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Reviewing Regulatory Review

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In its first term, the Obama administration presented itself as the champion of responsible regulation — a veritable model of rigorous cost-benefit analysis, efficient rule-making, and regulatory reform. "There's no question that some regulations are outdated, unnecessary, or too costly," the president proclaimed in early 2012, pointing to his record of "approv[ing] fewer regulations in the first three years of my Presidency than my Republican predecessor did in his." Last March, Cass Sunstein — the recently departed head of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget, which reviews all federal regulations — touted the administration's "unprecedented steps . . . to promote evidence-based regulation." Claiming sky-high net benefits for the major rules enacted under its watch, as well as a more comprehensive process of prospective review and the introduction of retrospective review, the administration has portrayed today's rule-making system as more stringent, and more efficient, than ever before.

As President Obama's second term begins, one question looms large for federal regulation: Are the gloves off now? Whatever one makes of the administration's claims about its first four years — and they certainly cannot be taken at face value, as we shall see — the signs so far suggest that Obama's second term will involve far more regulation, at a far higher cost, than his first term did. Historically, presidents of both parties have issued rules disproportionally toward the ends of their second terms, when the pressures of re-election are gone and political appointees seek to check off as much of the administration's wish list as possible before departing. As for Obama, his administration recently

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(and belatedly) issued its Unified Regulatory Agenda for 2012, which identified more than a hundred "economically significant" rules in the pipeline. While the details of those rules have yet to be fully fleshed out, the Environmental Protection Agency has already proposed a handful of emissions regulations with estimated costs per year in the range of hundreds of millions to billions of dollars. Moreover, it is unclear whether the administration will remain even nominally committed to cost-benefit analysis now that Sunstein is gone, as groups like the Center for Progressive Reform reviled Sunstein for his reported efforts to act as a brake upon agency actions whose benefits OIRA considered insufficiently supported by evidence. The odds of a similarly minded successor may not be high.

Obama's first term, in sum, may look in retrospect like a model of rigorous regulatory review. That prospect alone is reason for concern, because the gaps in accountability within the current system already allow entire agencies, as well as entire categories of rules, to evade cost-benefit analysis and other standards of accountability. Our system for scrutinizing particularly costly rules is insufficiently rigorous and ridden with loopholes.

To be sure, many of these shortcomings pre-date the Obama administration and allowed rules issued under Republican administrations to escape serious scrutiny as well. But the case for greater oversight is especially pressing now, as we face the prospect of rules that are both more numerous and more costly than ever before. It is time to review how the executive branch assesses proposed regulations, and to take seriously the need to limit those regulations' real costs.

COST AND BENEFIT

At first glance, today's system of regulatory oversight looks reasonably comprehensive. The basic process is well known: Agencies publish a notice of proposed rule-making, accept public comments, and issue the final regulation for publication in the *Code of Federal Regulations*. Since the Reagan administration, a key requirement of this process has been that agencies must use cost-benefit analysis to determine which rules to adopt. The greater the impact of a rule on the economy, the more rigorous the accompanying analysis must be.

If a rule has a "significant" effect on entitlements, grants, or similar federal programs, the agency proposing the regulation must prepare a

general assessment of costs and benefits. But if the regulation qualifies as a "major" rule — if it has "an annual effect on the economy of $100 million or more," or has a material and adverse effect on "the economy... productivity, competition, jobs, the environment, public health or safety" or on state and local governments — far more is required. In those cases, the agency must analyze in detail several specific kinds of costs (including direct costs and lost productivity, jobs, or competitiveness) and benefits (including improved market efficiencies and better health, safety, and environmental protection). The agency must also assess and compare the costs and benefits of feasible alternatives and justify why its ultimate choice of regulatory method maximizes net benefits.

