



## Achieving Smarter Regulation

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## Executive Summary

Federal regulation profoundly affects business in the United States.

Unfortunately, while regulation can be essential, during this time of economic challenges it has become all too apparent that specific regulations are often counterproductive and far too costly, with a detrimental impact on employment and job creation. The challenge is to have only regulations that are necessary and cost-effective.

The driving idea behind this report is simple and timely: By improving the regulatory process, the resulting regulations will better meet the needs of the American people in a way that does not impose unnecessary costs. Accordingly, building upon prior Business Roundtable reports and analysis, *Achieving Smarter Regulation* reaffirms time-tested recommendations and focuses on particular proposals that are most relevant today.

This report first outlines the major challenges posed by federal regulatory policy. Too often, regulations are too expensive and too rigid, hurting both innovation and competitiveness. The overall regulatory environment, especially in light of many regulations' heavy compliance burdens, too often fails to produce the certainty that business needs to invest and create jobs.

Second, this report lists key principles that should guide a well-functioning regulatory process. For example, by encouraging early public engagement and ensuring that agencies use quality information and engage in objective, common sense analysis, a smarter regulatory process can maximize the efficacy of regulations and minimize their costs. Meaningful oversight by the Office of Management and Budget is essential.

Third, this report explains that the regulatory process is a shared responsibility among all branches of government and the public. To achieve essential reform, all stakeholders must work together to implement smarter regulatory policy.

Fourth, this report explains particular concerns about the current regulatory process. For instance, agencies do not always conduct or adhere to cost-

benefit analysis. Nor do they always use the best available data and scientific methodologies. Courts are sometimes overly deferential to agencies in certain contexts. And in recent years, problems with the federal permitting process have also come to the fore.

Finally, this report sets forth four specific reforms to meet those challenges including: stronger requirements for objective analysis, including for rules issued by “independent” agencies; more and earlier agency disclosure of the costs of proposed regulations; updates to the Administrative Procedure Act to require more rigor in the promulgation of the key subset of major rules that impose the greatest economic burden; and streamlining the permitting process.

By implementing these reforms in legislation and with a spirit of cooperation, the regulatory process can be made more cost-effective and of higher quality for the American people and can accomplish necessary objectives in a better, more transparent and more efficient way than some of the highly problematic regulations of recent years.



# I. Introduction

Federal regulation of business has a profound impact on the public, on business investment and on U.S. competitiveness. Regulations on business impose costs that are like hidden taxes: not apparent but nevertheless significant in their impact on businesses, consumers and workers. Even a nonsignificant regulation adds to the growing cumulative burden of regulation, and this cumulative burden has a negative impact on jobs and the economy. The challenge is to have only regulations that are actually necessary and to design regulations to achieve worthwhile objectives at the lowest cost.

In 1994, Business Roundtable (BRT) issued *Toward Smarter Regulation*, which described problems with the regulatory process and recommended specific solutions, many of which were considered and debated in the chambers of Congress and the White House.<sup>1</sup> Although some progress was made, the underlying concerns remained. In the last few years, proposed and anticipated rulemakings at the federal level have alarmed the business community, shining a spotlight once again on the need for regulatory reform.

As BRT more recently explained in December 2010, “the success and profitability of U.S. companies — and their subsequent ability to invest in new jobs and new solutions — has been threatened by inflexible and cumbersome regulations in the financial services, environmental and health care sectors.”<sup>2</sup> Consequently, BRT revisited *Toward Smarter Regulation*, and the result is this report — a reaffirmation of the earlier recommendations with a focus on a few specific proposals deemed to be most relevant and appropriate in today’s economic and political climate.

This report (1) outlines the major challenges that federal regulation currently poses to U.S. businesses and domestic jobs; (2) proposes an optimal version of an improved regulatory process, referred to as “smarter regulation”; (3) describes the federal regulatory process as a shared responsibility among different branches of government and the public, including the business community; (4) presents a list of problems with the current regulatory system; and (5) recommends specific process reforms that, if implemented, can achieve “smarter regulation.”

