofold. First, it has close connections to competitive general equilibrium theory.[36] When a market failure is present, in the sense that there is a deviation from the Pareto optimum achieved in general competitive equilibrium, policies guided by this particular social welfare function will move the economy toward that optimum (and hence toward achieving Pareto efficiency). Second, the approach makes no presumption about the current state of markets being efficient, complete or in equilibrium. Rather, the social welfare function simply identifies whether projects are desirable according to a particular objective function associated with some economists' notion of an idealized market economy.

Interestingly, the individualistic social welfare function is virtually identical to equation (1), except the interpretation of the utility function is different. Economists who adhere to this approach

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[30] James M. Buchanan, *The State of Economic Science*, *in* THE STATE OF ECONOMIC SCIENCE: VIEWS OF SIX NOBEL LAUREATES (Werner Sichel ed., 1989).

[31] DONALD J. BOUDREAUX & RANDALL G. HOLCOMB, THE ESSENTIAL JAMES BUCHANAN 6 (2021).

[32] Kenneth J. Arrow, *Discounting, Morality, and Gaming*, *in* DISCOUNTING AND INTERGENERATIONAL EQUITY 16 (Paul R. Portney & John P. Weyant eds., 1999) (noting how the agent in the Ramsey growth model represents a generation).

[33] On the issue of standing in CBA, *see* RICHARD O. ZERBE, JR. & ALLEN S. BELLAS, A PRIMER FOR COST-BENEFIT ANALYSIS 40–68 (2006).

[34] *See* Arrow et al., *supra* note 23, at 142.

[35] *Id.* at 138.

[36] *See* Kenneth Arrow, Partha Dasgupta, Lawrence Goulder, Gretchen Daily, Paul Ehrlich, Geoffrey Heal, Simon Levin, Karl-Göran Mäler, Stephen Schneider, David Starrett & Brian Walker, *Are We Consuming Too Much?*, 18 J. ECON. PERSPECTIVES 147, 150 (2004) (noting how the discounted utilitarian framework can be linked theoretically to a fully competitive decentralized market economy with a complete set of futures markets and no externalities); *see also* Anthony E. Boardman, David H. Greenberg, Aidan R. Vining & David L. Weimer, *Efficiency without Apology: Consideration of the Marginal Excess Tax Burden and Distributional Impacts in Benefit–Cost Analysis*, 11 J. BENEFIT-COST ANALYSIS 457, 459 (2020) (noting the connection between cost-benefit analysis and general equilibrium under conditions of "complete, competitive, and undistorted" markets).

explicitly abandon methodological individualism.[37] The parameters of equation (1) are therefore modified, such that the parameter ρ, the agent's pure rate of time preference, becomes δ, *society's* pure rate of time preference. Next, η captures *society's* inequality and risk aversion and is the social version of the parameter θ. By extension, the welfare measure CBA attempts to evaluate shifts from Kaldor-Hicks efficiency toward social welfare, as measured by this particular social welfare function (which, as noted, is confusingly associated with a competing notion of efficiency, known as Pareto efficiency). Social welfare as understood in this context is associated with a particular philosophical system known as *discounted utilitarianism*.[38] The approach can also be understood as incorporating *extended preferences*, meaning benefits and costs affecting individual members of society are aggregated together through the use of a theoretical social planner construct, an individual whose utility function equates with social welfare. Sometimes the planner is referred to as an external "deliberator."[39]

The notion of an impartial deliberator has a long history in normative economics and philosophy. Adam Smith referred in his writings to an impartial spectator,[40] as did Emanuel Kant.[41] In the 20th century, philosopher John Rawls promoted a notion of justice that incorporated the construct of an individual who makes choices from behind a veil of ignorance.[42] The role of this external deliberator is to judge outcomes in society from the basis of an original position, whereby the chooser does not know which individual he or she might be born as in society. This position purportedly frees the deliberator to be more objective about the consequences of particular actions. Rawls is the philosopher most commonly associated with this original position thought experiment, but economists used variants of this thought experiment before Rawls did so.[43]

A result of this extended preferences method of preference aggregation—having the outputs of individual preference orderings enter as inputs into an impartial deliberator's preference ordering—is that the social welfare function maintains an ordinal notion of utility, a convention to which many economists adhere.[44] The deliberator's preference ordering can be expressed using a

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[37] Kenneth Arrow, *Methodological Individualism and Social Knowledge*, 84 AM. ECON. REV. 1 (1994).

[38] *See generally* Kenneth J. Arrow, *Inter-Generational Equity and the Rate of Discount in Long-Term Social Investment*, *in* CONTEMP. ECON. ISSUES, 89–102 (Murat R. Sertel ed., 1999).

[39] See Matthew D. Adler, *Extended Preferences*, *in* THE OXFORD HANDBOOK OF WELL-BEING AND PUBLIC POLICY, 476–517 (Matthew D. Adler & Mark Fleurbaey eds., 2016); *see also* Kenneth J. Arrow, *Extended Sympathy and the Possibility of Social Choice*, 67 AM. ECON. REV. 1 (1977).

[40] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Printed for A. Millar, A. Kincaid & J. Bell, 1759).

[41] EMANUAL KANT, *IV*, *in* GROUNDWORK FOR THE METAPHYSICS OF MORALS 393 (Belknap Press of Harvard University Press, 1971).

[42] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[43] *See* William S. Vickrey, *Measuring Marginal Utility by Reactions to Risk*, 13 ECONOMETRICA 319 (1945); William S. Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q.J. ECON. 507 (1960); John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434 (1953); John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955).

[44] *See* Kenneth Arrow, Nobel Memorial Lecture—General Economic Equilibrium: Purpose, Analytic Techniques, Collective Choice 112 (Dec. 12, 1972) (noting how the ordinalist view became standard).

cardinal utility scale, but the cardinal values include only ordinal information,[45] since positive affine transformations of these values will contain the same information.[46]

Thus, the net benefit estimates produced by a CBA should not be interpreted as stating anything about the intensity of how much more socially valuable one project is as compared to another. Rather, the net benefits include information only about whether one project is preferred to another. The outputs of a CBA may be expressed in cardinal units in the sense that they are expressed in dollars, but those dollars are not ordinary dollars like those that exist in our wallets. They are not a measure of wealth, because CBA dollars—after discounting—contain only ordinal information about the relative ranking of projects.

The core drawback of the social welfare function approach to CBA is its normative nature. Thus, if one finds the individualistic social welfare function objectionable for any reason, one need not accept it. Next, we turn to whether there might be an alternative social welfare function that is more ethically defensible than the social welfare function that provides the best defense of CBA.

B. The Regulatory Budget Social Welfare Function

"Efficiency" is often mentioned by those who defend the normative basis for what CBA measures. However, efficiency is also routinely raised as one of the primary benefits of implementing a regulatory budget. Jeffrey Rosen and Brian Callanan argue that "a regulatory budget would better inform priority setting and enhance economic efficiency of regulation across agencies and programs."[47] Jim Tozzi, citing legal scholar Yair Listokin, argues that "bounded institutions," such as a regulatory budget, "may prove superior to traditional unbounded oversight methods" such as cost-benefit analysis.[48] The idea is that placing a constraint on an activity can force a process of prioritization, thus ensuring that scarce resources are directed from lower priority or less effective projects toward higher priority, more effective ones.[49]

However, there is a more direct line of connection between efficiency and a regulatory cost budget than the priority-setting mechanism described by these authors. A welfare measure corresponding with an intergenerational notion of Kaldor-Hicks efficiency has a close connection to what is measured by the cost analysis as part of a regulatory budget. An intergenerational welfare measure is desirable because virtually all public policies have some intergenerational

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[45] *See* William Baumol, *The Cardinal Utility Which Is Ordinal*, 68 ECON. J. 665 (1958) (here the deliberator is maximizing expected utility over "lotteries" that, in this case, represent the potential outcomes of policy under uncertainty, and their corresponding impacts on the underlying members of the community). *See generally* JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 617 (1944); *see also* Harsanyi (1955), *supra* note 43.

[46] *See* JOHN VON NEUMANN & OSKAR MORGENSTERN, at *Id.*

[47] *See* Rosen & Callanan, *supra* note 13, at 839.

[48] Jim Tozzi, *Office of Information and Regulatory Affairs: Past, Present, and Future*, 11 J. BENEFIT COST-ANALYSIS 1, 24–37 (2020); *see also* Yair Listokin, *Bounded Institutions*, 124 YALE L.J. 336, 367 (2014).

[49] The defense of regulatory budgets on the basis of forcing priority setting is common. *See, e.g.*, ROBERT LITAN & WILLIAM NORDHAUS, REFORMING FEDERAL REGULATION 140 (1983) (noting how a regulatory budget would encourage "regulators to transfer regulatory costs from low-yield to high-yield programs"); Christopher DeMuth, *The Regulatory Budget*, 4 REGULATION 29, 37 (1980), (stating that "[t]he most attractive feature of the regulatory budget is that it would establish a clear upper limit on the government's regulatory activities and clear priorities among its various health, safety, environmental, and economic ventures"); Susan Dudley, *Can Fiscal Budget Concepts Improve Regulation?* 19 N.Y.U. J. LEGIS. & PUB. POL'Y 259, 266 (2016) (stating that "[b]y 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").

effects. Policies, even temporary ones, displace capital investments that have effects over extended periods of time. Children today will be affected by policy in the future when they are adults, but their preferences are not represented in current markets because they have no ability to pay. People are continually being born and dying, so even policies with effects over very short time horizons have an intergenerational character to them. Finally, policy interventions change the identities of the individuals who are born.[50]

Given the problems identified with the *intra*generational Kaldor-Hicks basis for CBA discussed in the previous section (where standing was only granted to individuals with current ability and willingness to pay), one could ask whether there is instead a social welfare function that is consistent with an *inter*generational notion of efficiency. Kaldor-Hicks efficiency is sometimes defined as a state of affairs whereby the dollar value of social wealth is maximized.[51] A trademark characteristic of this welfare measure is that it treats one dollar the same irrespective of whose pocket happens to receive that dollar,[52] so it is insensitive to equity and distributional concerns. Thus, a social welfare function describing efficiency in this context would presumably maximize wealth, irrespective of its distribution.

A social welfare function with these characteristics can be found by setting the parameters δ and η in the individualistic social welfare function equal to zero (thereby giving equal treatment to each generation). In that case, the social welfare function collapses into a special case of the utilitarian social welfare function. The social welfare function becomes $SW = \int_{t=0}^{\infty} U(c_t)dt$, and it is now indifferent with respect to the timing of benefits and costs, because the social welfare function lacks the discount factor, β. If one further assumes that $U(c_t) = c_t$, and therefore that the first derivative of the utility function is $U'(c_t) = 1$, then the social welfare function is also completely indifferent to the level of consumption of those who gain and lose from a policy change (which may also vary over time). Like CBA presently, this particular social welfare function continues to be indifferent with respect to distributional concerns within a time period. Now, however, it is also indifferent across time periods.

Kaldor-Hicks efficiency as a welfare measure is often defended on the grounds of the potential compensation test.[53] In practice, the compensation is merely theoretical, which has led this welfare measure to be the subject of considerable criticism in the academic literature.[54] However, an intergenerational notion of allocative efficiency could be defended on alternative grounds, because it is consistent with utilitarianism. Thus, the body of philosophical support for utilitarianism would seem to provide support for this welfare measure too. Utilitarianism, while not universally

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[50] Tim Mulgan, *Utilitarianism and Our Obligations to Future People, in* THE CAMBRIDGE COMPANION TO UTILITARIANISM 326–30 (Ben Eggleston and Dale E. Miller eds., 2014); DEREK PARFIT, REASONS AND PERSONS (1984).

[51] *See* Posner, *supra* note 20, at 1153, referring to the Kaldor-Hicks notion of efficiency as "wealth maximization."

[52] Kaldor-Hicks efficiency "treats a dollar as worth the same to everyone." *Id.* at 1154.

[53] Robin Boadway, *The Welfare Foundations of Cost-Benefit Analysis*, 84 ECON. J. 926 (1974); E. J. MISHAN, *COST-BENEFIT ANALYSIS* 317 (1972).

[54] *See, e.g.,* John S. Chipman & James C. Moore, *The New Welfare Economics 1939–1974,* 19 INT. ECON. REV. 547 (1978); Amartya Sen, *The Welfare Basis of Real Income Comparisons: A Survey,* 17 J. ECON. LITERATURE 1, 24–25 (1979).

accepted, is perhaps the most prominent philosophical framework, and it is sometimes regarded as the framework against which all competing moral theories should be judged.[55]

In choosing to adopt the utilitarian social welfare function just described, one encounters certain challenges because utility streams can become infinite in value owing to the absence of discounting.[56] One way of dealing with these problems of infinite utility streams is to assess utility streams in terms of their value in the limit,[57] via what is sometimes called an *overtaking criterion*.[58] The overtaking criterion says that if one utility stream overtakes another and remains permanently above it, then that utility stream is preferred to the other.[59] Thus, the problem facing society becomes one of maximizing limiting utility, which can be expressed according to the rule

$$max\ SW = max \lim_{t \to \infty} U(c_t)\ , \qquad (2)$$

which states that social welfare is maximized when the terminal utility value is maximized.

As noted earlier, one of the primary criticisms leveled at a regulatory budget is that it neglects benefits. However, this criticism turns into an advantage if one's goal is maximizing limiting utility, because by restricting the analysis to the cost side of the ledger, the analyst has likely restricted the focus to those benefits and costs with the highest rate of return, which determine social welfare in the limit.

Note that out of convention, positive and negative outcomes related to items traded in markets are often counted on the cost side of the ledger in a CBA, while positive and negative outcomes relating to items that fall outside of market activity go on the benefits side.[60] The main characteristic of goods traded in markets is that they are exchanged for money, whereas returns to nonmarket goods come only in the form of utility. Even when nonmarket returns are ongoing, such as with many environmental benefits for example, benefits traded in markets still have an advantage in that their returns can be reinvested through financial markets while the nonmarket goods' returns cannot. Continual reinvestment of some portion of returns means the principal value of wealth grows over time, which increases the return in subsequent periods. This is the source of

[55] Utilitarianism "is one of the leading theories in recent and contemporary moral philosophy" and "arguably has the distinction of being the moral theory that, more than any other, shapes the discipline of moral philosophy and forms the background against which rival theories are imagined, refined, and articulated." Ben Eggleston & Dale E. Miller, *Introduction to* THE CAMBRIDGE COMPANION OF UTILITARIANISM 1 (Ben Eggleston & Dale E. Miller eds., 2014).

[56] For a classic discussion of these difficulties, *see* Tjalling C. Koopmans, *Stationary Ordinal Utility and Impatience*, 28 ECONOMETRICA 287 (1960).

[57] Graciela Chichilnisky, Geoffrey Heal & Andrea Beltratti, *The Green Golden Rule*, 49 ECON. LETTERS 175 (1995); Tyler Cowen, *Caring about the Distant Future: Why It Matters and What It Means*, 74 U. CHI. L. REV. 5 (2007).

[58] *See* Graciela Chichilnisky, *What is Sustainable Development?*, 73 LAND ECON. 467 (1997); Cowen, *supra* note 57.

[59] *See* Cowen, *supra* note 57, at 15 (noting how one sequence of values is preferred to another "if that former sequence, after some point in time and continuing for the future, remains systematically higher").

[60] *See* Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84130, 84145 (Dec. 23, 2020) (to be codified at 40 C.F.R. pt. 83) ("[S]ocial benefits and social costs are often evaluated separately due to practical considerations. The social benefits of reduced pollution are often attributable to changes in outcomes not exchanged in markets, such as improvements in public health or ecosystems. In contrast, the social costs generally are measured through changes in outcomes that are exchanged in markets.").

compounding growth.[61] Thus, market-based benefits and costs can leverage the power of compound interest to increase social welfare in a manner unavailable to most benefits and costs falling outside of market activity. The market-based benefits (or costs) will eventually overtake the nonmarket benefits (or costs) when such reinvestment occurs.

Although nonmarket outcomes from government policies or regulations conceivably can produce compounding benefits and costs, this is probably most likely in the context of catastrophic risks, which are also situations where it is debatable whether CBA is even an appropriate policy evaluation tool.[62] In most ordinary situations, one can reasonably conclude that an analysis focused solely on the cost side of the ledger will identify those benefits and costs with the highest rate of return. A regulatory cost cap can be understood as a requirement that regulations not be allowed to proceed unless the rate of return on a project's market-based impacts exceeds some rate. When the cost cap is set at zero, the rate of return must be positive. For this criterion to be evaluated, however, a cost analysis needs to be conducted so that the analyst can determine whether regulations are increasing or reducing costs. As the next section will explain, many regulatory budgets are not based on any measure of cost of all.

III. THE REGULATORY BUDGET IN PRACTICE

In recent years, a series of experiments with regulatory budgets has unfolded across U.S. states. These state efforts vary in their approaches but are similar in the sense that all are much simpler than the regulatory budget implemented under Executive Order No. 13771. The Trump administration's regulatory budget was an incremental cost budget, meaning it placed limits on the net costs that regulatory agencies could impose through *new* regulations. Incremental budgets do not take into account how the cost of old regulations might be evolving with time,[63] thus missing the continuing effects of past regulations. These continuing effects are likely to be substantial and cumulatively larger than the effects from the relatively much fewer new regulations that tend to be issued from year to year.[64] State experiments with regulatory budgets, in contrast to the federal experience, have often come in cumulative form, meaning they affect a broad swath of both new *and* existing regulations from executive agencies.

The simplicity of some state efforts might cause some to question whether they indeed constitute regulatory budgeting efforts. Few of these efforts involve estimates of costs, for example. For the purposes of this article, a regulatory reform effort is considered to include a regulatory budget if it placed a cap on regulation levels. Such a cap can come in different forms. It might come in the form of a PAYGO requirement, such as a one-in, one-out provision. It might come in the form of a reduction target, such as a goal to reduce regulatory restrictions by 30 percent. Or, it could involve more sophisticated cost offsets, akin to what the Trump administration implemented under

[61] *See generally* Broughel, *supra* note 24.

[62] Martin L. Weitzman, *Fat-Tailed Uncertainty in the Economics of Catastrophic Climate Change*, 5 REV. ENVTL. ECON. & POL'Y 275 (2011).

[63] *See* DeMuth, *supra* note 49, and Graham, *supra* note 17 (on the difficulties assessing the cost of existing regulations).

[64] *See generally* JAMES BROUGHEL, REGULATION AND ECONOMIC GROWTH: APPLYING ECONOMIC THEORY TO PUBLIC POLICY (2017) (on how the cumulative burden of regulations can slow economic growth); *see also* Bentley Coffey, Patrick A. McLaughlin & Pietro Peretto, *The Cumulative Cost of Regulations*, 38 REV. ECON. DYNAMICS 1 (2020); John W. Dawson & John J. Seater, *Federal Regulation and Aggregate Economic Growth*, 18 J. ECON. GROWTH 137 (2013); Broughel & Hahn, *supra* note 10.

Executive Order No. 13771. The unit of measurement, in other words, does not affect whether a reform is considered to include a regulatory budget or not for the purposes of this article.

A. Legislative Reforms (Virginia, Ohio, and Texas)

Some regulatory budgeting reforms have begun as pilot programs, focused on a subset of state regulatory agencies, before being expanded statewide. In Virginia, for example, as part of a Regulatory Reduction Pilot Program passed into law in 2018,[65] two state agencies, the Department of Professional and Occupational Regulation (DPOR) and the Department of Criminal Justice Services (DCJS), were required to produce a count of their total regulatory requirements.[66] These two agencies oversee about 8 percent of the sections in the Virginia administrative code,[67] meaning their rules constitute a small, but not insubstantial fraction of Virginia regulations. Both agencies engage in a significant amount of occupational licensing regulation. At DCJS, regulated professions are primarily in the public safety area.

The count in Virginia was done manually, in the sense of being accomplished by human beings rather than computers (as will be shown, some states rely on text analysis software to count regulations). Civil servants read through their respective departments' rules and counted each requirement in place. The 2018 law set a reduction goal for the two pilot agencies of 25 percent of requirements from initial levels. No further cuts were required from other departments, but all agencies subject to the state Administrative Process Act were required to produce counts of their own regulatory requirements by July 2020,[68] which set the stage for potential further reductions and possibly the implementation of a state-wide regulatory budget.

In late 2018, the two agencies in the pilot program produced counts of their regulatory requirements. Between the two departments, they had 6,226 requirements (2,730 at DPOR and 3,496 at DCJS).[69] The two agencies interpreted the required cuts as applying to *discretionary requirements*, that is, those whose issuance is not required by law but instead is at the discretion of the regulating agency. Together the two agencies identified 4,947 discretionary requirements between them (about 80 percent of total requirements) and aimed to cut 25 percent, which equates to a total reduction goal of about 1,200 requirements.[70]

A year later in 2019, DCJS reported a reduction of 10.14 percent.[71] According to a report issued at the time, the reductions were "achieved primarily by streamlining the application process for licenses, registration, or certifications."[72] Meanwhile, regulatory boards under DPOR reported a reduction of 9.78 percent, "primarily achieved by lowering barriers to entry into professions and

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[65] H.B. 883, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

[66] *Id*. "Regulatory requirement" is defined in Virginia as "any action required to be taken or information required to be provided in accordance with a statute or regulation in order to access government services or operate and conduct business."

[67] COMMONWEALTH OF VA., RD356—COMMONWEALTH OF VIRGINIA REPORT TO THE GENERAL ASSEMBLY ON THE REGULATORY REDUCTION PILOT PROGRAM 13 (Aug. 15, 2021).

[68] H.B. 883, *supra* note 65.

[69] *See* Letter from Aubrey L. Layne Jr., Virginia Secretary of Finance, to Members of the Virginia House of Delegates & Senate (Oct. 22, 2018).

[70] *Id*.

[71] COMMONWEALTH OF VA., RD403—PROGRESS REPORT ON THE REGULATORY REDUCTION PILOT PROGRAM 3 (Oct. 1, 2019).

[72] *Id*.

improving regulatory clarity."[73] The two agencies exceeded their reduction goals in 2019, as they had been seeking a reduction of 7.5 percent in order to meet benchmarks established in state law.

Reform efforts at these agencies were upended to some extent by the coronavirus pandemic in 2020; both departments claimed the pandemic disrupted regular meetings, affecting their progress.[74] Only DPOR achieved the 15 percent reduction that was mandated by law to be achieved by July 1, 2020. Moreover, the agency barely exceeded the target, with an overall reduction of 15.12 percent relative to the baseline count.[75] This reduction was achieved mainly by streamlining business registration processes; repealing certain reporting requirements; repealing a regulatory chapter; and eliminating certain badge requirements for apprentices of barbers, cosmetologists, and estheticians.[76] Meanwhile, DCJS reported a 12.87 percent reduction in 2020 relative to initial levels,[77] thereby missing its reduction target in 2020.

A final report was issued August 15, 2021, shortly after the July 1, 2021 deadline that signaled the end of the three-year pilot program.[78] That report noted that DPOR achieved a final reduction of 26.92 percent, exceeding the 25 percent target, while DCJS achieved a 14.14 percent reduction from initial levels, which, although not insignificant, was less than the 25 percent target.[79]

In a report, DPB provided more details about the nature of the cuts. DPOR oversees 18 boards that regulate more than 300,000 professionals. There was significant variation in reductions across boards, with reductions ranging from 0 percent to 100 percent (the natural gas automobile mechanics and technicians license was eliminated). Variation is explained, in part, because the number of discretionary requirements across boards varies from zero to hundreds of requirements. Interestingly, four boards oversee roughly 90 percent of DPOR regulated persons, and each of these boards saw significant reductions. These boards oversee contractors (16.3 percent reduction), real estate (16.5 percent), barbers and cosmetology (32.8 percent), and architects, professional engineers, land surveyors, certified interior designers and landscape architects (72.1 percent). See table 1.

Table 1. Regulatory Reductions at Boards within the Department of Professional and Occupational Regulation, Virginia

Board or occupation	**Baseline mandatory requirements**	**Baseline discretionary requirements**	**Cumulative requirements reduced (number)**	**Cumulative requirements reduced (percent)**
Department of Professional and Occupational Regulation	14	2	0	0.0

[73] *Id.*
[74] COMMONWEALTH OF VA., RD394—PROGRESS REPORT ON THE REGULATORY REDUCTION PILOT PROGRAM 3 (Oct. 1, 2020).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] COMMONWEALTH OF VA., RD356, *supra* note 67.
[79] *Id.* at 2.

Board for Contractors	37	129	21	16.3
Real Estate Board	111	79	13	16.5
Board for Barbers and Cosmetology	23	436	143	32.8
Board for APELSCIDLA	31	104	75	72.1
Common Interest Community Board	85	327	107	32.7
WWWOOSSP Board	14	120	8	6.7
Board for Asbestos, Lead, and Home Inspectors	173	123	82	66.7
Real Estate Appraiser Board	79	45	3	6.7
Board for Hearing Aid Specialists and Opticians	20	81	12	14.8
Fair Housing Board	14	16	2	12.5
Auctioneers Board	18	53	3	5.7
Board for Professional Soil Scientists, Wetland Professionals, and Geologists	34	51	10	19.6
Cemetery Board	33	43	9	20.9
Board for Waste Management Facility Operators	14	29	3	10.3

Polygraph Examiners Advisory Board	0	54	4	7.4
Board for Branch Pilots	16	47	1	2.1
Athlete Agents	0	0	n.a.	n.a.
Boxing, Martial Arts, and Professional Wrestling Advisory Board	30	209	2	0.96
Natural Gas Automobile Mechanics and Technicians	0	36	36	100.00
Total	**746**	**1,984**	**534**	**26.9**

Note: n.a. = not applicable; APELSCIDLA = Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects; WWWOOSSP = Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals.

Source: COMMONWEALTH OF VA., RD356—COMMONWEALTH OF VIRGINIA REPORT TO THE GENERAL ASSEMBLY ON THE REGULATORY REDUCTION PILOT PROGRAM (Aug. 15, 2021).

A deeper look at the cuts reveals more insights. DPOR reduced requirements by 534 in total—85 percent of these reductions from streamlining and 15 percent from eliminating requirements altogether. Thus, most of the counted "reductions" did not lead to an actual decline in the number of regulatory requirements in place, though they did likely lead to a reduction in real burdens, highlighting a drawback of using simpler metrics. Thus, final counts of discretionary regulatory requirements at this agency fell modestly from 1,984 discretionary requirements in 2018 to 1,951 discretionary requirements in 2021.[80]

In total, DPOR undertook 36 regulatory actions as part of the reduction effort. These involved repealing a regulatory chapter, reducing filing fees, allowing use of digital forms, and striking unnecessary language and consolidating duplicative requirements.[81] The Board for Professional and Occupational Regulation (which is under the oversight of DPOR) also issued a report to the General Assembly in late 2020, recommending that licenses for soil scientists, waste management

[80] *Id*. at 8.
[81] *Id*.

facility operators, and Common Interest Community Manager employees be eliminated because these programs already have national certifications.[82]

At DCJS, meanwhile, the agency was able to eliminate 130 requirements in their entirety and relax another 291, with 38 more requirements in the process of being eliminated as of mid 2021.[83] About half of the total reduction (210 requirements) related to private security.[84] Overall, however, discretionary regulations remained flat for the agency (2,977 in 2018 and 2,974 in 2021), again because reductions typically meant reducing the burden from the requirement, as opposed to eliminating the requirement altogether.

The lack of decline in regulatory requirements may also signal that DCJS was adding requirements even as some were taken away. DPOR's percentage of actions exempt from the state Administrative Process Act (APA) rose from 39 percent to 48 percent over the course of the pilot program, while the corresponding percentage for DCJS rose from 33 percent to 36 percent.[85] Actions exempt from the state APA are also exempt from review by DPB, the agency overseeing the pilot program. Thus, the high number of exemptions in Virginia may have hindered the effectiveness of the pilot program. DPB notes that more than half (51 percent) of Virginia regulations promulgated over the previous 15 years were exempt from the state APA.[86]

Thirty-nine additional executive agencies in Virginia were required to submit a regulatory baseline catalog as part of the pilot program, while 32 agencies were exempt from the pilot program.[87] Twenty-eight of the 39 agencies required to submit baseline catalogs submitted a complete catalog by July 1, 2020,[88] the date required by law. As of August 15, 2021, when the final DPB report was issued, 38 of the 39 required agencies had completed their catalogs (only the Virginia Employment Commission had not done so). Counts of regulatory requirements for the agencies whose catalogs are publicly available are presented in table 2. (Note that only 36 of the 38 agencies had data available online at the time these data were collected.)

Requirement counts vary from a few dozen at some agencies to well over 100,000 at the Virginia Department of Transportation. DPB cautions that counts may not be fully comparable across agencies, owing to discrepancies in the way that counts were conducted. The numbers are nevertheless instructive, especially within particular agencies. For example, about 66 percent of agency restrictions are discretionary, meaning the agency has the power to amend or remove the requirement without a change in state or federal law.

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[82] Board for Professional and Occupational Regulation, Final Report to the General Assembly: Evaluation of the Need for Continued Regulation of Certain Professions and Occupations as Recommended by the Joint Legislative Audit and Review Commission (Dec. 17, 2020). https://www.dpor.virginia.gov/sites/default/files/Reports%20and%20Studies/Final_BPOR%20JLARC%20Report_adopted%2012-17-20%20(1).pdf.

[83] COMMONWEALTH OF VA., RD356, *supra* note 67, at 10-11.

[84] *Id*.

[85] *Id.* at 13.

[86] *Id.*

[87] *Id.* at 3.

[88] *Id.* at 16.

Table 2. Regulatory Baseline Counts for Departments Subject to the State Administrative Process Act, Virginia

Agency	Discretionary requirements	Total requirements
Board of Accountancy	24	72
Department for Aging and Rehabilitative Services	721	1,829
Department for the Blind and Vision Impaired	43	496
Department for the Deaf and Hard of Hearing	72	87
Department of Agriculture and Consumer Services	5,742	5,777
Department of Behavioral Health and Developmental Services	2,559	3,038
Department of Conservation and Recreation	297	512
Department of Corrections	33	2,361
Department of Education	2,110	2,995
Department of Elections	83	603
Department of Environmental Quality	27,131	76,998
Department of Fire Programs	24	52
Department of Forensic Science	121	171
Department of Forestry	34	61
Department of General Services	3,205	5,222
Department of Health Professions	1,564	1,961
Department of Historic Resources	265	468
Department of Housing and Community Development	2,365	5,427
Department of Human Resource Management	—	—
Department of Juvenile Justice	7,271	7,513
Department of Labor and Industry	—	—
Department of Medical Assistance Services	11,667	17,537

Department of Mines, Minerals and Energy	2,795	3,917
Department of Motor Vehicles	830	991
Department of Social Services	2,963	6,860
Department of State Police	57	510
Department of Taxation	2,037	2,281
Department of the Treasury	82	270
Department of Transportation	118,082	136,316
Department of Wildlife Resources	77	723
Motor Vehicle Dealer Board	7	64
Office of the State Inspector General	22	121
State Council of Higher Education for Virginia	144	745
Virginia Alcoholic Beverage Control Authority	930	2,459
Virginia Birth-Related Neurological Injury Compensation Program	82	103
Virginia Department of Aviation	162	276
Virginia Department of Health	12,332	25,200
Virginia Employment Commission	—	—
Virginia Racing Commission	2,216	2,254

Note: — = not available.

