Statement of
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Chairman Smith, Ranking Member Conyers, thank you for the opportunity to testify on the proposed "Regulatory Accountability Act of 2011" (H.R. 3010), which would amend the Administrative Procedure Act of 1946.

The APA was enacted as Congress returned to domestic business following the conclusion of World War II. It was a war-delayed response to the proliferation of regulatory agencies during the New Deal. Agencies such as the Securities and Exchange Commission, Federal Communications Commission, and Civil Aeronautics Board combined legislative, executive, and judicial functions. That raised serious separation-of-power questions under the Constitution. The APA's standards and procedures for administrative decision-making and judicial review resolved the constitutional questions to the satisfaction of the courts, and have served as the statutory backbone of federal regulation for the past sixty-five years.

The Regulatory Accountability Act would be the first major revision of the APA's core regulatory procedures. It is a response to the dramatic growth of regulation and unusual number of controversial regulatory proceedings of recent years. Prominent examples are the Treasury Department's and Federal Reserve Board's aggressive regulatory responses to the 2008 financial crisis and, more recently, the Environmental Protection Agency's highly ambitious rulemaking initiatives, the Federal Communications Commission's efforts to regulate the Internet, and the hundreds of high-stakes rulemakings pursuant to the Energy Independence and Security Act of 2007, the Patient Protection and Affordable Care Act of 2010, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Many of the agency proposals would be very costly—at a time when the economy is in the doldrums, business investment is anemic, and unemployment is high. Many of them involve

statutes that give the agencies enormous policy latitude—contributing to the pervasive business uncertainty that seems to be weighing on the economy. And all of them cast Congress more as a kibitzer than lawmaker—Members can hold hearings, give speeches, and write letters, but the ultimate policy decisions are made downtown rather than on Capitol Hill.

Yet the current controversies reflect developments that have been underway for forty years: the migration of lawmaking authority from Congress to the executive branch, and the problems of policy substance and political accountability that have arisen from executive lawmaking. These problems, like those that led to the original APA, are of constitutional dimension. Regulation has grown in scope and impact far beyond anything the framers of the APA (or for that matter the New Deal) could have anticipated. The APA has not kept up, and special-purpose administrative agencies have acquired an unsettling degree of power over our economy and society. The Regulatory Accountability Act is an effort to channel the discretion and improve the performance of the modern administrative state.

A BIT OF BACKGROUND

Two historical developments have set the stage for today's regulatory debates and are directly relevant to your deliberations. The first came in the early 1970s, when Congress created numerous regulatory agencies such as the Environmental Protection Agency, Occupational Safety and Health Administration, and National Highway Traffic Safety Administration. These agencies differed from their 1930s predecessors in important respects. The New Deal agencies were headed by commissions that included members from both political parties serving statutory terms; the new ones were generally headed by a single administrator serving at the President's pleasure. While most of the older agencies regulated single industries, the new ones regulated wide sectors of the economy. And while the older agencies were generally concerned with prices, terms of service, and other business decisions of individual firms, the new ones were concerned with economy-wide issues such as product and workplace safety, environmental pollution, and employment discrimination.

The second development was a change in the form of regulatory policymaking. Before the 1970s, regulatory agencies acted primarily through "adjudication"—deciding discrete cases involving one or a few parties through trial-like procedures. Thereafter, they

acted primarily through "rulemaking"—issuing rules that, like statutes, imposed requirements on hundreds or thousands of firms throughout entire industries or economic sectors. The APA established procedures for both adjudication and rulemaking, but those governing rulemaking were more general and flexible. APA rulemaking consists of a simple "notice and comment" procedure: An agency first issues a Notice of Proposed Rulemaking setting forth a regulatory proposal and its statutory authority, then collects public comments on the proposal, and then issues a Final Rule accompanied by "a concise general statement of [its] basis and purpose." Final rules are subject to judicial review on a number of grounds—they must conform to the requirements of agencies' authorizing statutes and also to the procedures and standards of the APA itself, including the famous catch-all requirement that rules not be "arbitrary, capricious, [or] an abuse of discretion."

Rulemaking was the characteristic method of the new 1970s regulatory agencies, such as the EPA and NHTSA, vested as they were with broad standard-setting responsibilities. But its advantages to the regulator—providing much greater flexibility, discretion, and economic leverage than case-by-case adjudication—led the older commissions such as the SEC and FCC to rely increasingly on rulemaking. Rulemaking typically, and increasingly over time, dispensed with the direct confrontation of opposing views that typifies adjudication—live testimony, cross-examination, and the give-and-take of argument over issues of fact and law. Today, rulemaking is largely a paper exercise. Agency officials may meet with interested parties in the course of rulemaking and, in the case of highly consequential or controversial proposals, they often hold informal hearings where parties may make brief oral presentations summarizing their positions; but even in these cases, rulemaking has an extemporaneous quality that is much more akin to legislative process than judicial process.

