



Administrative Conference of the United States

**WAIVERS, EXEMPTIONS, AND PROSECUTORIAL
DISCRETION: AN EXAMINATION OF AGENCY
NONENFORCEMENT PRACTICES**

Final Report: November 1, 2017

**Aaron L. Nielson
J. Reuben Clark Law School
Brigham Young University**

This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

**WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION:
AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES**

Aaron L. Nielson
*J. Reuben Clark Law School
Brigham Young University*

**Report to the Administrative Conference of the United States
October 31, 2017**

This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

About the Author: Aaron L. Nielson is an associate professor at the J. Reuben Clark Law School, Brigham Young University. He co-chairs the Rulemaking Committee of the American Bar Association's Section of Administrative Law & Regulatory Practice. Before joining the academy, Professor Nielson was a partner in the Washington, D.C. office of Kirkland & Ellis LLP, where he remains of counsel. Each week he authors a column for the Yale Journal on Regulation's *Notice & Comment* blog that reviews the decisions of the U.S. Court of Appeals for the District of Columbia Circuit.

**WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION:
AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES**

Aaron L. Nielson*

CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
I. BACKGROUND: AGENCY NONENFORCEMENT	8
A. The Administrative Procedure Act and Nonenforcement.....	10
B. Judicial Consideration of Nonenforcement	11
C. Academic Consideration of Nonenforcement	22
II. A TAXONOMY OF NONENFORCEMENT	25
A. Temporality and Nonenforcement.....	27
B. Non-Temporal Nonenforcement Factors	28
C. A Visual Taxonomy of Nonenforcement.....	32
III. STUDY FINDINGS.....	34
A. Study Methodology	34
B. General Survey Findings	35
C. Case Studies	49

* Associate Professor, J. Reuben Clark Law School, Brigham Young University. For excellent research assistance, the author would like to thank Brook Ellis, Kyle Harvey, Mallorie Mecham, Neal Monson, Joshua Prince, and Jordan Rex. The author also appreciates the assistance of Alyssa Dunbar and Nadeen Saqer, two dutiful interns for the Administrative Conference of the United States (ACUS). Many thanks are also due to Abigail Moncrief, who provided invaluable assistance in formulating this project and assisting with survey design. The author also thanks Emily Bremer, Christopher Walker, and the team of dedicated researchers at ACUS. Finally, the author is indebted to the many government officials who generously shared their experience and insight. All errors, of course, are those of the author.

IV. RECOMMENDED BEST PRACTICES	59
A. If Possible, Save Nonenforcement for “Special” Cases	60
B. Greater Use of Retrospective Review.....	61
C. Publicize Nonenforcement Programs, Policies, and Procedures	62
D. Publicize Nonenforcement Decisions and Encourage Comments	64
E. Use a Consistent Methodology, Including Written Justifications	65
CONCLUSION	67
APPENDIX: SURVEY INSTRUMENT	68

INTRODUCTION

Every day, in countless ways, federal agencies take steps to ensure that regulated parties comply with the law. For obvious reasons, a great deal of attention has been paid to these agency efforts to see that those who have breached legal duties are punished and that those who are tempted to cross the line are dissuaded from doing so. In short, we pay attention when agencies “bring the hammer down.”¹

Yet agencies sometimes decide *not* to bring the hammer down. They decline to enforce the law, either across the board or as applied to individual parties. An agency may prospectively tell a regulated party that it can do acts that would otherwise be punished, or it may retrospectively decline to bring enforcement actions against completed breaches of legal duties. And even if proceedings have been initiated, agencies sometimes allow procedural violations within those proceedings to pass by without sanction. For purposes of this Report, such agency decisions to not “bring the hammer down” are called nonenforcement decisions.

Although agency nonenforcement of legal duties—through means such as waivers, exemptions, and prosecutorial discretion—has received less attention than agency efforts to see that legal duties are complied with, it too is a critical aspect of administrative law that calls out for study and reflection. After all, although nonenforcement often can be beneficial and, in any event, at times may be inevitable,² it also raises important questions about administrative predictability and fairness. As the U.S. Court of Appeals for the D.C. Circuit has explained in the context of an agency decision to waive a procedural requirement in a proceeding:

The criteria used to make waiver determinations are essential. If they are opaque, the danger of arbitrariness (or worse) is increased. Complainants the agency “likes” can be excused, while “difficult” defendants can find themselves drawing the short straw. If discretion is not restrained by a test more stringent than “whatever is consistent with the public interest

¹ See, e.g., *FTC Brings the Hammer Down on Trans Union Sales of Credit Info*, CREDIT RISK MGMT. REP., Mar. 8, 2000, at 1.

² See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining that nonenforcement generally is not subject to judicial review because it requires considering “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all”).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

(by the way, as best determined by the agency),” then how to effectively ensure power is not abused?³

The Administrative Conference of the United States (ACUS) has commissioned this Report to examine agency nonenforcement of otherwise applicable legal provisions.⁴ In particular, this Report’s purpose is to investigate waivers and exemptions, as well as the related concept of prosecutorial discretion. The analysis is intended to be both conceptual and empirical, and to be driven by a very practical goal: identifying ways to improve the nonenforcement process.⁵

The challenge presented by nonenforcement is easy to state but hard to solve. As a general matter, agencies have a great deal of discretion whether to enforce legal provisions.⁶ And like many types of administrative discretion, nonenforcement can be used for laudable purposes. Because resources are finite, it is impossible for agencies to investigate—much less bring enforcement actions against—every violation of statutory or regulatory law. Nor would inflexible enforcement always be desirable. Sometimes generally applicable laws are a poor fit for a particular situation: “It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause

³ NetworkIP, LLC v. FCC, 548 F.3d 116, 127 (D.C. Cir. 2008).

⁴ This Report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

⁵ Specifically, this Report “draws conceptual distinctions among waivers, exemptions, and prosecutorial discretion; examines current practices in agencies that grant waivers and exemptions; reviews statutory and doctrinal requirements; and makes concrete procedural recommendations for implementing agency best practices.” *Regulatory Waivers and Exemptions*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, <https://www.acus.gov/research-projects/regulatory-waivers-and-exemptions> (last visited Oct. 31, 2017).

⁶ See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 273 (2013) (“[J]udges have treated the decision not to enforce a statutory requirement in an individual case—whether due to lack of resources, concerns about the complications the particular case presents, or any of a myriad of other bureaucratic considerations—as an exercise of an agency’s general administrative discretion. The agency’s organic statute, therefore, need not expressly confer such a power in order for the agency to exercise it lawfully.”) (citations omitted); *Heckler*, 470 U.S. at 838 (Brennan, J., concurring) (explaining that “in the normal course of events, Congress intends to allow broad discretion for its administrative agencies to make particular enforcement decisions”).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

of very great injustice.”⁷ Yet at the same time, again as with other forms of discretion, agency discretion regarding nonenforcement can be problematic.⁸ Indeed, “a central principle of administrative law is (or at least should be) that discretion can be dangerous.”⁹ Even leaving aside weighty constitutional concerns about the President’s duty to faithfully execute the law (which are beyond the scope of this Report),¹⁰ nonenforcement may encourage the appearance or perhaps even reality of unfairness and irregularity, for instance when an agency decides to waive requirements for some but not all regulated parties or where the result of nonenforcement is that a potential beneficiary of the administrative scheme finds itself out of luck.¹¹ The challenge therefore is to strike the proper balance between regulatory flexibility, on one hand, and evenhanded, non-arbitrary administration of the law on the other.

⁷ Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 701 (2014) (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot. ed., 1836)); see also *id.* at 675 (“[A] central normative reason for separating legislative and executive functions, as articulated by Montesquieu, the Federalist Papers, and other foundational sources, is to create a safety valve that protects citizens from overzealous enforcement of general prohibitions.”); Cf. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370 (2010) (explaining how a policy of maximalist enforcement forced school officials to expel a third-grader who, on instructions from her grandmother, carried a knife to school to cut her birthday cake).

⁸ See, e.g., Richard A. Epstein, *Government By Waiver*, NATIONAL AFFAIRS (2011), <https://www.nationalaffairs.com/publications/detail/government-by-waiver> (last visited Oct. 31, 2017) (arguing that waiver is dangerous because “when currying the favor of capricious government officials is required for a person’s well-being or a firm’s very existence, government abuse becomes nearly impossible to oppose”).

⁹ Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 113 (2017); cf. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652–53 (2015) (“We need not doubt the EEOC’s trustworthiness, or its fidelity to law . . . [to] know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence.”).