Source: Virginia Regulatory Town Hall, https://townhall.virginia.gov/ (last visited May 6, 2022).

In its concluding report, DPB identified five areas where the pilot program could be improved. These relate to (a) inconsistency in counting of regulatory requirements across agencies; (b) a lack of certainty about the source of original authority for some regulations (meaning it is not always clear whether a particular requirement is mandated by law or exists at the discretion of the regulating agency); (c) the high number of agencies claiming their rules are exempt from the state APA or the pilot program (leading to confusion about which agencies are required to comply with the pilot program); (d) inconsistent treatment of requirements incorporated by reference in the administrative code (leading to confusion about how these requirements should be reported in baseline catalogs); and (e) inconsistent compliance with existing periodic review requirements.

To address these challenges, DPB recommended the legislature provide clarity going forward about when regulations are considered mandatory versus discretionary and about who is exempt from the state APA and pilot program. In its final report, DPB fell short of recommending the pilot program be expanded, noting that until some of these issues are resolved, a continued pilot reform program will be less effective than it could be. DPB also noted that making changes to the existing

periodic review process is an alternative to expanding the pilot program, since not all agencies are complying. DPB found 12 agencies in full compliance with the existing 4-year review requirement for existing regulations, 22 in partial compliance, and 11 not in compliance.[89]

Despite these challenges, significant reductions do appear to have occurred in Virginia, especially at DPOR, which was able to officially meet its reduction goal of 25 percent. Moreover, the baseline catalogs produced by 38 state agencies make Virginia well positioned to expand the pilot program. Indeed, in January of 2022, upon taking office, Governor Glenn Youngkin expanded his predecessor's regulatory reform effort by extending the pilot program to all executive branch agencies under the authority of the governor. This meant these agencies would have to initiate a process to reduce regulations not mandated by federal or state statute by 25 percent.[90] The fact that this reform has extended through multiple administrations of different political parties may bode well for the regulatory budget in Virginia.

A second notable legislative reform was passed in Ohio in 2019 and expanded in 2022.[91] A provision was inserted in the state budget in 2019 that required state agencies to produce base inventories of their regulatory restrictions, where rules that include the words "shall," "must," "require," "shall not," "may not," and "prohibit" were defined as including regulatory restrictions. While there was no requirement that these reports be made public, many subsequently appeared online (*see infra* Table 4 in Section 4),[92] and the Ohio Legislative Services Commission released a summary of the catalogs in early 2021 (*see* Table 3). That report found that state agencies had identified 9,944 rules with restrictions, which included 155,073 restrictions in total.[93] The 2019 Ohio legislation also implemented a PAYGO requirement, initially in place until June 30, 2023, whereby a state agency may not adopt a new regulatory restriction unless it simultaneously removes two other restrictions.[94]

The initial stages of the reform appear to have mostly gone smoothly. Regulatory agencies produced baseline catalogs. When agencies promulgate a new regulation, they fill out a rule summary and fiscal analysis form, which asks, among other things, whether they are adding or removing regulatory restrictions, and if so, how many.[95] This appears to ensure compliance with the PAYGO provision. According to the Joint Committee on Agency Rule Review, which is tracking progress of the law, agencies subject to the 2-for-1 requirement added 378 restrictions, while removing 1,802, as of August 24, 2021.[96] That is a ratio of about 4.8 to 1.0, well in excess of the 2-for-1 requirement. An analysis of regulatory restrictions based on the Mercatus Center's State RegData project, using similar but not identical terms to those found in the Ohio legislation, found that Ohio

[89] *Id*. at 17–18.

[90] VA. EXEC. DIRECTIVE ONE (January 15, 2022).

[91] H.B. 166, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019); S.B. 9, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-2022).

[92] *See, e.g.*, OHIO DEP'T OF AGING, BASE INVENTORY OF REGULATORY RESTRICTIONS (Nov. 2019); OHIO DEP'T OF HIGHER EDUC., BASE INVENTORY OF REGULATORY RESTRICTIONS (Dec. 2019); OHIO DEP'T OF DEVELOPMENTAL DISABILITIES, BASE INVENTORY OF REGULATORY RESTRICTIONS (Dec. 2019); OHIO DEP'T OF HEALTH, BASE INVENTORY OF REGULATORY RESTRICTIONS (Dec. 2019).

[93] OHIO LEGIS. SERV. COMM'N. S.B. 9, 134th Gen. Assemb., Fiscal Note & Local Impact Statement (Feb 2, 2021).

[94] H.B. 166, *supra* note 91.

[95] *See* OHIO REV. CODE § 106.024. The Ohio Rule Summary and Fiscal Analysis form is available online at http://www.jcarr.state.oh.us/assets/files/all-rule-summary-and-fiscal-analysis-rsfa-forms-7-27-21-627.pdf (last visited Aug. 24, 2021).

[96] Joint Comm. on Agency Rule Review, *Regulatory Restrictions Report* (Aug. 24, 2021).

had 274,470 restrictions in administrative rules in 2020.[97] In 2021, this number has fallen to 263,349,[98] representing a decline of about 11,000 restrictions, or four percent of the 2020 total.

Perhaps due to these successes, in 2022 the reforms in Ohio were expanded significantly.[99] The legislature passed a law requiring state agencies to reduce regulatory restrictions by 30 percent over a three year period. The reductions would be achieved relative to the counts tabulated in agencies' baseline catalogs under the 2019 law. Once the 30 percent reduction is achieved, this becomes a new ceiling on the number of regulatory restrictions going forward. The 2022 legislation also extended Ohio's 2-for-1 PAYGO policy through June 30 of 2025.

Table 3. Agency Counts of Regulatory Restrictions, Ohio

Agency	**Number of Rules with Restrictions**	**Number of Regulatory Restrictions**
Environmental Protection	1,226	26,123
Public Utilities Commission	632	22,627
Health	767	13,637
Job and Family Services	870	10,004
Public Safety	663	9,602
Commerce	725	9,235
Natural Resources	890	8,747
Workers' Compensation	333	8,290
Agriculture	716	7,571
Racing Commission	578	6,718
Medicaid	327	6,260
Education	301	3,652
Insurance	114	3,324
Developmental Disabilities	119	2,828
Mental Health and Addiction Services	168	2,792
Rehabilitation and Correction	215	2,644
Aging	143	1,842
Taxation	174	1,538
Administrative Services	274	1,507

[97] Kofi Ampaabeng & James Broughel, *A Snapshot of Regulation in Great Lakes States* 3 (Mercatus Ctr. at George Mason U., Policy Brief, 2021).

[98] Patrick A. McLaughlin, Jonathan Nelson, Thurston Powers, Walter Stover & Stephen Strosko, State RegData 2.1 (dataset), QuantGov (Mercatus Ctr. at George Mason U., 2021), https://www.quantgov.org/state-regdata (last visited Aug. 23, 2021).

[99] *See* OHIO S.B. 9, *supra* note 91.

Youth Services	93	1,286
Casino Control Commission	223	1,204
Development Services	136	992
Higher Education	61	895
Transportation	91	886
Lottery Commission	83	531
Budget and Management	8	283
Veterans Services	14	55
Total	**9,944**	**155,073**

Source: OHIO LEG SERV COMM'N. S.B. 9, 134th General Assembly, Fiscal Note & Local Impact Statement (Feb 2, 2021).

Texas is another state to have implemented a regulatory PAYGO requirement through legislation.[100] Texas's one-in, one-out policy, passed in 2017, is permanent and, given the timing, it was likely inspired by Executive Order No. 13771's one-in, two-out requirement, the implementation of which preceded the Texas law by only a few months.[101] Texas's law states that a state agency may not adopt a proposed rule for which the fiscal note states that the rule imposes positive costs, unless the state agency repeals or amends a rule to decrease the total cost by an amount that is equal to or greater than the cost imposed by the new rule.[102] Texas's reform has two notable aspects. First, of the state reforms reviewed in this article, it is the only one to be based on cost offsets. Second, the Texas law includes many broad categories of exemptions, which likely substantially limits the number of regulations offset. For example, the offset requirement does not apply when a rule "is necessary to protect the health, safety, and welfare of the residents of this state,"[103] which may grant regulators significant leeway to avoid the offset requirement. Nevertheless, Texas is notable for having, alongside Ohio, one of the only legislatively-mandated regulatory PAYGO requirements in the nation.

B. Executive Reforms (Kentucky, Missouri, Oklahoma, and Arizona)

Several state regulatory budgeting experiments have come in the form of red-tape reduction efforts instituted by governors, often, but not always, through the issuance of an executive order. One of the first states to do so in recent years was Kentucky, whose Red Tape Reduction initiative began in 2016 under the leadership of then-Governor Matt Bevin.[104] The Kentucky reform is notable for having preceded the reforms of the Trump administration. As part of Kentucky's efforts, cabinet agencies were required to conduct a review of their regulations. To promote its efforts, the state created a website where members of the public could submit ideas about improvements for

[100] TEX. GOV'T CODE § 2001.0045.

[101] *New Texas Law Reflects Trump Executive Order*, LONE STAR VOICE, Jul. 10, 2017.

[102] TEX. GOV'T CODE § 2001.0045.

[103] TEX. GOV'T CODE § 2001.0045(c)(6).

[104] Press Release, Kentucky Cabinet for Economic Development, Gov. Matt Bevin Unveils Red Tape Reduction Initiative to Attack Outdated, Unnecessary Business Regulations (Jul. 6, 2016).

regulations. State employees were similarly asked to assist in the effort by identifying burdensome regulations.[105] Governor Bevin set a verbal goal of reducing regulations by 30 percent,[106] and according to the administration, of more than 4,700 Kentucky regulations initially on the books, 617 had been repealed and 661 had been amended as of May 2019.[107] In total, 27 percent of rules were either repealed or amended up to that point, coming close to Governor Bevin's 30 percent goal. However, a count of regulatory restrictions revealed regulatory agencies in Kentucky succeeded in cutting about 9 percent of restrictions by 2020.[108] This amount was less than the goal that Governor Bevin had set, though larger than reductions that took place at the federal level under President Trump. The number of regulatory restrictions actually rose during the Trump administration from 1,079,651 on January 23, 2017, to 1,089,742 on January 20, 2021.[109]

One reason for the difference between the 27 percent amended or repealed figure and the 9 percent reduction in regulatory restrictions is that different measures are used.[110] The former is based on counts of regulations, while the latter is based on counts of terms. The former also includes amended rules while the latter is a measure of aggregate restrictions reduced. Similar to what may have happened in Virginia, new regulations could have continued to be added during the time of the review, thereby offsetting some of the administration's efforts to reduce regulation levels. The reduction target of 30 percent was not legally binding either. Governor Bevin lost reelection in 2019, which brought an end to the red tape reform in Kentucky, highlighting the lack of permanence to some reforms implemented via executive actions.

Missouri's No MO Red Tape initiative is another example of a red-tape reduction reform. The program was initiated via a 2017 executive order signed by then-governor Eric Greitens.[111] Missouri's effort included a measure of regulation to track its progress—a "regulatory restriction," which is a metric from the RegData project from the Mercatus Center.[112] A regulatory restriction is defined as instances of terms "shall," "must," "may not," "prohibited," and "required" found in regulatory text. Governor Greitens also announced a 33 percent reduction target.[113] Like Kentucky, Missouri created a website, which included information about the state's regulatory count and allowed members of the public to submit information about problematic regulations.[114] One notable aspect of Missouri's reforms was the extensive outreach efforts undertaken to solicit information about regulations that were bothering the public. Leaders in Missouri set a goal for themselves to

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[105] *Id*.

[106] Matt Bevin, Opinion, *State Red Tape Initiative's Goal Is to Reduce Regs by 30 Percent*, PADUCAH SUN, Aug. 22, 2016.

[107] James Broughel, *Tracking the Progress of Kentucky's Red Tape Reduction Initiative* (Mercatus Ctr. at George Mason U., Policy Brief, 2019).

[108] Kofi Ampaabeng, James Broughel, Ethan Greist, Patrick Mclaughlin, Jonathan Nelson, Walter Stover, Stephen Strosko & Hayden Warlick, *A Policymaker's Guide to State RegData 2.0* (Mercatus Ctr. at George Mason U., Policy Brief, 2020).

[109] United States Federal Regulation Tracker (dataset), Quantgov (Mercatus Ctr. at George Mason U., 2021), https://www.quantgov.org/federal-us-tracker (last visited April 9, 2021).

[110] On various regulatory measures used in regulatory budgeting, *see* Laura Jones & Patrick A. McLaughlin, *Measurement Options for Regulatory Budgeting*, in this series.

[111] Missouri Exec. Order No. 17-03 (Jan. 10, 2017).

[112] Omar Al-Ubaydli & Patrick McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations for all United States Industries and Federal Regulations, 1997–2012*, 11 REG. & GOVERNANCE 109 (2017).

[113] *State Agencies Still Considering Rules Cutbacks*, NEWS TRIBUNE, Jan. 14, 2019.

[114] Justin D. Smith, *Regulatory Reform at the State Level: A Guide to Cutting Red Tape for Governors and Executive Branch Officials*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 276 (2019).

receive at least 100 public comments per agency.[115] This goal was exceeded at most agencies, and 5,765 public comments were received in total.[116] This number is sizable when one considers that the number of comments received in six previous state regulatory reviews exceeded 1,000 in only one instance.[117] Overall, regulatory restrictions fell in Missouri from a high of 134,702 to 93,915,[118] a cut of more than 30 percent that was in line with the goal of Governor Greitens to reduce restrictions by one-third. Also noteworthy is that the red-tape cutting effort continued into the term of Governor Greitens's successor, Mike Parson.[119]

One prominent feature of Missouri's reforms is that reductions varied significantly by regulatory agency. By early 2019, the Department of Transportation had cut restrictions by 57 percent, while the Department of Conservation had cut them by just 1 percent.[120] This variation suggests that reductions may be harder to achieve at some agencies than others. This could also explain, for example, why DCJS in Virginia, a public safety regulator, had more difficulty making cuts than did an agency regulating professions, many of which do not have an obvious connection to health or safety. Examples of eliminated restrictions in Missouri included a rule requiring car dealers to have a landline telephone, another requiring milk haulers to attend an in-person training class, and one requiring applicants for a manufacturing incentive program to present evidence of a written offer from another state.[121] Although these requirements on their own seem minor, thousands of such requirements, eliminated together, may have significant economic effects.

Oklahoma is a state that is notable for including an explicit reduction target codified in an executive order.[122] Like Kentucky and Missouri, Oklahoma also created a website for what it called its Break the Tape initiative. The website allowed for members of the public to submit comments about problematic regulations.[123] The 2020 executive order includes a number of regulatory budgeting elements.[124] First, the order contains a baseline count of regulatory restrictions for the state. Second, the order includes a reduction target of 25 percent. Third, it includes a one-in, two-out regulatory PAYGO provision.

Arizona's Regulation Rollback initiative is perhaps most notable for a regulatory moratorium the state put in place in 2015, which was subsequently extended each year from 2016 through 2022 through the issuance of an annual regulatory reform executive order.[125] In 2020, Governor Doug

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[115] *Id*. at 290.

[116] *Id.* at 291.

[117] *Id*. at 282.

[118] Ampaabeng et al., *supra* note 108.

[119] Governor Mike Parson, Greitens's successor, continued to tout the success of the red tape reforms. *See, e.g.*, Press Release, Office of Governor Michael L. Parson, *Governor Parson Joins Second Lady Karen Pence on Briefing Call Regarding White House Principles on Workforce Freedom and Mobility* (Jan. 17, 2020), https://governor.mo.gov/press-releases/archive/governor-parson-joins-second-lady-karen-pence-briefing-call-regarding-white.

[120] Smith, *supra* note 114, at 294.

[121] *Id*. at 295.

[122] Oklahoma Exec. Order No. 2020-03 (Feb. 3, 2020).

[123] *Help Oklahoma Grow: Break the Red Tape of Regulation* (Oklahoma Break the Tape Initiative) https://breakthetape.ok.gov/ (last visited Apr. 13, 2022).

[124] For a description of some of the key items identified as contributing to successful red tape reduction efforts, *see* James Broughel, *Constructing a Red Tape Reduction Executive Order* (Mercatus Ctr. at George Mason U., Policy Brief, Feb. 2021); James Broughel, *A Step-by-Step Guide to Using Mercatus Tools to Reduce State Regulation Levels* (Mercatus Ctr. at George Mason U., Policy Brief, Apr., 2017).

[125] Arizona Exec. Order No. 2022-01 (Jan. 19, 2022).

Ducey's executive order contained a one-in, three-out regulatory PAYGO provision, whereby the ins and outs are measured via rule requests.[126] The one-in, three-out provision was extended in subsequent years and, in 2021, was also accompanied by a provision requiring regulatory agencies to review regulations suspended during the COVID-19 pandemic to determine if suspensions should be made permanent.[127] The moratorium in Arizona is similar to a moratorium that has been in place in Indiana since 2013, which has extended through multiple governors' terms, despite being instituted via executive order.[128] To date, the Arizona moratorium has existed under one governor, Governor Ducey.

C. Regulatory Review Commissions (Mississippi, Illinois, and New Jersey)

Some state regulatory reforms can be viewed as steps in the direction of a regulatory budget, without formally meeting the definition of a regulatory budget established in this article. Three states are worth noting for their recent attempts to establish commissions to review existing regulations. A regulatory review commission could be viewed as a possible oversight authority overseeing a regulatory budget's implementation or, alternatively, as a mechanism for reviewing existing rules distinct from a regulatory budget.

Mississippi's Tackle the Tape initiative is similar to Virginia's pilot program due to its focus on occupational licensing regulators. In 2017, the Mississippi legislature created an Occupational Licensing Review Commission (OLRC) to review new occupational regulations.[129] In 2020, the legislature expanded OLRC's powers, granting it authority to also review *existing* licensing regulations from the 29 state boards under the purview of OLRC.[130] OLRC has the authority to force changes to rules, including the removal of regulations.[131] The commission is populated by several executive branch officials, including the governor and attorney general, but seems to be mainly overseen by the Secretary of State, who created the Tackle the Tape initiative in 2020.[132] That effort featured a website similar to those created in Kentucky, Missouri, and Oklahoma.[133] One notable amendment to OLRC's review process occurred in 2021, when OLRC passed an amendment requiring boards under its purview to submit a regulatory impact assessment along with rules that are under review.[134] The OLRC has also set a goal to review the regulations of all 29 boards under its authority by 2029.[135]

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[126] Arizona Exec. Order No. 2020-02 (Jan. 13, 2020).

[127] Arizona Exec. Order No. 2021-02 (Feb. 12, 2021).

[128] Indiana Exec. Order No. 13-03 (Jan. 14, 2013).

[129] H.B. 1425, 2017 Gen. Assemb., Reg. Sess. (Miss. 2017).

[130] H.B. 1104, 2020 Gen. Assemb., Reg. Sess. (Miss. 2020).

[131] James Broughel & Patricia Patnode, *Taming the Occupational Licensing Boards and Creating Jobs*, DISCOURSE MAGAZINE (Feb. 10, 2021), https://www.discoursemagazine.com/economics/2021/02/10/taming-the-occupational-licensing-boards-and-creating-jobs/.

[132] Office of Michael Watson, Secretary of State, *Y'all Politics: Secretary of State Watson announces "Tackle the Tape" Initiative* (Jul. 30, 2020), https://www.michaelwatson.ms/yall-politics-secretary-of-state-watson-announces-tackle-the-tape-initiative.

[133] Mississippi Secretary of State, Tackle the Tape, https://www.sos.ms.gov/content/tacklethetape/default.aspx (last visited Apr. 13, 2022).

[134] Anne Summerhays, *Mississippi Secretary of State Watson's "Tackle the Tape" Initiative marks one year*, Y'ALL POLITICS (June 30, 2021), https://yallpolitics.com/2021/06/30/mississippi-secretary-of-state-watsons-tackle-the-tape-initiative-marks-one-year/.

[135] Press Release, Mississippi Secretary of State, *Secretary Watson Announces 29 by 29 Strategic Plan for Tackle the Tape Initiative* (Jan. 19, 2022).

Illinois Governor Bruce Rauner instituted a red-tape cutting effort in 2016, and as part of that effort, he created the Illinois Competitiveness Council.[136] The Council was comprised of a Chair, who came from the governor's office, as well as ten other members of the governor's cabinet. The Council oversaw a government-wide review of existing regulations that was conducted by state agencies.

During Chris Christie's tenure as governor of New Jersey in the early 2010s, a Red Tape Review Group and subsequent Red Tape Review Commission were created.[137] Legislation that would have created a permanent regulatory review commission in New Jersey passed both chambers of the New Jersey legislature in 2021, before being vetoed by Governor Philip Murphy.[138]

The reforms in Mississippi, Illinois, and New Jersey may not officially constitute regulatory budgeting efforts, because none of them involved placing a cap or setting a reduction target on regulation levels. However, they are similar to the previous state efforts in terms of their emphasis on red-tape cutting. Moreover, creating commissions to oversee a regulatory reform effort, could inform how regulatory budgeting schemes are governed in the future, and since the Mississippi OLRC is still relatively new, it is conceivable it could adopt a regulatory budget in the future.

D. The Regulatory Reset in Idaho

One of the more novel regulatory reforms to take place in recent years happened in Idaho.[139] In 2019, newly elected Governor Brad Little signed an executive order creating a red-tape reduction program, which included a one-in, two-out PAYGO policy.[140] Idaho is a somewhat unique state in that it also has a sunset provision whereby the entire state administrative code expires each July 1 unless the code is extended for an additional year through legislative action.[141] For the first time since the sunset provision was created, in 2019 the legislature ended its session without passing a reauthorization bill, which meant that the governor at that time was put in a unique position to reauthorize only those regulations his administration deemed worthy of reauthorization (albeit with the significant added constraint of maintaining compliance with existing statutory obligations). One study summarized the results as follows:

> All told, 19 percent of rule chapters, 10 percent of pages, and 19,000 regulatory restrictions were allowed to expire on July 1 of 2019. Remaining rules were extended through the issuance of emergency regulations promulgated by the executive branch. The governor's office later claimed that in 2019 it cut or simplified 75 percent of all rules and eliminated 250 rule chapters, 1,804 pages of regulations, and close to 31,000 regulatory restrictions. By 2022, the governor claimed to have cut or simplified 95% of Idaho regulations. Consequently, as

[136] Illinois Exec. Order No. 2016-13 (Oct. 17, 2016).

[137] Governor Chris Christie, New Jersey Exec. Order Nos.1, 3 (Jan. 20, 2010); Acting Governor Kim Guadagno, New Jersey Exec. Order No. 41 (Sept. 23, 2010).

[138] A.B. 4810, 2021 Gen. Assemb., Reg. Sess. (N.J. 2021).

[139] James Broughel, *Zero-Based Regulation* (Mercatus Ctr. at George Mason U., Mercatus Research, forthcoming).

[140] Idaho Exec. Order No. 2019-02, Red Tape Reduction Act (Jan. 21, 2019).

[141] *See* IDAHO CODE § 67-5292 (2019). Tennessee, Utah, and Colorado have similar one-year sunset provisions for some or all rules. *See* TENN. CODE ANN. § 4-5-226(a) (2019); UTAH CODE ANN. § 63G-3-502(2) (LexisNexis 2019); COLO. REV. STAT. § 24-4-103(8)(c) (2019).

a result of these reforms, Idaho became the least regulated state in the nation by some measures.[142]

The Idaho government focused on a variety of metrics to track their progress including not only the quantity of regulatory restrictions eliminated, but also other measures such as a count of total pages and chapters.[143] The Idaho reforms received national attention,[144] but they seemed to go relatively smoothly, at least on the basis of a lack of obvious negative press.

In early 2020, Governor Little rescinded the 2019 executive order and replaced it with one titled "Zero-Based Regulation" which aimed to institutionalize some of the successes from the prior year.[145] The main elements of the 2020 executive order were the implementation of a permanent regulatory cap and a five-year retrospective review process that required, as part of reviews, that agencies rescind rule chapters and reissue them in updated form if rules are to be maintained. Together with reissued rules, a retrospective analysis is required.[146] Thus, similar to how the entire state administrative code was repealed and replaced in 2019, agencies were now required to periodically repeal and replace their administrative rule chapters. Both the 2019 and the 2020 reforms may have been inspired by an earlier reform that occurred at the Idaho Board of Pharmacy in 2018. As part of that effort, the agency repealed and rewrote its rulebook, in the process repealing six categories of licenses and reducing the word count in the board's rules by 74 percent.[147]

IV. LESSONS LEARNED

The differences between the regulatory budgets implemented in these U.S. states and the theoretical basis for a regulatory budget described in section 2 are significant. One of the more striking differences is that estimates of regulatory cost play almost no role in the state-level reforms. With the exception of Texas's one-in, one-out requirement, virtually all states' regulatory budgeting efforts have involved caps or reduction targets based on much simpler metrics than cost, such as counts of rules, requirements, restrictions, chapters, or words.

This could be viewed as problematic from a theoretical standpoint, because, as outlined in section 2, for regulations to improve long-run social welfare they generally must be cost saving (i.e., have negative costs, which can be thought of as productivity-saving or -enhancing). There may be a correlation between word counts and regulatory costs, but it is unlikely to be consistent across rules and programs. The Virginia pilot program, in particular, highlights how a lack of economic analysis creates uncertainty as to what is being accomplished. By a simple requirement count, the pilot program agencies in Virginia had very little success reducing aggregate regulatory volumes. However, these agencies engaged in dozens of regulatory streamlining exercises, which almost certainly reduced real burdens on the public, perhaps increasing social welfare. Without more information, the success of the Virginia pilot program is difficult to gauge, which may explain some

[142] Broughel, *supra* note 139.
[143] *Id*.
[144] James Freeman, *The Great Idaho Do-Over*, WALL ST. J., May 16, 2019; *Idaho Quits Worrying About Snails*, WALL ST. J., June 28, 2019; Kevin Williamson, *Idaho's Deregulatory Revolution*, NAT'L REV., May 16, 2019.
[145] Idaho Exec. Order No. 2020-01 (Jan. 16, 2020).
[146] *Id*.
[147] Broughel, *supra* note 139.

of the hesitancy on the part of the state budget department to recommend expanding the pilot program. Despite this uncertainty, however, the administration of Glenn Youngkin did move forward with expanding the pilot program to other state agencies.

That said, there are some good reasons for structuring regulatory budgets in the manner states have. Producing rigorous cost estimates for every regulation on the books is itself costly. Simply directing agencies to reduce burdens may be sufficient to ensure that the regulations updated or removed reduce costs. Moreover, ideally, costs should be estimated not just once but on an ongoing basis. Some commentators have described the task of creating a cumulative regulatory budget as "daunting."[148] However, states such as Ohio and Virginia demonstrate that an accounting of the entire stock of a department's existing regulations can be quite feasible if simple metrics are used. Regulators in those states were able to produce base inventories of their requirements or restrictions in a relatively short time period, and furthermore, these inventories included meaningful information. Table 4 includes information from a base inventory compiled by Ohio's Department of Developmental Disabilities. Although some restrictions do relate to definitions or to requirements imposed on regulators rather than the public, the base inventory provides a meaningful glimpse into the body of law overseen by this agency.

Table 4. Partial Base Inventory of Regulatory Restrictions from Department of Developmental Disabilities, Ohio

Rule number	**Regulatory restriction**	**Description of regulatory restriction**	**Statute under which the regulatory restriction was adopted**	**Is the regulatory restriction expressly or specifically required by state or federal law?**	**Is a law change required in order to remove the restriction?**
5123-1-03	Shall	(B): For the purposes of this rule, the following definitions shall apply.	5123.04, 5123.351, 5123.36	No, general rulemaking authority	No, general rulemaking authority
5123-1-03	Shall	(B)(20): "Single-family home" means a residential building consisting of one dwelling unit designed and arranged for use by one family. The term shall include a manufactured home and a condominium under Chapter 5311. of the Revised Code.	5123.04, 5123.351, 5123.36	Yes, state law	Yes, state law

[148] *See* Rosen & Callanan, *supra* note 13, at 845.

5123-1-03	Shall	(C)(1): The funds shall be used to acquire housing for individuals receiving supported living in accordance with sections 5126.40 to 5126.47 of the Revised Code or individuals receiving supported living funded by a home and community-based services waiver administered by the department.	5123.04, 5123.351, 5123.36	Yes, state law	Yes, state law
5123-1-03	Shall	(C)(2): The housing shall be used as residences for individuals for at least one hundred eighty months.	5123.04, 5123.351, 5123.36	Yes, state law	Yes, state law
5123-1-03	Shall	(C)(3): The funds shall be used to acquire a single-family home, a duplex, a quadplex, a permanently sited manufactured home, a condominium, or newly constructed housing.	5123.04, 5123.351, 5123.36	Yes, state law	Yes, state law
5123-1-03	Shall Not	(C)(5): The funds shall not be used to purchase: (a) Furniture and household items other than those fixed items customarily included in a purchase agreement or a construction contract; (b) Mobile homes; or (c) Housing when the purchase price exceeds, by more than ten percent, the appraised value of the housing.	5123.04, 5123.351, 5123.36	Yes, state law	Yes, state law
5123-1-03	Shall	(C)(6): The funds shall be repaid if any provision of this rule is violated. The repayment shall be calculated by multiplying the amount of funds provided under this rule by	5123.04, 5123.351, 5123.36	Yes, state law	Yes, state law

	the ratio of one hundred eighty minus the number of months the housing is used for residences for individuals (as determined by the department) to the total term of one hundred eighty months, that is:	

Source: OHIO DEP'T OF DEVELOPMENTAL DISABILITIES, BASE INVENTORY OF REGULATORY RESTRICTIONS 1 (Dec. 16, 2019), https://dodd.ohio.gov/wps/portal/gov/dodd/forms-and-rules/rules-in-effect/regulatory-restrictions-inventory.

The U.S. federal government and the states can likely learn from one another. The federal government could benefit from adopting simpler metrics and applying them across a broader swath of new and existing regulations. This approach could expand the scope of the federal regulatory budget beyond just new regulations, and perhaps beyond regulations reviewed by OMB (since OMB oversaw implementation of the federal regulatory budget, but OMB only reviews a minority of federal regulations).[149] The states meanwhile could benefit from incorporating cost analysis into their regulatory reforms, at a minimum for their largest and most significant rules.

Strategic implementation of sunset provisions or mandatory rule repeals could also incentivize the ongoing production of cost analysis for rules throughout their lifetimes. As the Idaho executive order for zero-based regulation demonstrates, periodic rule repeals can trigger analysis every few years.[150] If regulations are subject to an expiration date, or otherwise periodically must be refiled or repealed in order to be continued, then they can be subjected to a cost analysis at that time. In this way, a rule could be evaluated multiple times over its lifespan. Such expirations can be staggered so that all regulations do not have to be analyzed at once, making the task of producing cost estimates for the entire stock of regulations more manageable.