To be sure, rulemaking is not legislating. Regulatory agencies must provide reasoned explanations of their decisions and "do not have quite the prerogative of obscurantism reserved to legislatures" (as a reviewing court put it in a 1977 opinion). The demands of judicial review, and the increasing ambition and complexity of many rules, have led agencies to provide much more than the APA's "concise general statement" of their decisions. When an agency publishes a final rule in the *Federal Register*, it typically provides summaries of and responses to submitted comments, explanations of changes from proposed to final rules,

and, for major rules, evaluations of scientific and economic data. Nevertheless, rulemaking is far more expeditious than legislating. Hierarchical agencies can make decisions much faster than our bicameral Congress with its complex committee structure, and single-purpose agencies are free of the innumerable conflicting interests and political views that characterize a representative legislature.

By the late 1970s, scores of federal agencies were issuing rules generating billions of dollars of costs and benefits throughout the economy, through statutory standards and rulemaking procedures that afforded the agencies tremendous discretion. This state of affairs was bound to produce a political reaction from elected officials. From the White House, the reaction was specific and sustained. Presidents Nixon, Ford, and Carter all asserted their authority over agency rulemaking through informal review procedures that focused on the economic impact of proposed rules. These initial efforts led to President Reagan's Executive Order 12291 at the beginning of his administration, setting forth regulatory decision-making criteria—based on the cost-benefit standard discussed below—and requiring that proposed and final rules be reviewed for conformity with the criteria by the Office of Information and Regulatory Affairs in the Office of Management and Budget (I was administrator of OIRA from 1981–1984). The decision criteria and White House review procedures were continued, with refinements based on accumulated experience, in President Reagan's Executive Order 12498 in 1985, President Clinton's Executive Order 12866 in 1994, and President Obama's Executive Order 13563 earlier this year.

To date, the congressional response has been much less forceful. Congress enacted the Regulatory Flexibility Act and Paperwork Reduction Act in 1980 and the Information Quality Act in 1991, and it has considered enacting elements of the executive order programs on a few occasions. The Regulatory Accountability Act (along with a similar bill introduced in the Senate) would go beyond these earlier laws and bills in reforming regulatory standards and procedures. Notable provisions would provide for increased use of hearings with cross-examination for "high impact" and "major" rulemakings, require agencies to review new major and high-impact rules every decade, and limit agencies' ability to circumvent rulemaking requirements through interim rules and guidance documents. The most important requirements, however, are those establishing a cost-benefit standard for all agency rules including those of the "independent" agencies such as the SEC and FCC, subject to OIRA

guidance and judicial review (although the standard would be reviewable only for major rules in the current Senate version of your bill).

My testimony will focus on the requirement of a cost-benefit standard. Your bill says, essentially, that agencies must adopt the least costly approach to achieving statutory objectives unless they demonstrate that the additional benefits of more costly rules justify the additional costs (Section 553(f)(3)(B)). This is one of many possible formulations of a cost-benefit standard. The nuances of different approaches are important, but I will skip over them in the interest of focusing on broader issues. I will consider a simple statutory requirement, subject to judicial review, that agencies rigorously evaluate the benefits and costs of their regulatory proposals and adopt rules whose benefits exceed their costs.

Such a requirement would be a substantial improvement in administrative law and lead to substantial improvements in regulatory practices and policies. In what follows, I will offer five arguments for the cost-benefit standard, then respond to two prominent criticisms of the standard.

FIVE ARGUMENTS FOR A COST-BENEFIT STANDARD

Federal regulation today presents a political problem and an economic problem. The political problem is that regulatory agencies often operate under extremely broad grants of authority from Congress. Elected representatives vote foursquarely for clean air, safe products, and fair financial practices, then leave the hard decisions—the real lawmaking—to the agencies. The executive branch is, of course, responsible for the faithful execution of the laws, and that requires the exercise of discretion. But rulemaking proceedings are more than execution. They often involve the formulation of large, complex, economy-wide policies costing scores or hundreds of millions of dollars and involving numerous trade-offs among competing interests and values. It is anomalous—democratically and constitutionally—to leave such policies to the discretion of the executive branch.