¹⁰ See U.S. CONST. art. II, § 3 (stating that the president “shall take Care that the Laws be faithfully executed”). Many scholars have addressed the constitutionality of nonenforcement. See, e.g., Price, *supra* note 7; Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107 (2000); David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61 (2000); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000). This Report does not delve deeply into this scholarship.

¹¹ See, e.g., Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 882 n.20 (1989) (expressing concern about nonenforcement because “prejudice and unfairness are more likely to occur in a discretionary process than in a highly structured one”).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

In light of these competing concerns, it is important to understand the theoretical underpinnings of nonenforcement (i.e., an agency decision to excuse, either prospectively or retrospectively, a regulated party from an otherwise applicable legal provision). This question has received some attention by courts and scholars. But it is also important to understand *how* agency approaches to nonenforcement translate into day-to-day decision-making. This practical question has received much less attention. Hence, the time has come for an examination of the mechanics of nonenforcement, with a focus on empirical reality. When it comes to nonenforcement, what factors do agencies consider, and why do they consider them? What procedures do agencies use? Who is involved in the process? Are there internal checks, and if so, what are they? How often do regulated parties request nonenforcement, and how often are such requests granted? Are agencies more willing to excuse certain types of conduct? And is there judicial review? The value of nitty-gritty answers to such questions is apparent, but, unfortunately information is also difficult to obtain.

The challenge is more difficult, moreover, because agencies themselves differ, both in what Congress has allowed them to do and in culture, institutional design, and function.¹² Congress, for example, may explicitly authorize some agencies to “waive”¹³ requirements and also explicitly set out the requirements and procedures for such waivers.¹⁴ Yet Congress might also delegate authority to an agency to create its own procedures, which may allow the agency to create its own “exemption”¹⁵ scheme and

¹² See, e.g., Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 233 (2016) (rejecting the account of “administrative agencies as monolithic”); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 64 (2016) (explaining how agency organization may affect outcomes); Katherine A. Trisolini, *Decisions, Disasters, and Deference: Rethinking Agency Expertise After Fukushima*, 33 YALE L. & POL’Y REV. 323, 328 (2015) (“Agencies’ approaches to policy decisions will vary substantially depending upon their unique histories, legal mandates, structures, and organizational cultures, all of which affect the balance struck between conflicting demands for efficiency, reasoned analysis, and participation.”).

¹³ As explained below, “waiver” is the term that this Report uses when referring to explicit permission to agencies from Congress to not enforce the law.

¹⁴ See, e.g., Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 267 (2016) (“In the new Every Student Succeeds Act, for example, Congress has barred the Secretary of Education from disapproving key waivers based on ‘conditions outside the scope of the waiver request’ and has further specifically barred waiver conditions prescribing certain academic standards (as the Secretary sought to do through conditional NCLB waiver).” (citing Pub. L. No. 114-95, § 8013 (2016))).

¹⁵ Also as explained below, “exemption” is the term that this Report uses when referring to general delegations from Congress to agencies, which the agency then uses to create a nonenforcement

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

standards.¹⁶ Likewise, some agencies may attempt to insulate *future* conduct while others may instead exercise prosecutorial discretion regarding *past* conduct; the two types of nonenforcement can be similar but not the same.¹⁷ Likewise, an agency may choose to excuse a breach of a procedural requirement within a proceeding, but not forego the proceeding altogether. Again, the agency is not bringing the hammer down, but it is a different type of nonenforcement. Similarly, some agencies may forego enforcement only at the request of the regulated party, while others may do so *sua sponte*.¹⁸ Some agencies perhaps may use special processes for certain types of nonenforcement while others may always use the same processes. And some agencies might use *ad hoc* processes. In sum, just as it is a mistake to treat agencies as monoliths, it is a mistake to treat nonenforcement as a monolithic concept.

One purpose of this Report therefore is to disaggregate the concept of nonenforcement in hopes of creating a workable taxonomy, i.e., to identify the different species and subspecies within the broader nonenforcement genus. In truth, there is a wide variety of nonenforcement systems. Even within a single agency there can be a number of different types of nonenforcement, sometimes each with its own requirements. For instance, Congress has given the Federal Aviation Administration (FAA) at least seven grants of waiver authority in Title 49 of the U.S. Code, and that is not the full catalogue of the agency's nonenforcement power.¹⁹

scheme—in other words, where the nonenforcement authorization is implicit rather than explicit. This proper terminology is not clearly established in the literature or U.S. Code.

¹⁶ See, e.g., 47 C.F.R. § 1.3 (“The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the [Federal Communications] Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”). The statutory authority cited for this regulation provides that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i).

¹⁷ See, e.g., Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787, 1845 (2010) (distinguishing “ex ante legal channels” from “ex post prosecutorial discretion”).

¹⁸ Compare 49 C.F.R. § 1180.4(f)(1) (“Upon petition of a prospective applicant, the Board may waive or clarify a portion of these procedures.”), with 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

¹⁹ The FAA’s nonenforcement authority is discussed below. See *infra*, Part III.C(ii).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

It is also important to understand how common nonenforcement is (whether absolutely, relatively, or comparatively) and what types of actions are most likely to be the subject of it. For example, some agencies may engage in the practice more often than other agencies, and they may do so more often regarding certain types of conduct than other types. By the same token, some agencies may engage in nonenforcement less often than other agencies in absolute numbers, but yet still grant a higher percentage of requests. And there may be some commonalities across agencies.

Accordingly, another purpose of this Report is to examine the day-to-day exercises of nonenforcement authority across a number of agencies. To do this, the Report analyzes survey data provided by nine agencies: the Alcohol and Tobacco Tax and Trade Bureau (TTB) within the Department of the Treasury, the Community Development Financial Institutions Fund (CDFI) within the Department of the Treasury, the Consumer Financial Protection Bureau (CFPB), the Employee Benefits Security Administration (EBSA) within the Department of Labor, the FAA within the Department of Transportation, the Federal Motor Carrier Safety Administration (FMCSA) within the Department of Transportation, the Federal Transit Authority (FTA) within the Department of Transportation, the Mine Safety and Health Administration (MSHA) within the Department of Labor, and the Pipeline and Hazardous Materials Safety Administration (PHMSA) within the Department of Transportation. Likewise, the author of this Report conducted in-person interviews with officials from the FAA, MSHA, and TTB, plus a phone interview with officials from the CFPB.²⁰ Based on information learned through these surveys and interviews, it is possible to gain a more thorough understanding of the nonenforcement practices and procedures these agencies use.

Although this Report does not offer a comprehensive account of nonenforcement (a concept with innumerable applications) even for these agencies, the results of this study nonetheless are fascinating. For instance, nonenforcement is remarkably heterogeneous. The FAA, for example, receives hundreds (and sometimes even thousands) of requests for nonenforcement each year. The MSHA, by contrast, received 64 requests in 2014. Similarly, the frequency of granting nonenforcement requests varies a great deal across agencies. The FTA grants nearly 100% of certain types of request for nonenforcement. The CFPB, however, has only once formally prospectively allowed a party to engage in otherwise unlawful conduct, even though the agency has

²⁰ Other agencies were asked to participate in the survey or to be interviewed but declined.

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

programs specifically designed to facilitate prudent nonenforcement. Likewise, the FAA makes it a point to publicize their most important nonenforcement decisions. The TTB, by contrast, essentially never reveals its nonenforcement decisions, in part because tax information can be especially sensitive. Unsurprisingly, in light of this heterogeneity, agency terminologies vary widely. Agencies use words like “waiver” and “exemption” in very different ways.

At the same, however, there are some similarities. The FAA, MSHA, and TTB each stressed that the agency only engages in nonenforcement if the regulated party can credibly guarantee that it has taken steps that will prevent the purpose of the law (e.g., safety) from being undermined. Thus, neither the FAA nor MSHA will engage in nonenforcement if the proposed modification is not at least as protective as the legal standard, and the TTB will not do so if it threatens revenue collection. Similarly, officials recognized that nonenforcement discretion could be abused if it is treated too lightly and some suggested that, to the extent reasonably possible, agencies should change the underlying legal requirements themselves rather than simply allowing exceptions to those requirements through nonenforcement. Along with the CFPB, these agencies also recognized that there is little prospect of judicial review. Likewise, across all the agencies that contributed to this Report, there are few examples of agencies *sua sponte* engaging in prospective nonenforcement (i.e., excusing noncompliance with the law before it has occurred); usually, they require a regulated party to petition or otherwise ask for such treatment. That said, agencies are reticent to discuss prosecutorial discretion, including whether it is done *sua sponte*.