The title of this report — *Achieving Smarter Regulation* — is significant in that the underlying problems are more apparent and more acute today than they were 17 years ago, and many of the proposed solutions — such as cost-benefit analysis — have been proven to improve regulation. With the learning of the last two decades, and the major economic challenges currently facing our country, the time for debate is past; now is the time for adoption and implementation of smarter approaches to regulation.

## II. The U.S. Economy Needs Smarter Regulation

Since *Toward Smarter Regulation* was issued in 1994, the U.S. economy has undergone significant changes, and it continues to face global challenges. During the last year, BRT has highlighted a number of specific planned regulations that would have a major adverse impact on the U.S. economy.<sup>3</sup> The interaction between federal government actions and the economy is even more important now than in the past. Federal regulation, in particular, poses four major challenges to U.S. businesses:

- ▶ **A cost challenge.** Regulations are expensive. Every year, federal agencies issue thousands of new regulations, imposing a cumulative cost of more than \$1.7 trillion annually, according to a study sponsored by the Small Business Administration. Individual rules can impose costs of hundreds of millions of dollars — or even billions of dollars — on regulated parties. Moreover, while any individual regulation might be cost-effective, the cumulative impact of *all* regulations can be anything but.

In addition, if U.S. companies face costs that foreign competitors do not, then it is harder for them to successfully sell products. Agencies, however, are often blind to the effect that regulations have on competitiveness. The best regulations/regulatory programs help provide certainty for business investment decisions while achieving the regulatory objective in a cost-effective and efficient manner and in a manner that achieves a high compliance rate.

- ▶ **An innovation challenge.** Business works when companies can experiment and try new things. Agencies, however, often impose rigid one-size-fits-all requirements that cut off promising opportunities, or they impose overly prescriptive rules that prevent better solutions. Likewise, resources spent complying with ill-designed regulations are by definition not spent on developing the products of tomorrow.
- ▶ **An investment challenge.** The regulatory process creates uncertainty that undermines investment, growth and job creation. If companies do not know what regulators will do, they understandably are reluctant to undertake

costly investment. Likewise, agencies often take too long to give permission for regulated parties to act — in part because they are focused on broad rulemaking objectives. The current regulatory system fosters uncertainty and so hampers growth and job creation.

- ▶ **A compliance challenge.** Regulating is easier than complying with regulations. Mandates are easy to promulgate but often difficult to achieve, particularly when they are confusing or poorly drafted. Some regulations are “technology forcing,” meaning that they can be met only by solutions that do not yet exist. Moreover, the volume and complexity of regulations can make for a bureaucratic nightmare, especially as different agencies with overlapping jurisdiction all regulate the same subject matter. Extraordinary resources are spent annually ensuring that regulations are obeyed.

### III. Smarter Regulation

Government intervention in the economy may sometimes be necessary to achieve desirable goals such as a cleaner environment, safer working conditions and safer products. In some instances, specific regulations have been well conceived and reasonably implemented. These efforts have produced substantial benefits for the country and the American people.

And yet, even with the best of intentions, government is simply not allocating limited resources in a cost-effective manner. Despite a dramatic increase in environmental, health and safety regulation, experience has taught us that often our nation's regulatory efforts have been more costly and less effective than they could have been. Moreover, the enormous costs of federal and state regulations exert a heavy drag on the economy. They depress wages, stifle productivity and economic growth, drive up prices, and impede innovation. They also burden federal, state and local governments. In our increasingly global economy, excessive regulation seriously undermines the competitiveness of U.S. businesses. Ultimately, the American public suffers.