The economic problem is that regulatory agencies are single-purpose organizations operating with scant restraint on the resources at their command. The costs and benefits of regulation are realized almost entirely in the private sector—through the installation of pollution controls, the design of automobiles, the composition of gasoline formulas, the presentation of financial records, the design and marketing of medical insurance contracts,

and much else, in compliance with government mandates. The required expenditures are not constrained by the mechanisms of public finance that apply to spending programs—taxation, authorization, appropriation, and budgeting. As a result, regulatory agencies have inadequate incentives to take account of the costs of their policies: they do not operate within budget constraints that balance each agency's purposes against innumerable other public and private purposes.

The cost-benefit standard addresses these problems by imposing a resource constraint that is the regulatory analogue of the budget constraint on spending programs; by applying a decision rule that is the best approximation of how a representative legislature should want lawmaking discretion; and by promoting transparency and accountability. These advantages explain the consistent application of the cost-benefit standard over more than thirty years of White House regulatory oversight by Presidents of both parties. But the executive order programs have also proven deficient in many respects, and a statutory cost-benefit standard would improve considerably on existing practice.

First, a cost-benefit standard is the regulatory equivalent of the budget on spending programs.

This elementary point is often overlooked by critics of a cost-benefit standard, who focus on the health, safety, and other benefits of regulatory programs and ask why the pursuit of such worthy goals should be constrained. But spending programs, too, pursue health, safety, and other worthy public goals, yet no one seriously contends that spending levels should be determined by the agencies themselves, independently or in collaboration with their appropriating committees. Budgeting is the device by which the President and Congress—elected officials whose perspectives are broader than those of individual spending programs—size the government's total expenditures in relation to available revenues and set priorities within the total. The establishment of the White House regulatory review programs in the 1970s and 1980s was a natural and necessary response to the growth of government regulation, just as, in an earlier era, the Budget and Accounting Act of 1921 was a natural and necessary response to the growth of government spending.

The cost-benefit standard is admittedly only a rough analogue to the spending budget. Spending on Regulatory Project A is constrained not in relation to other projects within a

ceiling for all projects, but rather in relation to Project A's demonstrable benefits. A more direct analogue would be a "regulatory budget," an idea that has attracted some attention over the years and that Senator Mark Warner has recently proposed in the simplified form of a "regulatory pay-go" procedure. Under a full regulatory budget, each agency would receive an annual budget of the expenditures its new rules could impose. This sum—along with savings from established rules the agency reformed or eliminated—would set the limits on new rules for the budget year.

The regulatory budget has considerable appeal in theory, especially in inducing agencies to continually cull older rules (something the Regulatory Accountability Act would address by other means). But in practice it would encounter enormous, and probably insurmountable, institutional barriers. The calculation of aggregate regulatory expenditure figures for the entire government would be a herculean task. While spending budgets deal in hard dollars, a regulatory budget would deal in expenditure estimates subject to legitimate disagreement as well as deliberate gaming. So if agencies had the final say on expenditure estimates, the budget would accomplish nothing, but if a central authority such as OMB had the final say, that authority would exercise de facto control over agency decisions far beyond anything in budget controls. Difficulties such as these are presumably what led Senator Warner to his pay-go proposal, under which agencies would have to eliminate one existing rule every time they imposed one new rule. This approach has merit, but it would not address the problem of agency incentives with anything like the scope and thoroughness of a cost-benefit standard.

The cost-benefit standard, as a device for correcting parochial agency incentives, has two important advantages over the regulatory budget. First, it summons the apparatus of cost (and benefit) estimation—which is itself costly—only when new rules are proposed. It focuses on the critical problem of regulatory *growth,* while leaving the problem of aged and obsolete rules to other, less strenuous procedures. Second, it keeps the inherent problem of contentiousness over cost (and benefit) estimates within manageable bounds. At the time an agency is considering a major new rule, it will have assembled considerable data pertinent to the costs and benefits of alternate approaches to the problem at hand, and it will then receive much additional information in the course of rulemaking. This live, current information has the effect of narrowing disagreements (as between agencies and OIRA) and highlighting

areas of irreducible uncertainty. Moreover, many rules (based on my experience at OIRA, which I think was typical) are clearly cost-justified or not cost-justified, so that disagreements over the precise levels of costs and benefits are unimportant. That means that the problem of imprecision in cost and benefit estimates is important only in a subset of hard cases—which is exactly where arguments over benefits and costs ought to be focused. Finally, the cost-benefit standard has the advantage of fitting comfortably into the established practices of administrative law—requiring that rulemaking and judicial review become more informed and disciplined in doing what they have always done, rather than supplementing them with a separate, independent set of procedures.