Finally, this Report identifies best practices. Because nonenforcement decisions are often left to agency discretion, it is important that agencies be able to exercise nonenforcement discretion fairly and prudently. Accordingly, so long as it is reasonable and lawful for them to do so, this Report urges agencies to:

- Save nonenforcement for “special” cases, including by drafting criteria that prioritize objective characteristics.
- Eliminate outdated or otherwise ineffective regulatory requirements that regularly necessitate nonenforcement.
- Publicize their nonenforcement programs, policies, and procedures, particularly for prospective nonenforcement.

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

- Publicize their nonenforcement decisions and encourage comments from other affected entities.
- Use consistent methodology and prepare written explanations of their nonenforcement decisions, whether or not the decisions or explanations themselves will be made publicly available.

Although these best practices are not silver bullets and may not be a great fit for every agency or regulatory scheme, they should help regularize administrative nonenforcement without imposing undue limits on agency discretion.

* * *

This Report proceeds as follows. Part I lays out the background, with particular emphasis on the theoretical discussion to date surrounding nonenforcement. Part II attempts to set forth a taxonomy of nonenforcement by distinguishing between waivers, exemptions, and prosecutorial discretion, and by identifying different categories of each (e.g., broad versus narrow, upon petition or *sua sponte*, etc.). Part III, in turn, is the study. It begins by setting forth the methodology and then analyzes the survey data and offers case studies based on the interviews with the CFPB, FAA, MSHA, and TTB. Finally, this Report sets out a number of best practices in Part IV.

I. BACKGROUND: AGENCY NONENFORCEMENT

When one thinks of administrative law, what often comes to mind is agency efforts to enforce the law by punishing those who violate it and warning regulated parties who might be tempted to do so to watch their steps.

At times, however, agencies decide *not* to enforce the law. Instead, they may essentially excuse—either prospectively or retrospectively—violations of the law. Sometimes they do this pursuant to express grants of authority,²¹ including for reasons that Congress has specifically deemed important.²² Sometimes, however, they do it pursuant to implicit grants of authority. For instance, if the agency simply does not

²¹ Congress, for instance, has included waivers in certain statutory grants of authority for decades and they have been used “intensively since the G. H. W. Bush administration.” Edward H. Stiglitz, *Forces of Federalism, Safety Nets, and Waivers*, 18 THEORETICAL INQUIRIES L. 125, 131 (2017).

²² For instance, for purposes of federalism, waiver to States have been used extensively in welfare and healthcare schemes. See, e.g., Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1030 (2016).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

have enough resources to do all that is asked of it, it necessarily will allow some violations of the law to go unenforced. For purposes of this Report, an agency decision to excuse, either prospectively or retrospectively, a regulated party from an otherwise applicable legal provision is called nonenforcement.

For decades, Congress, courts, and agencies themselves have wrestled with how best to address nonenforcement. After all, even if useful or even sometimes inevitable, agency nonenforcement, like other discretionary powers, presents opportunities for abuse and the appearance of irregularity.²³ Nonenforcement, moreover, has become more controversial in recent years,²⁴ although even its critics generally recognize that it may have appropriate uses.²⁵ Accordingly, a balance must be struck. This section addresses various efforts to do so, with particular focus on the language used by Congress in the Administrative Procedure Act (APA)—and how federal courts have construed that language—to address agency nonenforcement of the law.

Note that because nonenforcement is a broad concept, this background section cannot address all conceivable aspects of it. For instance, a permit may be conceptualized as a form of nonenforcement; after all, there is some prohibition yet, if a permit is obtained, that prohibition no longer applies. Likewise, perhaps certain compliance schemes at times could be conceptualized as nonenforcement, especially if the agency allows regulated parties to rely on self-reporting without detailed investigation by the agency. Examining in full every potential feature of administrative law that may be deemed “nonenforcement” in some sense would be a herculean task.

²³ See, e.g., Richard A. Rosen & David S. Huntington, *Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws*, 29 INSIGHTS, Aug. 2015, at 2, 3 (“In recent years, however, in the wake of the financial crisis, the SEC has taken a harder look at the waiver process, denying waivers in some high-profile cases and generating dissent among the Commissioners about the proper role of waivers.”).

²⁴ See *id.* at 6 (“Until a few years ago, the SEC routinely granted waivers when they were requested, with little comment or dissent. Now, the Commissioners are increasingly outspoken and polarized on decisions about waivers. The current policy debate on the appropriateness of granting waivers turns on several core policy issues, and is divided among political party lines . . .”).

²⁵ See, e.g., Epstein, *supra* note 8 (“Although all selective waivers may be suspect, there are surely some circumstances under which they are acceptable. Assume, for example, that all the applicants for a new job were supposed to receive their application forms at the same time, but for some reason the instructions were delivered to one applicant a day late. At this point, a waiver extending the deadline by one day would redress an imbalance that arose through no one’s fault.”).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

Indeed, ACUS has engaged in detailed evaluations of such topics as standalone reports.²⁶

A. The Administrative Procedure Act and Nonenforcement

The APA, enacted in 1946, governs many (but not all²⁷) aspects of administrative law, including judicial review of agency action.²⁸ A key feature of the APA, especially as interpreted,²⁹ is a presumption of reviewability.³⁰ In application, this “presumption of reviewability” means “statutes will not be held to preclude review unless there is ‘clear and convincing’ evidence that Congress intended to do so.”³¹

Especially in light of a presumption of reviewability, one might think that nonenforcement decisions would be subject to the same sort of searching judicial review as enforcement decisions. After all, Section 704 declares that “final agency action” is “subject to judicial review” so long as there is “no other adequate remedy in a court.”³² “Agency action,” in turn, is defined to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.”³³ Likewise, Section 706 commands a reviewing court to “compel agency action unlawfully withheld.”³⁴ Thus, so long as the other requirements of judicial review are met, why wouldn’t an agency’s failure to enforce a legal provision ground a judicial challenge?

²⁶ See, e.g., Federal Licensing & Permitting, <https://www.acus.gov/research-projects/federal-licensing-and-permitting> (last visited Oct. 31, 2017); Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information; <https://www.acus.gov/research-projects/compliance-standards-government-contractor-employees-%E2%80%93-personal-conflicts-interest> (last visited Oct. 31, 2017).

²⁷ See, e.g., 5 U.S.C. § 553(a)(1) (excluding “military or foreign affairs” from rulemaking procedures).

²⁸ See *id.* §§ 701–706.

²⁹ See, e.g., Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014) (questioning the presumption as potentially inconsistent with the APA).

³⁰ See, e.g., *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016); *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

³¹ Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 654–55 (1985) (internal citations omitted).

³² 5 U.S.C. § 704.

³³ *Id.* § 551(13) (emphasis added).

³⁴ *Id.* § 706(1).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

The APA, however, imposes additional limits on judicial review—limits that may be relevant to nonenforcement. In particular, Section 701 creates two categories of unreviewable agency decisions: “(1) those in which the statute precludes review, and (2) those in which agency action ‘is committed to agency discretion by law.’”³⁵ As Cass Sunstein has explained, these provisions may create more questions than they answer. If the law commits an *unreviewable* decision to an agency, has it not also, by definition, precluded review?³⁶ But if the specific statute does not say the agency has unreviewable discretion, why wouldn’t the decision be reviewable, especially because the APA empowers courts to review agency decisions for abuses of discretion?³⁷ The APA, by its plain terms alone, does not appear to resolve this textual puzzle.

To be sure, to the extent that *formal* agency waivers or exemptions are conceptualized as permits or licenses, the APA speaks to them.³⁸ Formal grants of licenses, although potentially conceptualized as nonenforcement (because the agency allows the regulated party to do something that it otherwise forbids), are technically agency action and so reviewable (so long as other requirements are met).³⁹ But the APA does not clearly speak to an agency’s decision to not bring an enforcement action.

B. Judicial Consideration of Nonenforcement

In recent decades, the federal judiciary has not had many occasions to address agency nonenforcement. Ever since the Supreme Court’s decision in *Heckler v. Chaney*,⁴⁰ agency nonenforcement—or, rather, one type of agency nonenforcement, albeit an especially important one (i.e., non-prosecution)—has been presumptively unreviewable. That said, even after *Heckler*, there are a small number of examples of judicial review of nonenforcement decisions.

³⁵ *Id.* at 657 (citing 5 U.S.C. §§ 701(a)(1), (a)(2)).

³⁶ *See id.*

³⁷ *See* 5 U.S.C. § 706(2)(A) (authorizing a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion”).

³⁸ *See id.* §§ 551 (6), (7), (9).

³⁹ *See, e.g.,* *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (rejecting a challenge to a license for lack of standing).

⁴⁰ 470 U.S. 821 (1985).