*As the country embarks on a massive new wave of regulations ... it is imperative that the regulatory process be improved to avoid problems of the past.*

Beyond the problems caused by the rising costs of government regulation, the regulatory process itself has become unduly rigid, unresponsive, arbitrary and inconsistent. These problems have sparked increasing concern about the rationality of the regulatory process and a growing determination to do something about it. In April 2011, for example, BRT highlighted a number of individual current regulations that presented significant problems.<sup>4</sup>

As the country embarks on a massive new wave of regulations designed to address significant issues in health care and the financial sectors, as well as many new regulations involving the energy, transportation and labor sectors (among others), it is imperative that the regulatory process be improved to avoid problems of the past while ensuring that our limited resources are targeted prudently.

“Smarter regulation” equates to an improved quality control system for federal regulation. The following components do not guarantee good regulatory outcomes, but they increase the likelihood that a regulation will direct resources efficiently to achieve its objective.

## **Public Engagement**

Information gathering is critical to the development of a regulation or a change in regulation, and therefore agency interaction with those in possession of relevant information is also critical. Early engagement by the agency with the affected regulatory community is to be encouraged.

There are many ways an agency can engage with stakeholders. One common mechanism is the public notice-and-comment process for so-called “informal rulemaking.” However, even when that process is used, it would be desirable for an agency to seek earlier engagement with the business community and others prior to development of a proposed rule, especially when seeking a better understanding of the sector and when gathering information/data needed for regulatory development. Numerous methods are available to do that and ought to be employed more often. As the agency gathers information and receives public comment, the information and comments can be made publicly available in real time, thus fostering informed opinion.

For existing regulations, agencies should have mechanisms in place to receive information and feedback from the regulated community and to make improvements, as needed, to the underlying regulation.

## **Quality Information**

Regulations should be based on the best available information, and the information should be of sufficient quality. Agencies should be held accountable for the quality of the information upon which regulations are based. The public ought to have a reasonable opportunity to identify when information is flawed and to obtain its correction. On scientific and technical matters, agencies should be required to use the best available scientific information and methodologies and, where appropriate, create incentives for the development and use of such information.<sup>5</sup>

## **Objective Analysis**

When considering alternative approaches to regulation, an agency should rely on an objective analysis of benefits and costs along with a clear description of uncertainties in this analysis. Executive Order 12866 requires that certain covered agencies develop a cost-benefit analysis for each economically significant regulation, and agencies are free to develop such analysis for other types of regulation. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires analysis of impact for rules that affect a substantial number of small businesses. In these cases, it is imperative that impact analysis be objective and based on the best available information. Such an analysis is valuable both prospectively and retrospectively and when comparing/benchmarking U.S. regulations against those of other countries.

Methodologies should be continuously improved to assess the impact of significant regulations on productivity, wages and economic growth, as well as any adverse impact on jobs and international competitiveness in industries that bear the burden of regulation.<sup>6</sup>

## **Consideration of Costs and Benefits**

An agency should promulgate a rule only when it has determined that the benefits justify the costs. This principle is part of Executive Order 12866, and there has been considerable experience with its application. Because not all benefits and costs can be quantified, there will be situations in which an agency will make this determination where the quantitative costs exceed the quantitative benefits. In such cases, the agency should at a minimum explain its reasoning as part of the rulemaking record. More generally, agencies should ensure that rules successfully address actual problems in a cost-justified manner and with the least costly alternative that will address the problem.

## **Expert Oversight**

Congress often relies on the expertise of an agency to develop regulations. It is appropriate for such agency work, and the assumptions and data that underlie it, to be scrutinized by experts outside the agency to ensure its accuracy and objectivity. Under Executive Order 12866, the President has given the Office

of Management and Budget (OMB) responsibility for regulatory review and interagency coordination. It is critical that OMB devote sufficient resources (i.e., the quantity and quality of its staff) to implement this mandate effectively. Significant agency guidance documents and policies developed postregulation warrant special scrutiny, as they may be used as *de facto* regulation.