Moreover, ever since the Office of Management and Budget issued Circular A-4 in 2003, agencies have been directed to use "the best reasonably obtainable scientific, technical, and economic information" when identifying anticipated costs and benefits, and to follow a uniform, step-by-step process of analysis. An Obama executive order in 2011 further emphasized that agencies must "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." If they fail to do so — or if proposed rules otherwise appear inefficient — OIRA can send the rule back to the agency for further consideration (essentially an instruction to change the rule) within 90 days of submission. During Obama's first term, with Sunstein at the helm, this was no empty threat: OIRA changed 76% of all rules, reportedly in ways that reduced some of the burdens on the private sector (though the specifics of its instructions to agencies are not publicly available).

Such "prospective review" is just the beginning of OMB's scrutiny. Under another 2011 Obama executive order, agencies must conduct periodic *retrospective* reviews that identify ways to reduce costs and paperwork even after rules are on the books. Insofar as prospective estimates can be faulted for poor assumptions about costs and benefits, OIRA is confident that retrospective analysis — conducted with the benefit of recorded data and actual evidence of rules' effects — will provide the necessary tools to improve regulatory evaluation.

This self-policing by the executive branch is further backed by congressionally mandated regulatory reviews. The Unfunded Mandates Reform Act of 1995 compels agencies to conduct cost-benefit analyses of proposed "major" rules, directs them to consider alternatives, and requires them to choose "the least costly, most cost-effective or least

burdensome alternative." If an agency fails to do any cost-benefit analysis, or omits required elements like estimated compliance costs, judicial review is available to enforce these requirements. Nor can agencies issue rules in secret. All rules must be submitted to Congress (along with any cost-benefit analyses conducted) before they take effect, and "major" rules do not take effect until 60 days after such a submission, in order to allow for more thorough evaluation of their estimated effects. Meanwhile, under the Regulatory Right to Know Act of 2000, OMB must inform Congress of the estimated costs and benefits of the entirety of each year's federal regulations. The 2012 draft report ran to nearly 200 pages, identified all "major" rules issued, and provided a wealth of data about the rules agencies did and did not quantify.

Under this system, the norm is that all "major" rules have benefits in excess of costs, a fact the Obama administration frequently touts. Of all the major rules OIRA reviewed in 2011, only one, an EPA rule promulgating water-quality standards to reduce nitrogen and phosphorous pollution in Florida, had estimated costs in excess of benefits, and a consent decree with the regulated parties mandated that rule. "In view of the state of the art techniques we now have for engaging the public and disclosing material, and for assessing the consequences of rules both before we act and after we act," Sunstein told a Harvard Law School audience last year, "the dream of incorporating statistical analysis of rules, avoiding mistakes, and empowering the public is not so far from being a reality."

But this apparent commitment to rigorous regulatory analysis is not all that it seems, because the process applies to only a narrow sliver of federal regulations. In 2011—the latest year for which the executive branch has released comprehensive data—federal agencies promulgated more than 3,500 rules, but OIRA reviewed just 337 of them. Of those, only 54 qualified as "major" rules requiring detailed cost-benefit analysis and a 60-day congressional review period before going into effect.

If those 54 rules had comprised all the regulations likely to have a serious effect on our economy, isolated scrutiny of them might be a reasonable way to conserve scarce government resources. But they did not, for several crucial reasons. First, that figure excludes rules issued by so-called "independent agencies" like the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Reserve System, the National Labor Relations Board, and the National

Transportation Safety Board. These agencies are not directly answerable to OMB and are not subject to the cost-benefit analysis requirements imposed on normal executive-branch agencies.

Second, the definition of a "major" rule captures a number of rules that may not merit the same kind of scrutiny that regulations of the private sector should receive; at the same time, this definition leaves out many rules that should be more closely scrutinized. Of the 54 "major" rules promulgated in 2011, only 24 directly regulated the private sector. All others were "budgetary transfers" involving substantial "income transfers" (for instance, from taxpayers to beneficiaries of Medicaid, Medicare, and the federal school-lunch programs). And agencies pared the significance of the cost-benefit requirement down yet further: Of the 24 rules regulating the private sector, the relevant agencies quantified both benefits and costs for only 13 of them; the rest, the agencies asserted, had costs or benefits that simply could not be measured.