With regards to regulatory PAYGO provisions, such as a one-in, two-out requirement, these are perhaps most useful as communication devices. The policy signals to the public and to regulators that reducing regulatory burdens is the goal of the government, thereby signaling administration priorities. The Trump administration was criticized for the way it counted different classes of rules as "ins" and "outs" under its 2-for-1 policy.[151] When a PAYGO requirement is combined with a regulatory budget that relies on separate metrics (as was the case with the Trump administration), this can create confusion about what the goals of reform are, thereby hindering the PAYGO requirement's value as a communication device. Notably, the PAYGO provisions in states do not seem to have received the same level of criticism. Nevertheless, a one-in, one-out or similar PAYGO policy may be most defensible when the policy takes the form of requiring cost offsets. This is the

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[149] OMB reviews about 7 percent of final regulations annually. *See* Broughel & Jones, *supra* note 18, at 14.

[150] The U.S. Department of Health and Human Services finalized a similar periodic review requirement, using a sunset provision as a triggering mechanism. *See* Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021).

[151] Broughel & Jones, *supra* note 18.

way offset requirements have worked in Canada and the United Kingdom, where administrative or compliance burdens from new regulations have had to be offset.[152]

Some legal scholars, most notably Eric Posner, have proposed a *net benefits budget* as an alternative to a regulatory budget.[153] This approach works by requiring agencies to keep positive balances of net benefits, as measured by CBA, over some time period. In particular instances, an agency might be allowed to impose net costs through a rulemaking, but it would have to offset the loss by achieving positive net benefits through some other rulemaking later, such that over time cumulative agency net benefits exceed zero. The main problem with this approach is that it takes for granted that achieving net benefits estimated in a CBA is normatively attractive as an aim for policy. If the welfare measure CBA evaluates is unattractive as a basis for policymaking, then it is going to be unattractive as a basis for a regulatory budget as well. Indeed, one of the core arguments of this paper is that the welfare measure a regulatory budget evaluates is more compelling than that which underlies CBA.

One reason the welfare measure evaluated by CBA is so unattractive as a sole criterion for evaluating policies is its short-termism. CBA is present biased in the sense that present preferences and cost considerations dictate how resources should be allocated for all time.[154] By contrast, the focus of a regulatory budget is on increasing long-run social welfare. A long-run approach has strong moral appeal, though the requirement that regulations not be allowed to proceed unless there are cost saving could be perceived as problematic for being insensitive to the preferences of current citizens. Thus, while the CBA criterion anoints current citizens with willingness and ability to pay as dictators, a cost-saving criterion is indifferent to current preferences except to the extent that catering to these preferences also saves resources.

Jim Tozzi has argued that passing a cost-benefit test should be a necessary and not a sufficient condition for moving forward with a government regulation and that a separate, additional public evaluation criterion should be applied to rules based on a regulatory budget.[155] This approach is attractive because a combined criterion would be neither a dictatorship of the present nor a dictatorship of the future. Instead it would be a balance of short and long term interests.[156] In practice, this would likely mean that for regulations to proceed they would have to be shown to be cost saving *and* that current citizens, through their revealed preferences, are voluntarily willing to pay for whatever benefits the regulation generates in excess of costs. A future administration

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[152] *See* Dudley, *supra* note 49, at 269.

[153] Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1474–1488 (2001).

[154] As noted earlier, the discounted utilitarian framework has a connection to general competitive equilibrium theory. The optimal allocation in this framework is an optimum from the perspective of the present moment in time only. *See* Gerard Debreu, THEORY OF VALUE; AN AXIOMATIC ANALYSIS OF ECONOMIC EQUILIBRIUM 28 (1959) (noting that "[t]he economy is considered as of a given instant called the present instant"); *see also* Tjalling C. Koopmans, THREE ESSAYS ON THE STATE OF ECONOMIC SCIENCE 60 (New York: McGraw-Hill. 1957) (noting how the general equilibrium model can be understood as describing "a stationary state, in which all choices are made once and for all"); *see also* Arrow et al., *supra* note 36; Boardman et al., *supra* note 36.

[155] Tozzi, *supra* note 48, at 30 (noting that "the demonstration of positive net benefits is a necessary but not sufficient condition for the execution of a project").

[156] In the literature, a social welfare function that comprises a mixed criterion, in that it includes both short-run and long-run concerns as inputs, is sometimes referred to as "sustainable." *See* Graciela Chichilnisky, Peter J. Hammond & Nicholas Stern, *Fundamental Utilitarianism and Intergenerational Equity with Extinction Discounting,* 54 SOC. CHOICE & WELFARE 397 (2020); *see also* Arrow et al., *supra* note 36.

should consider integrating the two policy evaluation criteria. Perhaps a first step along these lines would be to integrate regulatory budgeting cost analysis into existing OMB guidelines on regulatory analysis, thereby requiring that cost analysis be a component of regulatory impact analysis alongside aspects of CBA in its current form.

V. CONCLUSION: THE RETURN OF THE REGULATORY BUDGET

The relative simplicity of state regulatory budgets is both their biggest advantage and their greatest weakness. The states have demonstrated not only that cumulative regulatory budgets are possible, but also that these programs can succeed at reducing the overall volume of regulations by significant margins. These simple regulatory budgets also avoid the daunting task of having to estimate the cost of each and every regulation on the books. However, without estimation of regulatory costs a great number of welfare-reducing regulations likely remain on states' books, while some welfare-enhancing regulations may have been removed as well. Without cost estimates the full extent of these programs' accomplishments are unclear, which could affect their credibility over time.

The greatest achievement of the Trump administration's regulatory budget is undoubtedly the regulatory accounting scheme implemented under Executive Order No. 13771. The negative cost allocations allotted to federal agencies throughout Trump's four years in office can be viewed as requirements that these agencies' regulations improve intergenerational efficiency and social welfare over the long run. The innovative cost accounting may even better comply with existing executive orders requiring regulatory analysis because, despite downplaying nonmarket effects, the emphasis on cumulative, long-run impacts arguably makes the analysis more comprehensive than CBA.

Going forward, states should, at a minimum, subject some of their most economically significant rulemakings to cost analysis. Regulatory review commissions, such as the one established in Mississippi, are also institutional arrangements worth experimenting with in more contexts. Meanwhile, the federal government, when an administration more open to regulatory budgeting returns, should reestablish in some form the institutions set up by the Trump administration with an eye toward making them more comprehensive and more permanent. This could be accomplished by integrating regulatory budgeting cost analysis into existing OMB guidelines for regulatory impact analyses, by utilizing sunset provisions and similar triggers to analyze portions of the stock of existing regulations in an ongoing fashion over time, and by adopting simpler metrics to track the overall level of the thousands of smaller regulations that escaped the regulatory budget the first go-round.

There are reasons to be optimistic about the future of the regulatory budget. The Trump administration and the states have shown the idea is workable even if it has been implemented imperfectly in some cases. The theoretical basis for a regulatory budget is one of its strongest features especially given the limitations of its chief alternative, CBA. That said, much more work needs to be done to align the theory and practice of regulatory budgeting. Similar to past regulatory reforms that were initially treated as controversial but have now become widely accepted, with some fine tuning one can easily see how a regulatory budget could grow to become a fundamental pillar of modern governance.

Measurement Options for Regulatory Budgeting

LAURA JONES
PATRICK A. MCLAUGHLIN

I. INTRODUCTION

With rare exceptions, regulations tend to accumulate over time (Coffey and McLaughlin, 2021; Bailey et al., 2021). Several recent economic studies have emphasized that failing to manage this accumulation has unintended consequences, including serious negative economic impacts such as reduced growth (Coffey et al., 2020) and hindered entrepreneurship (Chambers et al., 2022). Furthermore, economists have found regulatory accumulation is robustly associated with increasing poverty rates (Chambers et al., 2019a) and income inequality (Chambers et al., 2019b; Chambers and O'Reilly, 2020). Notably, Bentley Coffey and Patrick McLaughlin have shown the converse, at least in the case of economic growth. Reversing regulatory accumulation—by, in their 2021 study, reducing the quantity of regulations on the books in the province of British Columbia by implementing a form of regulatory budgeting—directly led to significantly increased economic growth.

As evidence mounts that the cumulative burden of regulation can be problematic, regulatory budgets and caps designed to manage or reduce the cumulated stock of regulations are becoming more popular. A regulatory budget entails implementing a consistent accounting system that tracks one or more dimensions of the volume of regulation. A regulatory budget cap often takes the form of a one-in-X-out (OIXO) requirement, where X represents the burden or volume of regulation, such as a dollar in regulatory costs or a number of discrete regulatory restrictions (typically, X = 1 or 2). Under a one-in, one-out scheme, for example, one existing restriction must be eliminated for each new restriction added to the regulatory code. When a specific reduction target is set (e.g., a one-third reduction in regulatory burden), a baseline count is needed.

While regulatory budgeting is a relatively straightforward concept, its actual implementation raises many challenging operational questions, one of the most important being: how do you measure regulation? For regulatory budgeting and red tape reform initiatives to deliver desired results, the solid theoretical idea of a regulatory budget needs to be married to a good practical measure of the cumulative burden. This is the current frontier of both regulatory policy and regulatory economics—a frontier with several recent developments in aggregate measurement.

In this study, we review some of the key metrics used to measure regulation. We argue that the choice of measure directly impacts the scope, sustainability, and ultimate effectiveness of regulatory budgeting as a policy solution to unwanted regulatory accumulation. We contend that complex metrics are costlier, requiring greater effort and budgetary outlays to produce and

maintain. This, in turn, increases the likelihood that the scope of the regulatory budget will be narrower, and that the entire budgeting exercise will be more difficult to sustain. By virtue of these limitations, regulatory budgets that use more complex metrics will tend to have more limited impacts than those that use simpler metrics. Further, simpler metrics make it more feasible to establish a regulatory baseline, making it possible to understand the overall amount of regulation that exists at a point in time and to obtain a perspective on the magnitude of the reductions (or increases) that have occurred since establishing the baseline. For example, when the Canadian government says it reduced its net annual administrative burden on business by $60.5 million between 2012 and 2020 with its one-for-one legislation, it is impossible to determine the relative magnitude of this change as there is no baseline total of the amount businesses spent on administrative compliance (Treasury Board of Canada Secretariat, 2021). In contrast, it is impressive to consider that the province of British Columbia has reduced its burden by close to 50 percent relative to its 2001 baseline (Coffey and McLaughlin, 2021; Jones, 2015).

This paper is divided into six sections. The next section discusses and defines concepts. Section three reviews the three main categories of metrics used in regulatory budgeting, linking them to a brief history of regulatory measurement. Regulatory measurement started with tools best suited to considering regulations individually, such as benefit-cost analysis as used in Regulatory Impact Assessment (RIA), and has progressed to include simpler, text-based measures more suitable for the regulatory budgeting that is the focus of this paper. Section four more closely examines the use of text-based counts in regulatory budgeting and considers the context in which they were implemented, as well as the available evidence of their effectiveness. In section five, we contrast experiences with text-based metrics and cost-based ones. We revisit the importance of regulatory budgets to controlling the proliferation of regulation, return to the importance of finding metrics that are suitable for budgeting, and consider the future of regulatory metrics and budgets. The final section offers our concluding thoughts.

II. CLARIFYING CONCEPTS: REGULATION, REGULATORY ACCUMULATION, AND REGULATORY BUDGETS

The definition of regulation can broaden or narrow depending on whom you ask. Fundamentally, regulation is a form of law that is designed to change the behavior of individuals, businesses, or other entities in a jurisdiction. Ideally, this leads to positive changes in one or more outcomes that people care about, such as workplace safety or environmental quality, and the value of these changes exceeds the costs of compliance. Prominent regulatory scholar Cary Coglianese explains the wide-ranging definitions of regulation:

> The word "regulation" itself can mean many things. At its most basic level, "regulation" is treated as synonymous with "law." Regulations are rules or norms adopted by government and backed up by some threat of consequences, usually negative ones in the form of penalties. Often directed at businesses, regulations can also take aim at nonprofit organizations, other governmental entities, and even individuals. Regulations can also derive from any number of institutional sources – parliaments or legislatures, ministries or agencies, or even voters themselves through various kinds of plebiscites. Given their

> variety, regulations can be described using many different labels: constitutions, statutes, legislation, standards, rules, and so forth. What label one uses to refer to them will not matter for purposes of evaluation. What does matter is that evaluators are precise about exactly what they seek to evaluate, however that governmental action may be labelled by others. (Coglianese 2012, p. 8).

From the perspective of most governments, "regulation" has a specific technical definition. It is delegated lawmaking—sometimes called administrative law, a statutory instrument, delegated legislation, or subsidiary legislation—and is distinguished from other sorts of law in that regulation takes its power from, and is meant to support, specific legislative acts.

However, those outside of government tend to have a much broader definition of regulation that includes government rules wherever they may be found. Outside of the narrower technical realm of formal regulations[1] government rules and compliance obligations can be found in primary legislation, and, far more commonly, in forms, guidance, bulletins, and instruction manuals – a set of informal regulatory documents that tend to be referred to collectively as "guidance documents."

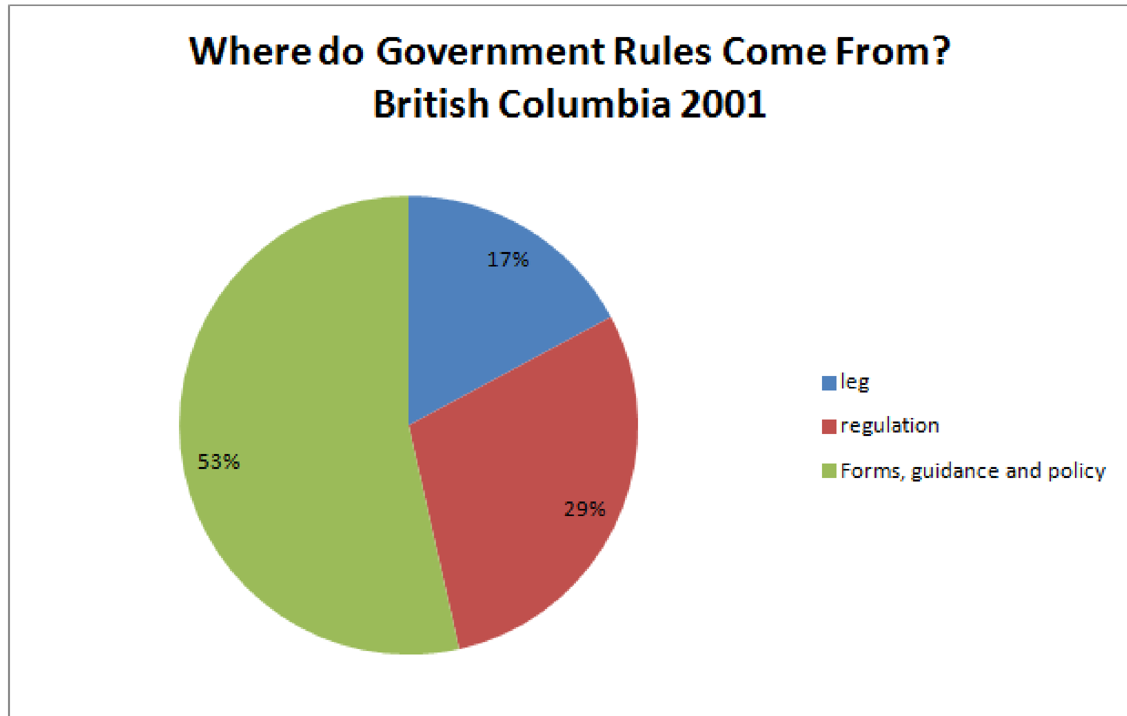
Understanding this definitional difference is important to choosing metrics for regulatory budgets that match the policy objectives they are intended to serve. If the policy objective is to reduce the overall burden of government rules, then choosing a narrow measure such as "regulation" that does not include guidance documents and the like is inadequate because it fails to fully capture the burden.

How important are these definitional differences? This partly depends on how many government rules (or how much of the burden of these rules) falls outside of the more narrowly defined "regulation." If the more narrowly and technically defined "regulation" captures most of the rules, we could dismiss this difference as trivial. But common sense and evidence from several Canadian jurisdictions that have categorized government rules suggest this is not the case.

To illustrate, figures 1 and 2 use data from two Canadian provinces to show the three main areas where government compliance obligations can be found: legislation (i.e., statutes and acts of legislatures), regulations (statutory instruments, delegated legislation, and subsidiary legislation), and guidance (forms, guidance, instruction manuals, and other informal regulatory and policy documents).

[1] For example, the text of the laws issued by regulatory agencies and printed in the *United States Code of Federal Regulations*, or in Canada, the interpretation of legislation known as Governor-in-Council (federal) and Order-in-Council (provincial) published in the *Gazette and Regulation Bulletins*).

Figure 1: Breakdown of government compliance obligations in British Columbia



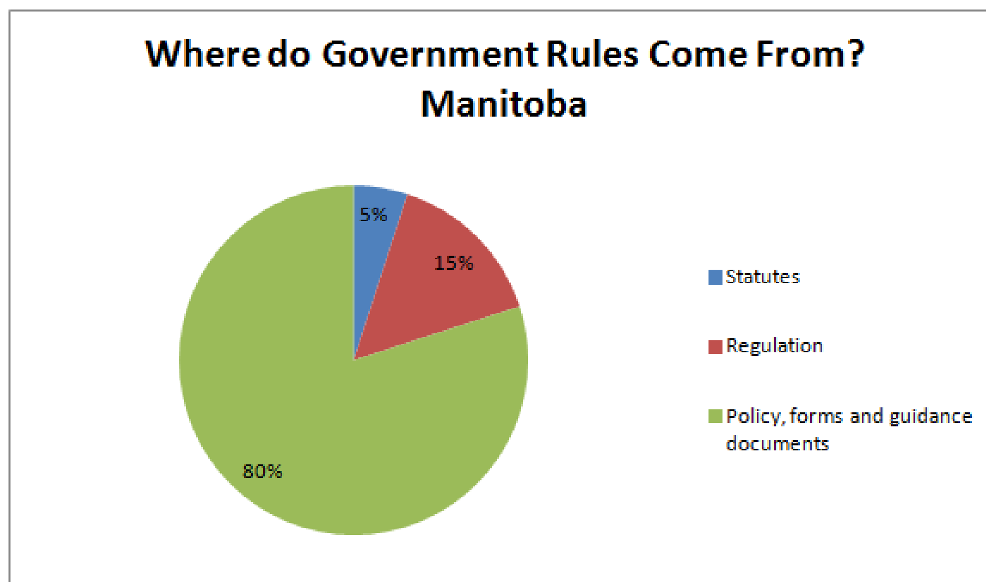
Source: Government of B.C. date from 2001

Data from a British Columbia inventory performed in 2001, as part of its regulatory reforms show 17 per cent of government requirements coming from legislation, 29 per cent coming from "regulation" as formally defined, and 53 percent from "guidance" documents (see figure 2). A 2007 inventory (not shown), conducted once the province's regulatory reduction initiative had reduced the total number of regulatory requirements, shows 23 percent of government rules from legislation, 34 per cent from regulation and 43 per cent from guidance documents, suggesting a disproportionate amount of the regulatory reduction came from requirements found in guidance documents. This makes some sense, because it is likely easier for a regulatory agency to simplify a form or a guidance document than to change a statute or regulation.

Manitoba used a slightly different way of measuring, which is discussed more fully in section 4.2. Like British Columbia, Manitoba had far more government rules in areas outside of what is technically considered "regulation," although its percentages were not the same as British Columbia's. Figure 2 shows 80 per cent of government rules were in the form of policies, forms and guidance documents with only 15 per cent and 5 per cent respectively found in the regulation and statute buckets. After some reduction, a more recent Manitoba report finds Manitoba's regulatory requirements broken down along the following lines: 62 per cent policy, forms and

guidance; 20 per cent policies; 12 per cent regulations and 6 per cent statutes.[2] Like in British Columbia, a significant amount of the reduction was in the "guidance" category.

Figure 2: Breakdown of government compliance obligations in Manitoba, 2017



Source: Manitoba Government, technical data

Data from these two provinces suggest that defining what is included in regulatory reduction initiatives is critical. Ignoring the considerable number of policies, forms and guidance requirements that lie outside of what is technically considered regulation is problematic. The objective of most regulatory budgets is to maintain or lighten the burden faced by businesses and citizens. Much of this burden, in volume if not in cost, is coming from guidance, policies and forms.

The definitional difference between the narrower technical use of the term "regulation" and the broader meaning can also cause confusion when politicians talk about regulatory reform as if the reform applies broadly to all regulatory documents (i.e., inclusive of forms and other guidance documents), when in fact what is being measured and reported applies to a much narrower set of documents. Recent U.S. reform is a good example of this and is discussed later in this paper.

A. Regulatory accumulation

Coffey and McLaughlin (2021) point out that where there is regulation, there also tends to be

[2] Manitoba Regulatory Accountability Report, Manitoba Government Regulatory Accountability Secretariat, September 2020. https://www.gov.mb.ca/asset_library/en/proactive/2020_2021/mra_2020_report.pdf

regulatory accumulation—the buildup of the stock of regulations over time.[3] For example, in the United States, the number of pages of federal regulation in effect has grown from about 10,000 in 1950 to 185,984 in 2019.[4]

Regulatory accumulation and its potential impact on the economy have caught the interest of economists and policymakers alike, with several national and subnational jurisdictions exploring ways to reduce the number of unnecessary regulations. We focus on the challenge of finding the right metrics for regulatory budgeting—because the effectiveness of a regulatory budget to control or reduce regulatory accumulation depends on it.

B. What is a Regulatory Budget?

Regulatory budgets are designed to account for regulatory activity undertaken by a government through systematic and regular measurement. The unit of measurement can vary, but the point of the exercise is—like a fiscal budget—to keep track of where resources are allocated and to have some way of limiting excess.

Regulatory budgets, like other types of budgets, only work to reduce spending if they force the spender to identify and prioritize the most valuable options. The behavior of a regulatory department or agency with a budget differs from that of a department or agency without a budget. In a no-budget world, an agency's objective is to fulfill its mission with the promulgation of rules. In contrast, an agency with a regulatory budget has different incentives. First, to avoid new regulations that would not achieve high benefits relative to their budgetary cost. Second, to eliminate old regulations that are found to be ineffective or intolerably inefficient. In other words, a regulatory budget process resembles an error-correction process: it leads to fewer new errors and aids in the identification and correction of existing ones. Further, it ensures that older, less effective rules are "sunsetted" to make way for newer more effective ones.

III. SIGNIFICANT DEVELOPMENTS IN REGULATORY MEASUREMENT

Compared to fiscal budgeting, regulatory budgeting has a distinct disadvantage: measurement is far more challenging. Fiscal budgets detail government spending, tax revenues, and surpluses or deficits that are directly observable and measured in monetary terms. Regulatory budgets assess regulatory burdens imposed on businesses and citizens, which can be harder to identify and disentangle from other costs. Regulatory burden can be measured in time, dollars, or some version of how many rules must be complied with.

As discussed in the previous section, regulatory burdens can come from legislation, regulation, and guidance documents. Regulatory burden can be divided along other dimensions too. For example, costs can be broken down into those borne by government in the form of managing and enforcing regulations (these can be found in government budgets) and those borne by businesses and citizens in the form of compliance. Compliance costs can be further categorized into those

[3] Regulatory accumulation should not be confused with *agencification*, or proliferation in the number of regulatory agencies. Although the two phenomena often occur together, having more agencies will not always mean having more regulations.

[4] Page counts of the *Code of Federal Regulations* from the website of the Office of the Federal Register, Accessed October 4, 2021.

related to buying new equipment and the costs of paperwork and administering regulation. Disentangling what is and isn't included in existing regulatory metrics can be confusing, but it is important for transparency and understanding how closely the measurement matches the intended policy objective of a regulatory budget.

Regulatory budgeting is still relatively new and not standardized. For example, both the Canadian province of British Columbia in 2001 and the federal government of the United States in 2017 put in place one-in-two-out regulatory budgets but, as we discuss further below and in the next section, while the budgets sounded similar, the metrics chosen to implement them were very different, leading to big differences in scope, longevity, replicability, and ultimately effectiveness at achieving desired policy objectives.

Below is a brief overview of three main approaches to regulatory measurement and their relevance to the challenge of finding the right metrics for regulatory budgeting.

A. Regulatory Impact Assessment and the U.S Opportunity Cost Model

The most established practice of regulatory measurement is considering the costs and benefits of individual regulations. This has been around since the late 1970s when the Carter administration started using "Inflation Assessments." The Regulatory Impact Assessment (RIA) requirement was broadened to include benefit-costs analysis under President Reagan in the 1980s.[5] By the mid-1990s, over half of the OECD countries employed RIA. Currently, all OECD countries use the RIA method, which is considered a best practice, to ground regulatory decisions in evidence and "ensure that regulations are efficient and effective in a changing and complex world."[6]

While benefit-cost analysis has proved an important tool for evaluating individual regulations and may slow regulatory accumulation, it was not designed with regulatory budgeting in mind and would be exceptionally costly to apply to all regulations and guidance.

The US regulatory budget brought in by President Trump when he signed Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*, comes closest to using a RIA-style approach. The Order required that executive branch agencies proposing a new regulation must find two to repeal. Initially, there was a requirement to add no additional costs, but it was subsequently changed to a requirement to find some cost reductions (Broughel and Jones 2018). The budget sounded broad when the President talked about it publicly, but it ended up being very narrow in scope. The Office of Information and Regulatory Affairs (OIRA) determined which regulations fell under the Order and how they would be measured. OIRA guidance specified only "significant" regulatory action and guidance would qualify and that "opportunity costs to society" would be the appropriate metric. Only a few dozen regulations a year (those expected to have $100 million or more in impact) are required to approximate an estimate of opportunity cost. Broughel and Jones (2018) estimate that this OIRA guidance narrowed the scope of the regulations that fell

[5] The typical RIA consists of four elements: a statement of need for the regulation, an assessment of alternative regulatory approaches, a benefit-cost analysis, and in some instances, a cost-effectiveness analysis.

[6] https://www.oecd.org/regreform/regulatory-policy/ria.htm; http://regulatoryreform.com/wp-content/uploads/2015/02/OECD-Regulatory-Policies-in-OECD-Countries- 2002.pdf

under the budget to around one percent of the total per year. The authors underscore one of the important trade-offs in regulatory measurement:

> "In theory, using a measure such as the "opportunity cost to society" suggested by OIRA is desirable because regulatory costs and benefits, not counts, are ultimately what matter for citizens' quality of life. However, in practice, opportunity cost measures are more difficult and expensive to manage, and they narrow the scope of the reforms to such a degree that reforms become significantly less meaningful." (Broughel and Jones, 2018, p. 16)

The US regulatory budget had other challenges, including a difference in what could count as an "in," or addition to the regulatory burden, and what could count as an "out," or subtraction from the burden. This difference undermined its credibility and made it difficult to track. Ultimately, it did not survive the change in government in 2021.

B. The Standard Cost Model

The Standard Cost Model (SCM) was developed in the Netherlands in the 1990s and subsequently used in a Dutch regulatory budget in the early 2000s, when a 25 percent reduction target was set. It was developed in response to a sluggish economy and businesses advocating for systemic measurement. The SCM has since been employed—with some variations—in countries including Denmark, Sweden, the UK, Belgium, Norway, and Canada.[7]

The SCM determines an aggregate cost for a portion of the regulatory burden (administrative costs) borne by private businesses (sometimes broadened to include "semi-private" businesses like charities). By design, it is not meant to apply to regulatory costs borne by citizens. The Standard Cost Model (SCM) defines administrative burdens as "[t]he costs on businesses when complying with information obligations stemming from government regulation."

The SCM does not include the direct financial costs of compliance (e.g., the fees associated with applying for a permit) or the substantive costs of purchasing equipment to meet compliance requirements.

The SCM can be used to consider the administrative burden of a new regulation or to understand the entire stock of administrative burdens to business. It was a major step forward for regulatory budgeting, because it created a systematic approach to evaluating a portion of the regulatory burden that includes both regulation and guidance documents. However, it excludes other pieces of the regulatory burden and, by design, only considers burdens on business.

C. Text-Based Metrics

At around the same time the SCM was being created, two text-based regulatory metrics were being developed in North America that spurred additional innovation—regulatory "requirements" in British Columbia and regulatory "restrictions" as defined by the Mercatus

[7] Canada's one-in-one-out law uses the SCM, and Quebec's provincial measurement is based on it.

Center's RegData project, both discussed further in the next section.[8] Text-based metrics involve counting and tracking regulatory obligations, either using machines or manually. The measurement is simpler than the SCM as it is a count of the obligations (e.g., the occurrences of the words "shall" and "must" and similar language) in regulatory text. Regulatory text metrics can measure any combination of statutes, regulations, and guidance. The metric can be applied broadly across all departments and regulatory agencies or narrowly to a subset of rules or agencies. These measures are objective and replicable but do not directly estimate costs.

IV. A MORE DETAILED LOOK AT THE USE OF TEXT BASED METRICS

Text-based metrics are emerging as a promising tool for regulatory budgeting as they are simpler to implement than the standard cost model, can be more easily applied broadly, and have a strong model of success in British Columbia dating back to 2001, around the same time the SCM was established in the Netherlands. Like the SCM, text-based metrics evolve differently depending on the jurisdiction using them. In this section, we provide more detail for three different versions of text-based metrics, including some context around how and why they are being used.

A. British Columbia

British Columbia's provincial government has published regulatory requirement counts to track its regulatory budgets since 2001, making it the longest running regulatory tracking initiative in North America.[9] The budget was established to meet a 2001 campaign promise to reduce regulation by one-third in three years. The commitment was bold for its time as aggregate regulatory measurement and budgeting did not have an established track record. Once elected, the new Premier turned his attention to implementing the regulatory budget. He appointed a minister tasked with determining an appropriate measure by which to track the one-third regulatory reduction and implementing a program to make it happen. The new minister responsible reviewed available measurement options, rejecting regulation and page counts as too crude and cost measures as too complicated.[10] Instead the government created its own way of measuring, which it called "regulatory requirements." A regulatory requirement is text-based and defined as "any action or step that must be taken, or information that must be provided to access services, carry out business, or meet legal responsibilities under provincial legislation, regulation,

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[8] Although they are not currently being used for regulatory budgeting, there are two other count-based measures worth mentioning as they are somewhat related to text-based metrics: counting rulemakings and pages. Both have been referred to in studies on limiting changes to the overall regulatory burden. See Dawson and Seater (2014) and Coffey, McLaughlin, and Tollison (2012) for examples of counting pages, and McLaughlin (2011) for an example of counting rulemakings. However, as neither is currently being used for regulatory budgeting, we limit our discussion to pointing out that while no measure is perfect, these two count-based measures are particularly crude. For example, some individual regulations have hundreds of specific requirements associated with them while others have far fewer. Counting pages can be problematic if font sizes or page sizes change. In addition, as discussed in section two, these measures do not include government rules that can fall outside of regulation (e.g., rules found in legislation and guidance, etc.). In British Columbia, it was the consideration of the limitations of these count-based metrics that led to the development of the text-based regulatory requirement metric.

[9] Quebec has also had regulatory measurement in place since 2001 but has not been nearly as consistent in its reporting as British Columbia.