Another role of effective oversight is the need for coordination among agencies. Coordination should be improved to eliminate inconsistencies, duplication and unnecessary regulatory burden, as well as to coordinate the dates on which new rules take effect.<sup>7</sup>

## **Legislative Accountability**

Congress plays a key role in the regulatory process and therefore is accountable in part for regulations that arise from legislation. Congress should take care when writing legislation that creates or modifies a regulatory program. For example, Congress should require that agency regulations be informed by considerations of direct and indirect costs and benefits. Congress should also clarify the conditions under which a regulatory program will begin and end, including the threshold for when regulation is appropriate. Congress should also make clear those aspects of administrative law that are judicially reviewable. In some instances, the authorizing statute and its subsequent regulations do not reflect current market conditions and circumstances. This is a particular concern in sectors where science/technology changes rapidly. Such outdated statutes and regulations should be modernized.

After an agency develops a regulation, it is appropriate for Congress to ensure that the agency is acting within its statutory authority. Any subsequent congressional action on an agency rule (approval or disapproval) should be constitutional, should not preclude judicial review by stakeholders, and should not create perverse incentives for agencies to work around the intent of Congress. It is certainly appropriate for Congress to consider ways to better exercise its oversight role for federal regulation by the agencies to whom Congress has delegated its own authority.



## IV. Federal Regulation Is a Shared Responsibility

The President, Congress, the regulatory agencies, the courts, state and local governments, and the public — including the business community — have a shared responsibility in the development, implementation and overall effectiveness of, and compliance with, federal regulation.

- ▶ Congress provides the authority for federal agencies to regulate and defines the boundaries within which regulatory agencies must operate.
- ▶ The regulatory agencies use their expertise to develop specific regulations within their statutory authority and oversee implementation and compliance.
- ▶ The President manages the regulatory agencies and coordinates their regulatory efforts.
- ▶ The courts ensure that specific regulations are appropriate given the underlying statutory authority.
- ▶ State and local governments sometimes serve as partners with federal agencies in the development, oversight and enforcement of federal regulation. And sometimes state and local governments must comply with federal mandates, with or without commensurate federal funding.
- ▶ The public feels the impact of federal regulation of business in terms of its costs and benefits, which include effects on jobs and the economy. The public also provides critical information to agencies for the development and modification of regulations.

Because regulation is a shared responsibility among the different branches of government, it is seldom appropriate to attribute regulatory success or failure to just one part of the government. It follows logically that proposed regulatory reforms that focus on just one branch of government are not going to resolve all regulatory concerns by themselves.

## V. Problems/Concerns with the Current Regulatory Process

A number of particular concerns plague the functioning of the rulemaking process in a wide variety of executive branch and “independent” agencies.

**First, regulations sometimes are not based on sound science and/or quality data.** A recent report from the National Academy of Sciences included harsh criticism of the Environmental Protection Agency (EPA) program to estimate chemical risk (i.e., the IRIS program). Though hundreds of billions of dollars can turn on what an agency does, major rules (having an annual impact on the economy of \$100 million or more) sometimes provide little assurance that valid science and quality data were used. A recent EPA proposed rule to control hazardous air pollution from industrial boilers included standards based on nonrepresentative data, a fundamental mistake acknowledged by EPA (and remedied in the final rule).

**Second, agencies do not always conduct/adhere to cost-benefit analysis.**

The Obama Administration has continued to use the longstanding Executive Order 12866, which requires that agencies “assess both the costs and the benefits of [an] intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>8</sup> Although once controversial, cost-benefit analysis is now considered a useful tool for saving lives and directing limited resources in the most effective manner.<sup>9</sup> Yet there continue to be examples that raise legitimate concerns about adherence to cost-benefit considerations. For example, the Department of Transportation (DOT) conceded that its Positive Train Control and Automobile Roof Strength rules had costs that exceeded their benefits by large amounts, and in the last few months of 2010, DOT proposed two more rules whose annual costs would exceed \$1 billion per year despite producing benefits that would be less than half the costs.<sup>10</sup> EPA conducted no cost-benefit analysis at all for its Endangerment Rule for greenhouse gases, which is one of the most far-reaching and economically consequential regulatory actions in American history.<sup>11</sup> OMB recently reported that in 2010, agencies quantified both benefits and costs for only 27 percent of major rules.<sup>12</sup>

**Third, regulated parties are not always given an opportunity to criticize agency record materials or file rebuttal comments.** When the notice-and-comment process is followed, it often does not work as well as it could. One reason is that after an agency opens up a proposed action for public comment, it seldom gives regulated parties a chance to respond to comments filed by others. At least for major rules, there is sometimes too little process and concern for accuracy.