Second, a cost-benefit standard is an appealing rule of statutory construction.

The standard would be a directive from elected political representatives to unelected agencies and appointed officials for exercising discretion in pursuing broad statutory goals. Congress sometimes prescribes regulatory policies with specificity; examples are the minimum wage, the CAFE fuel economy standards, and the lighting efficiency standards designed to abolish the incandescent light bulb. But in many cases statutory standards are very general and aspirational. A recent example is Congress's mandate to the Consumer Financial Protection Bureau created by the Dodd-Frank Act: "ensure that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive" (and this to an agency to which Congress was also surrendering its power of the purse!). Such cases, which are legion, arise when regulation presents technical questions that legislators cannot be expected to master, and/or when legislators are unable to compromise their differences sufficiently to pass a statute with more than broad, uncontroversial goals. In such cases, how should agencies make policy in a manner faithful to the values of representative democracy?

One cannot answer this question by asking individual legislators how to implement individual statutes. In every case of broad statutory goals, some legislators will prefer more aggressive regulation and others less. And for all broadly worded statutes taken together, individual legislators will differ over which programs should be pursued more or less aggressively and whether there should be more or less regulation on the whole. But if one imagines a consensus of *all* legislators toward *all* regulatory programs, it is hard to conceive

of a better common-denominator rule than that each program should be pursued as cost-effectively as possible.

Put the other way around, the faithful regulatory official should aim for policies that achieve statutory goals as economically as possible, and that impose added costs at the margin only when doing so would produce commensurate statutory benefits. That will not be easy to do. The natural incentive of the single-purpose regulatory official is to pursue that purpose single-mindedly—without regard to cost and the competing claims of other agencies and other purposes. And every policy decision will be surrounded by a cacophony of interest groups pressing for one or another decision that would bend statutory purposes to their own special interests. These problems are inherent to the regulatory process; the cost-benefit standard is a corrective to them. To be effective, the standard needs to be more than a good-government velleity or best-practices exhortation. It needs to be enforced—as it has been internally, by OMB/OIRA within the executive branch, since 1981, and as it would be independently, by the courts, under the Regulatory Accountability Act.

An important virtue of the cost-benefit standard is that it is capacious and disinterested. It asks us to consider all of the costs and all of the benefits of a policy initiative in circumstances where some will want to focus on just the costs and others on just the benefits, and others will be concerned with only certain kinds of costs or benefits. A durable feature of EPA rulemaking is environmental groups seeking to ignore or downplay costs and business groups seeking to ignore or downplay benefits. Another, subtler problem is the heavy emphasis on employment effects in wider political debate. This tendency is worth pausing over.

Among practicing politicians, employment—jobs “created” or “destroyed”—is a favorite metric of regulatory policy, especially during hard economic times such as the present. This is natural and admirable. Political representatives—unlike regulatory officials or economists!—spend a great deal of time talking with average citizens and listening to their problems, in district offices and town halls, in barbershops and on street corners. There is no more painful, socially destructive symptom of a poor economy than large numbers of people looking for jobs that aren’t there. Improving this dimension of economic performance is a high political calling.

The focus on jobs can, however, lead to confusion in regulatory debates. Regulation redirects economic activity. The new set of activities may involve more or fewer jobs than would have been the case without regulation. Many EPA regulations, for instance, require large capital expenditures for pollution control equipment (such as scrubbers on power plant exhaust stacks); these rules, by shifting the composition of inputs toward capital stock, and by increasing prices and reducing output, will reduce employment in many cases. Academic research showing substantial job losses from Clean Air Act regulations documents this tendency.[1] At the same time, many OSHA regulations require firms to hire additional workers to engage in safety tasks, such as frequent sweeping up of industrial and agricultural dust; these rules also increase product prices and reduce measured output, but their heavy focus on added manpower and staffing surely results in net increases in employment.

Yet no sensible person thinks that EPA and OSHA rules should be judged solely by their employment effects. Rules should instead be judged by whether their benefits—reduced pollution and workplace hazards, translating into better health and other benefits—are worth their total costs. Let me offer two examples from my time in the Reagan administration, far removed from the current regulatory frays:

- In the late 1970s and early 1980s, EPA required the phased elimination of lead additives in gasoline. The result was to reduce employment: sales and employment in the tetraethyl lead industry fell substantially, while the substitute method for boosting gasoline octane was to refine gasoline more thoroughly at existing refineries. Yet the elimination of lead in gasoline—and thereby in the atmosphere, where its poisonous effects were very serious and well documented—was highly beneficial on the whole.
- At about the same time, EPA considered requiring schools with fraying asbestos on heating ducts, pipes, and furnaces to remove and replace the asbestos. That would have created many jobs—the jobs of the asbestos removers (indeed the rule was proposed by a labor union). But it would have been a public health disaster—generating a great deal of airborne asbestos in and around many school buildings. Thankfully, EPA eventually settled on the right policy: to leave fraying asbestos in place but contain it through sealants and other means.