There are strong indications that tremendously burdensome rules are hiding among the 3,000-plus "non-major" rules issued in 2011, evading assessments of their costs and benefits as well as other forms of accountability. For example, determining when independent agencies that quantify neither the costs nor the benefits of their rules are actually promulgating "major" rules is a guessing game. Furthermore, agencies have political incentives to choose lower cost estimates, and often fail to quantify indirect costs in any event; these pressures, combined with the loopholes in the present system, suggest we should be skeptical of the notion that "major" rules are as comparatively rare as they seem. Perhaps the best and most publicized example of a "non-major" rule whose costs appear to be seriously understated are the Federal Communications Commission's highly controversial "net neutrality" rules (presently under challenge before the U.S. Court of Appeals for the D.C. Circuit), which are major enough to constitute "the most significant reach of regulatory power over the Internet in U.S. history," according to two former FCC advisors. Evidence suggests the rules could in fact devalue spectrum assets by billions of dollars. Nevertheless, the FCC's "net neutrality" regulations are not "major" rules, because the FCC dismissed their costs as "modest" and declined even to quantify them.

Third, the methods used by regulatory agencies to estimate costs and benefits are often grossly inadequate to the task (as we shall see). Both OMB and Congress have been far too willing to tolerate their inadequacies.

Each of these three loopholes in today's review system poses major costs and problems. And while all three have plagued that system for many years, they are particularly worrisome now. With an administration likely to ratchet up both the number and cost of the rules it promulgates over the next four years, even more rules may slip through the cracks—resulting in ever greater disparities between the purported benefits and costs of certain rules and our ability to even assess the scale of federal regulation.

INDEPENDENT OF REVIEW

The most glaring omission from today's regulatory-accounting scheme is the exemption of independent agencies. These federal agencies are "independent" in the sense that they are generally required to have members from both political parties and, crucially, because the law constrains the president's ability to remove the agencies' leaders. These bodies promulgate rules covering a vast array of sectors and activities, ranging from financial transactions to aviation safety.

All of the executive orders issued over the years instructing agencies to rely on cost-benefit analysis apply only to traditional executive-branch agencies and not to independent regulatory agencies. As Adam J. White described in these pages last year (see "Reining in the Agencies," Spring 2012), presidents have long been deterred from supervising independent agencies by the specter of *Humphrey's Executor.* This 80-year-old Supreme Court decision—of dubious validity—affirmed the limits on the president's ability to remove the heads of independent agencies, but left much else about their status unresolved.

For example, President Obama's 2011 executive order laying out cost-benefit requirements stated that independent agencies "should" conduct cost-benefit analyses. But an accompanying OMB memorandum explained that he was merely "asking" independent agencies nicely, "[w]ith full respect for [their] independence," to voluntarily comply in the "hope [they] see this as an opportunity to do something big and lasting." Indeed, despite the Obama administration's claims to have transformed the regulatory process, OIRA's most recent report to Congress describes the lack of information on the costs and benefits of independent agencies' rules as "a continued obstacle to transparency" that "might also have adverse effects on public policy."

There is no doubt that Congress could subject independent agencies to cost-benefit requirements, but it has generally chosen not to do so.

The Unfunded Mandates Reform Act of 1995 does not apply to them, and the legislation that does — the Paperwork Reduction Act of 1980, the Regulatory Flexibility Act of 1980, and the Congressional Review Act of 1996, to name a few examples — does not come close to requiring a comprehensive analysis of costs and benefits or of regulatory alternatives. And even when Congress has expressly required agencies like the SEC to follow cost-benefit analysis, the agencies have often failed to comply.

The widely discussed opinion of the D.C. Circuit in the 2011 case *SEC v. Business Roundtable* is just one of several examples in which the SEC's cost-benefit analysis was deemed deficient. In that case, the D.C. Circuit held that the SEC's rule on shareholder access — which required corporations to include information about shareholder-selected nominees to their boards of directors along with the usual proxy materials — was arbitrary and capricious. Among other defects, the D.C. Circuit cited the SEC's disregard of obvious costs that had been identified in relation to the rule and the agency's reliance on manifestly flawed studies to conclude that the rule would improve board performance and shareholder value.