**Fourth, when conducting judicial review, courts are highly deferential to agencies.** Courts in some important instances have become overly deferential to agencies. For instance, agencies once used formal rulemaking when dealing with complex issues, but in *United States v. Florida East Coast Railway Co.*, the Supreme Court held that deciding when to use formal rulemaking is generally subject to agency discretion.<sup>13</sup> Likewise, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court held that courts must take a hands-off approach and defer to an agency's choice of procedure.<sup>14</sup> In a more general way, *Chevron*<sup>15</sup> and *Seminole Rock*<sup>16</sup> deferences to the agency's own interpretation of the law are powerful weapons in an agency's litigation arsenal. While it would not be desirable to make judges into discretionary policy administrators, the upshot from having too wide a range of deferential doctrines is that judicial review in some instances does not provide adequate assurance that an agency has objectively evaluated the premises and consequences of its rulemaking choices.

**Fifth, the federal permitting process is unduly lengthy and time consuming, especially for new facilities/projects.** Many job-creating projects, especially those involving manufacturing, energy and infrastructure, require federal permits and approvals (in addition to state and local permits). The requirements for submitting those permits are extensive and demand a significant commitment of resources at the outset. But once submitted, those permits are increasingly subject to delays both at the agencies and in the courts. Federal permits are in many instances not coordinated among agencies and often not subject to deadlines or prioritization. Even worse, even after issuance, they are sometimes subject to litigation that itself has no deadline, even when the litigation is lacking in merit. For example, the six-year statute of limitations under the National Environmental Policy Act means that project opponents can wait a significant time and then sue to delay work on a project.

## VI. Recommendations for Improving the Regulatory Process

At this juncture, smarter regulation is not just desirable, but necessary. According to Andrew Liveris in *Make It in America: The Case for Reinventing the Economy*, “Regulations are beneficial only when they’re clear, consistent and wise.”<sup>17</sup> To make that sensible observation a reality, three key principles of smarter regulation should animate the reform process. Regulations should: (1) be made as objectively as possible; (2) be promulgated only to address a well-defined problem that represents a failure of markets or institutions that can reasonably be fixed by new rules; and (3) always be designed using the most efficient solution to achieve the defined objective.<sup>18</sup> In other words, agencies should always ask themselves whether a regulation is necessary as demonstrated by the data and, if so, whether there is a less burdensome way to accomplish that specific objective.

A robust and much-needed debate is under way about various approaches to reforming the regulatory process. Congress has held a number of important hearings on this topic this year, and several members have introduced reform proposals. Without speaking to each of these many proposals, some stand out as consistent with smarter regulation while providing benefits in both the short and the long run. These should be considered high priority for enactment/implementation:

**The government should objectively analyze the costs and benefits of proposed and final major rules from all agencies, including “independent” regulatory commissions.** Under Executive Order 12866, “covered” agencies must conduct a cost-benefit analysis for each economically significant rule (e.g., those imposing more than \$100 million in annual costs or benefits) and provide this economic analysis to OMB for review. The executive order excludes certain “independent” agencies (e.g., the Securities and Exchange Commission, Federal Communications Commission, Consumer Product Safety Commission, Federal Energy Regulatory Commission, Federal Trade Commission, and others), even though such agencies are responsible for a large share (typically 20 percent) of the most costly rules. Cost-benefit analysis, along with OMB review, is needed for regulatory proposals coming from these agencies to better ensure that alternatives are identified and evaluated appropriately. It is imperative that estimates of costs and benefits be done *objectively*. Without an objective

(unbiased) estimate of both costs and benefits, regulatory analysis is meaningless. Furthermore, objective analysis is fundamental to many of the major regulatory reform proposals (regulatory budget, expanded analysis of regulatory impact on small business, congressional approval of major rules, unfunded mandates reform, etc.) being raised and debated today.