[1] See Michael Greenstone, "The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufacturers," 110 *Journal of Political Economy* 1175 (2002).

The lesson of these examples is that the employment effects of regulation, while important, are indeterminate. In the current debates, opponents of EPA rules have pointed to the jobs that would be lost in plants that were closed or phased down, while proponents (including EPA itself) have pointed to jobs that would be created in providing pollution-control equipment. These exchanges are understandable in the current economic environment, but they are not going to lead to conclusions on the merits of the rules in question. One wants to know the total employment effects, direct and indirect; and one also wants to know the other costs such as higher prices; and, most of all, one wants to know the benefits and whether they seem reasonably worth the total costs. The cost-benefit standard would encourage all concerned to move their arguments to a more productive plane.

Finally, it is useful to compare the cost-benefit standard with a very different approach to the problems of delegated lawmaking, that of the REINS (Regulations from the Executive in Need of Scrutiny) Act currently being considered in the House and Senate. REINS would require that major new rules be approved by joint resolutions of Congress and signed by the President—that is, be approved by statute—with expedited procedures guaranteeing up-or-down floor votes promptly after final rules were issued. In place of the Regulatory Accountability Act's legal standard for applying broad regulatory statutes, REINS would go back to the political source for every regulation of major importance. It would also put precisely worded regulatory statutes to a second legislative test at the time of implementation, which will often be before a subsequent Congress and President. For example, the incandescent light bulb ban, enacted by the 110th Congress and President Bush in 2007, would need to be approved by the 112th Congress and President Obama before it could be implemented. This would be the regulatory equivalent of initial authorization and subsequent appropriation in spending programs.

I think the REINS Act is an admirable initiative, and I think the criticism that it would systematically block worthwhile regulations is mistaken.[2] It is, however, an effort to counter one of the most powerful and durable trends in American government and throughout the advanced democracies: the delegation of policy-making authority from legislatures to executive agencies. The trend has deep political, economic, and institutional causes and will

[2] See my testimony before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, Feb. 15, 2011.

not easily be diverted. Is Congress prepared to add 50–100 new pieces of procedurally privileged legislative business to its annual docket? I myself would be delighted to see Congress spending more time deciding on major policies derived from existing statutes and less time passing yet additional statutes and creating yet additional agencies. If Congress is willing to do this, REINS and the Regulatory Accountability Act may be considered complementary. But if it is not, a judicially enforceable cost-benefit standard is a reasonable alternative. Lawmakers should consider the two approaches side-by-side.

Here is a start: The cost-benefit standard would go with rather than against the trend of legislative delegation. It would discipline rulemaking with an economic test enforced by courts rather than a political test enforced by Congress. The standard would continue to excuse major rules from the need to attract contemporary legislative majorities; instead it would subject those rules to a new statutory directive, one that would yield substantial economic benefits with much less institutional burden on Congress. The two approaches would have similar results in clear-cut cases: under both, clearly beneficial regulations would generally pass while clearly harmful regulations would generally fail (not only through judicial or congressional action but also, and perhaps more importantly, through the deterrent effect of the new procedures). The approaches would be more likely to diverge in intermediate cases—where the balance of costs and benefits was close, or where rules involved political and social considerations beyond the scope of a cost-benefit calculation. Those cases might go one way under a cost-benefit test and another way under a REINS test—but no one could say in advance which would be which.