While the latest official tally of major rules counts only the 54 issued by executive-branch agencies, OIRA estimates that independent agencies issued an additional 17. Put another way, the key tally of major rules, used to compare the magnitude of federal regulation across administrations, underestimates the true number by nearly 25%. And while the Obama administration is not unique in this omission, independent agencies have issued considerably more major rules during this president's tenure.

Viewed over time, the extent of independent agencies' unaccountability is even clearer. In the past ten years, OIRA estimates, independent agencies issued 102 major rules; they provided "some information" on either costs or benefits — possibly OIRA's most forgiving metric — for only 60 of them. For example, in 2011, the SEC issued a rule requiring firms selling asset-backed securities to make a host of new disclosures; in evaluating the rule, the SEC apparently provided "some information" on its costs and benefits by simply acknowledging, "We understand that some of the data collection may be costly" and that preparing recurrent filings would be burdensome. The agency did not bother to quantify its claims. Moreover, unless their internal statutes require more rigorous analysis, agencies are not required to meet even the "some information" threshold when describing the effects of their proposed rules.

The lack of analysis behind the 17 major rules issued by independent agencies in 2011 is troubling. Almost all of these rules implemented aspects of the Wall Street Reform and Consumer Protection Act (commonly referred to as Dodd-Frank). In none of these cases did the agency involved quantify both costs and benefits, let alone indicate any consideration of alternative approaches. The Commodity Futures Trading Commission, for example, promulgated a rule that will pay whistleblowers substantial rewards (funded with the monetary sanctions imposed on law-breakers) if their tips lead to successful enforcement actions for Dodd-Frank violations. The CFTC claimed to have broadly considered the costs and benefits of this rule (both of which, the agency estimates, may increase), but declined to quantify either.

Worse yet, independent agencies are almost certainly under-counting their major rules. Independent agencies must report their major rules to the Government Accountability Office, part of the legislative branch, which conducts a cursory review of whether a rule, on its face, appears to comply with applicable requirements. But trusting independent agencies to self-report their major rules, with no external oversight of their accounting, gives them every incentive to underestimate (and therefore under-report) costs. Neither the GAO nor OIRA can gauge the rigor of independent agencies' analyses, let alone their plausibility, because the agencies provide so little information about them. And all signs suggest that the number of major rules issued by independent agencies will only increase. Hundreds more rules required by Dodd-Frank are on the horizon, and the new Consumer Financial Protection Bureau is on the verge of issuing a torrent of costly, industry-wide rules, starting with several affecting mortgage lenders. Some of those rules undoubtedly reflect worthy ends (like reducing mortgage fraud). But laudatory policy goals are no excuse for unaccountable government.

Unsurprisingly, when independent agencies do bother to estimate costs or benefits, they often rely on dubious methodologies. Take the SEC's long-delayed final rule on "conflict minerals," which requires companies that use any amount of tin, tungsten, tantalum, or gold in their products to ascertain those minerals' countries of origin and to identify any such minerals originating in the Democratic Republic of the Congo or its neighbors. While the SEC now concedes this rule will cost upward of $3 billion — despite its original estimate of $71 million — its calculation of costs, as well as its "qualitative" description of

the rule's benefits, are currently under challenge before the D.C. Circuit. The National Association of Manufacturers and the U.S. Chamber of Commerce, which have led the challenge, argue that the SEC has once again employed a woefully inadequate methodology for estimating both the costs and benefits of its proposed rule. The SEC, the plaintiffs argue, thoroughly failed to account for the immense costs involved in scouring companies' supply chains, and never even attempted to quantify the proposed benefits of its rule, or to explain how the rule would advance Congress's objective of reducing conflict in the Democratic Republic of the Congo.

"major" gaps

Even in the case of those more traditional executive-branch agencies that must accompany their "major" rules with detailed assessments of costs and benefits, the existing requirements fail to produce meaningful accountability.