[10] For a full discussion of British Columbia's regulatory reforms see Jones (2015).

policy, or forms."[11] The words "shall" or "must" are strong indications of a regulatory requirement when evaluating regulatory text.

The 2001 baseline count of regulatory requirements was 330,812. The baseline was calculated over the course of several months with the help of some interns and includes requirements found in legislation, regulation, government policies, and forms.[12] Thus, the budget is comprehensive, although there are some exclusions for delegated authorities. The government achieved its one-third reduction target by its 2004 deadline with a policy of requiring two regulatory requirements be eliminated for each new one introduced.

After the original target was met in 2004, a one-in-one-out policy for regulatory requirements, to maintain the one-third reduction from 2001 levels, was put into place and remains in effect today.[13] The government reports on its progress annually, as required by legislation. Interestingly, the counts have continued to fall and remain below the 2004 reduction. As June 2020, regulatory requirements had been reduced by roughly half since 2001 and stand at 167,635.[14]

The province's regulatory counts and budget now have more than a twenty-year history and have survived a change in government. Recent research suggests that meeting and maintaining the regulatory budget target lifted economic growth in the province by one percentage point annually (Coffey and McLaughlin, 2021).

B. Manitoba

Manitoba began its regulatory budgeting and red tape reduction initiative in 2015 with an explicit focus on measurement, including a commitment to create a baseline count of regulatory requirements from which to evaluate progress towards reducing the overall regulatory burden on individuals, businesses, non-profits, and local governments.

The province modeled its reforms on British Columbia, with a few notable differences. The regulatory requirement metric used in Manitoba is more comprehensive than the one used in British Columbia. The budget also works differently. Instead of setting a one-third reduction target in three years, the Manitoba government passed legislation requiring that two regulatory requirements be eliminated for every new one added between July 2019 and March 2021, when a one-in-one-out rule comes into effect. In addition, the two regulatory requirements being eliminated must represent at least twice the administrative burden of the new regulatory requirement coming in—an additional provision that did not exist in British Columbia.[15]

Manitoba's baseline starts April 1, 2016, when it recorded 906,824 regulatory requirements in

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[11] British Columbia, Regulatory and Service Improvements BC: How We Count. https://www2.gov.bc.ca/assets/gov/government/about-the-bc-government/regulatory-reform/pdfs/bc_how_we_count_guide.pdf

[12] The original baseline was higher. An early review to eliminate some initial double-counting lowered it.

[13] The one-in-one out policy has been extended five times—to 2008, to 2012, to 2015, to 2019, and to 2022.

[14] *Better Regulations for British Columbians 2019/20 annual report*, Ministry of Jobs, Trade and Technology, June 2020, Province of British Columbia. https://www2.gov.bc.ca/assets/gov/government/about-the-bc-government/regulatory-reform/pdfs/better_regulations-2020-annual_report-web.pdf

[15] *Manitoba Regulatory Accountability Report*, Manitoba government Regulatory Accountability Secretariat, September 2019, p. 9.

12,393 documents across government.[16] Like in British Columbia, the baseline was corrected after review and is currently reported as 962,586.[17] The province reduced its requirements to 939,306 by March 2018 and then to 880,048 by March 2019, and 871,173 by March of 2020 for a total reduction of 9.4 per cent or 90,824 requirements relative to its starting baseline.[18]

Like British Columbia, Manitoba is using a text-based metric it calls "regulatory requirements." A regulatory requirement is similarly defined as "an action or step that must be taken, or a piece of information that must be provided, in accordance with provincial government legislation, regulation, policy or forms, in order to access programs or services, carry out business or participate in regulated activities."[19] However, Manitoba's measure is more comprehensive in several respects. First, it includes arms-length government entities that are excluded from British Columbia's count.[20] Second, it includes frequency. For example, a piece of information on a form that must be submitted four times a year counts as four regulatory requirements in Manitoba and one regulatory requirement in British Columbia. The budget also works differently: the Manitoba one-in-two-out policy requires that the requirements being eliminated be of equivalent burden, as determined by a regulatory cost calculator. In British Columbia, this requirement does not exist.

Like British Columbia, Manitoba's count started as a physical, paper-based count, with marked up copies of all regulatory documents scanned and part of the permanent record. The instructions for doing the count include: "Paper copies of the Acts, regulations, policies and forms must be printed (all single-sided) and assembled in binders, as counting must be recorded directly on the paper copies. Marked up paper copies will be scanned and will form a permanent record, so the legibility of the marking and the quality of the copies is important."[21]

The count has since been since been uploaded to the government's new Regulatory Accountability Database. The database includes access to other measurement tools such as an administrative burden estimator (ABE) adapted from the Standard Cost Model to help assess the costs of new proposals. The tool is unique in that it allows for cost estimation at the regulatory requirement level. Another aspect of Manitoba's measurement program is its use of a Direct Internal Cost Estimator (DICE), which allows regulators to estimate the cost to government of managing, administering, and enforcing new regulatory requirements.

Noteworthy to Manitoba's approach is its emphasis on "being highly transparent and open with the public and stakeholders in identifying and tracking regulatory requirements and the costs they impose."[22]

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[16] Manitoba Government News Release, September 19, 2017; https://news.gov.mb.ca/news/?item=42154&posted=2017-09-19

[17] *Manitoba Regulatory Accountability Report*, Manitoba Government Regulatory Accountability Secretariat, September 2019, p. 2.

[18] Manitoba Regulatory Accountability Report, Manitoba Government Regulatory Accountability Secretariat, September 2020. https://www.gov.mb.ca/asset_library/en/proactive/2020_2021/mra_2020_report.pdf

[19] Manitoba counts all policies and forms whether they were prescribed by legislation or regulation.

[20] Manitoba's count only excludes regional health authorities, school divisions, post-secondary institutions, and courts. It includes crown corporations.

[21] Manitoba Government, Guide for Manitoba Regulatory Requirements Baseline Count, updated April 24, 2017, Regulatory Accountability Support, p. 3.

[22] Ibid.

C. RegData

While the text-based metrics of regulation used in British Columbia and Manitoba require humans to read regulatory text and count regulatory requirements, computer-assisted approaches have been in development for the past decade that can produce similar, and other, metrics of regulation. The earliest and most prominent of these approaches is the RegData project, which was introduced in a working paper in 2012, subsequently published as Al-Ubaydli and McLaughlin (2017), with the intent of creating comprehensive, objective, and replicable regulatory datasets with which to study the causes and effects of regulation. RegData's primary measure of regulation is called "regulatory restrictions," and, although it was developed independently, it is remarkably similar to the count-based measures implemented in British Columbia and Manitoba with a couple of important differences. First, RegData data are not produced manually, but by computers using text-analysis and machine-learning algorithms. Second, much of the data currently available from the RegData project focuses on regulatory restrictions found in formal regulatory documents, not legislation or guidance documents.[23]

RegData has been used in hundreds of research applications. But, more importantly for this paper, RegData has also been used in policy applications of regulatory budgeting. For example, several states in the United States have used or built upon the output of RegData to establish baselines and track progress in regulatory budgeting, including Idaho, Virginia, Ohio, and Missouri.[24] The Canadian province of Alberta also built upon the logic of RegData in crafting its own regulatory budgeting approach.

RegData datasets currently cover three national (United States, Canada, and Australia) and many subnational jurisdictions (45 US states plus DC, all Canadian provinces and territories, and six Australian states). RegData offers richer and more complex metrics of regulation as well, such as industry-specific regulatory data. However, to our knowledge as of this writing, industry data has only been used in research, and has not been used in any regulatory budgets.

V. REGULATORY MEASUREMENT OPTIONS AND THE FUTURE OF REGULATORY BUDGETING

Like fiscal budgeting, regulatory budgeting can be an important accountability tool for citizens to evaluate governments in their efforts to balance the benefits that regulations bring to society with an understanding of the costs and burdens they impose. One of the big challenges that governments face as they work toward the win-win of less burden from government rules (regulation broadly defined) while maintaining or, ideally, improving the outcomes that regulations are designed to achieve is how to measure burden in a way that is both practical and credible.

A. Comparing Measurement Options

The first big question and stumbling block for many jurisdictions when it comes to

[23] RegData originally focused solely on regulations, but as the project grew, some jurisdictions' legislative documents were included. As of this writing, RegData datasets cover both regulatory and legislative documents in the US and Australian states, and Canadian provinces as well as the federal regulations and statutes of Canada and Australia.

[24] See Broughel (2022) for details about the regulatory budgeting efforts in these states.

implementing a regulatory budget is choosing a metric. Currently there are three general categories of metric to choose from: full cost models, such as the opportunity cost model used in recent US reforms, or some variation of the cost analysis used for RIA; the Standard Cost methodology (or a variation of it); and text-based metrics. Table 1 gives an overview of the trade-offs when considering these different options.

Full cost measures are theoretically more appealing than text-based counts but are far costlier to implement and tend to narrow the scope of the reforms to a degree that they become significantly less comprehensive and meaningful. They are not widely used in regulatory budgeting and do not have a track record of sustained success.

Table 1: Measurement Options for Regulatory Budgeting						
Regulatory Measure	**Use**	**Comprehensiveness**	**Replicable**	**Cost to Implement**	**Sustainability**	**Overall Assessment**
Opportunity cost	Reforms in the US 2017-2021 under Executive Order 13771	Very limited scope, applied to around one percent of regulations.	Very difficult to replicate, cost analysis depends on assumptions	Very costly and resource intensive to use even for individual regulations.	Difficult to sustain, no longer in use in the US.	Not a good choice for regulatory budgets. Expense and complexity limits transparency, scope, and overall effectiveness.
Standard Cost Model	Various countries in Europe including the Netherlands, UK; Variation on the model used in Quebec, Canada.	Limited scope. Applies to a portion of regulatory costs (administrative costs) borne by business. In theory it could be extended.	Somewhat difficult to replicate, as estimates of time for administrative compliance are used	Costly and resource intensive	Widely used in Europe since the 2000s	Not the best choice for regulatory budgeting as it is limited by design and costly to create a baseline. Good for evaluating new regulatory proposals and comparing to alternatives.

Text-based regulatory counts	British Columbia, Manitoba, various other Canadian provinces, and US states; used in research papers.	Several jurisdictions are applying it comprehensively—to legislation, regulation and guidance affecting both businesses and citizens.	Replicable, can be challenging if doing manually, technology makes this easier.	Less costly than other options. Can be done manually or with the help of computers. Sub-national jurisdictions have been able to implement.	British Columbia has been using a text-based measure since 2001; Manitoba since 2017. More recently some other states and provinces have adopted.	Best available choice for regulatory budgets as it is can be applied comprehensivel y, and it is relatively easy to create a baseline.

The Standard Cost Model is more widely used, particularly in Europe. Although less costly to implement than an RIA-based approach such as the U.S. regulatory budget of 2017 to 2020, an SCM-based budget is nonetheless expensive, and its scope is limited by design to focus only on the administrative cost of regulation and only on the costs imposed on business.

Text-based counts of regulatory requirements or restrictions are becoming a popular option, particularly for subnational jurisdictions. They are affordable to implement, easy to understand, and can cover most of the regulatory burden. They also have been successful in achieving regulatory reductions. As referenced earlier, British Columbia's one-in-two-out budget sounded similar to the recent one-in-two-out U.S. budget, but the two used very different metrics. The BC budget used the text-based metric (regulatory requirements), while the U.S. approach used opportunity cost. RegData shows slowed growth for the U.S. and significant reductions for BC.

B. Measurement Options and Regulatory Inventories (Baselines)

Another important consideration when choosing a metric is how well it lends itself to creating an inventory or baseline for the regulatory burden. The simpler the measure, the easier this is. Thus, with text-based metrics, baselines are often available. British Columbia, Manitoba, and, more recently, Alberta all assessed the number of regulatory requirements they started with when they implemented reforms and continue to track this over time. RegData has this information at the federal level for Canada, the US, and Australia as well as for US states and Canadian provinces. In addition to tracking the flow of ins relative to outs, a baseline allows an assessment of the relative amount of reduction or addition to the existing stock of regulation. It adds to available information and makes reductions easier to communicate. After all, a percentage change in the stock of regulations provides more perspective that an absolute number representing costs or requirements. Text-based metrics allow for the creation of a comprehensive, objective, and replicable baseline. In addition, particularly when making use of technology, changes relative to that baseline can be calculated at regular and potentially frequent intervals—sometimes on a daily basis—by simply re-running the software application using the updated body of regulatory text.

C. Using text-based metrics for comparability and research

Because text-based metrics are typically more comprehensive, objective, and replicable than full cost or Standard Cost Model metrics, text-based metrics are better suited for comparisons and research. In Figure 3, we take advantage of these features to examine trends in year-to-year changes in the stock of regulation across 62 national and subnational jurisdictions in Canada and

the US. Each data point in Figure 3 is a year-to-year percent change in regulatory restrictions (e.g., the words "shall" and "must") in the jurisdiction's regulatory code. For example, the federal regulations in the US contained 841,978 regulatory restrictions in 1999, and 853,667 in 2000. That addition from one year to the next of 11,689 restrictions represents a 1.39% percentage increase.

Figure 3: Distribution of Year-to-Year Percent Changes in Regulatory Restrictions

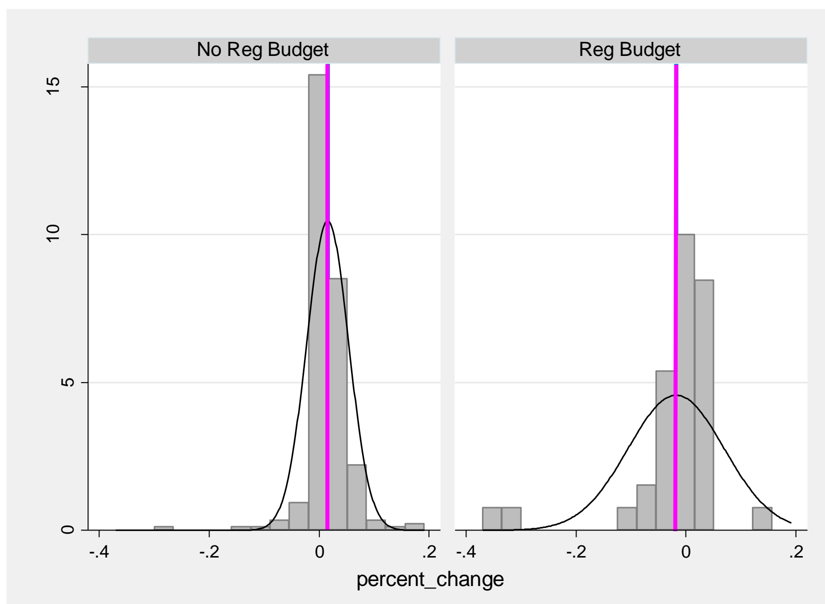

Figure 3 shows two distributions of year-to-year percent changes in regulatory restrictions. The distributions show data from two categories: jurisdictions operating under a regulatory budget ("Reg Budget") and jurisdictions operating without a regulatory budget ("No Reg Budget"). Note that a given jurisdiction (such as the US) may be in the Reg Budget category for some years (2017 – 2020) and in the No Reg Budget category for other years (1970 – 2016). The mean change for jurisdictions in the No Reg Budget category is 0.0156, or 1.56 percent growth in regulatory restrictions from year to year. The mean change (indicated with the tall, thin vertical bar in the figure) for jurisdictions in the Reg Budget category is -0.0179, or a decrease in regulatory restrictions of 1.79 percent. This cursory analysis is by no means dispositive. Rather, the exercise is intended to show that such an analysis is readily feasible with data from text-based metrics. Further, it suggests that regulatory budgets do help reduce regulatory restrictions.

VI. Concluding Remarks

Benefit-cost analysis is now a well-established best practice for evaluating the merit of individual regulations, and many governments require it as part of an RIA. But looking at the merit of an individual regulation is different from a regulatory measurement program intended to monitor the aggregate quantity or cost of regulation for regulatory budgeting purposes. The latter practice is less well-established and requires broad, credible metrics that are cost-effective to collect, maintain, and report. Successfully implemented, comprehensive measurement of regulation can provide some sense of the total quantity or burden of regulation and how it is

changing over time. This, in turn, creates more transparency and makes governments more accountable for their regulatory activity. Such transparency and accountability are valued when it comes to fiscal budgeting, and similar values likely apply to regulatory budgeting.

Policymakers that have implemented a regulatory budget would presumably be interested in tracking the budget's success. A baseline and a way of measuring change relative to the baseline are ideal for tracking success, whether the goal is to reduce, maintain current levels, or manage the growth of regulation. However, these regulatory budgeting actions become more challenging when measurement is complicated or expensive.

Text-based metrics are emerging as a practical and effective choice for regulatory budgets. They offer a number of advantages over alternatives, including a cost-effective way to get a handle on both the stock and the flow of government rules stemming from legislation, regulation and guidance, policies and forms. They can complement tools such as cost-benefit analysis and RIAs that are well-suited to consider individual regulations but too costly to be used for the many obligations found in guidance documents.

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Regulatory Budgeting: Inhibiting or Promoting Better Policies?

ANDREA RENDA*

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ABSTRACT

The adoption of regulatory budgeting rules such as "One In One Out" (OIOO) has proven to be beneficial in a number of countries around the world, not only (and not prevalently) due to the cost reductions achieved, but rather since it triggered greater awareness of the costs generated by regulation; and provided administrations with incentives to manage the existing stock of regulation and perform regular retrospective reviews. At the same time, these should neither be conceived as sufficient to improve the quality of legislation, nor hailed as substitutes for a comprehensive analysis of the positive and negative impacts of regulatory measures. This paper reviews the international experience with regulatory budgeting and cost offsetting rules in nine countries, drawing lessons from this emerging experience for future reform in the United States, where the regulatory budgeting system introduced by the Trump administration with EO13,771 is now officially repealed.

Ten main lessons can be drawn from the analysis. First, regulatory budgeting systems are not a panacea, but can only bear fruit as part of a broader mix of better regulation instruments. Second, these systems work best when implemented as a whole-of-government commitment. Third, if properly designed, regulatory budgeting systems can generate positive behavioral impacts inside the administration. Fourth, rules that take the form of "One In One Out" are the most recurrent and the most sustainable form of regulatory budgeting rule. Fifth, If carefully designed, regulatory budgeting rules are not incompatible with an ambitious policy agenda. Sixth, regulatory budgeting systems should focus on the elimination of "unnecessary costs", i.e. costs that do not generate corresponding regulatory benefits. Seventh, regulatory budgeting systems are compatible with innovation-friendly tools such as regulatory sandboxes. Eight, if properly designed such rules can incentivize widespread, transparent retrospective reviews. Ninth, regulatory budgeting systems can be reconciled with full-fledged cost-benefit analysis or multi-criteria frameworks. Finally, regulatory budgeting systems have produced limited impact when governments have contemplated a broad set of exceptions, or adopted an excessively narrow focus.

INTRODUCTION

Over the past two decades, several governments have introduced tools to incentivize regulators to become more aware of the costs they impose on businesses and citizens when they propose new rules. In some European countries, such as the Netherlands and Germany, this cost-focused approach has taken priority over more comprehensive better regulation strategies such as the use of *ex ante* regulatory impact analysis (RIA), or comprehensive retrospective reviews of the costs and benefits of individual regulations. In a dozen European Union Member States, plus Canada, Korea, Mexico and the United States, governments of various political orientations have introduced forms of regulatory budgeting, which require administrations to identify, every time they introduce new regulation entailing significant regulatory costs, provisions to be repealed

or revised, so that the net impact on overall regulatory costs is (at least) offset.[1] These rules are generically referred to as "One-In-X-Out" (OIXO). They can be considered as a special case of so-called burden reduction targets, which in turn originate in the Standard Cost Model, a simplified approach to cutting red tape implemented in the Netherlands since the early 1990s.[2] While these targets tend to be specified in absolute terms (*e.g.*, reducing 10 billion USD of regulatory costs within five years), OIXO rules work differently, in that they link the introduction of new regulatory costs to the achievement of a cost reduction. In their most common form of "One-In-One-Out" (OIOO), these rules amount to a commitment not to increase the estimated level of burdens over the chosen timeframe. The OECD refers to these commitments as "regulatory offsetting."[3]

Depending on the circumstances, the OIXO rule may explicitly refer to the number of regulations, and thus require that for every regulation introduced, one or more existing regulations are eliminated; or to the corresponding volume of regulatory costs, and hence require that when a new regulation is introduced, one or more regulations are modified or repealed, such that the overall change in regulatory costs is zero or negative. Most countries adopted the latter version, based on cost offsetting rather than on avoiding increases in the number of regulatory provisions. The United States, as well as France, specified the OIXO rule both in terms of number of regulations, and in terms of volume of regulatory costs.

Regulatory budgeting systems have sparked a heated debate over the past decade. Some commentators have argued that they may end up reducing the incentive for policymakers to introduce rules that, despite being costly, would entail net benefits for society. More generally, rules that impose a gradual reduction in regulatory costs have been criticized as jeopardizing the agenda of governments willing to pursue an ambitious, expansive policy agenda, for example pursuing enhanced civil rights protection, sustainability goals, or greater resilience. On a more positive note, OIXO rules are seen as potentially beneficial since they incentivize policymakers to consider more carefully, and where possible monetize, the cost of regulatory interventions. They can also push administrations to carry out comprehensive retrospective reviews of their regulatory stock, in the search for provisions to repeal or, more generally, rules that are obsolete, redundant, or inefficient.

This paper reviews the international experience on OIXO rules, drawing some lessons for the future of regulatory reform. Section I below introduces basic definitions that can help the reader navigate through the technical jargon used in the remainder of the paper. Section II discusses the experience of eight countries with OIXO mechanisms, and briefly describes the one recently announced, and currently being piloted, by the

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[1] See Robert W. Hahn and Andrea Renda, *Understanding Regulatory Innovation: The Political Economy of Removing Old Regulations Before Adding New Ones* (2017). Available at SSRN: https://ssrn.com/abstract=3022552 or http://dx.doi.org/10.2139/ssrn.3022552

[2] For a detailed description, see Andrea Renda et al., *Assessing the Costs and Benefits of Regulation* (2013), Report for the European Commission, Study for the European Commission's Secretariat General. Available online at https://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf.

[3] Daniel Trnka and Yola Thuerer, *One-In, X-Out: Regulatory offsetting in selected OECD countries*, OECD REGULATORY POLICY WORKING PAPERS 11 (2019), OECD Publishing, Paris.

European Commission. Section III summarizes the main lessons learnt from these experiences and briefly discusses the future of regulatory budgeting. Section IV concludes by briefly reflecting on possible future scenarios for improving regulatory quality after the pandemic.

I. REGULATORY BUDGETING AND THE BROADER BETTER REGULATION AGENDA

Terms like "administrative burdens", as well as "substantive compliance costs" are often used to refer to specific categories of regulatory costs. While in the United States emphasis is normally placed on so-called "opportunity costs", as part of the overall benefit-cost analysis framework described in OIRA Circular A-4, in many other countries a more pragmatic, accounting-based definition of regulatory costs has prevailed, becoming part of the better regulation practice over time. Figure 1 below shows a general map of the impacts generated by legal rules, now included in the European Commission's Better Regulation Toolbox.[4] As shown in the figure, regulation normally produces both direct and indirect impacts, which in turn can generate second-order effects ("ultimate impacts"). The tools described in this report mostly deal with "Area 1", or "Direct Regulatory Costs", which encompass both direct compliance costs and, as a residual category, irritation costs (or hassle costs), which are typically more difficult to quantify or monetize. These costs are represented in the left part of Figure 1 below, which provides a comprehensive map of the costs and benefits of regulation.

Direct compliance costs include the following sub-categories:

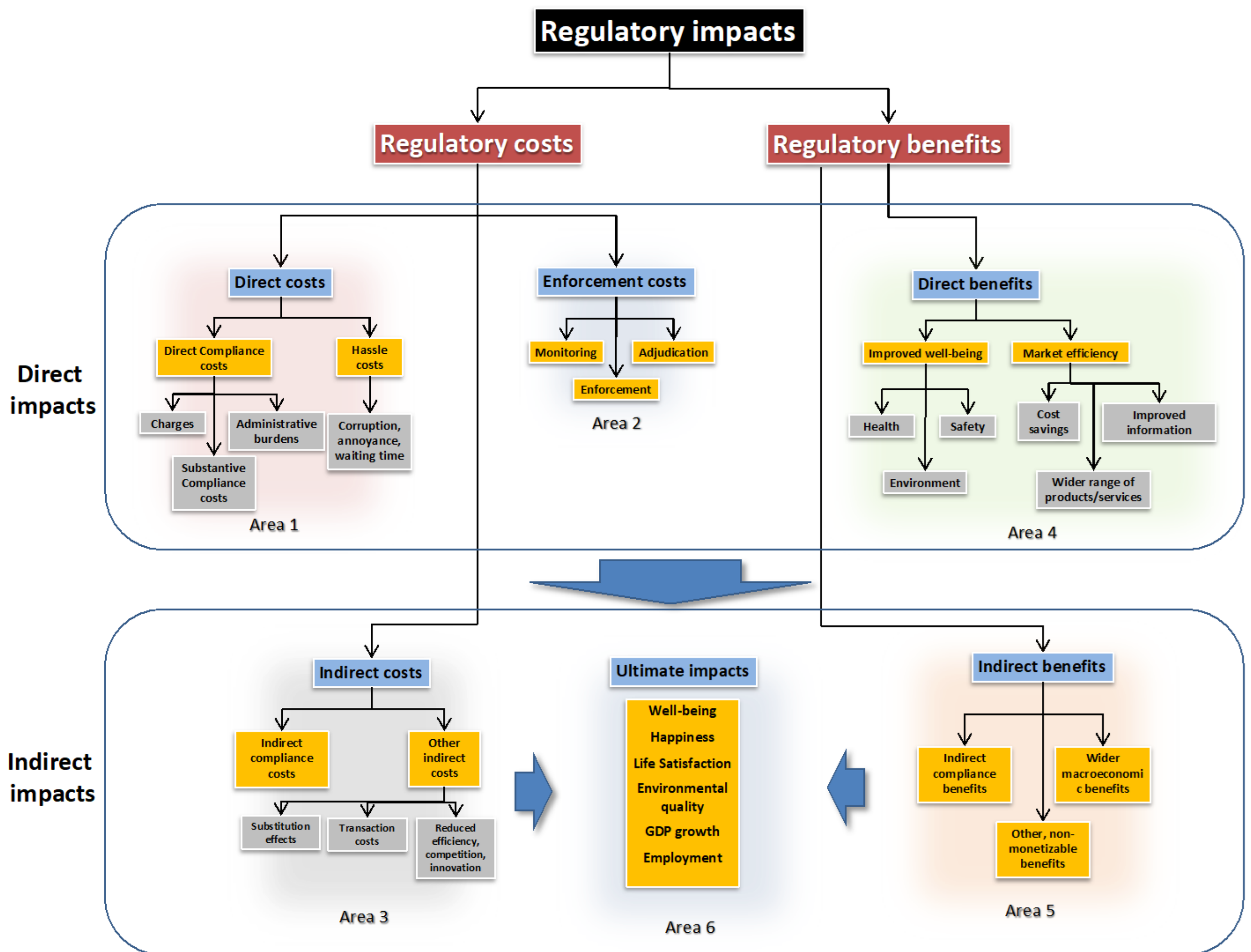
- *Charges*, which include fees, levies, taxes, royalties, etc. These are often easy to calculate, as their extent is known. What is sometimes more difficult to assess is who will bear those costs, as this might depend on the extent to which these costs will be passed-on to entities other than those targeted by the legal rule. For example, emissions allowances might be passed downstream onto end consumers in the form of higher prices for certain products, or a more expensive electricity bill.
- *Substantive compliance costs*, which encompass those investments and expenses that are faced by businesses and citizens to comply with substantive obligations or requirements contained in a legal rule. These costs can be further broken down into *one-off costs* (faced by regulated actors to adjust and adapt to the changed legal rule); and *recurrent costs* (substantive compliance costs that are borne on a regular basis due to the existence of a legal rule that imposes specific periodic behaviors). These costs are calculated as a sum of capital costs, financial costs, and operating costs.
- *Administrative burdens* are costs borne by businesses, citizens, civil society organizations, and public authorities as a result of administrative activities performed to comply with information obligations included in legal rules.

Direct costs are normally instrumental to the achievement of specific benefits. For example, investments related to compliance with health or environmental standards, such as the purchase of new equipment or the training of personnel, are needed to ensure

[4] The figure was originally published in Andrea Renda et al. *Assessing the Costs and Benefits of Regulation*, *supra* note 2. In that study, all other types of costs and benefits are given a detailed description.

that the policy objective to improve healthcare or protect the environment is met. However, in some circumstances the existence of overlaps between regulatory provisions, as well as inconsistencies or redundancies between regulatory provisions, can generate "unnecessary" (or "unnecessarily high") costs. Some costs can also become unnecessarily high after the entry into force of a given rule. For example, this can occur when new technologies make it possible for regulators to introduce new forms of electronic compliance verification, which replace older and more costly ones and thus lead to a reduction of administrative burdens. Accordingly, direct costs from regulation must be approached in a dynamic way, rather than as a static concept.

Figure 1 – A map of regulatory costs and benefits



Source: Renda *et al.* (2013)

Against this backdrop, OIXO rules vary significantly across jurisdictions, according to several features, such as:

- *Their scope, e.g.*, whether it is limited to secondary legislation, such as sectoral regulation and implementation measures, or also covers primary legislation developed and voted upon by parliaments. The scope of OIXO rules tends to follow that of *ex ante* policy appraisal instruments, such as Regulatory Impact Analysis.

Contrary to what happens in the United States, where the RIA system applies to federal regulation, in many other countries *ex ante* impact assessments are carried out also on legislation approved by Parliament, and regulatory/legislative budgets follow the same approach.

- *The type of costs covered, e.g.*, whether the rule only covers administrative burdens, or also substantive compliance costs, and/or enforcement costs. The impact of an OIXO rule becomes much greater if the scope extends to substantive compliance costs, which tend to be much higher than administrative burdens. However, most countries apply the rule only to administrative burdens, and often limit themselves to computing regulatory costs for businesses, rather than for society as a whole.
- *Whether the rule requires regulations to be eliminated, or also modified*. OIXO rules that focus on the volume of costs, rather than the number of rules, are more likely to allow for the revision of existing regulations, rather than requiring withdrawal.
- *Whether X > 1*, *i.e.*, whether the amount of costs to be eliminated equals the amount of costs introduced, or is a multiple. For example, in the U.S. the Trump administration introduced with EO13,771 a "one-in-two-out" rule in terms of number of regulations; however, the rule is effectively an OIOO rule in terms of the volume of regulatory costs.
- *The timing of offsets, i.e.* whether the rules to be repealed must be eliminated contextually with the approval of the new rule, or within a given timeframe. For example, in Germany the "outs" should be identified and acted upon by the end of the fiscal year, whereas in Canada the offsetting can occur within 24 months from the introduction of the "ins".
- *Whether an ex ante impact assessment is required* for measures that are repealed or revised.[5] In principle, mandating a fully-fledged impact assessment for both "ins" and "outs" could end up placing additional burdens on the administration, hence slowing down the regulatory process. At the same time, it can provide a stronger guarantee that the decision to revise or repeal a given existing regulation does not lead to the elimination of significant (or greater) regulatory benefits alongside costs.
- *Whether any exemption is foreseen, e.g.*, for regulations in the domain of home affairs or national security, or adopted in situations of emergency. In some countries, including Mexico and Spain, several exemptions have been introduced, whereas in other legal systems certain areas have been excluded altogether from the application of the rule: for example, in Germany the transposition of EU law is not subject to the OIOO rule, although the government occasionally analyses the prospective impact of new EU rules on regulatory costs.
- *Whether the system adopted allows for "banking" cost savings over time, or "trading" cost savings across agencies/ministries*. In the case of banking, one administration that achieved extra savings compared to the target for a given year is allowed to carry

[5] Note that in some countries (e.g., the United States) the government uses the term Regulatory Impact Analysis or RIA; whereas in other countries (also for reasons related to the scope of their better regulation system, which does not only include regulatory measures) reference is made to Regulatory Impact Statements (RIS), or Impact Assessment.

forward the extra savings to the following year. This measure provides incentives to the administration to implement reduction measures as quickly as possible, in order to be relieved from the responsibility of achieving additional savings in the future. In the case of trading, the government can decide to take the "outs" from a different policy area than the one where new costs are introduced. This can occur, for example, whenever a regulatory measure is deemed necessary in a given policy area where no opportunities for cost reductions can be identified.