(i) The Supreme Court's Build-Up to *Heckler v. Chaney*

The Supreme Court has long struggled to define what the APA means by “committed to agency discretion by law.” One of the Court’s most important efforts to do so was in *Citizens to Preserve Overton Park, Inc. v. Volpe*, decided in 1971.⁴¹ There the Court explained that the APA provision “is a very narrow exception” that merely bars review “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”⁴² Nothing in *Overton Park*’s analysis necessarily commands that the “committed to agency discretion by law” standard for nonenforcement decisions should be more pro-agency than for enforcement decisions. And, indeed, after *Overton Park* was decided, the Supreme Court did review an agency nonenforcement decision of the non-prosecution variety. In *Dunlop v. Bachowski*, the Court held that a judge could order the Secretary of Labor to undertake an investigation.⁴³ Hence, for a time it appeared that perhaps the same sort of judicial review analysis would apply in both enforcement and nonenforcement contexts.

(ii) The Watershed *Heckler* Decision

And then came *Heckler*—one of the most important cases in administrative law.⁴⁴ There, a group of death row inmates in Oklahoma and Texas were sentenced to die by lethal injection.⁴⁵ In response, they petitioned the Food and Drug Administration (FDA), “claiming that the drugs used by the States for this purpose, although approved by the FDA for the medical purposes stated on their labels, were not approved for use in human executions.”⁴⁶ Thus, they urged that the “FDA was required to approve the drugs as ‘safe and effective’ for human execution before they could be distributed in interstate commerce.”⁴⁷ Indeed, they even called for “the prosecution of all those in the

⁴¹ 401 U.S. 402 (1971).

⁴² *Id.* at 410 (quoting S. REP. NO. 79-752, at 26 (1945)).

⁴³ 421 U.S. 560 (1975).

⁴⁴ See, e.g., Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 159 (1996) (“*Heckler v. Chaney* stands as one of the modern landmarks of administrative law.”); Kenneth C. Davis, *No Law to Apply*, 25 SAN DIEGO L. REV. 1, 2 (1988) (“The most important decision denying review of administrative action on the ground of ‘no law to apply’ may now be *Heckler v. Chaney* . . .”).

⁴⁵ *Heckler v. Chaney*, 470 U.S. 821, 823 (1985).

⁴⁶ *Id.*

⁴⁷ *Id.*

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution.”⁴⁸

The FDA disagreed with that “understanding of the scope of FDA” authority.⁴⁹ But the FDA also concluded that even if it could grant such relief, it would not. The agency reasoned that it does not bring enforcement actions against every “unapproved use of approved drugs” but rather – generally – only “when there is a serious danger to the public health or a blatant scheme to defraud.”⁵⁰ According to the FDA, use of drugs for state-authorized execution did not satisfy that standard.⁵¹

The inmates brought suit under the APA but the district court granted summary judgment against them on the theory that agency decisions “to *refrain* from instituting investigative and enforcement proceedings are essentially unreviewable by the courts.”⁵² The D.C. Circuit disagreed, reasoning that agency refusals to act are considered “final agency action” under the APA, and the APA’s explicit exclusion of judicial review for agency decisions “committed to agency discretion by law” should be read narrowly in light of the presumption of reviewability.⁵³

The Supreme Court, per then-Justice Rehnquist, reversed. Specifically, the Court concluded that the FDA’s “inaction was an unreviewable exercise of prosecutorial discretion” because there was “no law to apply”; “[s]uch decisions should therefore be presumed unreviewable under the ‘committed to agency discretion’ exception to the general rule of reviewability under the APA.”⁵⁴ Rehnquist offered at least four reasons for this conclusion. First, and most importantly, he explained that

an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another,

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Heckler*, 470 U.S. at 824–25 (citation not included in original).

⁵¹ *Id.* at 825.

⁵² *Id.* (internal citation omitted).

⁵³ *Id.* at 825–26 (quoting 5 U.S.C. § 701(a)(2)).

⁵⁴ Sunstein, *supra* note 31, at 662 (internal citations omitted).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.⁵⁵

Second, “when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”⁵⁶ Third, “when an agency *does* act to enforce, that action itself provides a focus for judicial review” in a way that is different in kind from nonenforcement.⁵⁷ And fourth, “an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch.”⁵⁸

The Court stressed, however, that the presumption is rebuttable, in particular “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”⁵⁹ But without such “guidelines” from Congress, the agency’s nonenforcement decision—as a rule—cannot be challenged. On this basis the Court distinguished *Dunlop*,⁶⁰ in which Congress had specifically ordered (using the word “shall”) the Secretary of Labor to undertake an investigation if certain predicate requirements were met.⁶¹ The Court concluded with respect to the FDA that Congress

⁵⁵ Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

⁵⁶ *Id.* at 832.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 833; *see also id.* (“Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”).

⁶⁰ Dunlop v. Bachowski, 421 U.S. 560 (1975).

⁶¹ Heckler, 470 U.S. at 833 (quoting 29 U.S.C. § 482).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

had not provided such “guidelines.”⁶² The Court also suggested, in a footnote, that certain types of nonenforcement may be too significant to escape review.⁶³

Justice Brennan concurred because every day “hundreds of agencies” make “[i]ndividual, isolated nonenforcement decisions,” and Congress surely “has not intended courts to review such mundane matters.”⁶⁴ Yet he also emphasized that the Court’s decision did not address situations in which “(1) an agency flatly claims that it has no statutory jurisdiction . . . ; (2) an agency engages in a pattern of nonenforcement of clear statutory language . . . ; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect; or (4) a nonenforcement decision violates constitutional rights.”⁶⁵ Justice Marshall concurred in the judgment because although it was “easy” to conclude that the FDA’s particular decision should not be reviewed, in his view a “‘presumption of unreviewability’” goes too far.⁶⁶

(iii) Post-*Heckler* Supreme Court Cases

Since *Heckler*, the Supreme Court has largely continued to take the position that nonenforcement is not reviewable, at least when it comes to a decision not to bring an enforcement action. That said, the Court has also concluded, albeit in somewhat unusual circumstances, that nonenforcement sometimes is subject to review.

The Court has repeatedly reiterated *Heckler*’s presumption of nonreviewability.⁶⁷ Even in finding the presumption overcome, moreover, the Court has stressed the

⁶² *Id.* at 835–37.

⁶³ See, e.g., Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083, 1098 (2015) (“In *Heckler*, the Supreme Court suggested in a footnote that there is some threshold at which an executive’s exercise of discretion becomes ‘so extreme as to amount to an abdication of its statutory responsibilities.’”) (quoting *Heckler*, 470 U.S. at 833 n.4).

⁶⁴ *Heckler*, 470 U.S. at 839 (Brennan, J., concurring).

⁶⁵ *Id.*

⁶⁶ *Id.* at 840 (Marshall, J., concurring in the judgment).

⁶⁷ See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (reiterating *Heckler*); *Webster v. Doe*, 486 U.S. 592, 599–600 (1988) (same); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157–58 (2012) (similar). The Court also has made statements along these lines in the context of immigration. See, e.g., *Arizona v. United States*, 567 U.S. 387, 396–97 (2012); *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 484–85 (1999).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

presumption's strength. In *FEC v. Akins*,⁶⁸ for instance, the Court concluded that notwithstanding *Heckler*, the agency was required to enforce certain disclosure requirements. But the Court reached this conclusion only because federal law "explicitly" required the agency to act.⁶⁹

Yet *Heckler* does not extend to all agency refusals to act. In *Massachusetts v. EPA*,⁷⁰ for instance, the Court read *Heckler* narrowly—at least in one context. The question in *Massachusetts* addressed the agency must regulate greenhouse gas emissions under the Clean Air act. The Court largely concluded yes, and in so doing devoted much of its analysis to its substantive interpretation of the statute. The Court, however, also had to address a nonenforcement question. Certain entities petitioned the EPA to regulate such emissions; the EPA concluded, however, that it lacked statutory authority to do so and, in any event, that even if it did have such authority, it would not exercise it.⁷¹ The Court thus had to address whether a denial of a petition for rulemaking (which also is a decision to not act) should be treated the same as a decision to not bring an enforcement action.

The Court concluded that the two situations are not comparable, even though they both, in a sense, involve agency inaction. Although noting that the Court had "repeated time and again" that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," and, indeed, that such "discretion is at its height when the agency decides not to bring an enforcement action," the Court refused to apply the *Heckler* presumption:

There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." They

⁶⁸ 524 U.S. 11 (1998).

⁶⁹ *Id.* at 26. Justice Scalia, joined by Justices O'Connor and Thomas, disagreed: "The provision of law at issue in this case is an extraordinary one, conferring upon a private person the ability to bring an Executive agency into court to compel its enforcement of the law against a third party. Despite its liberality, the Administrative Procedure Act does not allow such suits" *Id.* at 29–30 (Scalia, J., dissenting).