The definition of a major rule — the trigger requiring agencies to conduct a detailed cost-benefit analysis and to delay a rule's implementation pending a 60-day congressional review — is both over- and under-inclusive. Recall that a major rule includes any rule that has an "annual effect on the economy of $100 million or more," or otherwise significantly affects the economy. That definition captures a number of rules that should not be subject to heightened scrutiny, like rules with estimated benefits, but not costs, exceeding $100 million. For instance, the Department of the Interior's migratory-bird hunting regulations regularly qualify as major rules because, under the arcane Migratory Bird Treaty Act, the federal government sets annual quotas on the length of hunting seasons for particular migratory birds and on how many of a given type of bird can be bagged per day. In 2011, as in previous years, the Department of the Interior opted for a "liberal," less restrictive hunting season; as more people had more time to hunt (and thus to spend on equipment, transportation, lodging, and so forth), consumer surpluses were expected to run well north of $200 million. The department also certified that costs, though undefined, were lower than $100 million (indeed, this may be the model of a rule with few non-administrative costs).

At present, "major" rules also count so-called "budgetary" rules that result in federal transfers (or reductions in transfers) of $100 million or more. In fiscal year 2010, for instance, a rule changing Medicare

reimbursement formulas qualified as "major" because it was expected to reduce government payouts to hospitals by about $460 million. In 2011, rules implementing the "Biomass Crop Assistance Program," the "Biorefinery Assistance Program," and the federal school-lunch program were among the 54 major rules issued by executive agencies. Undoubtedly, many of these rules would benefit from more scrutiny. Some implement the Affordable Care Act, and others—in Medicare, the Rural Broadband Access Loans program, and the federal Crop Assistance Program, to name a few—are hardly models of government at its most efficient. But counting them as major rules does not seem to translate into greater oversight. Agencies currently specify only the "transfer" costs to the federal budget for these rules, not the harder-to-quantify social costs (as well as the economic costs) these rules create by encouraging certain behaviors and deterring others. And it makes little sense—and results in unnecessary expense and effort—to subject all "budgetary" rules to the same kind of scrutiny faced by major rules that cost the *private* sector $100 million or more. Indeed, counting all transfer rules as part of the major rules issued in a given year only reduces the usefulness of that total figure as a gauge of whether federal regulation is becoming more or less burdensome.

On the other hand, the definition of major rules may generate too narrow a picture of the number of rules that negatively affect the private sector. Tracking only those rules that impose annual costs of $100 million or more is arguably too high a threshold, especially since costs tend to be concentrated in a single industry, and tend to be underestimated. Indeed, determinations of whether a rule's costs even reach the $100 million mark are often based on agencies' (and OIRA's) best guesses based on competing numbers provided by proponents and opponents of proposed rules. Those numbers often vary by orders of magnitude, and agencies may find it difficult to resist the built-in political incentives to discount high estimates. Moreover, in our troubled economy, costs of, say, $50 million may well be worth subjecting to greater scrutiny. And while agencies must also designate as "major" rules that "adverse[ly] affect" the economy "in a material way," that is a meaningless standard without a uniform set of criteria.

ESTIMATING CONSEQUENCES

Even for quintessential "major" rules—those that impose at least $100 million in estimated costs on the private sector—the implementation

of cost-benefit analysis often falls short. Executive-branch agencies are required to produce a detailed analysis of costs and benefits for all such rules, yet in their last review period, agencies quantified both costs and benefits for barely half (13 of 24) of them.