Congressional sentiment can, however, change the course of rulemaking proceedings without a REINS procedure. We saw this recently, when EPA postponed its “Boiler MACT” rulemaking, and its proposal to tighten the national air standards for ozone, in response to political opposition from Congress and elsewhere. I was a skeptic of both rules, but let’s assume that both actions would have produced benefits commensurate with their substantial costs. Nevertheless, in both cases the costs would have been realized years in advance of their benefits—a pattern characteristic of many EPA rules. So it would not have been unreasonable to defer the rules at a time of serious economic malaise and high unemployment. That is a political judgment, not a judgment on the rules’ ultimate merits on their own terms. So these cases would fall into my intermediate category—where a single-

mission agency is pursuing its mission oblivious to wider political and economic concerns, where cost-benefit analysis alone does not provide an effective counterweight, and where a blunt, REINS-like political correction could be effective. But it is also a case where the political correction was administered informally, without REINS. EPA did not postpone the rules because it recognized their weaknesses on the cost-benefit merits, but rather because political representatives were up in arms over the rules' employment effects. Those effects were not the whole story of the rules' merits, as I emphasized earlier. They were, however, a good proxy for the exercise of prudence in deferring consideration of two expensive regulatory projects at a time when other economic problems were paramount.

Third, a cost-benefit standard promotes transparency and accountability.

Agency rulemaking is a parade of narrow, discrete, complex, and sometimes highly technical policy proposals. Each one is of intense importance to a small number of people but unknown to the rest of the world except through occasional, usually sensationalized news reporting, and many of them are shot through with interest-group lobbying and rent-seeking. These circumstances insulate regulation from the level of informed debate and oversight, accessible to the attentive non-expert, that characterize taxing and spending policies. (For such policies, aggregate dollar figures at least provide a common language for considering individual decisions and policy trends.) That is why regulatory policy, despite the APA's requirements for public notice and comment, concise statements, and reasoned explanations, is largely an insider's game, unusually prone to special-interest favoritism and "agency capture."

The cost-benefit *standard* is a corrective to this problem because it requires the preparation of a cost-benefit *analysis* that translates all (or at least most) of the details to a common metric. Compliance expenses, reduced employment, higher prices, and opportunity costs are estimated, translated into cost figures, and summed. Improved public health, reduced accident rates, increased employment, lower prices, and recreational and aesthetic improvements are estimated, translated into benefit figures, and summed. Although cost-benefit analysis is often regarded as an arcane, technocratic exercise, its purpose is to transcend arcanery. It is best regarded as a means of summarizing a complex decision for higher-level decision-makers and outside observers. If you examine the evolution of the regulatory cost-benefit standard within the executive branch, you will find that it did not

arise because economists seized control of the West Wing. Rather, regular White House staffers needed to know about a pending decision at the EPA, or the Agriculture Department, or the Federal Aviation Administration that had attracted political attention. Working in a hectic, high-pressure environment, they needed an efficient, informative briefing. Why, briefly, was this a good idea? How much would it cost?

This is not to say that cost-benefit analysis is turning a crank. The estimation of component benefits and costs often involves large ranges of uncertainty. The procedure itself involves many arguable issues—such as how to discount future costs and benefits for comparison, and how to value non-market benefits such as improved visibility and "years of life saved." These, however, are precisely the issues that serious regulatory debate *should* plumb. The generality of the APA's current rulemaking standards, combined with the generality of the goals of many regulatory statutes, means that *Federal Register* explanations of final rules are often murky and defensive—written not to illuminate but rather to protect agency prerogatives and be "review proof" when they arrive in court. A cost-benefit standard would leave less room for maneuver.

When I was administering OIRA, I emphasized that cost-benefit analysis had a political purpose as important as its economic purpose: to widen the audience of people who could understand the stakes in a given regulatory proposal and come to an informed judgment of its merits. That is also the mantra of President Obama's OIRA administrator, Cass Sunstein. The audience is not only OIRA and the White House: it is Members of Congress, judges, reporters, editorial writers, executives, academics, and interested laymen. Accountability to Congress is not the only means of improving regulatory policy. Accountability to the general public—beyond the immediate participants in each proceeding—is equally important.

Fourth, a cost-benefit standard builds on thirty years of agency practice.

From Ronald Reagan in 1981 to Barack Obama in 2011, White House regulatory review, while varying in details and emphases, has followed the same essential policy: a regulation's benefits should exceed its costs, and the margin of benefits over costs should be the greatest among the alternatives considered. The executive orders have included several ancillary policies as well. Most have been extensions of the cost-benefit standard and axioms

of regulatory economics—agencies should identify a market failure justifying regulation, should use performance standards rather than input controls, and should choose the most cost-effective means of achieving a given goal. Others have underscored the accountability function of cost-benefit analysis—agencies should use clear language, be transparent, and promote public access and participation.