⁷⁰ 549 U.S. 497 (2007).

⁷¹ *See id.* at 513 ("Even assuming that it had authority over greenhouse gases, EPA explained in detail why it would refuse to exercise that authority.").

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is “extremely limited” and “highly deferential.”⁷²

Although four justices dissented on other grounds, this analysis went without rebuttal. A denial for a petition of rulemaking, although potentially conceptualized as nonenforcement, thus falls outside *Heckler*.

(iv) Recent Supreme Court Non-Answers

Recently, the Supreme Court was asked to address nonenforcement of the non-prosecution variety in litigation challenging the Obama Administration’s nonenforcement of certain immigration laws. President Obama announced that a subset of otherwise deportable immigrants would not be deported so long as they could satisfy certain conditions.⁷³ In a preliminary injunction posture, the Fifth Circuit rejected that decision as unlawful.⁷⁴ The Supreme Court granted certiorari and, interestingly, in doing so directed the parties to brief “Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.”⁷⁵

In its brief to the Supreme Court, the United States repeatedly invoked *Heckler*—arguing that “*Heckler*’s presumption of non-reviewability applies to decisions to defer immigration enforcement action” and that “discretion to permit an alien to be ‘lawfully present’ . . . is thus precisely the kind of agency judgment that is committed to DHS’s discretion under *Heckler*.”⁷⁶ Texas, joined by numerous other States, rejected this

⁷² *Id.* at 527–28 (quoting *Am. Horse Protection Ass’n v. Lyng*, 812 F.2d 1, 3–4 (D.C. Cir. 1987) and *Nat’l Customs Brokers & Forwarders Ass’n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

⁷³ See, e.g., *Fact Sheet: Immigration Accountability Executive Action*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> (“These executive actions . . . prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay their fair share of taxes as they register to temporarily stay in the U.S. without fear of deportation.”) (last visited Oct. 31, 2017).

⁷⁴ See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

⁷⁵ *United States v. Texas*, 136 S. Ct. 906, 906 (2016) (mem.).

⁷⁶ Brief for the Petitioners at 36–37, *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (*per curiam*) (No. 15-674), 2016 WL 836758; see also *id.* at 39 (“A ruling that the Guidance is reviewable because of long-established consequences that it does not alter would eviscerate *Heckler*’s protection under [immigration

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

argument: The new policy is “affirmative governmental action” rather than nonaction because “it creates a massive bureaucracy to grant applicants lawful presence, related benefits eligibility, and work authorization.”⁷⁷ The Court, however, did not decide which side had the better of the fight. Instead, it divided four to four and affirmed the lower court decision while issuing no opinion.⁷⁸

In a similar vein, the Supreme Court recently denied leave to file a bill of complaint in an original case brought by Nebraska and Oklahoma against Colorado challenging Colorado’s marijuana laws.⁷⁹ This complaint also raised, indirectly to be sure, questions about federal nonenforcement because activities authorized by Colorado violate federal law. The U.S. Department of Justice, however, has determined that, as a matter of “prosecutorial discretion,” it generally will not enforce federal law so long as certain conditions (i.e., “both the existence of a strong and effective state regulatory system, and an operation’s compliance with such a system”) are satisfied.⁸⁰ The Supreme Court has not addressed the validity of this nonenforcement.

(v) Lower Court Litigation

Following *Heckler* and these cases, one might suppose that federal courts would only rarely review nonenforcement decisions, if at all. And that is generally true.⁸¹ Certain types of nonenforcement, however, are reviewed. Although courts, for instance, rarely review an agency’s decision to not bring an enforcement action, they are more willing to review an agency’s decision to waive one of its own rules *within* a proceeding that has already begun. Likewise, courts may review an agency’s decision

law], because the same consequences flow from countless discretionary decisions in immigration enforcement.”).

⁷⁷ Brief for the State Respondents at 39, *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (*per curiam*) (No. 15-674), 2016 WL 1213267.

⁷⁸ See *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.) (*per curiam*).

⁷⁹ See *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (mem.) (denying the Motion for Leave to File a Bill of Complaint).

⁸⁰ See Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (last visited Oct. 31, 2017).

⁸¹ See, e.g., *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 458–59 (D.C. Cir. 2001) (“*Chaney* sets forth the general rule that an agency’s decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion.”); *Am. Gas Ass’n v. FERC*, 912 F.2d 1496, 1505 (D.C. Cir. 1990) (broadly stating that “nonenforcement decisions are ordinarily unreviewable”).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

to *not* exercise its nonenforcement power, including its refusal to waive or exempt (as noted above, an agency's grant of waiver or exemption may be challenged, so long as the other justiciability requirements are met). And, of course, sometimes courts conclude that *Heckler's* presumption is rebutted. Finally, at least in some courts, a general policy of nonenforcement may be reviewable even if an individualized instance of nonenforcement is not.

The D.C. Circuit's decision in *NetworkIP, LLC v. FCC*⁸² is a good example of an agency's decision to not enforce a requirement within a proceeding. There, APCC Services, Inc. (APCC) filed an informal complaint against NetworkIP, LLC and Network Enhanced Telecom, LLP (which the D.C. Circuit collectively referred to as "NET"). Unfortunately, "[o]n the absolutely last day it could be timely, . . . APCC unsuccessfully attempted to file a formal complaint."⁸³ There were two problems with APCC's formal complaint. First, APCC was required to submit two checks, not just one, because there were two carriers at issue. And second, "the filing fee proffered for each defendant was \$5.00 short" because APCC did not read the latest version of the Code of Federal Regulations before trying to file.⁸⁴ About two weeks later, APCC filed a correct formal complaint, which the FCC accepted.⁸⁵ The agency did so by invoking its waiver authority: "Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."⁸⁶ The result of the agency's exercise of its waiver authority was that NET—deemed liable on the merits by the Commission—was subject to an increase in liability.

NET challenged the FCC's nonenforcement of the agency's procedural rules.⁸⁷ The D.C. Circuit "reluctantly" agreed with NET, despite "the deference we afford to an agency's decision whether to waive one of its own procedural rules."⁸⁸ In particular, the court explained that "before the FCC can invoke its good cause exception, it both 'must explain why deviation better serves the public interest, and articulate the nature

⁸² 548 F.3d 116 (D.C. Cir. 2008).

⁸³ *Id.* at 125.

⁸⁴ *Id.* at 125–26.

⁸⁵ *Id.* at 126.

⁸⁶ 47 C.F.R. § 1.3.

⁸⁷ *NetworkIP*, 548 F.3d at 126.

⁸⁸ *Id.* at 127.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.”⁸⁹ Because the power to waive procedural rules is so important, the court demanded clear criteria to prevent “the danger of arbitrariness (or worse).”⁹⁰ After all, if the test is too ill-defined, “[c]omplainants the agency ‘likes’ can be excused, while ‘difficult’ defendants can find themselves drawing the short straw.”⁹¹ The court concluded that there were no special circumstances as to APCC; waiting until the last minute and then having something go wrong is too ordinary a situation to merit a waiver of the rules.⁹²

Another example of judicial review in the context of nonenforcement occurs when an agency declines to exercise its nonenforcement authority, for instance by refusing to grant a waiver. An excellent example of this is found in *Blanca Telephone Co. v. FCC*,⁹³ also decided by the D.C. Circuit. In this case, the FCC required digital wireless service providers to offer handsets that could be used by those with hearing aids by a certain date. Over one hundred of these providers petitioned the FCC to “waive the deadline.”⁹⁴ Exercising its waiver authority,⁹⁵ the agency did so for a great many of those providers but not for three of them. It concluded that those three had not exercised enough diligence prior to the deadline to justify waiver. The three providers then sought review on the ground that this “differential treatment” was not justified.⁹⁶ The D.C. Circuit sided with the agency, explaining that its review of a denial of a waiver is “‘extremely limited’”⁹⁷ and that it will vacate a denial only if, for instance, the

⁸⁹ *Id.* (quoting *N.E. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ 743 F.3d 860 (D.C. Cir. 2014).

⁹⁴ *Id.* at 861.

⁹⁵ *See* 47 C.F.R. § 1.925(a) (“The Commission may waive specific requirements of the rules on its own motion or upon request.”); *see also id.* § 1.925(b)(3) (“The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”).

⁹⁶ *Blanca Tel.*, 743 F.3d at 862.