II. OIXO RULES: SELECTED NATIONAL EXPERIENCES

There are at least twenty countries in the world that have adopted an OIXO rule. These include ten EU member states (Austria, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Spain and Sweden) as well as Canada, Mexico and Korea. In the past, three countries have had a similar rule in place (Denmark, the UK, and the United States), but later decided to gradually phase it out, for reasons that will be detailed below. Four other countries were reportedly introducing similar regulatory budgeting systems in 2020: Poland, Romania, Slovakia, Slovenia. Below, we illustrate in detail the experience of larger countries such as France, Germany, Italy, Canada, Mexico, Korea, Spain, and the United Kingdom.

A. Canada

In Canada, the reduction of administrative burdens has been an area of focus since the launch of the Red Tape Reduction Commission in 2011. The Commission's Recommendations Report was released in January 2012 and detailed 15 systemic changes and 90 department-specific solutions to reduce or remove "regulatory irritants." The Government of Canada took specific actions in response to the Report.[6] The so-called "one-for-one" rule is highly formalized and accompanied by *ad hoc* policies and guidance issued by the Treasury Board of Canada Secretariat.

The Canadian one-for-one rule applies to all regulatory changes that impose new administrative burdens on business[7]. All federal regulations are generally included, but primary legislation issued by the legislative branch of the government (i.e., Parliament) is not included. When a department intends to seek approval for a new regulation or to

[6] In particular, the Government's October 2012 Red Tape Reduction Action Plan included a commitment to operationalize the one-for-one rule, and this commitment was later reaffirmed in the October 2013 Speech from the Throne. The rule was rooted in the Red Tape Reduction Act introduced in January 2014 in Parliament to control the administrative burden that regulations impose on business. The Act received Royal Assent on April 23, 2015. The Red Tape Reduction Regulations were enacted on July 23, 2015 to operationalize the rule. In September 2018, the Cabinet Directive on Regulation was introduced, replacing the 2012 Cabinet Directive on Regulatory Management as the Government of Canada's policy for the regulation-making process. Subsection 5.2.4 of the 2018 Cabinet Directive on Regulation states that regulators must comply with the one-for-one rule and must identify and estimate the cost of administrative burden impacts of regulatory proposals on Canadian businesses, as set out in the Red Tape Reduction Act and the Red Tape Reduction Regulations. Further detailed information can be found in Section 7 of the Policy on Limiting Regulatory Burden on Business. See http://www.reduceredtape.gc.ca/heard-entendu/rr/rrtb-eng.asp.

[7] The Red Tape Reduction Act defines administrative burden as "anything that is necessary to demonstrate compliance with a regulation, including the collecting, processing, reporting and retaining of information and the completing of forms".

amend an existing one, it must engage the Regulatory Affairs Sector of the Treasury Board of Canada Secretariat at the earliest stages of regulatory development so that its level of impact can be determined. At this "triage" stage, the Regulatory Affairs Sector will provide an early indication as to whether the rule applies. Whenever a new regulation or an amendment to an existing regulation imposes new administrative burdens on businesses, departments are required to monetize and offset those costs with equal administrative burden reductions within 24 months of approval.[8] In monetizing "ins" and "outs", departments are required to use an *ad hoc* Regulatory Cost Calculator; and to consult affected stakeholders to validate estimates.[9]

The Red Tape Reduction Regulations authorize the Treasury Board to exempt regulations from the requirement to offset administrative burdens. The three categories of exemption are: (i) regulations related to tax or tax administration; (ii) regulations that implement non-discretionary obligations;[10] and (iii) emergencies and crisis situations or other unique, exceptional circumstances.

After the consultation of stakeholders on the estimated changes in administrative burdens, departments prepare their regulatory submissions to obtain the approval of the Treasury Board. Following approval, the proposed regulatory change is pre-published in the Canada Gazette, Part I.[11] At the pre-publication stage, regulators receive public comments on the proposed regulatory change; this provides a final opportunity for refinements before the proposal is finalized. Once adjustments are made to address public comments, the proposed regulation is submitted to the Treasury Board for final approval. If approved, it is registered and published in the Canada Gazette.[12]

B. France

In France, after piloting the Standard Cost Model in 2004, the government decided to rely on a simpler method to continue monitoring the evolution of administrative burdens.[13] In 2013, the government introduced a *gel de la réglementation* (regulatory

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[8] A regulation must be amended or repealed in accordance with section 5 of the Act within 24 months after the day on which a regulation that imposes a new administrative burden is registered. If a regulation has been amended or repealed before a regulation that imposes a new administrative burden is made and the prior repeal or amendment offsets the cost of the new administrative burden that is imposed, one or more regulations do not need to be amended or repealed.

[9] The Red Tape Reduction Regulations introduced in 2015 a specific formula for the calculation of the administrative burdens within the OIOO rule. The burden equals the sum of the cost of each activity expected to be completed during the first 10 years after the regulation is registered.

[10] This exemption applies to regulations that implement obligations for which there is no discretion with regard to the manner in which they can be designed and administered.

[11] Not all regulations are pre-published, however, as Treasury Board can exempt regulatory proposals from pre-publication. When considering approval to pre-publish, Treasury Board (Part B) decides on the application of the rule and whether to exempt the proposal from the requirement to offset based on the categories above.

[12] See Treasury Board of Canada Secretariat, Annual Report for the 2020 to 2021 Fiscal Year: Federal Regulatory Management Initiatives, available online at https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/annual-report-2020-2021-fiscal-year-federal-regulatory-management-initiatives.html#appB

[13] The Oscar database, developed to take account of the administrative burden of new regulations, implies a "net" target. Oscar uses reference data collected from DGAFP (*Direction générale de l'administration et de la fonction publique*), the INSEE statistics office, and the Budget Directorate on the hourly costs of civil servants and the cost

freeze) that involved the creation of a Business Simplification Council (January 2014) and the appointment of a Minister of State for State Reform and Simplification attached to the Prime Minister (June 2014). Since 2015, the government has been considering the adoption of an OIXO approach to regulation. Initially, departments were required to follow an OIOO rule by both offsetting the increase in costs to businesses and removing (or, if not possible, simplifying) an existing regulation when a new one was enacted. The system also includes costs to local governments and citizens.

The rule was then transformed into a one in, two out (OI2O) rule with the introduction of the *maîtrise du flux des textes réglementaires* (control of the flow of regulatory texts) by the government in 2017.[14] The French model was formally introduced by a "circular" adopted on July 26, 2017, on the control of regulatory texts and their impact, which aims at controlling normative production so as to limit the negative effects on business (competitiveness), local authorities (administration), local services (operation), and citizens (daily life). To this end, "any new regulation must be offset by the elimination or, if impossible, the simplification of at least two existing regulations." The General Secretariat of the Government (SGG) must ensure compliance with the application of this circular to ministries, and it arbitrates disputes.

The SGG ensures compliance with the two requirements of the OI2O rule: (1) that the two repealed or simplified regulations belong to the same departmental field or fall within the framework of the same public policy as the new regulatory measure, and (2) that the rules appear qualitatively of equivalent level (for example, they are all decrees, or all subordinate regulations). The rule also establishes an inventory of rules for each department according to its public policy field, overseen by the SGG.

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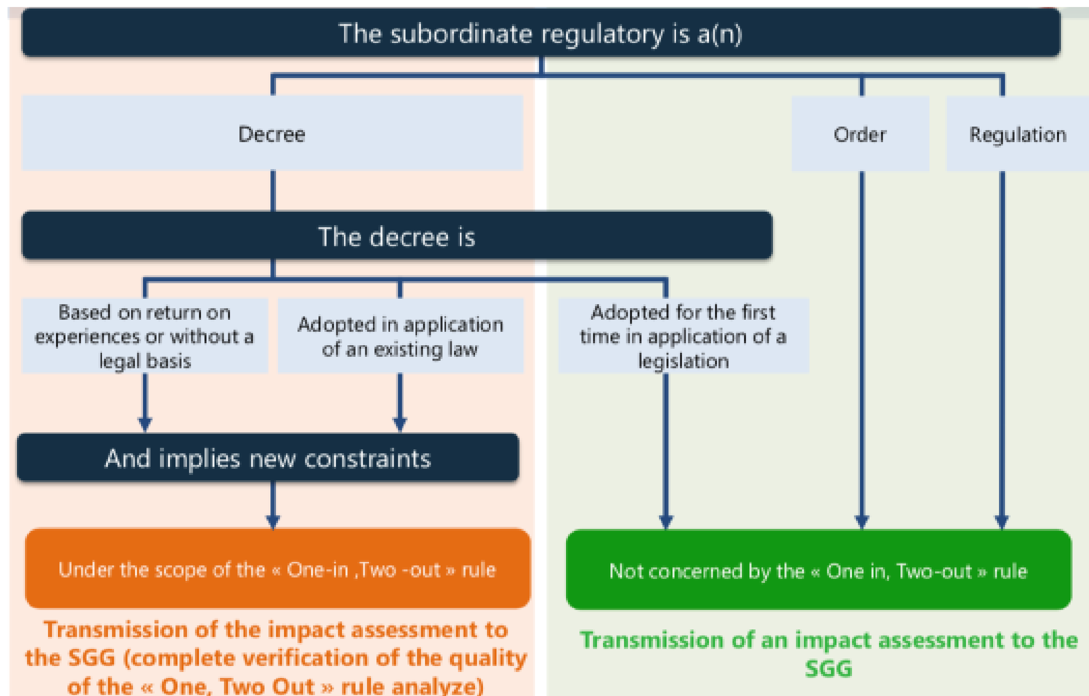
of company employees for each socioprofessional category and sector of activity. Furthermore, the database resulting from the work of the MRCA (Measure to Reduce the Administrative Burden) provides preliminary information on both one-off and ongoing compliance costs.

[14] The offsetting obligation was doubled with the intent to impose greater control of the flow of regulatory texts on the different ministerial departments, because the original approach had not achieved the desired results.

Figure 2 – OIOO in the French System



Source: French SGG (2018)

The OI2O rule applies to all national regulations, decrees, and circulars. Not included in this framework are draft decrees that are by nature without impact on the administrative burden of civil society (e.g., statutory provisions applicable to state employees and provisions of a budgetary nature); as well as the decrees issued to accompany a new law or regulation in order to condition their entry into force (See Figure 2). The SGG is responsible for ensuring compliance with the OI2O rule, centralizing the elements of costs and quality control (via the impact sheets that are systematically addressed to it), and reporting semiannually the growth of the costs and the savings obtained. The Secretariat submits the draft decrees containing the new rule and the proposed simplification measures to the arbitration of the presidential cabinet. The cabinet then decides whether to continue, modify, or abandon the draft regulation.

The French system stands out from other systems adopted in the EU, since it requires regulatory offsetting by means of the repeal or simplification of two existing rules, rather than one. Therefore, similarly to the rules adopted in the U.S. during the Trump administration, it is an OIOO rule in terms of volume of costs and an OI2O rule in terms of number of regulations.

C. Germany

Germany has adopted a strategic approach to regulatory cost reduction since 2006. Between 2006 and 2013 it successfully implemented a reduction target of 25% regarding administrative burdens for businesses. The council of ministers' decision on January 27, 2010, reinforced the reduction target. In 2006, a National Regulatory Control Council

(NKR) was introduced to provide independent oversight of the respective numbers and figures in the Impact Assessments and to support the government's efforts to meet its target. The government met its net reduction target in 2013, and since then a Bureaucracy Cost Index has been maintained, which keeps track of new additions and reduction in regulatory costs.

The German experience has shown that bureaucracy costs ensuing from information obligations account for only a small part of the follow-up costs incurred by federal regulations, leading to an expansion of the scope of the reduction efforts to cover compliance costs as well. The "Bureaucracy Reduction and Better Regulation" policy has thus been significantly expanded, as has been the mandate of the NKR. In December 2014, the federal government launched new initiatives for further reducing the bureaucratic burden on small and medium-sized enterprises. One of these key points is the introduction of the OIOO rule, aiming to "restrict the proliferation of red tape in the long term without hindering political projects." Further, those measures specifically outlined in the coalition agreement must not be obstructed or delayed.

The "one in, one out" rule generally applies to all regulatory proposals from the federal government that impact the recurring compliance costs of business. Exemptions apply to proposals which:

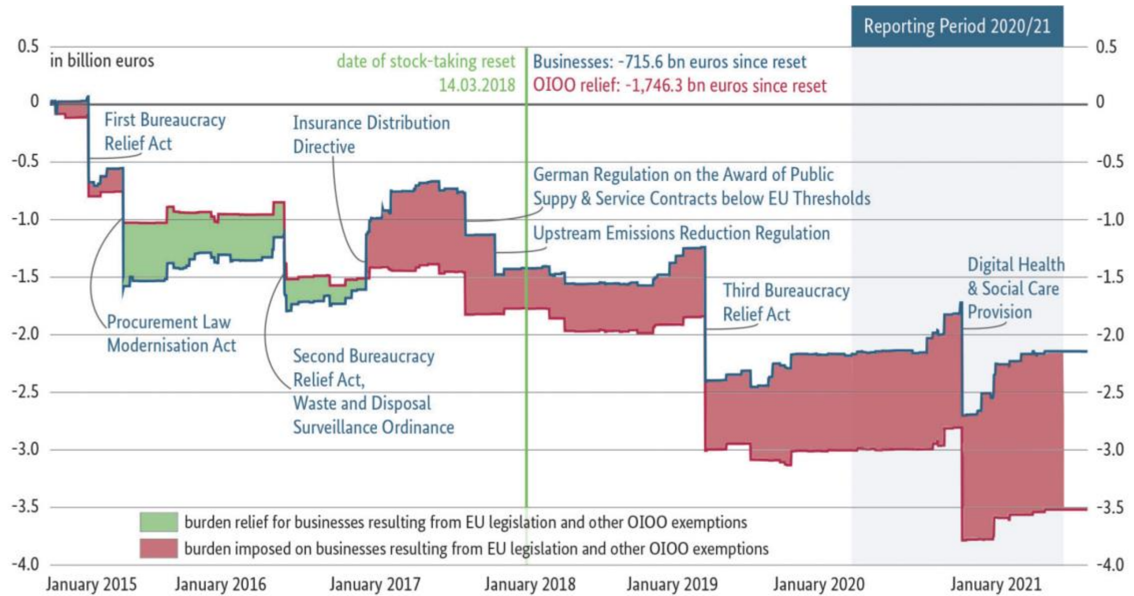
- constitute an exact (1:1) implementation of EU legislation, international agreements or rulings by the Federal Constitutional Court and Court of Justice of the European Union;
- address substantial security threats; or
- have impacts that are time-limited (up to one year).

All measures were based on a common methodology.[15] Government departments report to the State Secretaries Committee on Bureaucracy Reduction every six months on progress made, difficulties encountered, and any imminent failure to meet targets with regard to the planned reduction measures. The federal government must then report annually to the German Bundestag, and in liaison with the NKR it reviews and (if necessary) revises the procedure for identifying and expressing compliance costs.

The OIOO rule has had a tangible effect so far, resulting in a net relief of approximately 3.5 billion euros for businesses since its introduction in 2015. However, the German government argued that EU legislation, which is currently not subject to the OIOO rule, added regulatory costs for an additional annual "in" of 0.5 billion euros (2015–2021) to this equation. Figure 3 below shows the burdening (marked in red) and the relieving impact (marked in green) of the implementation of EU directives on businesses. Furthermore, the current relief arising from national legislation can be partially or completely offset by burdens that are currently exempt from the OIOO rule.

[15] For administrative burdens, the Standard Cost Model. For compliance costs, a common methodology based on the SCM. For a more detailed description, see Andrea Renda et al. *Assessing the Costs and Benefits of Regulation*, *supra* note 2. In that study, all other types of costs and benefits are given a detailed description.

Figure 3 – One in one out monitor in Germany: results 2015-2021



Source: Normenkontrollrat (2021)[16]

Importantly, the German OIOO rule includes only ongoing compliance costs, excluding so-called "one-off costs." However, one-off costs are also calculated and reported by the NKR. The latest Annual Report of the NKR mentions that while the recurrent compliance costs to businesses have decreased in the present reporting period, businesses had to face one-off compliance costs amounting to 5.8 billion euros, far greater than in the previous reporting periods. A similar spectacular increase occurred in the one-off compliance costs faced by public administrations. As reported by the NKR, "this is largely due to the interim measures concerning the COVID-19 pandemic which are also included in one-off compliance costs."[17]

The OIOO process is coordinated by the State Secretary Committee for Bureaucracy Reduction led by the Minister of State with the Federal Chancellor; the NKR verifies the quality of cost estimations provided by ministries, providing an independent oversight.

In terms of the specific design features of the German model, the following can be observed.

- *Compensation is specific to the target sector*. Any increase in recurrent compliance costs for businesses can only be compensated for by a reduction in recurrent compliance costs for businesses.
- *Possibility of exemptions.* If there is a political will to regulate, but no prospects of identifying the offset within the competent ministry's portfolio, a ministry can ask

[16] *See* Annual Report 2021 of the National Regulatory Control Council pursuant to Section 6 (2) of the National Regulatory Control Council Establishment Act. Available online at https://www.normenkontrollrat.bund.de/resource/blob/656764/1960670/ae6c9535f5bec8f248cc72bb86a1214e/210916-annual-report-2021-data.pdf?download=1.

[17] *Id.* at 14.

the steering group of state secretaries (representing all ministries) for an exemption, but it needs to secure the approval of the NKR. None of the ministries has used this option so far. Moreover, the State Secretaries Committee on Bureaucracy Reduction can cap the amount of compensation required (1) if the new increase in compliance costs demonstrably exceeds the capacity of the relevant ministry to offset the burden, (2) if the compliance costs as presented do not adequately reflect direct cost reductions that could be expected, or (3) if the regulatory proposal will otherwise benefit the business community. Before the State Secretaries Committee decides on any plan to cap compensation, it must consult the NKR on whether the planned compensation, particularly the compliance costs, has been presented reasonably and plausibly.

- *Ministry-specific compensation*. The lead ministry for the respective individual provision is responsible for the compensation. If that department cannot identify any possible way of balancing out the increase or demonstrate that it has achieved a suitably significant reduction with previous proposals, then it may—either bilaterally or in the State Secretaries Committee on Bureaucracy Reduction—ask other government departments to take on the task.
- *Temporal dimension*. Where a proposal increasing the bureaucratic burden cannot be balanced out with immediate effect, the plan or prospects for compensation are explained either in the explanatory or covering note or by some other suitable means. The usual time limit for compensatory measures to be presented is one year. The aim is to limit the rise in compliance costs within the legislative term.

As observed in a recent OECD report, in Germany the OIOO rule was introduced with the aim to raise regulators' awareness of the issue of compliance costs by linking the responsibility of calculating costs and finding offsets to the "owner" of the regulation.[18] This implies that the prospect of complying with the OIOO rule provides incentives to the administration to control regulatory costs while adopting socially and economically beneficial regulation.

D. Korea

In Korea, a "Cost-in, Cost-out" (CICO) system formally entered into force in July 2016 by ordinance of the Prime Minister, after its launch as a pilot in 2014. CICO is a mechanism to restrict the increase of the costs of newly introduced or reinforced regulations by abolishing or relaxing regulations that carry equal or greater costs. As of late 2018, 27 central administrative agencies have adopted CICO concerning regulations that generate direct costs for profit-seeking activities of any individual or business. Since CICO requires the responsible agency to conduct a cost-benefit analysis for outgoing regulations that offset the costs of newly introduced regulations, there is a built-in mechanism to reassess the validity, rationality, and appropriateness of the existing regulations.

The CICO system entails a different calculation compared to the one used in the general Regulatory Impact Analysis carried out in Korea. In particular, the system looks

[18] *See* Daniel Trnka and Yola Thuerer, *supra* note 3.

only at the direct burdens added and subtracted by new legislation. In this respect, this system does not cover the broader, indirect impacts on the economy resulting from regulation. Table 1 below shows an illustration of this difference.

Table 1 – Calculation of net benefits in RIA and CICO system in Korea

	Benefits		Costs	
Regulatees	A	B	W	X
Others (general public and government)	C	D	Y	Z
RIA System: (A + B + C + D) - (W + X + Y + Z)				
CICO System: A - W				

Source: OECD and KDI (2017)

The following cases are exempted from the CICO program:

- Regulations necessary for dealing with a national crisis or emergency.
- Regulations required to implement treaties or international agreements.
- Regulations directly related to maintenance of order, public life, or safety.
- Regulations necessary for preventing financial crisis, securing financial stability, dealing with environmental crisis, and fostering fair competition.
- Regulations associated with administrative fees, administrative actions, or administrative sanctions.
- Regulations that are sunsetting within one year.

Approximately 72% of new regulations established during the pilot project were subject to an exemption.[19] In the CICO system, banking is allowed (i.e. extra savings can be carried forward to the following year), whereas trading is not allowed (i.e., "Outs" must be found in the same policy areas as the "Ins"); and the agency increasing regulatory costs is itself responsible for finding necessary offsets. In the pilot tests of CICO, started in July 2014, 15 ministries analyzed and abolished (or relaxed) 28 existing regulations in exchange for 24 newly introduced ones. In July 2016 the CICO system was introduced in full force, covering 27 agencies in total. All ministries and agencies must evaluate their CICO performance semiannually. The Regulatory Reform Office compiles this information and submits it to the central oversight body, the Regulatory Reform Committee. CICO is one of the factors that play a role in the evaluation of the ministries' performance. The results are published online. Interestingly, ministries are graded based on their performance and financially rewarded for very good performance. The RRC submits an annual report to the National Assembly in which one chapter is dedicated to CICO.

[19] OECD (2017), *Regulatory Policy in Korea: Towards Better Regulation*, OECD Reviews of Regulatory Reform, OECD Publishing, Paris, https://doi.org/10.1787/9789264274600-en.

The key advantages of the CICO system in Korea include greater awareness of public authorities of the need for ex-post evaluation of regulation, because evaluation helps identify the rules to eliminate when new regulation is proposed. Administrations also reportedly have the incentive to replace old regulations with more efficient ones over time. Initially thought to be costly, the system proved to be cheaper than other ex-post evaluation mechanisms. And a recent study jointly undertaken by the OECD and the Korea Development Institute found CICO's impact on RIA quality to be positive.[20]

E. Italy

The Italian Government has used an OIOO rule since 2011. The "*Statuto delle Imprese*" (Law of November 11, 2011, n. 180, article n. 8) provided a stock-flow control mechanism for administrative burdens, introducing the OIOO rule in the annual regulatory budget.[21] To foster the implementation of the rule, in 2013 the Department of public administration published guidelines on administrative burdens helping public administrations in identifying costs and defining the regulatory budget. The OIOO rule applies to both primary and secondary legislation and does not apply to independent agencies. It applies to administrative burdens only, not substantive compliance costs. It applies both to citizens and businesses, despite the fact that it was introduced by a law dedicated to businesses. The rule is cost-based: it does not require that for every new regulation introduced, existing regulations are removed, but it requires that the total amount of new administrative burdens introduced every year be offset by an equivalent amount of costs to be removed in the same sector. The application of the rule is limited to administrative burdens. The rule does not take into account the benefits introduced by new regulation nor those of the regulations that are repealed.

The Italian OIOO rule allows for offsetting to take place also by modifying (thus, not necessarily repealing) existing regulations. The rule does not allow for banking regulatory costs. Each Ministry chooses the regulations to be repealed or simplified, and there are no specific provisions about the qualitative criteria that must be used to offset new costs. The repealed rules must fall in the same policy area as the ones that are introduced. Fiscal, tax, and public games and lotteries regulations are exempted. According to the *Statuto delle imprese*, each Ministry is required—by January 31 of each year—to submit to the Prime Minister's office a report on the total amount of newly introduced or eliminated administrative burdens on citizens and businesses by the regulatory acts approved during the previous year[22]. The Department of Public Administration in the Prime Minister's office prepares, both on the basis of these reports and considering the results of ad hoc stakeholder consultations, a comprehensive report

[20] OECD/KDI (2017), *Improving Regulatory Governance: Trends, Practices and the Way Forward*, OECD Publishing, Paris, https://doi.org/10.1787/9789264280366-en. The sparse academic literature available appears to be less enthusiastic.

[21] *See* Senato della Repubblica, Servizio per la qualità degli atti normativi, Ufficio per la verifica della fattibilità amministrativa e per l'analisi di impatto degli atti *in itinere* (2017), *La riduzione degli oneri amministrativi*, edited by Stefano Marci, available online at https://www.senato.it/service/PDF/PDFServer/BGT/01044562.pdf

[22] Paragraph 2, Article 8 of the Statuto delle Imprese, as modified by decree-law n. 5 of 2012, provides that by January 31 of each year, state administrations must send to the Presidency of the Council of Ministers a report on the overall balance of administrative burdens, including a detailed description of those introduced and eliminated for citizens and businesses.

containing the annual budget of the newly introduced or reduced administrative burdens, by each Ministry. The report is published on the Government's institutional website by March 31 of each year. If the administrative burdens introduced are higher than those reduced, the Government is allowed to provide for the corresponding offsetting, adopting, within ninety days after the publication of the report, one or more regulations for removing an equal amount of administrative burden costs from the existing stock of regulations. Regulatory offsetting measures have to undergo an impact assessment.

The Italian experience has remained relatively hidden over the past years, and the OIOO rule never achieved the prominence it has in countries like Germany. At the same time, the relative under-development of other better regulation tools, such as ex ante RIA, make this national experience less successful when it comes to the overall mainstreaming of the OIOO rule in the culture of the administration.

F. Mexico

In Mexico, the new General Law on Better Regulation includes the adoption of an OIOO rule, which is implemented by the new National Commission for Better Regulation (CONAMER) in the Federal government. Art. 78 of the new law aims directly at reducing, or at least avoiding increases in, the regulatory stock. Based on the new law, the OIOO rule requires regulators to expressly indicate in their regulatory proposals the regulatory obligations or acts to be modified, abrogated or derogated; that the corresponding impact on cost is zero or negative; and that the acts or obligations to be eliminated are related to the same subject matter or regulated sector than the ones introduced.

Additionally, based on the Presidential decree dated March 8th, 2017, the federal government initially applied a similar version of the OIOO rule, which requires regulatory authorities to eliminate two regulatory actions or administrative acts in the same economic sector, as a condition for issuing a new regulation.[23] This initial rule, as a result of the 2017 Presidential Decree, is still valid for Federal regulatory proposals and the CONAMER currently makes a joint interpretation of both versions of the OIOO. As of March 30, 2020, the government of Mexico had received 4,032 regulatory proposals, and the OIXO measure had reduced the cost of compliance for citizens by USD 13.70 billion.

The OIOO rule generally applies to all national regulations imposing direct compliance costs to individuals. However, the following regulations can be exempt from both versions of the OIOO rule:

- Regulations that address an emergency, provided that they have a validity of no more than six months, seek to avoid imminent damage or mitigate existing damage, and an act with equivalent content has not previously been issued.

[23] It must be emphasize that this rule might not be interpreted as an "one in two out" (OI2O) rule because the spirit of the Presidential decree was to verify that, for each new regulatory proposal, there would be at least a reduction in the compliance cost for the individuals by eliminating two regulatory obligations or acts (including procedures), with a greater emphasis on the amount of cost saved by eliminating these regulatory obligations or acts.

- Regulations with automatic sunset or evaluation clauses.
- Regulations related to the disbursement and operation rules of the Federal subsidies.
- Regulations issued by the President.
- When the regulator proves that the economic sector to be affected by the regulatory proposal does not have current regulations to be eliminated in order to comply with the OIOO rule. In this case, the regulator can request CONAMER to exempt the measure from the OIOO rule.

Exceptions seem, however, to have quickly become the rule in the Mexican system. In the period of March 9th, 2017 to October 31st, 2019, only 13.7%of the total of new Federal regulatory proposals received by CONAMER were subject to the OIOO rule.[24] Since its introduction, the OIOO rule has shown the following statistics: between March 9th, 2017 to October 31st, 2019 CONAMER reported USD 517 million of new regulatory compliance costs, and almost USD 15.8 billion of savings, leading to net savings of USD 15.3 billion[25].

Several lessons have emerged as a result of the implementation of OIOO rule in Mexico. First, the rule has become an effective way to differentiate relevant regulations from those that are not, since regulators are not willing to comply with their OIOO obligations in the case of unnecessary new regulations. With this tool, the oversight authority can easily identify the impact of the new regulatory proposals. Second, the implementation and interpretation of the OIOO by the oversight authority has avoided the dismantling of the regulatory stock to comply with the OIOO; the rule focuses on avoiding increases in regulatory costs, rather than on reducing the number of regulations. Third, the implementation of the OIOO rule has allowed for a systematic increase in the quality of regulatory impact analysis and also has improved the quality of the human resources dedicated to performing this type of analysis. Fourth, the adoption of the OIOO rule should not prioritize cost reductions over the pursuit of the public interest. Fifth, the statistical evidence of this policy after two years of implementation confirms its success since the savings generated would not have been achieved by another mechanism.

G. Spain

In Spain, regulatory offsetting was introduced by Law 14/2013, of September 27th, of support for entrepreneurs and its internationalization (article 37). The Council of

[24] Between March 9th, 2017 to October 31st, 2019, the CONAMER received 3466 new regulatory proposals from which 2990 (86.3%) were applicable to the exceptions included in the OIOO rule or were regulatory proposals that didn't generate compliance costs to individuals.

[25] Source: internal statistical reports in CONAMER. During this period, over 80% of the reduction in compliance costs (12,662.5 million dollars) was result of a regulatory proposal issued by the National Banking and Securities Commission about "Financial Hybrid Limits" (Resolution modifying the general provisions applicable to the institutions of credit), in which at least 4 provisions of current regulatory obligations were repealed as part of the OIOO rule. The consequence was more flexibility in the use that credit institutions could give to their capital, so, the credit institutions were able to put more resources in the financial market and that financial profits could not be generated if they had to be placed as capital, as it was stipulated in the initial provisions. The repeal of provisions as a result of the OIOO rule implied that credit institutions could generate additional profits in the market of around 12,662.5 million dollars per year.