It is remarkable to find this degree of policy constancy across Republican and Democratic administrations. (If the same Presidents had issued executive orders on administering health care, Social Security disability, or wage-and-hour programs, the documents would have been dissimilar.) This suggests that the cost-benefit standard is addressed to the essentially nonpartisan institutional problems I have described. The growth of the volume, scope, and impact of regulation, and the extreme delegation of legislative authority inherent in the profusion of broadly worded regulatory statutes, are incontestable facts of modern government. They have created a need for (1) some equivalent to a budget constraint for regulatory agencies, (2) a standard for applying broad statutory mandates that is at once more pointed than the APA's current standards and capable of winning wide political assent, and (3) a method of summarizing and communicating complex regulatory issues and highlighting areas of uncertainty and dispute. Of course, the executive order programs employed the cost-benefit standard for the specific purpose of strengthening presidential oversight of the sprawling regulatory establishment. But it can serve equally well as a statutory standard for strengthening congressional and judicial oversight. And it has broader benefits as well, such as more focused rulemaking submissions and more productive media scrutiny and public debate. Although the cost-benefit standard and White House review procedures were highly controversial at first, they have become radically less so over time. After thirty years of bipartisan endorsement and agency practice, the cost-benefit standard is sufficiently established to merit statutory codification.

Fifth, a statutory cost-benefit standard would significantly improve the executive order programs.

The executive order programs have proven durable and useful and are sure to be continued by future Presidents of both parties. But they have suffered from several serious

weaknesses that are well documented in academic research.[3] There is great variation in the quality and thoroughness of cost-benefit analyses, both among and within agencies. Many analyses are perfunctory, and many are clearly prepared to justify a decision that has already been made. They are almost always undertaken after a Notice of Proposed Rulemaking has been issued. OIRA sometimes returns fairly thorough analyses to agencies for further work, and other times lets sloppy or highly incomplete analyses pass.

Two stark features of regulatory activity in the Obama and Bush administrations illustrate the malleability of the cost-benefit standard under the executive order programs:

- First, EPA has touted benefits from its pollution-control rules of many hundreds of billions of dollars per year, vastly exceeding its estimates of the costs of those rules. But the huge majority of the benefits come from just one source: EPA's calculations of enormous health benefits of reducing airborne particulate matter from already low levels to still lower levels. These calculations are based on a few studies that assume that the benefits of a given reduction from today's low levels of particulates produces identical health benefits as those from the far higher levels of decades ago. That is much too thin and contestable a basis for the fabulous benefits EPA is claiming.
- Second, EPA, NHTSA, and the Department of Energy similarly claim hundreds of billions of dollars of benefits from energy-efficiency standards—for motor vehicles, dishwashers, stoves, light bulbs, and other appliances—greatly exceeding the costs. But, again, the huge majority of the benefits is from a single source, and one that is highly debatable to put it mildly. They are not public benefits, such as reduced emissions, at all. Instead they are the presumed benefits of forcing consumers to spend more on energy-using products today in exchange for lower energy expenses in the future. The presumption is that when citizens are left to make decisions for themselves, they will care too much about actual lower prices today and too little about estimated lower prices in the future. As Energy Secretary Steven Chu has put it, "We are taking away a choice that continues to let people waste their own money." This is pure paternalism. If it is accepted, the government might as well order everyone to buy galoshes.

These two propositions account for a very large share of the advertised net benefits of federal regulation today. Whatever one's view on their ultimate merits, they are certainly

[3] An excellent example is Ted Gayer, *A Better Approach to Environmental Regulation: Getting the Costs and Benefits Right*, The Hamilton Project, Brookings Institution, Discussion Paper 2011-06, May 2011, and the further research cited and discussed therein.

propositions from the executive in need of more scrutiny than they are currently receiving.

The deficiencies of the executive order cost-benefit standard are the result of its being internal, informal, and private within the executive branch, and therefore ultimately voluntary. A statutory standard—especially one girded by the other procedural refinements of the Regulatory Accountability Act, such as the requirements for preliminary cost-benefit estimates at the NPRM stage and for hearings for high-impact rulemakings—would go a long way to correcting them. The prospect of judicial review would transform the dynamics of the cost-benefit standard within the agencies and between the agencies and OIRA. Today, the agencies and OIRA often disagree strenuously over the merits of individual rules. But once a decision is made, they naturally lock arms and present a united front to the outside world—they are, after all, administration colleagues and subordinates to the same President. And the agencies' final cost-benefit analyses and underlying studies are often omitted from the formal, judicially reviewable rulemaking records. Under the Regulatory Accountability Act, final cost-benefit analyses would receive independent judicial scrutiny; that would lead to much greater care and honesty in the preparation of those analyses.