⁹⁷ *Id.* at 864 (quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C. Cir. 2003)).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

agency altogether “‘fails to provide adequate explanation before it treats similarly situated parties differently.’”⁹⁸ The court concluded that the agency’s decision satisfied that standard.⁹⁹ The D.C. Circuit has applied similar analysis in other cases.¹⁰⁰

There are also instances in which the *Heckler* presumption is rebutted. Consider *Cook v. FDA*.¹⁰¹ Like *Heckler* itself, this case involved a lawsuit by “prisoners on death row.”¹⁰² In particular, prisoners sued the agency “for allowing state correctional departments to import sodium thiopental (thiopental), a misbranded and unapproved new drug used in lethal injection protocols”¹⁰³ The agency eventually issued a statement that “in ‘defer[ence] to law enforcement’ agencies, henceforth it would exercise its ‘enforcement discretion not to review these shipments and allow processing through [Customs’] automated system for importation.’”¹⁰⁴ The prisoners thereafter sought judicial review of the new policy. The D.C. Circuit distinguished *Heckler*, because “even assuming the presumption against judicial review . . . does apply to the FDA’s refusal to enforce [the statute], that presumption is rebutted by the specific ‘legislative direction in the statutory scheme.’”¹⁰⁵ The statute “sets forth precisely when the agency must determine whether a drug offered for import appears to violate the [Food, Drug, and Cosmetic Act], and what the agency must do with such a drug.”¹⁰⁶ Courts have applied this sort of analysis in other cases as well.¹⁰⁷

⁹⁸ *Id.* (quoting *Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009)).

⁹⁹ *See id.* at 865-66.

¹⁰⁰ *See, e.g., Delta Radio, Inc. v. FCC*, 387 F.3d 897, 901 (D.C. Cir. 2004) (“Given this limited review, we hold that the FCC did not abuse its discretion in failing to grant Delta a waiver of its payment obligations or in assessing the statutory default penalty when Delta failed to meet payment deadlines.”).

¹⁰¹ 733 F.3d 1 (D.C. Cir. 2013).

¹⁰² *Id.* at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (alterations in original) (no citation in original).

¹⁰⁵ *Id.* at 7 (quoting *Heckler v. Chaney*, 470 U.S. 821, 833 (1985)).

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g., Nat’l Wildlife Fed’n v. EPA*, 980 F.2d 765, 773-74 (D.C. Cir. 1992); *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 803 (D.C. Cir. 1987) (“The *Chaney* Court said it was ‘leaving to one side the problem of whether an agency’s rules might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce.’ This case, however, squarely presents that situation in which an agency’s own regulations do contain a ‘judicially manageable’ standard for making nonenforcement decisions.”) (citation omitted).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

Finally, some lower courts have held that even as to non-prosecution, there is a difference between nonenforcement in an individual case and a policy of nonenforcement. For instance, in the D.C. Circuit, “an agency’s statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process . . . or has otherwise articulated it in some form of universal policy statement”¹⁰⁸ Hence, for example, in *Edison Electric Institute v. EPA*, the court concluded that an EPA “Enforcement Policy Statement” could be reviewed because the “[p]etitioners [were] not challenging the manner in which the EPA has chosen to exercise its enforcement discretion” but instead were attacking the agency’s statutory interpretation.¹⁰⁹

C. Academic Consideration of Nonenforcement

Although the academy has not devoted as much attention to nonenforcement as it has to other aspects of administrative law, the subject has not gone unnoticed.¹¹⁰ This Report is not the place for an exhaustive review of the literature, especially because the Report does not address the constitutional questions surrounding nonenforcement—questions which, at least of late, have dominated the academic discussion. That said, it is useful to examine some of the key insights from scholarship.

Unsurprisingly, the academic discourse focuses on many of the same questions that have occupied the judiciary. Some appear to have advanced arguments that would support robust discretion when it comes to nonenforcement, including notably Kenneth Culp Davis, who observed that “[r]ules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular

¹⁰⁸ *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994) (emphasis in original) (citations omitted); *see also* *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep’t of Agric.*, 7 F. Supp. 3d 1, 10 (D.D.C. 2013) (explaining the exception).

¹⁰⁹ 996 F.2d 326, 333 (D.C. Cir. 1993).

¹¹⁰ *See, e.g.*, Barron & Rakoff, *supra* note 6, at 276 (discussing waiver in some detail); Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1818 (2015) (briefly discussing waiver); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 535 (2015) (same). Prosecutorial discretion—including the context of regulatory duties administered by federal agencies—has also received scholarly attention in recent years. *See, e.g.*, Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017) (urging that discretion makes the most sense when it protects liberty); Daniel Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159 (2014) (examining such discretion empirically in environmental context).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

cases. The justification for discretion is often the need for individualized justice.”¹¹¹ That analysis, although written about discretion generally, captures one of the key underpinnings of nonenforcement discretion. Some amount of nonenforcement is inevitable because of resource constraints.¹¹² Looking for evidence of a violation when that violation may or may not have occurred could, in theory, soak up infinite resources since it is impossible to prove a negative. And even if a violation is known, it may not be cost-effective to pursue it, especially if it means that other, more important violations cannot also be pursued.

More provocatively, David Barron and Todd Rakoff have written in defense of so-called “big waiver,” a concept that includes the idea that agencies should be able to waive not just regulatory requirements of their own making but also statutory requirements of Congress’s making.¹¹³ They argue that “big waivers” are constitutional and sometimes good policy: “Big waiver offers a salutary means of managing the practical governance concerns that make traditional delegation unavoidable.”¹¹⁴ Similarly, Leigh Osofsky – in the context of tax – has advanced the case for “categorical nonenforcement,” i.e., “complete, prospective nonenforcement of some aspect of the law.”¹¹⁵ Simply stated, she argues that if some nonenforcement is going to happen anyway, there sometimes is value in doing so categorically.¹¹⁶ And in the context of

¹¹¹ KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 17 (1969); see also *id.* at 43–44 (arguing that eliminating “all discretion on all subjects would be utter insanity”). That said, it is important to note that Professor Davis was skeptical of an absolutist position; for instance, he disagreed with the Supreme Court’s decision in *Heckler*. See Davis, *supra* note 44, at 9 (“In light of the long history, one may be reasonably sure that the Court’s preference for the extreme *Chaney* view will not long endure.”).

¹¹² See, e.g., Michael Sant’Ambrogio, *The Extra-legislative Veto*, 102 GEO. L.J. 351, 381 (2014) (explaining that some “laws that cannot achieve all their goals with the resources available”); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1846 (2015) (listing “resource allocation” as a “[k]ey component[] of administration”).

¹¹³ See Barron & Rakoff, *supra* note 6, at 267.

¹¹⁴ See *id.* at 270; see also *id.* (“Through big waiver, Congress takes ownership of the first draft of a regulatory framework, confident that its handiwork will not prove to be rigid and irreversible.”).

¹¹⁵ Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 73 (2015).

¹¹⁶ See *id.* at 75–76 (“[I]n some circumstances categorical nonenforcement may actually increase the legitimacy of the IRS’s nonenforcement.”).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

immigration in particular, many scholars have urged that policy concerns should be allowed to influence nonenforcement decisions.¹¹⁷

At the same time, others have criticized nonenforcement, especially some applications of it. Zach Price, among others, has expressed concern about policy-driven nonenforcement, both as a constitutional matter and also for its normative implications.¹¹⁸ If nonenforcement is applied too broadly (for instance, in the non-prosecution context, but not necessarily limited to that context), the Executive Branch could essentially nullify a valid act of Congress.

Another concern, expressed by some, is that there are few “laws, procedures, or assurances of transparency” for nonenforcement.¹¹⁹ This lack of transparency can be problematic. Likewise, an agency may use its nonenforcement power to achieve ends not allowed by the statute; where the agency can pursue an enforcement action, it may be able to leverage that power to force a regulated party to do something else the agency wants, in hopes of avoiding an enforcement action.¹²⁰ That may be appropriate if the agency’s goal is an end the law allows; for instance, if the agency agrees to waive a safety requirement if the regulated party agrees to do something instead that is equally safe but technically noncompliant. But it is something else altogether if an agency can use the threat of an enforcement action to obtain an outcome that is not within its statutory authority.¹²¹

¹¹⁷ See, e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) (“This article argues that prosecutorial discretion is both a welcome and a necessary component of immigration law.”). But see Delahunty & Yoo, *supra* note 10, at 781 (challenging whether broad nonenforcement is always permissible).

¹¹⁸ See, e.g., Price, *supra* note 7, at 671 (arguing that “the President’s nonenforcement authority extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders”); Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1124–25 (2013) (“Though he has great latitude to influence enforcement policy, the President also has an obligation to use his enforcement authority in a way that he can defend as consistent with the law.”).

¹¹⁹ Gluck et al., *supra* note 110, at 1818.

¹²⁰ See, e.g., Barron & Rakoff, *supra* note 6, at 277–78 (explaining that agencies “can condition its grant of a waiver on an applicant’s satisfying requirements not otherwise required by statute”); Epstein, *supra* note 8 (vigorously criticizing this practice as fundamentally contrary to rule-of-law values).