Ministers Agreement of January 30th, 2015 lays down measures to strengthen the monitoring of the principle of compensation of administrative burdens. No modification has been put in force since then. Law 14/2013 "On Support For Entrepreneurs And Their Internationalization" introduced a OIOO principle limited to the offsetting of administrative burdens for businesses: "When public administrations create new administrative burdens for companies, at least one existing burden of equivalent cost will be eliminated" (Article 37). Some regulations that are exempted from the mechanism include:

- Regulations transposing EU legislation or international agreements into national law;
- Regulations concerning civil emergencies; regulations containing measures to prevent financial risk, contain inflation, regulate taxes and fees, fines and penalties and social security contributions; and
- Regulations with temporary validity (especially those with an annual term).

Spain uses direct administrative burdens on businesses as a metric for regulatory offsetting. These costs are measured as part of the RIA process using a modified version of the Standard Cost Model called "Simplified Method." According to the Council of Ministers Agreement of January 30th, 2015, the annual global increment of administrative burdens in each ministry must be compensated by the same ministry during the following year. Each ministry chooses the rules to be repealed considering the exceptions set by the Council of Ministers. Offsetting rules do not necessarily have to fall in the same policy area; ministries can choose from their whole portfolio of competences. The offsetting is explicitly announced in the impact assessment of the new regulation that introduces new burdens. The offsetting measure is not subject to an impact assessment. However, if the provisions to be repealed had been originally accompanied by an impact assessment at the moment of their adoption, the compensatory regulation that replaces them should also be accompanied by an impact assessment.[26]

The overall experience of the Spanish government with OIOO was reported as positive. The administration became more attentive to burdens and improved the quality of ex ante impact assessments (particularly the level of cost quantification) and of the regulatory management process.

H. The United Kingdom

The United Kingdom features one of the most well-established experiences and traditions in the field of better regulation, which enables it to reach a greater degree of sophistication in the analysis of the costs and benefits of regulation. After a partly successful experience with the baseline measurement of administrative burdens in 2005-2006, initiatives aimed at monitoring and reducing regulatory costs have proliferated, including the introduction, in 2010, of an independent body, the Regulatory Policy Committee (RPC), to validate the costs and benefits of all new regulatory and de-

[26] Moreover, according to article 26.9 of Law 50/1997, of November 27, on the Government, the Ministry of Presidency, Parliamentary Relations and Equality assesses the need to include an expressed derogation, as well as the need to consolidate other texts in the same field. These functions are currently developed by the Office for Regulatory Coordination and Quality according to the Royal Decree 1081/2017, of December 29.

regulatory proposals.[27] In 2011, an OIOO rule was introduced. Over the 2011-12 period, government departments, not only met the target, but exceeded OIOO, removing around £963 million more in business burdens than they introduced according to the UK Regulatory Policy Committee. Since 2013, the UK has operated a 'One-in, Two-out' (OI2O) regulatory management system. The premise is that for every net £1 in regulatory cost introduced by domestic regulation, departments would need to find twice the amount of savings. The OI2O rule required an even stronger performance from departments compared to the previous rule.

With the change of government in 2015, the agenda changed. The Small Business, Enterprise and Employment Act 2015 required the Government to publish a Business Impact Target (BIT) for the duration of each Parliamentary term, obtain independent verification of the economic impact of new regulation, and report regularly on progress against the target. The Cameron government extended the scope of the BIT in the Enterprise Act 2016 to include the activities of statutory regulators that have an impact on business.[28] In March 2016, the Government announced new measures to cut a further GBP 10 billion of red tape, including moving to a 'One-in, Three-out' OI3O rule to be achieved by departments for them to deliver the BIT.[29] In addition, the "Cutting Red Tape" initiative led to the creation of an online website dedicated to interaction with stakeholders on areas that should be prioritized in this respect. The offsets identified in the UK system "often do not actually remove any regulatory requirements, but rather make regulatory compliance less costly, for instance by streamlining paperwork processes so that businesses could make some filings without the need of a lawyer."[30] Notably, before Brexit, European Union regulations and directives have been exempted from this requirement. The U.K. government reports that its regulatory offsetting polices have reduced both the number of regulations and the associated costs to businesses.

However, after the Brexit referendum the popularity of the OI3O rule has decreased in the UK. The criticisms raised are related both to the representativeness of the costs included in the analysis and to the overall salience and soundness of the whole exercise. The UK National Audit Office (NAO) reviewed the system in 2016 and concluded that while the system has successfully raised the profile of regulatory costs imposed on businesses across government, the bulk of regulatory costs had not been included in the analysis, and departments had not done enough to appraise the wider impacts of their

[27] For a description of the early UK experience in 2005-2006, see Andrea Renda, *One Step Forward, Two Steps Back? The New U.S. Regulatory Budgeting Rules in Light of the International Experience*, 8 JOURNAL OF BENEFIT-COST ANALYSIS 291–304 (2017).

[28] The Enterprise Bill is available online at http://services.parliament.uk/bills/2015-16/enterprise.html.

[29] *See* Appendix 4: operating a 'one in, two out' rule for business regulation, available online at https://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business/supporting-pages/operating-a-one-in-two-out-rule-for-business-regulation. The independent Regulatory Policy Committee publishes its Opinion on all ex ante assessments, including whether it has validated OI2O measures from departments. See the opinions expressed at https://www.gov.uk/government/policies/regulatory-policy-committee-opinions-on-impact-assessments.

[30] Ted Gayer, Robert Litan & Philip Wallach, Evaluating the Trump Administration's Regulatory Reform Program, Brookings Institution (2017), https://www.brookings.edu/wpcontent/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf. *See also* Jitinder Kohli, What President Trump Can Learn from the UK about Reducing Regulations, FORBES, January 27, 2017.

decisions, or to evaluate their effects[31]. This, the NAO added, "harms the credibility of claimed savings and reduces opportunities to learn from past experience" (NAO 2016). Even more negative was the comment of the House of Commons' Committee on Public Accounts, which released in September 2016 a rather critical report on the UK better regulation agenda, including the regulatory budgeting and OI2O system.[32] The Committee observed *i.a.* that the whole exercise failed to consider the wider costs and benefits of regulation.

The rule is now being given lower priority compared to other better regulation initiatives of the government, including the Business Impact Target and the promotion of innovation through smart regulation. This is also due to the fact that simplification initiatives have been underway for several years, whereas other instruments have been less strongly pursued by the government, and deserve now priority.

I. The new European Union OIOO rule

In the European Union, the European Commission (the institution that initiates new legislative and regulatory proposals) has traditionally been very reluctant to introduce a OIXO rule.[33] This is understandable, also since it has limited control of what its co-legislators, the Parliament and the Council, do in terms of introducing costly amendments on its proposals; and since regulatory costs can also depend on the way in which EU Member States transpose and implement legislation (especially in the case of so-called gold-plating or double banking practices). In 2019, however, the newly elected President of the European Commission, Ursula von der Leyen, announced her intention to introduce the OIOO principle "to cut red tape."[34] She stated that "the Commission will develop a new instrument to deliver on a 'One In, One Out' principle," adding that "every legislative proposal creating new burdens should relieve people and businesses of an equivalent existing burden at EU level in the same policy area"; and that the

[31] The NAO observed that "the government's measure excludes over £8 billion in costs to businesses during this Parliament so far, many times greater than the £0.9 billion of savings it includes"; and "[l]imitations in the approach means the scope of the Target is open to manipulation." Moreover, the NAO added that departments do not do enough to appraise the wider impacts of their decisions, or to evaluate their effects. This, the NAO adds, "harms the credibility of claimed savings and reduces opportunities to learn from past experience." See National Audit Office, *The Business Impact Target: cutting the cost of regulation*, 2016. At https://www.nao.org.uk/wp-content/uploads/2016/06/The-Business-Impact-Target-cutting-the-cost-of-regulation.pdf.

[32] The Budget Committee criticized the methodology used to achieve the reduction target is not sound: in particular, in noting that that "[t]he Government's limited progress … relies, ironically, on the imposition of a new regulation requiring larger retailers to charge customers 5p for plastic bags," the Committee explained that classifying the plastic bag charge as a saving to business because it brings additional revenue to retailers is largely incorrect: "[w]ithout the plastic bag charge, performance against the Business Impact Target … would show a net additional cost to business rather than a reduction." See House of Commons Committee of Public Accounts, *Better Regulation Eighteenth Report of Session 2016–17*, available online at https://www.regulation.org.uk/library/2016-PAC_Better_Regulation.pdf.

[33] Andrea Renda, Moritz Laurer, Ada Modzelewska, Antonella Zarra, *Introducing One-In-One-Out in the European Commission, a Feasibility Study*, report for the German Government, December 2019.

[34] *See* the inaugural speech of Ursula Von der Leyen, 10 September 2019, at https://europa.eu/rapid/press-release_IP-19-5542_en.htm.

Commission "will also work with Member States to ensure that, when transposing EU legislation, they do not add unnecessary administrative burdens."[35]

Notwithstanding the pandemic, the commitment seems likely to see its first implementation in the second half of 2021. A recent Communication on better regulation, "Joining forces to make better laws," announced that the Commission will "strengthen the burden reduction effort further through a 'one in, one out' approach whereby, when introducing new burdens, we systematically and proactively seek to reduce burdens imposed by existing legislation."[36] The Commission also warned that an approach solely oriented towards cost reduction "has significant drawbacks"; accordingly, already in 2012 a REFIT program was introduced, which focuses on balancing costs with benefits when legislation is being revised. This ensures that the original motivation for legislation, i.e. its prospective benefits, is kept always in due consideration. The OIOO approach will now complement the REFIT program by helping the European Commission pay special attention to cumulative costs for individuals and businesses in a given policy area and by covering new initiatives.

The OIOO approach presented by the Commission is still rather vague, but the following features are already defined:

- No trading. Offsets will normally have to be found in the same policy area. However, if it is not possible to find an 'out' in the same area, the Commission can decide to take the 'out' from a different policy area.
- Focus on cumulative costs. The approach will widen the focus from burdens stemming from specific legislative acts to the accumulation of burdens in each policy area and thus give a better overview of costs across policy areas every year. While administrative costs will be offset, compliance costs will be analysed and quantified in the impact assessments, where this is feasible and proportionate.
- Fostering enhanced attention to costs. The Commission acknowledges that national experience shows that OIOO rules strengthen "a policymaking culture that not only ensures that we achieve our policy objectives, but also pays closer attention to how we do so." In particular, the OIOO rule is expected to incentivize policymakers to look for digital solutions, thereby reducing costs and improving the quality of regulation.
- Flexibility in the implementation. The rule will not be applied mechanically. The Commission states that "if an 'out' cannot be identified in the same year's work programme, it will be reported in the next year." In general, the Commission will report on the annual implementation of the OIOO approach in its Annual Burden Survey, towards the end of the solar year.

[35] *See* the mission letter sent by President Von der Leyen to Vice President Maroš Šefčovič, at https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-maros-sefcovic-2019_en.pdf

[36] Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, Better Regulation: Joining forces to make better laws, at https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf.

- Exceptions. If there is political will to regulate but it is not possible to identify an offset in the same area, the Commission can decide to exempt the regulation from the OIOO approach.

J. Comparison of selected national experiences

The analysis of national experiences revealed the heterogeneous landscape of regulatory budgeting rules in the selected countries. Table 2 below summarizes the main findings in this section, adding a description of the U.S. model introduced by the Trump administration. As shown in the table:

- Six out of ten administrations have adopted a OIOO rule, whereas Mexico, France, the UK, and the US having launched OIXO rules with X > 1.
- Most administrations go beyond administrative burdens. Canada and Spain, so far, have adopted regulatory budgeting with a narrower scope, but also reported less significant results.
- The scope is most often limited to government regulation rather than extended to primary laws discussed in Parliament.
- Most governments apply the rule flexibly, allowing for offsets within a given timeframe rather than requiring simultaneous identification of the "outs."
- Most administrations contemplate the possibility of exemptions, especially in cases of urgency, or political will to enact a regulatory proposal in cases where no "outs" can be identified.
- Most administrations do not allow trading across policy areas.

Table 2 – Overview of the experience with OIXO rules in selected countries

Country	Rule	Type of costs covered)	Scope (law)	Regulated entities)	Timing of offsets	Banki ng	Trading	Exemptions	Experience
Canada	OIOO	Administra-tive burdens	Secondary legislation	Citizens and businesses	Within 24 months	Yes	No	• Regulations that implement non-discretionary obligations; • Regulations related to tax or tax administrations; • Regulations that address emergencies or crisis situations, Or other unique circumstances.	Impact was relatively small
France	Since 2015 OIOO. Then OI2O in 2017 with Macron	Administrative burdens and substantive compliance costs	National regulations, decrees and circulars	Businesses, Local Administra-tion and services, Citizens	Simultaneous	No	No	Decrees without impact on civil society and decrees that accompany new laws or regulations	First tests did not achieve the desired results. The government decided to move to an OI2O for this reason.
Germany	OIOO	Administrative burdens and substantive compliance costs	Primary and Secondary legislation	Businesses	Within a year's time	No	Yes	Ministry can ask the steering group of state secretaries for an exemption (never happened to date) Taxes and Budget 1:1 transposition of EU-directives Decisions of the Constitutional Court	Positive: ministries became more attentive to costs.
Italy	OIOO	Administrative burdens	Primary and Secondary legislation (but not independent agencies)	Citizens and businesses	Within 90 days after the publication of the annual report	No	No	Fiscal, tax, public games and lotteries regulations are exempted.	Positive experience: it improved quantification efforts.
Korea	OIOO	Administrative burdens and substantive compliance costs	Secondary legislation			Yes	No	• Regulations necessary for dealing with national crisis or emergency; • Regulations required to implement treaties or international agreements; • Regulations directly related to maintenance of order or public life and safety; • Regulations necessary for preventing financial crisis, securing financial stability, dealing with environmental crisis, and fostering fair competition; • Regulations associated with administrative fees, administrative actions or administrative sanctions; • Regulations that are sunsetting within 1 year.	Broadly positive: it has reportedly increased the quality of RIA.

Mexico	OIOO (coupled with OI2O in terms of number of rules)	Administrative burdens and substantive compliance costs	Secondary legislation	Citizens and businesses				• Regulations that address an emergency situation, provided that they have a validity of no more than six months, seek to avoid imminent damage or mitigate existing damage, and an act with equivalent content has not previously been issued; • Regulations with automatic sunset or evaluation clauses; • Regulations related to the disbursement and operation rules of the Federal subsidies; • Regulations issued by the President; • When the regulator proves that the economic sector to be affected by the regulatory proposal does not have current regulations to be eliminated in order to comply with the OIOO rule. In this case, the regulator can request CONAMER to exempt the compliance with the OIOO rule.	
Spain	OIOO	Administrative burdens	Government regulation	Businesses	Within a year's time (offsetting announced in the impact assessment of the "in" regulation)	No	Yes	• Transposition of EU legislation or international agreements • Regulations on civil emergencies; • Measures to prevent financial risk, contain inflation, regulate taxes and fees, fines and penalties and social security contributions • Regulations with temporary validity (especially those with an annual term)	Positive: more attention to costs, quality of IAs improved, along with the quality of regulation
The UK	OIOO in 2011; OI2O in 2013; OI3O in 2016 and 2017	Administrative burdens and substantive compliance costs	Primary and Secondary legislation	Businesses				• tax administration (particularly Income Tax, Corporation Tax and VAT), • European Union regulation, • the National Minimum Wage (see further below), • the Living Wage (ditto), • the Apprenticeship Levy, • compulsory Workplace Pensions, • fees and charges imposed by government or regulators	The OIXO rule gradually lost momentum, and is now hardly mentioned in official documents.
The United States	OIOO (OI2O in terms of number of rules)	Administrative burdens and substantive compliance costs	Secondary legislation	Citizens and businesses	By end of fiscal year	Yes	No		
European Union	OIOO	Administrative burdens and substantive compliance costs	Initiatives, that generate significant costs or remove them and are accompanied by an impact assessment	Citizens and businesses	By end of the year	Yes	No (only excepti onally)	If there is political will to regulate but it is not possible to identify an offset in the same area, the Commission can decide to exempt the regulation from the OIOO approach.	Not yet implemented

III. MYTH AND REALITY OF REGULATORY BUDGETING: TEN LESSONS FROM THE INTERNATIONAL EXPERIENCE

Regulatory budgeting rules have been met with strong criticism in various countries, and even more in the European Commission, where these rules have been considered, and rejected, for several years. The harshest critics point out that these rules end up frustrating attempts to develop an ambitious regulatory agenda, especially in social and environmental terms. Especially in Europe, and even more at the EU level, this has been a recurrent theme in the debate, with trade unions and environmental organizations often opposed to industry associations and national governments. A recurrent theme in the debate is also the lack of methodological soundness, due to the fact that several countries make a significant departure from economic analysis and use rather standardized and simplified tables in order to approximate the magnitude of the costs to be introduced or repealed. This is particularly the case in Germany, but also in the Netherlands, the homeland of administrative burdens reduction (via the so-called Standard Cost Model), where no OIXO is in place, but the use of standardized tables to measure administrative burdens and compliance costs is a consolidated practice; and in Mexico, where the SIMPLIFICA model brought this practice to a high level of standardization, in the attempt to reduce the time and resources needed in the administration to complete the assessment of costs. A related critique relates to the accuracy of the cost estimates presented to the public. Particularly in Germany, where the OIOO rule is acknowledged as important by both government and the private sector (much less by NGOs), the accuracy of the estimates is regularly questioned by the industry association (including the Association of German Chambers of Commerce and Industry, DIHK). And in the United Kingdom, as mentioned above, both the House of Lords and the National Audit Office have stigmatized the government's implementation of the OIXO rule.

Furthermore, critics and reluctant administrations have often expressed concern that the rule, to work properly, requires a degree of quantification and monetization of costs that is seldom achievable in practice. As a matter of fact, existing empirical work on the degree of quantification and monetization of costs and benefits in ex ante RIA shows a rather low incidence, with qualitative analysis being most often the most recurrent approach to the assessment of benefits and costs. However, advocates of OIXO rules also argue that the existence of the rule has worked as stimulus for cost quantification. Another recurrent critique points at the lack of legitimacy of these rules, often implemented entirely in the administration, with limited stakeholder consultation. Similarly to the United States, in many countries the rules selected as "out" are often repealed or eliminated by the administration after the compilation of a "black list"; and repealing or revising a rule to offset the cost of another rule often takes place without the need for a fully-fledged regulatory impact analysis. Another critique relates to the need for an extensive, and expensive, baseline measurement of the regulatory costs generated by the relevant stock of regulation. Some countries, e.g. the UK, spent substantial resources commissioning external measurements, the accuracy of which has however proven to be quite disappointing. Today, several governments implementing burden reduction targets and/or OIXO rules agree on the

limited usefulness and value for money of baseline measurements and prefer to set the targets "politically."[37]

Finally, administrations such as the European Commission have expressed the concern that the implementation of the rule, by adding at least another layer of administrative procedure, would increase complexity and thereby cause delays in the administration. However, so far no country has reported such an occurrence, perhaps since the implementation of the OIXO rule has been far from mechanistic.

Below, the main lessons learnt from the international experience are analysed, also in light of these critiques.

Lesson 1. *OIXO rules are not a panacea, but can only bear fruit as part of a broader mix of better regulation instruments*. In all countries analysed, the adoption of an OIXO rule does not exhaust the government's efforts to improve the quality of regulation. OIXO rules are always a piece of a much broader puzzle, which often includes other simplification tools (e.g. burden reduction targets; simplification of administrative procedures; life events surveys); full-fledged *ex ante* impact analysis; *ex post* evaluations; various forms of stakeholder consultation; analyses of the regulatory stock; and many other forms of regulatory scrutiny and oversight. It would be entirely misleading to judge OIXO rules as if they were adopted in isolation, and thus without considering the existence of procedural and methodological arrangements that ensure adequate attention for regulatory benefits, and specific goals such as resilience, well-being, or sustainability.

Lesson 2. *OIXO rules work best when implemented as a whole-of-government commitment.* Rather than confining them to individual policy areas, OIXO rules trigger their behavioral impact in the administration when they are applied across the whole range of government policies, or at least across all areas of business-relevant regulation. Past international experience suggests that this behavioral impact is perhaps the most important alongside the regulatory relief that the OIXO rule may bring about.

Lesson 3. *OIXO rules, if properly designed, can generate both positive and negative behavioral impacts inside the administration*. The European Commission observed in the past that "some national experiences show that if quantitative reduction targets apply, administrations tend to focus on meeting the target rather than seeking to maximize policy benefits." However, the same institution more recently observed that administrations can become more focused on costs, and more prone to quantification, thanks to the existence of these rules. A well-designed system, with evidence-based assessments of the potential to reduce unnecessary burdens and

[37] The national experience to date confirms this view: some baseline measurements have proven to be unnecessarily costly (in the UK, over 15 million pounds; in the EU, 20 million Euros), and the operation of the Standard Cost Model often led consultants into acrobatic guesstimates both in terms of the classification of origin (EU, national, regional), and in terms of the estimation of the so-called "Business As Usual" or BAU Factor, among other parameters. The EU experience in 2007 was similarly disappointing, with a budget of 20 million Euros spent on the mapping of 43 EU directives, which did not retrieve reasonably solid results, and ultimately did not provide for sufficient value for money. See Lorenzo Allio and Andrea Renda, *Evaluating Administrative Burden Reduction Programmes and their Impacts*, in: OECD, *Why Is Administrative Simplification So Complicated? Looking Beyond 2010*, OECD, Paris, 2010.

adequate stakeholder involvement throughout the process, would not feature these problems. Needless to say, the removal of unnecessary burdens will also liberate resources for the private sector: such resources could then be re-invested into more productive activities.

Lesson 4. *OIOO rules are the most recurrent and sustainable form of regulatory budgeting rule.* Countries that have ventured into higher multipliers, including OI2O and OI3O rules, have experienced a degree of fatigue over time. This is the case of the United Kingdom, and also, to some extent, Mexico. The main reason is that while at the beginning of the implementation of these rules the portion of regulatory stock that can be streamlined and simplified may be significant, over time the opportunities for meaningful reduction of unnecessary costs inevitably shrink; at the same time, priority shifts towards other better regulation tools available to regulators, such as innovation-friendly regulation, based *i.a.* on incentivizing innovative business models (as occurred in the UK).

Lesson 5. *If carefully designed, regulatory budgeting rules are not incompatible with an ambitious policy agenda*. Some countries have introduced OIXO rules and burden reduction targets in the context of a deregulatory effort. But the fact that these rules have been used in the context of a deregulatory attempt does not mean that they are, *per se*, incompatible with a more far-reaching and proactive approach to deregulation. In Germany, for example, the OIOO rule was adopted in a context in which by ambitious programs such as *Energiewende* are in place, and a systematic scrutiny of the impact of new legislation on sustainable development is carried out. In France, the government uses the OI2O rule but at the same time adopts ambitious proposals in terms of social and environmental benefits. In short, there is no incompatibility *per se* between the adoption of a cost reduction or regulatory budgeting system and an ambitious regulatory and policy agenda in the social and environmental domain.[38]

Lesson 6. *It is important that OIXO rules prioritize the elimination of unnecessary costs.* Direct costs are most often introduced in order to achieve benefits.[39] However, in some circumstances the existence of overlaps between regulatory provisions, as well as inconsistencies or redundancies between regulatory provisions, can generate "unnecessary" (or "unnecessarily high") costs.[40] These are those direct regulatory

[38] As already recalled, governments of both right- and left-wing orientation have adopted OIOO rules and burden reduction targets. See Robert W. Hahn and Andrea Renda, *Understanding Regulatory Innovation: The Political Economy of Removing Old Regulations Before Adding New Ones*. Available at SSRN: https://ssrn.com/abstract=3022552, 2017. What is important is that the system targets "unnecessary costs," such as redundant provisions, irritation burdens, and existing provisions that new developments (e.g. digital technologies) can now help simplify, without compromising on regulatory benefits.

[39] For example, investments related to compliance with health or environmental standards, such as the purchase of new equipment or the training of personnel, are needed to ensure that the policy objective to improve healthcare or protect the environment is met.

[40] Some costs can also become unnecessarily high after the entry into force of a given rule: for example, the diffusion of digital technologies can make it possible for regulators to introduce new forms of electronic compliance verification, which

costs that could be reduced or eliminated by policymakers without negative repercussions on the benefits sought by the regulatory intervention. These can also be costs that were considered to be necessary at the time of adoption of the legislation, but that are now unnecessary (or unnecessarily high) due to the availability of new solutions, such as digitally-enabled compliance measures.

Lesson 7. *OIXO rules are compatible with innovation-friendly tools such as regulatory sandboxes*. Whenever existing regulation entails significant compliance costs, and governments transparently publish a list of most burdensome regulation, businesses could be empowered to propose experimental initiatives, which would give them the opportunity to prove that they can comply with the regulation in a less burdensome way. This can lead to so-called "negotiated rulemaking" in some cases (following the U.S. experience); or innovation deals (in the EU), or regulatory sandboxes.

Lesson 8. *OIXO rules can incentivize widespread, transparent retrospective reviews*. The need to scan the regulatory stock to identify regulation for possible repeal or revision is an important incentive for administration to engage with retrospective review.[41] A meaningful OIXO rule could lead agencies to look more carefully into the regulatory stock. This is now being facilitated using innovative tools, such as e.g. Natural Language Processing (NLP), which allows for an easier identification of overlaps between regulatory provisions, and a more immediate clustering of regulatory interventions.

Lesson 9. *OIXO rules can be reconciled with full-fledged cost-benefit analysis or multi-criteria frameworks*. As already mentioned, however, this requires that the rules focus on unnecessary costs, and/or that reduction measures undergo a full RIA. This guarantees that the elimination of regulatory provisions does not entail, at the same time, the elimination of important benefits that accrue to society as a result of the regulation. The design of the rule is, however, essential: a badly designed, or excessively simplified rule can easily depart from the conceptual framework used in cost-benefit analysis, or in multi-criteria assessment (Renda, 2017; 2019): this is due to the fact that very often, the definition of regulatory cost used in the OIXO rule can differ from the one used in ex ante RIAs. A good example in this respect is Korea's CICO system. Other good examples are countries such as Germany and the Netherlands, where a clear decision was made to prioritize cost assessment over a more comprehensive system of benefit-cost analysis.

Lesson 10. *OIXO rules have produced limited impact when governments have contemplated a broad set of exceptions, or adopted an excessively narrow focus.* This is the case for countries like Canada (mostly due to the focus on administrative burdens); Mexico (due to the broad range of exceptions to avoid the rule); and the UK (where the National Audit

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can lead to a reduction of administrative burdens. This is the case of so-called RegTech or SupTech solutions, which apply digital technology to monitoring, supervision and compliance verification in a growing number of sectors. Accordingly, direct costs from regulation must be approached in a dynamic way, rather than as a static concept.

[41] John Graham. *A Future for Federal Regulatory Budgeting?* JOURNAL OF BENEFIT-COST ANALYSIS, 11(1), 55-61. doi:10.1017/bca.2019.36 (2020).

Office heavily criticized the implementation of the OI3O rule *i.a.* due to the rather arbitrary selection of costs to include in the overall budget). Perhaps the most impactful implementation of the rule to date can be found in Germany, where political commitment, methodological rigor, extreme transparency and adequate governance have made the OIOO rule a cornerstone of the government's effort to improve the quality of regulation, at the same time extending to the relationship between the federal government and the Parliament, subnational governments (the *Laender*) and even the European Union level.

IV. DOES REGULATORY BUDGETING HAVE A FUTURE? POST-PANDEMIC SCENARIOS FOR IMPROVING REGULATORY QUALITY

The adoption of regulatory budgeting rules has proven to be beneficial in a number of countries around the world, not only (and not prevalently) due to the cost reductions achieved, but rather for the impact it has had in terms of triggering greater awareness in the administration of the costs generated by regulation; as well as a greater incentive to manage the existing stock of regulation, and perform regular retrospective reviews. Burden reduction targets and OIXO rules are widely considered as useful tools to improve the relationship between government and regulated entities, as well as the overall quality of regulation. However, these tools should not be conceived as the only tools to be deployed to improve the quality of legislation: as this paper explained, the global debate on better regulation is increasingly welcoming the adoption of a variety of techniques to manage and improve the regulatory stock and flow.

The United States regulatory budgeting rule is now revoked after President Joe Biden issued an executive order, revoking EO13771 "Reducing Regulation and Controlling Regulatory Costs", as well as EO13777. With hindsight, the rule may have been designed in a way that imposed excessive deregulatory efforts, and a too significant deviation from the established practice of cost-benefit analysis in Federal agencies. Not surprisingly, and in line with similar international experience (*e.g.*, the UK), the rule introduced with EO13,771 has only partly achieved its intended goals. The international experience reviewed in this article suggests that the new administration may still find it beneficial to consider the adoption of a regulatory budgeting rule: yet, this may rather take the form of a cost-based OIOO rule (this, with X = 1); with no reference to the number of regulations to be repealed; implemented on the basis of systematic retrospective reviews; based on the notion of unnecessary costs; deeply nested in the regulatory review system introduced with EO12,866; attentive to the economic, social, environmental, and overall distributional consequences of the measures repealed or revised; focused on the implementation of digital solutions as options for simplification and regulatory relief; and compatible with the President's social and environmental agenda.

Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets

ANTHONY P. CAMPAU[1]

ABSTRACT

Regulatory budgets have been explored in the academic literature and employed around the world for decades, but the U.S. Federal Government did not establish a regulatory budget until January 30, 2017, with the signing of Executive Order 13,771. The budget set in place by that order achieved its central goal: Federal departments and agencies reporting to the president imposed, on net, no new regulatory costs during the entire four-year period they operated on a regulatory budget. According to the Office of Information and Regulatory Affairs, federal departments and agencies actually achieved a net regulatory cost savings of $198.6 billion over those four years.

This commentary, based on the author's experience helping to develop and implement that budget, offers perspective on the design and structure of the first U.S. federal regulatory budget. It responds to several criticisms, and it offers lessons and recommendations for future regulatory budgeting efforts.

INTRODUCTION

The idea of using a regulatory budget to manage the development of regulations has been widely discussed for decades, and regulatory budgets have been employed in countries, states,

[1] The author served as chief of staff and counselor for the Office of Information and Regulatory Affairs (OIRA) from April 2017 to March 2019, as a member of the President's Beachhead Team at OIRA from February to April 2017, and as a core member of the Regulatory Reform Team on the Presidential Transition Team from December 2016 to January 2017. In these roles, he helped to develop and implement the first U.S. federal regulatory budget, and therefore offers these reflections and recommendations based on that experience. The author is grateful to James Broughel, Caroline Cecot, Bridget Dooling, Susan Dudley, Kristin Hickman, Laura Jones, Donald Kenkel, Patrick McLaughlin, Casey Mulligan, James Owens, Neomi Rao, Jeffrey Rosen, and Adam White for their valuable perspectives and comments on an early draft of this paper. Of course, none of these distinguished individuals should be understood to agree with any claim or recommendation in this commentary.

and provinces throughout the world for many years.[2] In January 2017, the United States federal government joined the fray with the introduction of the nation's first regulatory budget to manage the flow and stock of federal regulations. That budget was established by Executive Order 13,771 (the Order), signed by President Donald J. Trump, and expounded upon by M-17-21, an implementing guidance document from the Office of Information and Regulatory Affairs (OIRA) within the U.S. Office of Management and Budget (OMB).[3] The Order had two core features: a zero-dollar cost cap and a requirement to eliminate two existing regulations for each new regulation.