To be sure, in some cases, quantification can be understandably difficult. The Treasury Department, for instance, was unable to quantify the costs of a rule to provide federal benefits through debit cards rather than by issuing checks — because the rule's main cost is the inconvenience (hard to quantify) that it poses to an unknown number of check-preferring beneficiaries. Of greater concern is the Department of Education's inability to monetize the benefits of its controversial rule regulating for-profit colleges. That rule requires for-profit colleges to show that they promote "gainful employment" of their students (and thus are eligible for federal student-loan aid) by demonstrating that 35% of graduates repay their loans, that graduates' average annual loan payments are 12% or less of their earnings, or that such payments are 30% or less of their discretionary incomes. According to the Department of Education, the rule will cost for-profit institutions $138.5 million a year, but even OIRA believes the actual costs will be much greater, since the department's estimate excludes the added costs of institutions' efforts to improve performance. The rule's benefits, on the other hand, consist of descriptive and concededly "speculative" improvements in graduation rates and student retention, lower loan-default rates (which depend on for-profit colleges' undertaking reforms that are not actually required by the rule), and "better return on money spent on education." (Other apparent defects may have already doomed the rule: A federal district judge recently vacated it on the ground that the 35% repayment rate had nothing to do with gauging whether an institution was adequately preparing its students.)

As for the 13 rules with quantified costs and benefits, there is reason to be skeptical of whether review by OIRA is really an effective check on lax agency analysis. The nature of many regulations is that costs are imposed on a single industry and occur immediately, while benefits are diffuse and accrue to society at large over decades. Claiming that such rules are no cause for concern because their "net benefits" are disproportionately high thus ignores the acute effect those costs have in the short run. Moreover, "net benefits" is a term with a particularly amorphous meaning under the Obama administration. According

to President Obama's 2011 executive order on regulatory review, "maximiz[ing] net benefits" means choosing the rule that most serves aims like "distributive impacts . . . and equity," not simply the one that produces the largest economic gains.

In practice, using such vague benchmarks allows for illogically optimistic assumptions about rules' purported benefits. The EPA's recent air-pollution regulations — the single greatest source of regulatory "benefits" in recent years — have been rightly derided for claiming that further reductions in tiny airborne particulates will produce massive gains on the order of tens of billions of dollars at the price of a few hundred million dollars per year for hard-hit manufacturers and other emitters. The science supporting these estimates, OIRA concedes, is "not resolved"; nevertheless, OIRA accepted the EPA's analysis.

Likewise, the Department of Labor's recent rule removing existing restrictions on financial advisors from advising 401(k)-plan participants seems like a good idea in the abstract. Yet the benefits — estimated at $7 billion to $18 billion per year — are all predicated on the notion that people not only make terrible investment decisions if left to their own devices but will start making fewer "investment errors" like "excessive or poorly timed trading," paying "excess taxes," and inadequately "diversifying their portfolios" if they have better access to investment advisors and "recei[ve] and [follow] good advice" — highly questionable assumptions.

Meanwhile, the 1995 Unfunded Mandates Reform Act — intended to provide a means of independently reaffirming cost-benefit requirements — is undermined by the broadest loopholes of all. The act applies only to "mandates" — the definition of which has long been disputed — and only to private-sector mandates that result in expenditures of more than $100 million in a single year, adjusted for inflation since the law's enactment (in effect, more than $140 million a year in today's dollars). The act, in other words, applies to a narrower class of rules than just "major" rules. It also excludes any final rules that were not first published as "proposed" rules in the *Federal Register*. Ordinarily, all rules are supposed to go through that process. But agencies have liberally invoked a "good cause" exception, claiming time is of the essence and proceeding straight to a final rule — thus avoiding the requirements of the act. Thanks to these exceptions and caveats, of the 642 major rules issued between the act's effective date in 1995 and the 2009 fiscal

year, agencies considered only 170 rules — or about 12 a year — as "unfunded mandates" on the private sector subject to the act's requirement of cost-benefit analysis. In 2011, only 13 major rules qualified. George W. Bush's OMB director Mitch Daniels testified in 2001 that the Unfunded Mandates Reform Act had had no real impact on agency rule-making because agencies "aggressively utiliz[e] the exemptions outlined by the Act." Little has changed since then.