¹²¹ See, e.g., James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 428 (1986) (“A number of recent cases arguably involve agency efforts to leverage authority from one area into another.”) (collecting citations); see also *id.* at 429 (“[T]he steady growth of the

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

Academics have also recognized that the whole idea of agency inaction versus agency action (which goes to the heart of non-prosecution) may be problematic because it can be difficult to draw a line between the two.¹²² At the same time, judicial review of such nonenforcement can be institutionally challenging for courts, although Daniel Walters has recently suggested that perhaps an APA “arbitrary and capricious” approach would be desirable.¹²³

To be clear, the academic discussion of nonenforcement goes beyond these issues, especially to the extent that nonenforcement discretion is part of the larger question of how to manage discretion.¹²⁴ For purposes of this Report, however, this discussion, through truncated, should suffice.

II. A TAXONOMY OF NONENFORCEMENT

As explained above, nonenforcement has not received a great deal of attention from courts and academics. And when it is mentioned, all too often, it is treated as a unitary concept. In fact, however, there is a wide variety of nonenforcement. And different types of nonenforcement present different considerations. For instance, a public decision to forego a substantive enforcement action against an already complete violation of the law following a formal request by the lawbreaker is different in many respects from a *sua sponte* decision by the agency to prospectively waive a procedural requirement for a party that has not yet violated the law. This is not to say that nonenforcement is more or less appropriate in one than the other. Rather, it is enough to observe that the two situations are different and how one thinks about

Regulatory State has greatly increased the number of grants of authority that agencies may exploit. Also, the very fact that there has been an explosion of regulatory authorities means that any specific statute, and any specific exercise of authority, is less visible than it would have been two or three decades ago. In a crowded forest, no tree stands out. Furthermore, even when an exercise of authority becomes visible, legal doctrines that might limit the use of leveraging are not well-developed. For all of these reasons, almost any grant of regulatory or program authority has the potential to become a valuable franchise for an interest group or policy entrepreneur to acquire, even if the acquirer’s interests have little to do with the ostensible purposes of the authority.”).

¹²² Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359, 1369–70 (1997).

¹²³ See, e.g., Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911 (2016) (identifying the difficulties with judicial review of nonenforcement and urging a middle ground).

¹²⁴ The “discretion question” may be the largest question of all in administrative law. See, e.g., Geoffrey C. Shaw, *H. L. A. Hart’s Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 668 (2013).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

nonenforcement – and how to safeguard it – might also be different in each. In short, an agency’s decision to not “bring the hammer down” may arise in numerous contexts – and they are not the same.

To be sure, some have recognized that there are different types of nonenforcement. For instance, Leigh Osofsky has observed that how one views nonenforcement may change depending on whether the decision is “technical” or “policy-laden.”¹²⁵ She also has focused on the differences between an agency decision to engage in “categorical, or complete, prospective nonenforcement of some aspect of the law” versus merely “setting low enforcement priorities.”¹²⁶ Similarly, Kate Bowers has differentiated “project-specific” waivers that are based on “individual circumstances” from “[c]ategory-specific waiver[s]” that apply to a “designated category” or even “a single law, such as the Energy Policy Act of 2005.”¹²⁷ She also has recognized “[n]onspecific” waivers that give “general principles to guide” the agency.¹²⁸ The distinction between “big” and “little” waiver is similar.¹²⁹ Likewise, Michael Kagan has organized nonenforcement along a spectrum in the context of immigration, concluding that “[c]ongressionally authorized discretion” and “[d]iscretion to not enforce the statute in every case” have the most legal support while “[e]stablishing categorical criteria” may be most vulnerable to legal challenge.¹³⁰

This instinct to disaggregate nonenforcement is right. Such analysis, however, can and should be expanded. To begin, it is important to evaluate nonenforcement depending on *timing*, i.e., whether the unlawful conduct has occurred. An agency’s

¹²⁵ Osofsky, *supra* note 115, at 112. See also *id.* (“A comprehensive evaluation of executive nonenforcement should take into account the different types of decisions that agencies make.”).

¹²⁶ *Id.* at 73.

¹²⁷ Kate R. Bowers, *Saying What The Law Isn’t: Legislative Delegations Of Waiver Authority In Environmental Laws*, 34 HARV. ENVTL. L. REV. 257, 261–62 (2010).

¹²⁸ *Id.* at 262.

¹²⁹ Barron & Rakoff, *supra* note 6, at 277–78 (explaining that “little waiver” is “a limited power to handle the exceptional case” while “big waiver” is authority to “substantially revise and not modestly tweak”); see also *id.* (listing a number of types of considerations that may constitute “big waiver,” including the Agency’s “authority to waive otherwise applicable statutory requirements, even absent an application for a waiver,” its “authority to waive” without first “ascertaining the existence of specified factual predicates,” its authority to “waive any part of the statute at issue” rather than just a set of specific requirements, and whether its “authority to waive pertains to a substantial group of outside parties”).

¹³⁰ See Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama’s Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083, 1085–87 (2015).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

decision to excuse a violation that has not occurred yet is different in kind¹³¹ from an agency's decision to not enforce the law against a violation that has already happened. Likewise, apart from timing, there are a wide range of *situational* considerations that may go into evaluating a nonenforcement decision, including but not limited to those identified above. Hence, the purpose of this section is to begin to create a taxonomy of nonenforcement. Hopefully doing so will enable more meaningful evaluation.

A. Temporality and Nonenforcement

One of the key distinctions that must be drawn is between nonenforcement when the entity at issue has already violated a legal duty and when it has not. If the law has already been violated, nonenforcement comes via prosecutorial discretion (or something akin to it). If the law has not been violated, either waiver or exemption may apply.

At this point it is useful to define some terms, at least for purposes of this Report. There is an obvious difference between not enforcing the law against an already complete violation and pledging to not enforce the law against a violation that has not yet occurred. The former is an act of prosecutorial discretion; the latter is an act of prospective authorization. Yet not all acts of prospective authorization are the same. For instance, sometimes Congress has explicitly created a system that allows the agency to give such prospective authorization. Other times, Congress has authorized, perhaps implicitly, the agency to create its own procedures and internal rules, and from that authorization the agency has created its own system to provide prospective authorization. Of course, in a sense, these two situations are not categorically distinct because an agency cannot do what Congress has not allowed; agencies (as a rule) do not have inherent authority to act beyond what Congress has permitted.¹³²

¹³¹ The law often distinguishes between acts that have occurred and those that have not. One does not go to jail for something that has not happened. Likewise, procedural options may change depending on whether the action has occurred. *See, e.g.,* *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975).

¹³² *See, e.g.,* *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) (“[W]e have recognized that agencies enjoy some powers that were not expressly enumerated by Congress. Although we have often described these powers as ‘inherent,’ the more accurate label is ‘statutorily implicit.’”) (citations omitted). That said, there may be some examples of inherent authority if the agency is exercising a core Article II power. For purposes here, that is a distinction that does not matter; if the power is implied rather than found in a statute, it is an exemption power rather than a waiver power.

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

Yet it is useful to distinguish between the two situations. For purposes of this Report, where Congress has expressly authorized the agency to permit prospective nonenforcement, the term “waiver” is used; by contrast, where the agency has acted without an express grant of authority from Congress, the term “exemption” is used. As it is now, the terms are often used fairly interchangeably or in ways that draw distinctions that are not conceptual in character.¹³³ That said, for reasons explained below, although it is possible to draw such a conceptual distinction between “waivers” and “exemptions,” it may not be worthwhile to do so. These types of nonenforcement are sufficiently similar (and appear to be treated by agency officials as virtually interchangeable) that distinguishing between them may not be worth the candle. Another possible way to try to distinguish between waivers and exemptions is to say that waivers apply to statutory requirements while exemptions apply to regulatory requirements; that distinction also does not seem to be universally accepted, however. Thus, for purposes of this Report, an agency can waive or exempt either a statutory or regulatory requirement; the distinction is not the type of duty at issue but the textual clarity of the agency’s grant of nonenforcement authority.

B. Non-Temporal Nonenforcement Factors

Apart from time, there are many other situational factors to consider when evaluating nonenforcement. The following ten factors (which, of course, are not exhaustive¹³⁴) are worth considering:

(i) Who Makes the Decision?