I served as a core member of the Regulatory Reform Team on the Presidential Transition Team from December 2016 to January 2017, as a member of the so-called Beachhead Team at OIRA from February to April 2017, and as chief of staff and counselor at OIRA from April 2017 to March 2019. Those roles afforded me the opportunity to work on the development and implementation of the nation's first federal regulatory budget. In my view, that budget – rightly understood – was enormously successful. It immediately and consistently achieved its central goal of limiting the net cost of new regulations to zero dollars or less.[4] Still, both supporters and critics have tended to focus on the "one-in-two-out" feature of the budget, rather than the budget itself. Indeed, for purposes of the public debate, the "Two-for-one!" mechanism has subsumed the regulatory budget. Consequently, the design and effectiveness of the nation's first regulatory budget are apparently not well understood.

This commentary endeavors to provide an historical account of the budget's design, operation, and effect. It also responds to several criticisms and offers lessons and

[2] The other papers published in this symposium discuss at length the intellectual heritage and prior practical experience with regulatory budgets. *See generally* James Lankford, *For a Regulatory Budget: Successful Policies Should Be Made Permanent*, 45.1 HARV. J LAW & PUB. POL'Y 1, 2 (2022); James Broughel, *The Regulatory Budget In Theory And Practice: Lessons From The U.S. States*, 45.1 HARV. J LAW & PUB. POL'Y 1, 11 (2022); Laura Jones & Patrick A. McLaughlin, *Measurement Options for Regulatory Budgeting*, 45.1 HARV. J LAW & PUB. POL'Y 1, 45 (2022); Andrea Renda, *Regulatory Budgeting: Inhibiting or Promoting Better Policies?*, 45.1 HARV. J LAW & PUB. POL'Y 1, 72 (2022); Anthony P. Campau, *Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets*, 45.1 HARV. J LAW & PUB. POL'Y 1, 101 (2022); *see also* Christopher C. DeMuth, *Constraining Regulatory Costs Part Two: The Regulatory Budget*, 4 AEI J. ON GOV'T & SOC'Y 29, 32 (1980); *see also* Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 836, 836-860 (2014); *see also* Jeff Rosen, *Putting Regulators on a Budget*, NAT'L AFFS., Spring 2016.

[3] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" (2017).

[4] OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf [https://perma.cc/335L-6HZQ]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf [https://perma.cc/7JS6-GN5J]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2019, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf [https://perma.cc/N76R-8N2Y]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf [https://perma.cc/6MZ6-BBFY].

recommendations for the design and implementation of future regulatory budgets. My goal is not to respond to every challenge nor wade into the debate over any particular regulation or area of policy. I wish simply to inform and advance the dialogue over regulatory budgets and offer experience-based recommendations for consideration in the development and implementation of future regulatory budgets.

With that in mind, the remainder of this commentary takes the aforementioned topics in turn: (II) The Design and Structure of the First U.S. Federal Regulatory Budget; (III) The Mechanisms of Implementation; (IV) A Brief Response to Several Criticisms; and (V) Recommendations for Future U.S. Federal Regulatory Budgets.

I. THE DESIGN AND STRUCTURE OF THE FIRST U.S. FEDERAL REGULATORY BUDGET

The primary organizing mechanism for the first U.S. federal regulatory budget was Executive Order 13,771.[5] The Order was perhaps best known by the rhetorical catchphrases, "one-in-two-out" or "two-for-one," but it was much more than a requirement to eliminate two existing regulations each time a new regulation was promulgated. The Order consisted of two primary elements, one major and one minor. The minor requirement was that each new regulation had to be offset by the elimination of two existing regulations. The major requirement was that each new dollar of regulatory cost was to be offset by the elimination of one existing dollar of regulatory cost. That major requirement was, in fact, the regulatory budget, yet its operation and effectiveness have largely been lost in the "two-for-one" noise. This discussion of the design and structure of the first U.S. federal regulatory budget proceeds in four parts: (A) The One-In-Two-Out Feature of Executive Order 13,771; (B) The Regulatory Cost Allowance Feature of Executive Order 13,771; (C) Additional Useful Features of Executive Order 13,771; and (D) The Implementing Guidance for Executive Order 13,771.

A. The One-In-Two-Out Feature of Executive Order 13,771

Much of the public attention on Executive Order 13,771 has focused on the "two-for-one" requirement found in Section 2 of the Order.[6] Even President Trump's remarks about the regulatory budget tended to emphasize this feature.[7] For that reason, this provision of the Order is worth close inspection: "Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."[8] There are two key features of this directive.

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[5] Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[6] *See, e.g.*, Glenn Kessler, *Has the Trump administration repealed 22 regulations for each new one?*, WASH. POST (Aug. 3, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/08/03/has-the-trump-administration-repealed-22-regulations-for-each-new-one/ [https://perma.cc/LY5P-D4XR] (asserting that deregulatory claims were overstated); *see also* Cary Coglianese, Opinion, *Let's Be Real About Trump's First Year in Regulation*, REGUL. REV. (Jan. 29, 2018), https://www.theregreview.org/2018/01/29/lets-be-real-trumps-first-year-regulation/ [https://perma.cc/LK9V-DH5B] (arguing that most regulatory actions were significant while most ostensibly offsetting deregulatory actions were not significant).

[7] *See, e.g.*, President Donald J. Trump, Address at the World Economic Forum in Davos, Switzerland (Jan. 26, 2018).

[8] Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(a) (Jan. 30, 2017).

First, and most importantly, it was flexible. It did not require that deregulatory actions be proposed in the Federal Register at the same time regulatory actions are proposed in the Federal Register. It did not require that regulatory comment periods run in tandem. It did not even require that deregulatory actions be finalized and in effect at the same time or in the same year regulatory actions are finalized and in effect. It did not require that the rules be similar in scope and impact. For example, borrowing the parlance of Executive Order 12,866 – the longstanding, bipartisan foundation for regulatory analysis and review in the Executive Branch – it did not indicate that "economically significant" regulations must be offset by the elimination of two existing "economically significant" regulations.[9] Nor did it require that regulations identified as significant for other reasons be offset by regulations of similar significance. It did not indicate whether a regulation at one sub-agency may be offset by the elimination of two rules at a different sub-agency. Into a realm of government marked by complexity and specificity, the Order spoke directionally and succinctly. Even the all-important "Definition" section did little to clarify how this requirement would or ought to be implemented.

Rather than provide lengthy detail about the nature of the requirement, the Order empowered the Director of the Office of Management and Budget (OMB) to set the terms of engagement. Section (2)(d) of the Order instructed:

> The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.[10]

Clearly, the Order gave the OMB Director tremendous latitude to define the contours of the regulatory budget. It also gave him primary management responsibility for most aspects of the program.[11] Ultimately, the foreshadowed guidance from OMB's Office of Information and Regulatory Affairs (OIRA) provided much of the operational mechanics for the Order – a topic that shall be visited shortly.

A second noteworthy feature of the "one-in-two-out" component of the regulatory budget was its location within the Order's schema. Rather than devoting one or more stand-alone sections to the topic, the Order placed the requirement within Section 2, the heading for which was, "Regulatory Cap for Fiscal Year 2017."[12] In other words, the much-discussed "one-in-two-out" program was in fact a subcomponent of the overarching regulatory cost cap program, not the other way around. Indeed, most of Section 2 was not focused on the tabulation or mechanics

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[9] Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf [https://perma.cc/UDL7-WK9Z].

[10] Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(d) (Jan. 30, 2017).

[11] *See, e.g., id.* § 3(b) and (e).

[12] *Id.* § 2.

of regulatory "ins" and "outs," but on the cost accounting mechanism associated with the budget. This paper now takes that topic in turn.

B. The Regulatory Cost Allowance Feature of Executive Order 13,771

The second key feature of the regulatory reform program established by Executive Order 13,771 was the regulatory cost allowance. It generally appears this feature has received less attention than the "one-in-two-out" requirement, but it is no less important.[13] Indeed, it is the heart of the Order and its regulatory budget. Overall, its effect was to constrain the amount of new regulatory costs that may be imposed across the Executive Branch.

It achieved that goal not only by providing flexibility on the structure and terms of engagement, but by clearly bounding the exercise:

> For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director[.][14]

Beyond 2017, the Order indicated,

> [T]he Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.[15]

In short, the Order set an Executive Branch-wide cost allowance of zero dollars for FY 2017 and empowered the OMB Director to set cost caps for each agency in the ensuing years. While the Order required the OMB Director to provide guidance to the agencies on how to implement the requirement,[16] the requirement's most significant feature was provided clearly in the Order itself: No net new regulatory costs in 2017 and no net new regulatory costs beyond a dollar amount to be determined by OMB for fiscal years 2018 and beyond. As will be discussed, this was the core requirement of the regulatory budget.

C. Additional Useful Features of Executive Order 13,771

The two core features of Executive Order 13,771 have been described, but there are especially helpful complementary features of the Order that are worth brief review.

The first and perhaps most important such feature was the instruction,

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[13] *See, e.g.*, Glenn Kessler, *Has the Trump administration repealed 22 regulations for each new one?*, WASH. POST, Aug. 3, 2018, https://www.washingtonpost.com/news/fact-checker/wp/2018/08/03/has-the-trump-administration-repealed-22-regulations-for-each-new-one/ [https://perma.cc/LY5P-D4XR] (asserting that deregulatory claims were overstated); *see also* Cary Coglianese, *Let's Be Real About Trump's First Year in Regulation*, REGUL. REV., Jan. 29, 2018 (arguing that most regulatory actions were significant while most ostensibly offsetting deregulatory actions were not significant).

[14] Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(b) (Feb. 3, 2017).

[15] *Id.* § 3(d).

[16] *Id.* § 2(d), 3(e).

> Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.[17]

This requirement made several important contributions to the regulatory budget, and in some cases to the broader regulatory development process. First, it intensified the obligation to plan, coordinate, and conduct preliminary analysis of potential regulatory actions. It also provided the public with more information about regulatory actions under development at federal agencies, whether primarily regulatory or deregulatory in nature. Increased planning, coordination, analysis, and transparency are basic good regulatory practices advanced by this simple step.

More specifically for the budget, it imposed the substantial immediate and continuous burden of priority setting on the agencies, rather than on OIRA or other offices within the White House. Imposing that requirement on the agencies was consistent with the general approach to developing regulatory agendas, but it had renewed significance in the context of the regulatory budget, where agencies had to assess the likely net effects of their entire portfolio of planned regulatory actions. It also reinforced the Director's ability to oversee the implementation of the Order's core requirements by providing early visibility into whether future regulations would require or provide offsets, and the extent to which those offsets may be measured. All of that was helpful information for budgetary planning and management purposes.

Second, Section 3 of the Order articulated a process for making Annual Regulatory Cost Submissions to OMB. This reporting process allowed OIRA and the White House to monitor and enforce compliance with the regulatory budget. It also informed OIRA's decisions about regulatory cost allowances beyond Fiscal Year 2017, when the cap across the Executive Branch was zero dollars, on net.[18]

Third, the Order's definition of "regulation" or "rule" was very useful for managing the regulatory budget. That definition read,

> For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:
>
> (a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;
>
> (b) regulations related to agency organization, management, or personnel; or
>
> (c) any other category of regulations exempted by the Director.[19]

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[17] *Id.* § 3(c); *see also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, COMPLIANCE WITH SECTION 3(C) OF EXECUTIVE ORDER 13771, REDUCING REGULATION AND CONTROLLING REGULATORY COSTS (2018).

[18] Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 3(d) (Feb. 3, 2017).

[19] *Id.* § 4.

That definition closely paralleled the definition found in Executive Order 12,866.[20] It was sweeping in its construction, allowing OIRA to review and ensure 13,771 compliance on a wide range of regulatory activity, not merely those identified as such by the agencies. In practice, that often meant designating less formal regulatory activity like guidance documents as regulations subject to the regulatory budget. Still, the definition in the Order did not delineate between regulations that were primarily regulatory and primarily deregulatory, leaving room for OIRA to define its own scope of review through follow-on guidance.

D. The Implementing Guidance for Executive Order 13,771

Executive Order 13,771 required OMB to provide guidance on how to implement the regulatory budget.[21] OIRA provided interim guidance on February 2, 2017, and final guidance on April 5, 2017.[22] Both the interim and final guidance provided an extraordinary amount of additional detail and granularity for understanding the operation of the regulatory budget. That detail included definitions, exceptions, flexibilities, and other features that facilitated implementation.

One important core feature of the guidance was the provision of definitions for what constituted regulatory and deregulatory actions. The guidance defined an "EO 13771 regulatory action" as a significant regulatory action under Section 3(f) of Executive Order 12,866 or, "A significant guidance document (*e.g.*, significant interpretive guidance) reviewed by OIRA under the procedures of EO 12866 that has been finalized and that imposes total costs greater than zero."[23] It then used the longstanding Final Bulletin for Agency Good Guidance Practices to define significant guidance for the purposes of the Order.[24] In so doing, the guidance clarified that for the regulatory budget, OIRA would monitor not just the issuance of new regulations but also new significant guidance. The goal was to prevent guidance documents from becoming a mechanism for side stepping the requirements of Executive Order 13,771, as well as longstanding good regulatory practices such as those discussed in the Good Guidance Bulletin and Executive Order 12,866. This measure underscored OIRA's important role in reviewing significant guidance documents, not just for purposes of the regulatory budget, but more generally for a wide range of regulatory actions that ought to be reviewed by OIRA pursuant to 12,866 and the Good Guidance Bulletin.

In defining an "EO 13771 deregulatory action," the guidance clarified that such actions are "not limited to those defined as significant under EO 12866 or OMB's Final Bulletin on Good Guidance Practices." It also indicated that deregulatory actions could be issued in a variety of forms, including guidance, interpretive documents, and information collections, and provided that, "Significant proposed rules issued before noon on January 20, 2017, that are formally

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[20] Exec. Order No. 12,866, 58 Fed. Reg. 51735 § 3(d) (Oct. 4, 1993).

[21] Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(d) (Feb. 3, 2017).

[22] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, INTERIM GUIDANCE IMPLEMENTING SECTION 2 OF THE EXECUTIVE ORDER OF JANUARY 30, 2017, TITLED, "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" (2017); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" (2017).

[23] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" 3 (2017).

[24] *Id.*

withdrawn by notice in the Federal Register and removed from the Unified Agenda of Regulatory and Deregulatory Actions may qualify as repeal actions, but do not qualify for cost savings."[25] This broad definition was provided in an effort to encourage agencies to think expansively about regulatory reforms they might undertake, even if they may not in each case receive credit toward their regulatory cost-savings goals. Many of those deregulatory actions did not provide quantifiable savings because they were based on the revocation of quasi-regulatory guidance documents that likewise did not include quantified costs, benefits, or economic transfer effects. However, in the judgement of OIRA's professional staff, they were bona fide deregulatory actions that satisfied the terms of OIRA's implementing guidance for the budget.

In like manner, the guidance explained that regulatory actions associated with international regulatory cooperation agreements and new market-enabling regulations might both constitute deregulatory actions for purposes of the regulatory budget.[26] While perhaps not obviously deregulatory on their face, those types of actions can play an important role in opening markets, creating opportunities for economic growth and producing regulatory benefits that outweigh or are justified by any regulatory costs they may impose. In the case of international regulatory cooperation, new or revised regulations can help to reduce cross-border regulatory friction that provides little or no public benefit but can add real costs to production and ordinary market activity. By developing or revising such rules, agencies could reduce real-world costs without sacrificing regulatory benefits. In the case of market-enabling regulations, new technologies and other innovative market solutions that could not have been introduced in commerce suddenly could be given an opportunity to be tested and flourish. The guidance for the Order sought to encourage those types of regulatory activities in a deregulatory environment where some might have feared they would be regarded as purely regulatory, thus requiring offsets. Indeed, the Administration issued numerous market-enabling rules that qualified as deregulatory actions, such as those that facilitated more frequent commercial space launches.[27]

Importantly, the guidance also clarified that Executive Order 13,771 had *no* effect on the long-standing requirement to consider economic benefits when promulgating new regulatory and deregulatory actions. The Order did *not* change the requirements of Executive Order 12,866, "which remain[ed] the primary governing EO regarding regulatory review and planning."[28] In particular, the Order had no effect on the consideration of benefits in informing any regulatory decisions. As explored more thoroughly *infra*, when implementing the regulatory budget, agencies were required to continue assessing both costs *and* benefits and comply with all other long-standing requirements and best practices pertaining to the regulatory development process, including but not limited to those in EO 12,866 and OMB Circular A-4.[29]

This portion of the guidance was extremely important because it underscored that the longstanding good regulatory practice of considering both economic costs *and* benefits, as well as economic transfer effects, was very much still in effect. Indeed, it was required by Executive

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[25] *Id.* at 4.

[26] *Id.* at 7, 10.

[27] *See, e.g.*, 85 Fed. Reg. 79566 (Dec. 10, 2020).

[28] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" 2 (2017).

[29] *See, e.g.*, *id.* at 2, 13.

Order 12,866. Any time a new regulatory or deregulatory action was proposed and finalized under Executive Order 12,866, and thus was reviewed by OIRA, it was required to pass the longstanding cost-benefit test of 12,866. If a deregulatory action sought to overturn an existing rule that provided considerable net benefits, that deregulatory action was required to explain and justify its effect on the benefits calculation. This feature of the guidance is important not just because it promotes an accounting of benefits, but also because it helps to explain how the regulatory budget interacted with essential, well-established regulatory process requirements and conventions. By design, the regulatory budget supplemented, but did not supplant, the longstanding set of good-government procedures and practices at the core of the regulatory development process. Indeed, to function, the budget had to be layered on top of existing procedural architecture and substantive requirements. Explanation of the interaction between the new and the established rules of the road permeates the regulatory budget's guidance.

II. THE MECHANISMS OF IMPLEMENTATION

The day-to-day implementation of Executive Order 13,771 was equal parts science and art. Some objectives were clear: Impose, on net, no new regulatory costs and eliminate two existing regulations for each new regulation. At the same time, the Order and its implementing guidance afforded agencies and OIRA a great deal of flexibility in whether and to what extent agencies delivered on those objectives. For its part, OIRA used that flexibility, existing and contemporaneously developed regulatory processes, and other coordination efforts to advance the implementation of Executive Order 13,771. This discussion of the mechanics and methods used to implement the first U.S. federal regulatory budget will cover seven key points: (A) An Overall Balanced Approach; (B) The Role of the Unified Agenda; (C) The Role of Annual Regulatory Cost Submissions to OMB; (D) The Role of Other Coordinating Mechanisms; (E) The Importance of Definitions; (F) The Importance of Regulatory Baselines; and (G) The Importance of Putting the Onus on Federal Agencies.

A. An Overall Balanced Approach

For its part, OIRA attempted to take a balanced approach to implementing the regulatory budget. It was responsible for centrally managing much of the reform effort, but it did not require agencies to link planned regulatory and deregulatory actions. For example, OIRA did not require agencies to promulgate offsetting deregulatory actions when they submitted proposed regulatory actions to OIRA for review. Rather, as required by the Order, agencies generally indicated to OIRA that they intended to repeal existing regulations and regulatory costs in exchange for new regulations. That often happened in the context of Executive Order 12,866's significance determinations, which are routine intra-governmental conversations about the extent to which specific regulatory actions are likely to be significant for purposes of 12,866, and thus subject to OIRA review. Under the operating framework of the regulatory budget, those ordinary 12,866 conversations allowed OIRA to gather early information on planned actions and make initial determinations about whether rules would likely be regulatory or deregulatory in nature. Extensive discussions on the timing and substance of planned offsets often ensued, but they also did not prevent the promulgation of statutorily required or other necessary regulatory actions.

B. The Role of the Unified Agenda

Academics and practitioners across the philosophical spectrum have long called on OIRA to improve the quality and utility of the Unified Agenda of Regulatory and Deregulatory Actions, both for public transparency and regulatory process management purposes.[30] Heeding that wise counsel, in 2017, OIRA endeavored to revitalize the Unified Agenda process and employ it for the purpose of managing the regulatory budget. That played out in a handful of ways.

First, during the course of the Spring Unified Agenda cycle – which is generally regarded as a semi-annual update to the full Fall Agenda that is published alongside narrative Regulatory Plans – agencies were directed to incorporate the regulatory budget's concepts and requirements into their respective lists of planned regulatory actions.[31] That is, in addition to listing and describing each planned regulatory action, agencies were required to indicate whether those planned actions were likely to be regulatory or deregulatory and provide at least some initial analysis to OIRA in support of those designations.

In response to that instruction, agencies sent draft Unified Agenda entries to OIRA that generally did a good job of indicating whether planned actions were likely regulatory or deregulatory. However, the number of entries to be included on the public-facing Agenda shrank considerably while the number of entries to be included on a non-public-facing list of Agenda entries swelled considerably. Anecdotal evidence received by OIRA's professional staff suggested one key reason for that development was that agencies still lacked the permanent political leadership to make decisions about the entries, which meant the professional staff of the agencies were doing their best to bring their respective agendas into compliance with the regulatory budget using the tools then available to them.

One such tool, which had previously been discovered by a scholar affiliated with the Administrative Conference of the United States (ACUS), allowed agencies and OIRA to maintain planned regulatory actions on a non-public Unified Agenda list known as the "pending list."[32] According to that scholar, that non-public list appeared to contravene a key purpose of the Unified Agenda, which was to make transparent all planned regulatory actions of U.S. federal regulatory bodies.[33] In June of 2015, ACUS formally recommended that OIRA eliminate the "pending list" and return to making public all regulatory actions in the pipeline.[34] In the spring of 2017, under OMB Director Mick Mulvaney's leadership, OIRA did just that. OIRA informed

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[30] *See, e.g.*, ADMIN. CONF. OF THE U.S., RECOMMENDATION 88-9, PRESIDENTIAL REVIEW OF AGENCY RULEMAKING 4 (adopted Dec. 8, 1988); *see also* ADMIN. CONF. OF THE U.S., RECOMMENDATION 8 2013-2, BENEFIT-COST ANALYSIS AT INDEPENDENT REGULATORY AGENCIES (adopted June 13, 2013); *see also* Letter from the ABA's section on Admin. Law and Regul. Practice to the Off. Info. & Regul. Affs. (2009); *Improving the Administrative Process: A Report to the President-Elect of the United States* (2016), 69 ADMIN. L. REV. 205 (2017).

[31] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, SPRING 2017 DATA CALL FOR THE UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS (2017).

[32] Curtis W. Copeland, ADMIN. CONF. OF THE U.S. BLOG, *The Unified Agenda: Proposals for Reform* (March 10, 2015), https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Report%20031015.pdf [https://perma.cc/Q97C-HXS3].

[33] *See, e.g.*, *id.* at 106.

[34] ADMIN. CONF. OF THE U.S., RECOMMENDATION 2015-1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA (adopted June 4, 2015), https://www.acus.gov/recommendation/promoting-accuracy-and-transparency-unified-agenda [https://perma.cc/8MPF-4JJZ].

agencies that the "pending list" of regulatory actions would be eliminated, which meant all regulatory actions in the government's underlying database of regulations would be made public, irrespective of the degree to which they comported with the regulatory budget. The objectives were twofold: (1) ensure transparency in the regulatory process; and (2) hope that the added transparency would drive more internal agency discussion, deliberation, and ultimately entries that more fully complied with the regulatory budget.

That single act of transparency quickly transformed the Unified Agenda from a rote and listing bureaucratic exercise into a robust mechanism for regulatory planning and coordination. It provided the pubic with a clear picture of what was and was not being planned by federal regulators. Irrespective of the regulatory budget, it served an important public good, which was to make sure federal agencies were, to the fullest extent possible, regulating in a planned, systematic, transparent, and accountable manner. The move received plaudits from ACUS.[35] It also had the incidental benefit of forcing agencies to make decisions about regulatory actions that had, over time, been on or added to the so-called "pending list." After additional rounds of what is commonly called "passback" between OIRA and the agencies, a Spring Unified Agenda was finally released that not only satisfied the requirements of the regulatory budget, but far exceeded them.[36] The additional measure of transparency forced much additional deliberation and discussion, rendering the first 2017 Agenda as something more of a Summer Agenda than a Spring Agenda. But the cost of delay was far exceeded by the benefits of enhanced public transparency and a more accurate inventory of planned regulatory and deregulatory actions that would later be accounted for in the regulatory budget.

Once the Unified Agenda became a more accurate and therefore useful management tool, OIRA added a regular discussion about how planned regulatory activity would or would not comport with the regulatory budget to the attendant semi-annual passback process. That discussion was important because OIRA had limited visibility into agencies' compliance with the budget. The primary responsibility for regulating and deregulating belonged with the regulatory agencies themselves. They decided whether and how to regulate, and whether and how to offset the incremental costs associated with those new regulations. As already discussed, agencies did not link their new regulatory and deregulatory actions. OIRA intentionally provided agencies room to make decisions that would be evaluated holistically, not on a transaction-by-transaction basis. OIRA's objective was to support and empower federal regulatory agencies to deliver on their own unique missions in a manner that was, to the fullest extent possible, consistent with the regulatory budget, much as a core part of OIRA's general role is to help agencies deliver on their own unique missions in a manner that is, to the fullest extent possible, guided by rigorous analysis and coordinated with other regulatory stakeholders across the Executive Branch.

The enhanced Agenda passback process also facilitated discussions about planned regulatory activity between and among agencies, as well as with other White House offices. It was not

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[35] Todd Rubin, ADMIN. CONF. OF THE U.S. BLOG, *Unified Regulatory Agenda Change Accords with ACUS Recommendation* (Sept. 8, 2017), https://www.acus.gov/newsroom/administrative-fix-blog/unified-regulatory-agenda-change-accords-acus-recommendation [https://perma.cc/YMP5-2AE6].

[36] OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2017 (2017), https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf [https://perma.cc/QU89-27XL].

uncommon for a Unified Agenda circulation or meeting on an agency's planned regulatory activity to lead to further conversations on a wide range of regulatory issues. Those conversations led to greater coordination, planning, and implementation of the regulatory budget.

C. The Role of Annual Regulatory Cost Submissions to OMB

Section 3(d) of Executive Order 13,771 required OMB to identify a "regulatory cost allowance for each agency for FY 2018."[37] In response, OIRA Administrator Neomi Rao issued a memorandum that established a new process for developing annual regulatory cost allowances that would become the regulatory budget for each fiscal year beyond FY 2017.[38] In brief, those steps were as follows: First, agencies were directed to "prepare a proposed total incremental cost allowance for FY 2018 to inform the [OMB] Director's determinations[.]"[39] Second, agencies were required to provide "an explanation of how the agency developed its proposed allowance and how that proposed allowance is consistent with the administration's regulatory policies and priorities[.]"[40] Third, OIRA said it "will review each agency's proposed FY 2018 cost allowance for consistency with the regulatory policies and priorities set forth in Executive Orders 13771 and 13777[.]"[41] And fourth, "OMB expects that each agency will propose a net reduction in total incremental regulatory costs for FY 2018."[42]

By that memorandum, OIRA once again made clear that, within the context of the regulatory budget, the onus for developing and setting regulatory priorities was primarily on the agencies. Agencies made the initial decisions about which regulatory and deregulatory actions to pursue. Agencies took the lead in developing and supporting proposed regulatory cost allowances. Overall, agencies first identified the best way to implement the regulatory budget while satisfying their other regulatory objectives and obligations. The process used to develop the FY 2018 cost allowances was repeated for the next two years, but in those later cases it was incorporated directly into the ordinary data call that commenced the Fall Unified Agenda.[43]

OIRA robustly analyzed and utilized the Annual Regulatory Cost Submissions from the agencies. Submission of the reports was often followed by a version of Agenda passback, as well as meetings between OIRA and senior agency leaders. Summaries of those meetings were often shared with White House principals and policy councils, who often played key roles in supporting and advancing the implementation of the regulatory budget.

After careful staff analysis of agency submissions, correspondent Unified Agenda entries, and any other information that may have been available, OIRA made determinations as to each agency's cost allowance and published those allowances near the start of each fiscal year, along

[37] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).
[38] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-31, FY 2018 REGULATORY COST ALLOWANCES (2017).
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *E.g.*, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, DATA CALL FOR THE FALL 2019 REGULATORY PLAN, FALL 2019 UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS, AND FY 2020 REGULATORY COST ALLOWANCES (2019).

with the release of the Fall Unified Agenda, the Regulatory Plan, and the annual review of how each agency performed with respect to its regulatory budget.[44]

This Regulatory Cost Submission process was new, but it was layered on top of existing mechanisms like the Unified Agenda and cost-benefit analysis. It recognized that the regulatory agencies had primary responsibility for their own rulemaking dockets, and thus were well positioned to develop and initially propose their own regulatory budgets. Those proposals were then informed by OIRA staff analysis of likely economic effects, as well as policy council preferences for how statutory discretion ought to be exercised.

D. The Role of Other Coordinating Mechanisms

Executive Order 13,777 required each agency to designate a Regulatory Reform Officer ("RRO") to "oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carr[ied] out regulatory reforms, consistent with applicable law."[45] Those regulatory reform "initiatives and policies" clearly included the regulatory budget outlined in Executive Order 13,771, but they also explicitly included the regulatory quality and review standards established by President Bill Clinton and the regulatory improvement and retrospective review standards established by President Barack Obama.[46] The objective was to ensure that an agency leader vigorously implemented the regulatory budget in a way that was consistent with longstanding good regulatory practices and other recent regulatory improvement efforts. The RROs played a lead role in managing the regulatory budget of each agency.

Relatedly, Executive Order 13,777 required each agency to establish a Regulatory Reform Task Force to "evaluate existing regulations […] and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law."[47] Those Task Forces reportedly conducted extensive internal reviews and largely set the regulatory reform agenda for their respective agencies.

Agency RROs, OIRA, the White House Counsel's Office, and White House policy councils periodically met to discuss the implementation of the regulatory budget, best practices, lessons learned, and areas of potential focus for the future. OIRA also interacted regularly with the White House Counsel's Office and policy councils on regulatory and deregulatory actions under development, and those offices provided considerable support in shoring up regulatory policy and implementing the regulatory budget.

E. The Importance of Definitions

The explicit inclusion of significant guidance in the definition of an "EO 13771 regulatory action" empowered OIRA to review more guidance documents, not just for purposes of the

[44] *See, e.g.*, OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: COST CAPS FISCAL YEAR 2018 (2018), https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf [https://perma.cc/5DMV-A4EH].

[45] Exec. Order. No. 13,777, 82 Fed. Reg. 12285 § 2 (March 31, 2017).

[46] *Id.* § 2(a)(i)–(iv).