In sum, today's regulatory-review system does not deliver the efficient or accountable review process we need. Too many costly rules evade cost-benefit analysis entirely for the perverse reason that they are issued by independent agencies considered outside the president's supervisory control. We vigilantly track "major" rules issued by executive-branch agencies, but we count a number of rules that have little to do with our burgeoning regulatory state as much as, if not more than, rules that hinder the private sector. We give agencies too much freedom to decline to quantify costs or benefits without asking whether they are truly unable, or just conveniently unwilling, to do so. We tolerate implausible exaggerations of regulatory benefits. And we have laws in place that impose independent checks on agencies in name only.

At every turn, the metrics we use to gauge how much the federal government is regulating, how many rules will seriously affect our fragile economy, and how much they really cost on balance produce a misleadingly optimistic picture. To be sure, Republican administrations, as well as the Obama administration, have relied on these metrics. But this bipartisan avoidance of real oversight is all the more reason to demand greater accountability.

SOME NEEDED REFORMS

If our ultimate concern is that the federal regulatory state is promulgating too many costly regulations, the proper response should be clear: Set a higher bar for agencies to justify such regulations and ensure that they face meaningful accountability for their regulatory choices.

An essential part of achieving that objective is to make sure that we target the right rules for heightened scrutiny. The laundry list of needed reforms is long. Independent agencies should be subject to the same rules as traditional executive-branch agencies, and should be required to undertake rigorous cost-benefit analyses of their rules. The definition of a "major" rule should also be revised to focus on the costliest regulations.

Whether an agency must conduct detailed cost-benefit analysis for a given rule — and whether its implementation should be delayed during a 60-day congressional review period — should be a function of whether the rule is likely to pose serious, negative economic consequences. The threshold of $100 million in costs is probably too high. Lowering it to $50 million or so would be better, especially since a number of rules affect a single industry that may have only a few dozen players and thus faces concentrated compliance costs. Major rules should also include those with substantial, negative effects on *jobs* — something agencies currently do not track in cost-benefit analyses.

But even these steps would mean little if agencies got free passes on questionable assessments of costs and benefits. One of the more inventive proposals among current reform efforts (floated by several Republican members in the last Congress) would create a Congressional Office of Regulatory Analysis. The office would scrutinize agencies' cost-benefit analyses as well as conduct its own reviews. In so doing, it would pressure agencies to take cost-benefit analyses seriously and to vigorously defend all their assumptions — or face possible hearings or other forms of political oversight and public embarrassment. Agencies might think twice about asserting dubiously immense benefits, or about declining to quantify certain costs or benefits at all, if these actions carried real consequences. And giving representatives and their staffs the ability to develop a real understanding of the technical details of a given rule, as well as a sense of potential problems with an agency's analysis, could help overcome the sense that Congress is starting from scratch every time it is faced with a major rule and a 60-day window.

The problem, of course, is that today's political realities leave such reform efforts all but dead in the water. Republicans have proposed a number of partial reforms that would, among other things, subject independent agencies to the same rules as executive-branch agencies. Both the Regulatory Accountability Act and the REINS Act (proposed in the last Congress) included such a provision. Providing for meaningful oversight of independent agencies' rule-making should be a bipartisan no-brainer. Yet the Obama administration has shown no inclination to rein in independent agencies. Indeed, the administration has every incentive to distance itself from the costly regulations being promulgated by independent agencies, especially the rules to enforce Dodd-Frank: The buffer between the White House and the independent

agencies is politically valuable to an administration seeking to implement unpopular or costly policies. And then there are the inevitable partisan obstacles. Republicans' reform proposals are unlikely to get past the Democratic Senate; even if they did, they would stand virtually no chance of overcoming a presidential veto.

All of this is worrisome and grim. While the administration pats itself on the back for unprecedented accountability in regulation, rules of immense (if often unknown) cost take effect and burden the economy. Still, there may be a silver lining. If, in the course of the next four years, the federal government issues a panoply of yet costlier rules, reforms may be seen as all the more necessary and urgent. The failures of our system of oversight will become harder to ignore. Reformers can use this time to start the process of clearly accounting the system's many failings so that, when the opportunity presents itself, they can be ready to seize it.