One valuable way to ensure objective analysis is to have a credible, independent party perform the analysis rather than the regulatory agency itself. Where such an approach is not practical, another option is to have a credible, independent party review and critique the agency analysis.

For example, the National Academy of Sciences has criticized EPA's process for assessing risk and recommended fundamental changes to the agency's program. EPA should not move forward with that program until it makes the recommended changes. The independent review should induce the agency to rely on objective data and analysis.<sup>19</sup>

*Agencies should publicly disclose the estimated costs of planned regulatory actions early in the regulatory process and with greater specificity.*

**Agencies should publicly disclose the estimated costs of planned regulatory actions early in the regulatory process and with greater specificity** (e.g., less than \$50 million, \$100 million, \$500 million, \$1 billion, \$5 billion, \$10 billion, \$50 billion, etc.). Today, almost all agencies disclose whether a planned action will be "major" (generally having an impact of \$100 million or more on the economy). Although useful, this approach is outdated, having been imposed 30 years ago when there were few, if any, billion-dollar rules. Today, agencies are issuing rules that are estimated to impose costs in the tens of billions of dollars. Our old and simplistic system needs modernization. If the public does not know the magnitude of a proposed regulatory action, then it is difficult to focus public attention on the most significant rulemakings. Accordingly, such basic information should be provided earlier in the process and with greater specificity, as well as with an opportunity for regulated parties and the public to give agencies input as to the accuracy of their cost estimates.

**Congress should consider changes to the Administrative Procedure Act (APA), particularly relating to the content of the rulemaking record and greater judicial scrutiny of that record.** Major rules involving more than \$100 million per year are a distinct subset of the overall flow of federal regulations — fewer than 1 percent of the rules issued annually — but they account for

a majority of the identified costs and sometimes involve billions or even tens of billions of dollars of impact on our economy. More careful development of a major rule before it becomes final (e.g., a hearing on the record) will make it more defensible and therefore lessen the resources spent on litigation and judicial review. Major rules should be subject to more administrative process to avoid agency error and unnecessary harm to our economy and jobs. This means restoring the original purpose of the APA to allow affected parties some form of a hearing when the consequences are great and enabling judicial review to provide a “check and balance” on the erroneous exercise of the authority delegated to agencies, as well as agencies’ legal determinations about the scope of their own jurisdiction. For instance, some degree of formal rulemaking should be available for the most costly and significant regulations, as formal rulemaking “on the record” both requires and facilitates more careful judicial review. By allowing cross-examination of key agency assertions and reviewing these rules under a more searching standard of review, the accuracy of the facts and the quality of these rules will improve for those rules that **matter most to our economy and to job creation**.

**The federal government should streamline the permitting process for siting and operating a new facility/project.** A more certain and speedier process will enhance U.S. competitiveness and create jobs. One component toward achieving this recommendation is to create a federal office responsible for coordinating and expediting permit applications across the federal government.

\* \* \* \*

These recommended reforms should not — and are not intended to — make the regulatory process cumbersome and unduly lengthy, but they should — and are intended to — create quality rulemakings that improve the functioning of government and serve the public interest. Well-managed agencies can conduct rulemaking with better procedures in a timely manner.

Reforms, of course, should be tailored to the type of rulemaking. That is, the resources required to implement such reforms should be commensurate with the importance and/or impact of the rulemaking and the nature of the issues at stake. Major rulemakings, such as those involving more than \$100 million of annual costs to our economy, certainly warrant improvements to the process to

ensure the accuracy and objectivity of the information used to promulgate them and the efficacy, efficiency and fairness of the rules that are issued. Everyone will benefit from smarter regulation.