The Act's provisions encouraging agency compliance with OIRA guidance on cost-benefit methods, and providing OIRA the discretion to place its own analyses in rulemaking records, would further strengthen intra-administration incentives for preparing analyses that were disinterested and illuminating of the merits of final rules. Over time, a new common law of regulatory review would come into being; this, along with the academic and political debate it would inspire, would introduce a degree of professionalism into regulatory policy-making that is lacking today.

Finally, the Regulatory Accountability Act's application of the cost-benefit standard to the decisions of the "independent" commissions such as the FCC and SEC would be a major step forward. These are among the most powerful regulatory agencies in Washington, with some of the most sweeping statutory mandates—as in my instance of the CFPB. And their policies often overlap with those of the executive agencies, which has frustrated policy coordination under the executive order programs. It is time for these agencies to catch up.

TWO CRITICISMS OF A COST-BENEFIT STANDARD

My arguments in favor of a statutory cost-benefit standard have addressed many of the criticisms that have been leveled at the proposal. But two criticisms, which have been prominent in initial commentary on the Regulatory Accountability Act, call for separate attention.

The first is that a cost-benefit standard would be inherently biased against regulation because regulatory benefits are often more difficult to quantify than costs. The premise of the criticism is not a strong one. Regulatory interventions often have "unintended consequences" that make them more costly and less beneficial than projected; this is because people and business firms adjust to the interventions in unpredictable ways, and the adjustments often have costs of their own even as they compromise regulatory goals. But it is certainly true that many regulations aim to provide "public goods" that are difficult to price because they are not traded on any market—a classic case is the aesthetic and amenity benefits of clean air and water. In these cases, it will typically be relatively easier to estimate the immediate compliance costs for reducing pollution for the sake of the benefits.

The cost-benefit standard is not, however, biased against regulatory action in such cases. Rather it clarifies the nature of the choice being made—the price being paid for an immeasurable (or hard to measure) public good. That the value of a public good is difficult to specify does not mean that one is indifferent to its price! A government official deciding on whether or how far to protect a natural habitat, or to improve visibility in a national park or urban area at certain times of the year, should be intent on knowing the cost of various possible decisions. And regulatory officials make such judgments all the time. A cost-benefit standard generates a useful stream of precedents of how others have decided similar cases, leading over time to standards of reasonableness (this has already begun under the executive order programs). There is no reason whatever to worry that courts will be unsympathetic to these circumstances, especially under the Regulatory Accountability Act's provision directing deference to cost-benefit determinations that follow OIRA guidelines.

The second criticism of the cost-benefit standard is that it would throw sand in the gears of rulemaking for the benefit of business interests—imposing costly and time-consuming burdens on regulatory agencies, and establishing impossibly high standards of

decision-making, all with the purpose of delaying and defeating important regulatory protections. One obvious weaknesses of this line of attack is that we have already had an administrative cost-benefit standard in place for thirty years. I read a recent criticism of the Regulatory Accountability Act that claimed it would have made it impossible to ban lead in gasoline. But, as I have mentioned, we did ban lead in gasoline, and did so under a cost-benefit standard (in the Reagan administration). The lead phase-down passed the cost-benefit test with flying colors—its benefits were revealed with such clarity that its timing was accelerated significantly beyond the policy inherited from the Carter administration. Another problem with the criticism is that business interests, too, are often advocates of regulatory measures—for purposes of legal certainty, improved market performance, or competitive advantage. A statutory cost-benefit standard would not play favorites among interest groups.

But I must conclude on a note of impatience with the claim that cost-benefit analysis is too much of a burden for government regulators to bother with. Federal regulations impose enormous burdens on the American public's time, energy, and pocketbooks. Is it too much to ask of the officials responsible for these regulations that they devote careful thought and meticulous study to making $100 million decisions? If regulatory protections are indeed essential and obviously needed, why should it be so difficult to demonstrate that this is so? It is risible to suggest that it is unreasonable to ask regulators to show that the benefits of their major decisions are worth the costs.

CONCLUSION

The Administrative Procedure Act is overdue for modernization to bring it up to date with the practices and problems of contemporary regulation. The reforms set forth in the Regulatory Accountability Act would address many of those problems. It would not bring an end to heated controversies over the appropriate scope and purposes of federal regulation—that will never happen. But it would make those controversies more focused and productive. Rulemaking proceedings would become more transparent and governed by objective criteria. The policy discretion of regulatory agencies would be narrowed to a degree appropriate to their position in our constitutional system. And the agencies' decisions would become more economically sensible, cost conscious, and socially beneficial. One could not ask for more from our fundamental law of administrative procedure.