[47] *Id.* § 3(d).

regulatory budget, but also ordinary 12,866 review.[48] Many of those guidance documents were ones OIRA would have liked to review under 12,866 but perhaps may not otherwise have been able to bring in for review because of their less formal nature.[49] But by explicitly indicating that significant guidance documents were included in the definition of a qualifying regulation for purposes of the regulatory budget, OIRA had more practical, political ability to demand and enforce the requirements of centralized regulatory review on significant guidance. Regardless of how the guidance documents were ultimately categorized and treated for purposes of 13,771, the benefits of coordination, transparency, and analysis were injected into those guidance documents and their attendant federal programs. In some cases, guidance documents were scuttled. In others, they were issued as rules or incorporated into related rulemakings, where most interagency participants agreed they belonged. Steps like these – ensuring regulatory obligations were created through the proper mechanisms – were good government accomplishments facilitated by 13,771, regardless of how the rules were ultimately categorized under the Order.

F. The Importance of Regulatory Baselines

One challenge for implementing Executive Order 13,771 was the perpetual fight over the baseline for analysis in regulatory and deregulatory actions. Identifying the correct baseline or baselines is essential because it is the starting point for ordinary analysis of impacts, and that analysis and the corresponding 13,771 designation and scoring could swing dramatically if the wrong baseline is selected. For example, during OIRA review, an agency may argue the proper baseline for a rule is a post-statutory baseline, which could mean all the economic effects of the rule are attributed to underlying legislation and not the agency's implementing regulation, possibly allowing the regulation to appear as though it would have little to no economic effect in the world. In those cases, OMB Circular A-4 generally encourages agencies to use both a pre-statutory and a post-statutory baseline to help identify the full range of effects and the measure of discretion afforded to and exercised by the agency.[50] After identifying that discretion, the agency can use the tools of analysis to make rational and consistent policy choices, and those choices could properly be evaluated as constituting regulatory or deregulatory actions for purposes of the regulatory budget. While seemingly obscure, this key component of analysis can give rise to many analytical complications and inaccuracies if it is not performed correctly. OIRA's economists and professional staff expertly managed these discussions, but they were a challenge to the consistent implantation of 13,771.

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[48] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" 3 (2017).

[49] Traditional regulations are typically coded with a Regulatory Identification Number, or RIN, which allows them to be included in the underlying database of regulatory actions under development, which is managed by OIRA. Some less traditional regulatory actions are coded with a ZRIN, which allows them to be included in the database, published in the Unified Agenda, and generally managed like a regulation. Most non-traditional regulatory actions, however, are issued in the form of guidance letters, circulars, question-and-answer documents, and the like, and consequently those actions are typically not coded with a RIN or ZRIN and included in the underlying regulatory database, the Agenda, and so on. OIRA's review authority is relatively easy to establish and enforce for actions that live within its database, over which it has a hard, mechanical control, but relatively more difficult to establish and enforce for actions that do not live within that database. Often, review of such non-traditional or quasi-regulatory actions comes down to advance notice and political muscle.

[50] OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ [https://perma.cc/94Z3-VZCA].

G. The Importance of Putting the Onus on Agencies

Executive Order 13,771 required OMB to set and enforce the parameters of the regulatory budget, but within those parameters the agencies did much of the work. In addition to their obviously primary role in conducting cost-benefit analyses and drafting regulatory and deregulatory actions, agencies also took the initial lead in identifying regulatory and deregulatory actions for repeal. The White House and OIRA specifically provided support and direction for those efforts in a variety of ways, but the primary responsibility was with the agencies. They populated the Unified Agenda with planned actions, made initial efforts to categorize rules as regulatory or deregulatory, developed and submitted Annual Regulatory Cost Submissions, tallied their results under 13,771, and more. This ensured that the professionals closest to each agency's regulatory programs were primarily responsible for understanding the status and possibilities for that agency's programs. Even if it wanted to take on these responsibilities, which it did not, OIRA was too small of an office to undertake those activities on behalf of all federal agencies reporting to the president. Agencies possessed both the expertise and bandwidth to lead on these core regulatory budgeting initiatives, and many reported the exercise of reviewing and updating their existing stock of regulatory actions was useful and positive for the agency, even if they ultimately did not result in many deregulatory actions.[51]

III. A Brief Response to Several Criticisms

This paper now addresses several criticisms of the Order's design and implementation. This is not an exhaustive list of critiques and responses but rather a brief answer to several objections concerning the regulatory budget's design and structure: (A) Not an Apples-to-Apples Analysis; (B) Awarding Credit for the Obama Administration's Reforms; (C) Awarding Credit for Delays and Withdrawn Proposals; (D) Awarding Credit for Congressional Review Act Deregulation; (E) Not Enough Transparency; and (F) Benefits Ignored.

A. Not an Apples-to-Apples Analysis

In the fall of 2017, OIRA released its first status report on the regulatory budget. The report noted that, across the federal government, agencies imposed, on net, less than $0 of new regulatory costs.[52] Indeed, they achieved a net regulatory cost savings of $8.1 billion in present value terms.[53] In addition, the report noted that agencies completed 22 new deregulatory actions for each new regulatory action in FY2017.[54] Critics charged that many of the actions listed as "EO 13771 Deregulatory Actions" were not significant while most actions listed as "EO 13771

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[51] *See generally* Regulatory Reform Task Forces Check-In: Before the Subcomm. on Gov't Operations and the Subcomm. On Healthcare, Benefits, and Admin. Rules of the Comm. on Oversight And Gov't Reform H. R., 115th Cong. (October 24, 2017), https://www.govinfo.gov/content/pkg/CHRG-115hhrg30293/pdf/CHRG-115hhrg30293.pdf [https://perma.cc/F96J-R988].

[52] Off. Info. & Regul. Affs., Off. of Mgmt. & Budget, Exec. Off. of the President, Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2017, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf [https://perma.cc/Y2BZ-9HR7].

[53] *Id*.

[54] *Id*.

Regulatory Actions" were significant under 12,866.[55] This critique was expected and understandable, but more penetrating than anticipated. The implementing guidance for Executive Order 13,771 very intentionally cast a wide net for qualifying deregulatory actions. However, it generally only allowed agencies to receive credit for an "out" in the "one-in-two-out" program for such deregulatory actions, not regulatory cost savings credit that would count for purposes of the regulatory cost allowance. The objective was to encourage agencies to undertake sensible regulatory reforms of all sizes, even if the reforms would not result in qualifying cost savings under the regulatory budget. OIRA's guidance could easily have been written to provide offsetting credit only for significant deregulatory actions, and that may well have encouraged agencies to dig deeper and find more impactful regulations to reform or repeal. The expectation, however, was that the Order's cost allowance mechanism would work to ensure that new regulatory costs would be fully offset, while its "two-for-one" mechanism would function somewhat separately to encourage agencies to reform a wider array of existing regulatory actions. In general, this approach appears to have worked. For FY 2017 – FY 2020, regardless of whether "ins" and "outs" were significant under Executive Order 12,866, under Executive Order 13,771, OIRA reported that agencies imposed, on net, no new regulatory costs and actually achieved a meaningful net reduction in regulatory costs.[56]

It is also worth noting that while the annual 13,771 accounting for FY2017 included deregulatory actions that were not significant, in many cases that was because the underlying regulatory actions being repealed or rewritten were not promulgated as regulations – never mind significant or economically significant regulations – in the Federal Register. That means those underlying actions generally included no benefit-cost analysis or other discussion of impacts that could be reconsidered. OIRA worked with agencies to assess economic effects for purposes of categorizing actions as regulatory or deregulatory, but absent hard, written, public-facing analysis, it refused to award credit toward cost-savings goals.

In any event, to respond to this understandable critique, in FY2018 OIRA issued an apples-to-apples comparison alongside its accounting that was consistent with the Order and its

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[55] *See, e.g.*, Glenn Kessler, *Has the Trump administration repealed 22 regulations for each new one?* WASH. POST (Aug. 3, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/08/03/has-the-trump-administration-repealed-22-regulations-for-each-new-one/ [https://perma.cc/S2CJ-WMTN] (asserting that deregulatory claims were overstated); *see also* Cary Coglianese, *Let's Be Real About Trump's First Year in Regulation*, REGUL. REV. (Jan. 29, 2018), https://www.theregreview.org/2018/01/29/lets-be-real-trumps-first-year-regulation/ [https://perma.cc/U52A-GU2S] (arguing that most regulatory actions were significant while most ostensibly offsetting deregulatory actions were not significant).

[56] OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, Regulatory REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2017, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf [https://perma.cc/EKJ3-PDXE]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf [https://perma.cc/YVR7-XV7A]; OFF. INFO. & REG UL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2019, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf [https://perma.cc/JCA7-3ADC]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf [https://perma.cc/B5K2-TSZN].

implementing technical guidance from OIRA.[57] It reported agencies issued 12 deregulatory actions for every new regulatory action and four significant deregulatory actions for each new significant regulatory action.[58] The addition of an apples-to-apples comparison was a concession to those who argued some of the "outs" were a stretch. However, it was still believed that the rationale underpinning the technical guidance was sound and thus ought to be maintained. That is, the expansive definitions, exceptions, and flexibilities found in the guidance encouraged and rewarded a wide range of regulatory reforms for purposes of the "one-in-two-out" program, even if those reforms were unquantified and thus ineligible for credit in the cost-accounting system. Consequently, the substance of the guidance was not altered, but OIRA continued to provide an accounting of significant deregulatory actions to significant regulatory actions.

B. *Awarding Credit for the Obama Administration's Reforms*

Another critique was that numerous qualifying deregulatory actions were begun during the Obama Administration, yet the Trump Administration attempted to "take credit" for those regulatory reforms.[59] This criticism is understandable, but it misses the mark. First, agencies that received such credit generally had to take important additional steps to complete the actions begun during the Obama Administration, so they generally were not mere credit-grabbing actions. Second, and more importantly, OIRA could easily have refused to award such credit, but instead it sought to clarify that sensible reforms could and ought to be pursued across administrations. Not all regulatory and deregulatory actions under development need to be discarded simply because of a change in administration. That much should go without saying. Indeed, some regulatory actions from the prior Administration were finalized and accounted for under the regulatory budget.[60] Should OIRA have discouraged sensible regulatory reforms that were, in effect, bipartisan? To what end? If credit had only been awarded for deregulatory actions begun during the Trump Administration, several worthwhile, if comparatively small, bipartisan reforms likely would not have been finalized.

C. *Awarding Credit for Delays and Withdrawn Proposals*

Some critics also challenged the awarding of credit for regulatory delays that were not fuller deregulatory actions, as well as the awarding of credit for withdrawing rules that had been proposed but not finalized by the prior administration.[61] That criticism has some purchase if one defines deregulation as the wholesale elimination or reformation of existing regulatory programs. Surely, that is a common and appropriate understanding of the term. Delays and proposal

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[57] OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf [https://perma.cc/YVR7-XV7A].

[58] *Id.*

[59] *See, e.g.*, Stuart Shapiro, *Deregulatory Realities and Illusions*, REGUL. REV. (Nov. 12, 2018), https://www.theregreview.org/2018/11/12/shapiro-deregulatory-realities-illusions/ [https://perma.cc/XD2X-D3YJ].

[60] *See, e.g.*, 82 Fed. Reg. 27154 (June 14, 2017); OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf [https://perma.cc/335L-6HZQ].

[61] *See, e.g.*, Stuart Shapiro, *Deregulatory Realities and Illusions*, REGUL. REV. (Nov. 12, 2018), https://www.theregreview.org/2018/11/12/shapiro-deregulatory-realities-illusions/ [https://perma.cc/XD2X-D3YJ].

withdrawals that received 13,771 credit certainly did not meet that standard. In the case of delays, however, they often had measurable and meaningful economic cost savings. For example, by delaying the implementation of rules such as the U.S. Department of Labor's Fiduciary Rule, regulated entities were able to delay expenditures on significant new compliance costs. Importantly, cost savings credit was only awarded to the extent such delays included public-facing analysis to support those determinations. While obviously not as impactful over the long run as wholesale deregulatory actions, some delays did notch meaningful real-world savings deserving of credit under the system as designed and implemented.

In the case of withdrawn proposals receiving partial credit, clearly those deregulatory actions did not have a measurable impact on the market because the underlying regulatory proposals had not yet been finalized and made effective. Accordingly, there was no analysis to demonstrate cost savings, and no regulatory budget credit could be awarded. Agencies were, however, permitted to receive credit for an "out" in the "one-in-two-out" system. The decision to award partial credit under 13,771 was, again, a function of an over-arching decision to incentive a wide range of regulatory reforms, no matter the size or immediacy of the impact. Had such withdrawals not received any credit under 13,771, the prior administration's unfinalized regulatory proposals may well have remained in proposal status for years, only to be finalized on an expedited timeline by a future administration.

Reasonable minds may differ, but it seemed like an acceptable accommodation to award partial credit for partial reforms like these. Without a quantification of cost savings, clearly no credit could be awarded for purposes of the regulatory budget. However, when savings could be demonstrated, such as in the case of delay actions that included meaningful analysis, then cost savings credit could be awarded. Awarding an "out" for purposes of the "one-in-two-out" program seemed like a reasonable way to provide some recognition of progress toward the broader goal, even if that progress could not easily be measured and therefore recognized in the regulatory budget.

D. Awarding Credit for Congressional Review Act Deregulation

Critics also challenged that OIRA should not have awarded credit for regulations that were repealed by Congress and the President through the Congressional Review Act.[62] This, too, is understandable, because these were not wholesale reforms developed and finalized by the agencies. However, these actions resulted in significant regulatory cost savings and did require meaningful engagement by the Administration. Indeed, as is generally the case with important legislative developments, there was extensive discussion and deliberation between Congress and the Executive Branch on regulations that were repealed under the authority of the Congressional Review Act. The President signed the resolutions, and agencies then had to take a series of technical steps to effectuate the repeal of those regulations. That all required substantially less work for the Executive Branch than drafting and finalizing wholesale deregulatory actions, to be

[62] *See, e.g.*, Cary Coglianese et al., *Deregulatory Deceptions: Reviewing the Trump Administration's Claims About Regulatory Reform*, PENN PROGRAM ON REGUL. RSCH. REP. (Nov. 1, 2020), https://www.law.upenn.edu/live/files/11017-coglianesesarinshapirotrumpderegulationreport11012 [https://perma.cc/BQ8F-LHFZ] (advancing an alternative method for tabulating regulatory and deregulatory actions, challenging Trump Administration claims about regulatory reform, and arguing that regulatory reform provided little demonstrable economic lift).

very sure, but the decision to award credit should be understood in light of the overarching goal of incentivizing a wide range of reforms, whatever their size and formal categorization. Denying credit for these revocations would have eliminated from the tally actual cost savings that were achieved during the covered periods of each 13,771 report, and it arguably may have discouraged agencies from enthusiastically pursuing a broader array of reforms. Those decisions were also made at the very beginning of the administration, when the Executive Branch was looking to get off to a strong start on regulatory reform. Not awarding credit would have been understandable but would have risked diminishing the import of the cost savings achieved and the likelihood that agencies would have enthusiastically pursued reforms beyond wholesale deregulatory actions, proposed and finalized by the agencies.

E. Not Enough Transparency

Other recommendations for reforming the 13,771 accounting system included a series of transparency measures, most of which I endorse. Those recommendations include: providing more information about the costs and savings associated with each action in OIRA's Regulatory Reform Reports; providing more visibility into the development of regulatory cost allowances for each agency; sharing more information with the public about the banking of cost savings; and facilitating open data and independent research by making the format for delivering annual 13,771 reports more user-friendly.[63] These recommendations would advance the good regulatory practice of creating regulations that advance regulatory quality through greater transparency, objectivity, accountability, and predictability. Indeed, had such information been incorporated in OIRA's annual regulatory budget reports, many of the responses and explanations in this commentary would not be necessary.

The annual regulatory budget reports and charts provided a great deal of information, but they did not provide transaction-specific cost accounting, which meant observers were left to comb through the text of the individual rules to determine whether and to what extent they generated regulatory cost savings for purposes of the regulatory budget. That was a lot of work to ask of the public. It may have been difficult to construct, implement, and simultaneously provide comprehensive reporting on the first U.S. federal regulatory budget, but future federal regulatory budgets should endeavor to provide, whenever feasible, an even more detailed accounting for the public.

F. Benefits Ignored

One of the earliest and most persistent criticisms of the Order was the assertion that it looked only at the cost side of the ledger and ignored the benefits of regulation.[64] That critique is understandable and partially valid, but it does not accurately reflect the design or operation of the regulatory budget under 13,771. The regulatory budget was deeply integrated with the federal government's longstanding benefit-cost analysis standards, articulated in Executive

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[63] *See, e.g.*, Dan Bosch, *The Legacy of the Regulatory Budget*, AM. ACTION F. (Feb. 17, 2021), https://www.americanactionforum.org/insight/the-legacy-of-the-regulatory-budget/ [https://perma.cc/B3RY-282N].

[64] *See, e.g.*, Cass R. Sunstein, *On Neglecting Regulatory Benefits*, 72 ADMIN. L. REV. 445 (2020) (arguing that Executive Order 13,771 improperly ignored regulatory benefits, and proposing alternative strategies for regulatory reform that seek to lower regulatory costs while maximizing regulatory benefits).

Order 12,866 and OMB Circular A-4. It did not replace or amend those standards, which it certainly could have done. Rather, it processed each significant regulatory and deregulatory action through ordinary 12,866 review at OIRA, which imposed all customary benefit-cost analysis standards on those rules. Clearly, as discussed *supra*, some non-significant 13,771 deregulatory actions did not undergo that review process, typically because the revoked or amended actions were guidance documents and other quasi-regulatory issuances that existed outside the federal government's underlying regulatory database. But, importantly, those deregulatory actions did not receive regulatory cost savings credit for purposes of the regulatory budget. After vetting by OIRA's professional staff, who refused to award credit for many purported deregulatory actions, some non-significant deregulatory actions were permitted to qualify for credit under the Order's "two-for-one" program, but they could not improve the agency's standing with respect to the regulatory budget unless they included supporting written analysis.

That basic structure ensured significant regulatory and deregulatory actions were all subject to benefit-cost analysis, while non-significant deregulatory actions received the same treatment that non-significant regulatory actions had long received: they were not generally subject to 12,866 review and therefore were not generally subject to formal benefit-cost analysis requirements. Regulatory benefits, costs, and transfer effects of underlying significant regulatory actions had to be addressed by agencies seeking to unwind those standards through deregulatory actions. But where agencies had previously issued guidance documents, letters, circulars, and the like without attempting to ground their policy choices in rigorous analysis of benefits, costs, and transfer effects, those who later sought to unwind the actions were similarly not required to provide a formal analysis of the benefits, costs, and transfer effects of their choices.

To better understand how benefit-cost analysis standards were incorporated into the regulatory budget, consider the following.

Executive Order 13,771 required, "Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law."[65] That is, the regulatory budget did not eliminate existing requirements, but supplemented them by directing agencies to pursue compliance with the budget to the extent permitted by other standing obligations.[66]

In case the language of the Order was insufficiently clear that the regulatory budget was to be implemented in a manner that comported with other executive orders and procedural requirements, including ordinary benefit-cost analysis standards, OIRA left no room for doubt in its implementing guidance. Included among the introductory General Requirements of the regulatory budget was this instruction:

> Agencies should continue to comply with all applicable laws and requirements. In addition, EO 12866 remains the primary governing EO regarding regulatory planning and review. Accordingly, among other requirements, except where prohibited by law, agencies must continue to assess and consider both the benefits and costs of regulatory

[65] Exec. Order No. 13771, 82 Fed. Reg. 9339 § 2(c) (Feb. 3, 2017).
[66] *E.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

> actions, including deregulatory actions, when making regulatory decisions, and issue regulations only upon a reasoned determination that benefits justify costs.[67]

Later in the guidance, OIRA reiterated the important role of regulatory benefits in the implementation of the regulatory budget:

> Q32. How does EO 13771 affect the consideration of regulatory benefits or other requirements under EO 12866?
>
> A: EO 13771 does not change the requirements of EO 12866, which remains the primary governing EO regarding regulatory review and planning. In particular, EO 13771 has no effect on the consideration of benefits in informing any regulatory decisions. For all EO 13771 regulatory actions and EO 13771 deregulatory actions, except where prohibited by law, agencies must continue to assess and consider both benefits and costs and comply with all existing requirements and guidance, including but not limited to those in EO 12866 and OMB Circular A-4.[68]

In addition to Executive Order 13,771 and its implementing guidance, Executive Order 13,777, Enforcing the Regulatory Reform Agenda, was issued to help ensure the proper and robust implementation of the regulatory budget.[69] That Order required agencies to comply not just with 13,771, but also Executive Order 12,866 by President Clinton and Executive Order 13,563 by President Obama.[70] As discussed, 12,866 clearly articulates the important role of benefits in the regulatory development process. In like manner, Executive Order 13,563 emphasizes the need to carefully assess benefits, both quantitative and qualitative, when developing regulatory policy and implementing regulatory reforms. Because all significant deregulatory actions under Executive Order 13,771 were categorized as significant regulatory actions for purposes of Executive Order 12,866 review, those rules were required to satisfy the ordinary benefit-cost standards of 12,866 and the attendant requirements of OMB Circular A-4. These points were emphasized repeatedly by OIRA and other stakeholders throughout the implementation of the regulatory budget.

IV. RECOMMENDATIONS FOR FUTURE U.S. FEDERAL REGULATORY BUDGETS

The early experience with Executive Order 13,771 provided an excellent proving ground for one version of regulatory budgeting. A few lessons have already been explored in this paper, but the following are several key lessons learned and recommendations for future regulatory budget efforts: (A) Regulatory Budgets Work; (B) Contextualize Two-for-One Mechanisms; (C) Emphasize the Importance of Analysis, Including Analysis of Regulatory Benefits; (D) Build on Existing Procedural Mechanisms; and (E) Remember: Regulatory Process is Friend, Not Foe.

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[67] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" 2 (2017).

[68] *Id.* at 13.

[69] Exec. Order. No. 13,777, 82 Fed. Reg. 12285 (Feb. 24, 2017).

[70] *Id.* § 2(a)(i)–(iii).

A. Regulatory Budgets Work

From FY 2017 through FY 2020, the U.S. federal government imposed, on net, no new regulatory costs. Further, federal agencies reporting to the president achieved a combined net regulatory cost savings of $198.6 billion.[71] While observers have critiqued aspects of the "two-for-one" program, comparatively little criticism has been leveled against the accuracy and effectiveness of the regulatory cost accounting mechanism that is at the heart of the regulatory budget. Future regulatory budgets should place considerable emphasis on this core component of the regulatory budget.

In addition, the simplicity of the clear regulatory cost goal was, as a practical matter, very useful. It set a clear initial target for agency leadership and staff, the White House, and the public. It provided a clean and relatively fair starting point for the first fiscal year of the project. It set expectations early: the goal would not be to reduce the rate of growth in regulatory costs and declare victory but to eliminate the imposition of net new regulatory costs across the Executive Branch. It also provided a useful mechanism for comparing initial agency performance and anchoring future discussions about agency budgets.

Further, the zero-dollar cost allowance in the first fiscal year anchored discussions about cost allowances for the following years. Had a less clear and uniform target been used in the first year, discussions about targets for subsequent years would likely have been less ambitious. While there are many appropriate factors to consider when setting a regulatory budget, the experience of 13,771 suggests it is not bad to begin the reform effort with an expectation-setting target and then revise that target in later years as appropriate. One could imagine providing even more directional clarity, such as allowing the OMB Director to set future cost caps "not to exceed zero dollars" to the extent permitted by law. That might further anchor later budget discussions, but its absence from 13,771 did not appear to have a materially detrimental effect. Budgets below zero dollars were frequently set and achieved, and in other cases budgets exceeding zero dollars were determined to be necessary, suggesting that maintaining the flexibility to go in either direction may continue to be useful in the future.

B. Contextualize Two-for-One Mechanisms

The two-for-one program as developed and implemented under Executive Order 13,771 was in many respects successful. It contributed to the larger goal of eliminating the imposition of new regulatory costs. In addition, by the terms of the Order and guidance, agencies generally succeeded in achieving their two-for-one objectives.[72]

That success, along with the more important success of the regulatory budget, has, however, largely been overshadowed by criticisms of the "two-for-one" program. Admittedly, that is likely

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[71] OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf [https://perma.cc/6MZ6-BBFY].

[72] *See, e.g.*, OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf [https://perma.cc/7JS6-GN5J].

at least partially due to the fact that the Administration often referred to Executive Order 13,771 as the "two-for-one" requirement, often not even mentioning the regulatory cost savings goal and success. The rhetorical appeal of eliminating two regulations for every new one was significant. Had it been properly contextualized and supplemented with a discussion of the impressive accomplishment of altogether halting the imposition of new regulatory costs, perhaps less ire would have been trained on the "two-for-one" accounting system. That system was thoroughly and painstakingly explained in advance in OMB's guidance, so there should have been no surprises when the first 13,771 accounting report was released for FY2017, but given the intense focus from the Administration on the "ins" and "outs," much of the guidance's nuance and import was apparently lost on the public that was digesting the results and associated rhetoric.

To restate a point stressed throughout this paper, the "two-for-one" requirement was designed to aid the goal of achieving no net new regulatory costs, and possibly a net regulatory cost savings after the first year. That goal was met and exceeded for all four years of the Trump Administration. The two-for-one program was intentionally flexible and accommodating. That basic structure allowed the Order to work. It created a system that rewarded agencies for good behavior, even if only partially. It was not meant to subsume the regulatory cost cap, which was the core regulatory budget of the Order. Future efforts may absolutely benefit from using some version of a two-for-one program – indeed, it was a very useful organizing mechanism for Executive Order 13,771 – but they should consider either making it less accommodative and more intuitive or clearly explaining the existence, purpose, and context of any accommodations. Future efforts should also consider providing more transaction-specific cost accounting in annual reports so the public can more clearly see which rules are awarded both cost-savings and "out" credit, and which are only awarded "out" credit and therefore are not included in the core regulatory budget calculations.

C. Emphasize the Importance of Analysis, Including Analysis of Regulatory Benefits

The U.S. federal government has long been committed to developing regulatory actions in a rational, analytically defensible manner. No matter the philosophical persuasion, this fundamental commitment has been integral to the development of regulatory policy. In nearly all conceivable events, that posture ought to be maintained. The regulatory budget, like other overlapping procedural requirements, ought to be understood as a complement or supplement to established norms. Specifically, it should not replace or diminish the essential role of regulatory decision-making grounded in rigorous analysis. Future administrations should consider making this point even clearer in the design and operation of the regulatory budget.

Executive Order 13,563 on retrospective review may provide something of a guide in this regard. Near the beginning it makes clear, "This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993."[73] It then proceeds to discuss core requirements of 12,866, including the requirement that regulatory benefits must justify regulatory costs. Such a clear, up-front statement of principles is important not only to fend off critics, but also to ensure those responsible with implementation understand that rigorous analysis is

[73] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

essential to rational regulation and proper implementation of the regulatory budget. Future regulatory budgets may be well served not just to incorporate such standards by reference, but to restate them up front in plain terms.

D. Build on Existing Procedural Mechanisms

Much of the architecture for Executive Order 13,771 was layered on top of existing bureaucratic architecture, to positive effect. Rather than replacing that architecture – as was considered – the decision was made to supplement it. OIRA has competently managed a variety of regulatory processes for decades. Its requirements, principles, conventions, and norms are deeply entrenched in the federal regulatory process. Those processes include many useful features that administrations of any philosophical persuasion can use to their advantage, rather than discard and replace every few years. For example, in the case of Executive Order 13,771, the Administration leveraged the Unified Agenda platform and process to obtain information about planned adherence to the regulatory budget. The Unified Agenda is an Executive Branch-wide process that allows OIRA to play a leadership role in managing and coordinating the development of the regulatory pipeline, including to some extent at the historically independent agencies. By layering on top of it the 13,771-information-gathering exercise, OIRA was able to comprehensively, systematically, and relatively quickly undertake a major new and highly technical information gathering exercise of importance to the White House.

The Order also leveraged several features of the ordinary regulatory review process articulated in Executive Order 12,866. For example, the significance determination process allows OIRA to determine whether a rule is significant under the terms of 12,866, but it was also used to determine whether a rule was EO 13,771 regulatory or deregulatory. The 12,866 regulatory review process was also used to determine whether agencies were fairly representing and accurately substantiating that rules were either regulatory or deregulatory. In like manner, the information collection review processes of the Paperwork Reduction Act and the significance determination process of the Congressional Review provided additional mechanisms for evaluating and enforcing compliance. In each of these cases, existing capabilities and processes were used to implement the regulatory budget.

E. Remember: Regulatory Process is Friend, Not Foe.

Finally, it is important to understand up front that the regulatory process can be a regulatory reform-minded administration's friend and need not be its foe. The regulatory process is arcane and arduous, and some may not have the patience to navigate it carefully, and therefore successfully. The problem may be exacerbated when sights are set on swift and sure goals like "slashing red tape." However, regulatory and deregulatory objectives must be carried out in the context of regulatory process, not above it or beside it. Long-term regulatory reform successes cannot be traded in for quick regulatory budget points. After all, deregulatory actions – at least those that are significant – are in fact regulatory actions that must satisfy all the ordinary requirements of significant regulatory actions. That means existing significant regulations cannot be, in ministerial fashion, revoked, changed, or extensively delayed. They must be engaged, analyzed, and reformed or rolled back appropriately. This theme was emphasized throughout the implementation of Executive Order 13,771, but it should be stressed even more fully and

forcefully in the future. Expectations should leave room for analysis, collaboration, and review, and trainings should be provided to guide officials and staff through the process.

The regulatory process should not be regarded as a time-consuming, box-checking exercise. If trusted and engaged, it can provide significant value for the regulation being advanced. At the risk of stating the obvious, the centralized regulatory review process brings together talented career and political officials from offices and agencies across the Executive Branch to share their perspectives, determine lines of demarcation between sibling agencies and programs, discuss the likely and possible real-world effects of a planned action, and ensure that regulations are well considered, net beneficial, and tailored to achieve their stated objectives. The public notice and comment process provides the public an opportunity to weigh in on proposed regulatory actions, sharing information, arguments, and perspective that might advance or inform the rulemaking. Early rounds of engagement such as advanced notices of proposed rulemaking can further support these government efforts to obtain the best information and perspective possible when developing a regulatory program. All that activity helps to develop the record and public support necessary to implement and maintain regulatory reforms.

Similarly, the Unified Agenda, while perhaps appearing to be a mundane paper-pushing exercise, is actually an incredibly important and powerful mechanism for coordinating and making transparent the government's intention to regulate or deregulate in particular ways. The list of crucial but byzantine regulatory processes goes on, but one thing is true about nearly all of them: the one who attempts to shirk the process will very likely suffer unwelcome consequences down the road. That lesson has been painful for many enthusiastic reformers, but it is one that need not be painful in the future. The regulatory process has existed in largely the same form across multiple administrations for decades for good reason: it works. Regulatory reformers should not let any latent distrust of government get the better of them and prevent them from robustly and earnestly engaging staid regulatory processes. By embracing and supplementing them with unique new perspectives, reformers of all philosophical stripes can make significant progress toward their goals.