## VII. Conclusion

In the 17 years since BRT issued its call for regulatory reform, *Toward Smarter Regulation*, some points of contention have been resolved. For example, there is no longer a debate over whether regulatory agencies should conduct cost-benefit analysis for major rules because the technique has been widely accepted and has been credited with improving specific regulations.

By and large, however, the proposals contained in *Toward Smarter Regulation* have not been fully adopted, which is unfortunate because all of the recommendations remain applicable today, in some respects more than ever. The importance of regulation with regard to our national economy cannot be overlooked. The President and the Congress should seize the moment, enact the aforementioned reforms and achieve smarter regulation. The result will be positive for U.S. jobs and competitiveness. We can and must achieve our regulatory objectives at lower cost and with fewer adverse consequences for jobs, for innovation and for U.S. competitiveness.



## Endnotes

- <sup>1</sup> Business Roundtable, *Toward Smarter Regulation* (1994), available at <http://businessroundtable.org>.
- <sup>2</sup> Business Roundtable, *Roadmap for Growth* (Dec. 8, 2010), available at <http://businessroundtable.org>.
- <sup>3</sup> See, e.g., Business Roundtable, *Major Regulations/Issues of Concern* (April 12, 2011), available at <http://businessroundtable.org>.
- <sup>4</sup> *Ibid.*
- <sup>5</sup> *Toward Smarter Regulation* uses the term “sound science” to encompass the need to both use the best available information and objectively measure risk.
- <sup>6</sup> See *Toward Smarter Regulation*, recommendation 6.
- <sup>7</sup> See *Toward Smarter Regulation*, recommendation 7.
- <sup>8</sup> Exec. Order No. 12866 (Sept. 30, 1993); see also Exec. Order No. 13497 (Jan. 30, 2009) (adopting Exec. Order No. 12866).
- <sup>9</sup> John D. Graham, “Saving Lives through Administrative Law and Economics,” 157 *Univ. of Penn. Law Rev.* 2 (2008).
- <sup>10</sup> See 74 Fed. Reg. 22348, 22377–78 (May 12, 2009); 75 Fed. Reg. 2598 (Jan. 15, 2010); 75 Fed. Reg. 55852 (Sept. 14, 2010); 75 Fed. Reg. 76186 (Dec. 7, 2010).
- <sup>11</sup> See 74 Fed. Reg. 66496 (Dec. 15, 2009).
- <sup>12</sup> Office of Management and Budget, *2011 Report to Congress on the Benefits and Costs of Federal Regulations* (2011), p. 3.
- <sup>13</sup> 410 U.S. 224 (1973).
- <sup>14</sup> 435 U.S. 519 (1978).
- <sup>15</sup> *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) (holding that agencies may receive deference when interpreting statutes that they administer).
- <sup>16</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency interpretation of its own regulation is “controlling ... unless it is plainly erroneous or inconsistent with the regulation”).
- <sup>17</sup> Andrew Liveris, *Make It in America: The Case for Reinventing the Economy*. Hoboken, NJ: John Wiley & Sons (2011).
- <sup>18</sup> *Toward Smarter Regulation* recommended the use of market incentives and performance standards over more prescriptive regulation. Such standards provide more flexibility to regulated entities and therefore are less likely to impede innovation and cost-effective compliance.

<sup>19</sup> There are several other ways to promote objectivity, including developing standard methodologies to be used by all agencies when estimating benefits and costs and the uncertainties in these estimates, allowing other agencies to conduct the analysis jointly with the issuing agency, ensuring that OMB (and/or Congress) has the resources to evaluate the analysis, subjecting the preliminary analysis to public comment, requiring objective analysis in the underlying statute providing authority for the regulatory program, permitting evidentiary hearings about the data and assumptions used, and/or requiring the analysis to be part of the rulemaking record for a “more searching” judicial review process. These differing approaches, alone and in combination, also should be considered to determine the best way to ensure objectivity.





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