To begin, it is useful to know who makes nonenforcement decisions. Specifically, can the decision to engage in nonenforcement be made by agency staff or must a political appointee do so? And if the decision is left to staff, is there a meaningful right of appeal to the political appointee? Relatedly, it is useful to know who has a part in the decision-making process, even if they are not the ultimate deciders. For instance, if someone from outside of the agency plays a role, that may be useful information. To the extent that nonenforcement decisions are controversial, one

¹³³ See, e.g., *What is a waiver? An exemption?*, FED. MOTOR CARRIER SAFETY ADMIN., <https://www.fmcsa.dot.gov/faq/what-waiver-exemption> (last visited Oct. 31, 2017) (stating a “waiver provides the person with relief from the regulation for up to three months” while an “exemption provides the person or class of persons with relief from the regulations for up to two years”).

¹³⁴ Other potential factors, for instance, include the reasons for the violation, the consequences of nonenforcement, the ease of identifying whether a violation has occurred, and agency design (e.g., whether enforcement is handled by a separate office). Undoubtedly there are others.

might think that they are important matters meriting greater political accountability. At the same time, to the extent that one is concerned that the administrative process takes too long, one might worry about appellate rights.

(ii) The Nature of the Agency Judgment

One of the most important factors is whether the agency's waiver decision is merely technical or whether it is driven by policy.¹³⁵ As Professor Osofsky explains, an agency "may make policy-laden decisions about whether to pursue business taxes aggressively or not, as well as expertise-laden decisions about whether administrative concerns preclude enforcement of a very technical tax provision."¹³⁶ The public may perceive nonenforcement differently in those two circumstances. This is not to say that nonenforcement is necessarily more or less appropriate in one type of situation than another; the answer to that question depends on one's theory of how governmental authority should be distributed. Some might argue, for instance, that policy-driven nonenforcement is more dangerous, perhaps for constitutional reasons.¹³⁷ Others, by contrast, may think that nonenforcement can act as a liberty-enhancing check on bright-line laws, which may require some policy consideration.¹³⁸ This Report is not directed at those higher-level questions; it is enough to observe that they exist. Of course, separating decisions between "policy-laden" and "technical" is not a simple line to draw; there is a spectrum. Indeed, it is difficult to imagine a purely "technical" decision that does not have *some* policy implications.¹³⁹ Even so, although it may not always be possible to paint a clean line, the distinction is not worthless.

(iii) The Source of the Legal Duty

Another important factor is the nature of the legal duty that the agency is choosing not to enforce. More specifically, is the agency choosing not to enforce a legal duty created by Congress in a statute, or does the duty come from the agency itself in a regulation. (As noted, this one of the key demarcations between "big" and "little" waivers.¹⁴⁰) This distinction too, of course, is not always black-and-white. After all,

¹³⁵ See, e.g., Osofsky, *supra* note 115, at 112 (distinguishing "technical" and "policy-laden" waivers).

¹³⁶ *Id.*

¹³⁷ See, e.g., Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1216–17 (2014) (expressing concern about nonenforcement when used for policy reasons).

¹³⁸ See, e.g., Michael Sant'Ambrogio, *The Extra-legislative Veto*, 102 GEO. L.J. 351, 361 (2014).

¹³⁹ "A certain degree of discretion, and thus of lawmaking, inheres in most executive . . . action." *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 475 (2001) (internal citations and punctuation omitted).

¹⁴⁰ See Barron & Rakoff, *supra* note 6, at 267.

agencies cannot act without congressional authorization, and sometimes Congress specifically commands the agency to issue a regulation. The distinction between congressional and administrative action thus may be quite thin.

(iv) The Instigation of Nonenforcement

Another factor is whether the agency has authority to engage in nonenforcement *sua sponte*, i.e., on its own volition, or whether it must be made following the receipt of a petition or other such device. Professors Barron and Rakoff consider authority to waive legal duties *sua sponte* to be a “bigger” power.¹⁴¹ Prosecutorial discretion generally is something that the agency can choose to do on a *sua sponte* basis. (Indeed, if the agency simply chooses not to investigate, it may not even know that a violation has occurred.) But when it comes to prospective nonenforcement, an agency with power to waive or exempt noncompliance without a petition presumably has more discretion.

(v) The Criteria to Evaluate Potential Nonenforcement

The clarity of the criteria used by the agency in making a nonenforcement decision is also important. Certain agencies, for instance, may have specific requirements that must be met before the agency can engage in nonenforcement (e.g., as discussed below, at some agencies a waiver or exemption can only be given if the regulated party has proposed an alternative that is equally safe; likewise, there may be other forms of conditional nonenforcement, i.e., if X is done, nonenforcement results). By contrast, other agencies may have broad discretion; indeed some agencies have authority to issue waivers based on “the public interest.”¹⁴² In terms of authority, the more flexible the standard, the more powerful the agency. Discretion, of course, enables the agency to target nonenforcement with greater precision, but also increases the risk of bias or at least the appearance of bias. And this too is a spectrum.¹⁴³

(vi) The Breadth of Nonenforcement Across Entities

At the same time, it is also important to observe how many entities are affected by the agency’s nonenforcement decision. An agency may decide to waive a

¹⁴¹ *Id.* at 277–78.

¹⁴² See, e.g., Sergio J. Galvis & Angel L. Saad, *Collective Action Clauses: Recent Progress and Challenges Ahead*, 35 GEO. J. INT’L L. 713, 728 (2004) (explaining that “the SEC has authority to waive any provision of the Trust Indenture Act for reasons of public interest”); 49 U.S.C. § 31315 (“The Secretary may grant a waiver that relieves a person from compliance in whole or in part with a regulation issued under this chapter . . . if the Secretary determines that it is in the public interest to grant the waiver and that the waiver is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver . . .”).

¹⁴³ Cf. Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 968 (2017).

requirement for a single entity, or it may do for an entire category of entities.¹⁴⁴ Both of these approaches have pluses and minuses. When nonenforcement is limited to a single entity, for instance, the aggregate amount of nonenforcement is less than when it applies to a great number of entities. To the extent that compliance with the law is valuable, this is a good thing. Yet if one worries about evenhandedness, categorical nonenforcement may be superior, for instance because it requires drawing fewer nuanced lines.¹⁴⁵ For purposes here, it is enough to observe that the two are distinct.

(vii) The Breadth of Nonenforcement for a Particular Entity

The breadth of nonenforcement for a particular entity also matters. For example, an agency may choose to enforce parts of the law while leaving other parts of the law unenforced, or it may choose not to enforce the law at all against that entity. Partial nonenforcement raises different sorts of considerations than complete nonenforcement. On one hand, it may be less objectionable because the violator is not wholly off the hook. On the other hand, it may be more objectionable if it minimizes public scrutiny. Likewise, an agency may elect to excuse a procedural violation in the midst of a proceeding but not forego the proceeding itself.

(viii) Whether Nonenforcement Is Publicly Disclosed

Another factor is whether the agency's nonenforcement programs, procedures, and decisions are available to the public. Public scrutiny may be a check on abuse.¹⁴⁶ Publicity, however, may also create incentives for agencies to enforce the law even in situations in which nonenforcement makes sense, if, for example, the explanation for nonenforcement may be misunderstood or require disclosing sensitive information. Few argue for complete transparency.¹⁴⁷ Publicity, of course, is also not a binary concept. An agency could make sure that its procedures for requesting and obtaining nonenforcement decisions are public. It could also provide that all requests for nonenforcement are public—either before the decision is made (thus potentially allowing others to comment) or after the decision is made. Similarly, an agency could generally make information about its nonenforcement decisions available, subject to exceptions (for instance, if privacy is implicated).

¹⁴⁴ To the extent that permitting is deemed nonenforcement, there may be a general or a specific permit, for instance. See, e.g., *Sierra Club v. U.S. Army Corps of Engr's*, 803 F.3d 31, 38 (D.C. Cir. 2015).

¹⁴⁵ See, e.g., Osofsky, *supra* note 115.

¹⁴⁶ See, e.g., T. Alex Aleinikoff, *Non-Judicial Checks on Agency Action*, 49 ADMIN. L. REV. 193, 195–96 (1997) (“Old-fashioned publicity is another significant check on agency action.”).

¹⁴⁷ See generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 902–03 (2006) (setting forth some of “transparency’s limits”).

(ix) Benefit to Agency

Another consideration is the question of what the agency “gets,” if anything, for allowing nonenforcement. For instance, what must a regulated party do for the agency to obtain a waiver? Is a waiver given as of right, or must a regulated party in a sense “trade” for it by agreeing to do something else that the agency wants, perhaps something not squarely related to the particular issue at hand (i.e., something “outside of the program”)? One problem with nonenforcement is that an agency might leverage its power to obtain ends that it may not be able to obtain otherwise within the law. To the extent that the criteria are objective, an agency’s ability to leverage authority in this way would be reduced (though of course not eliminated).

(x) Whether There Is Judicial Review

Finally, it also is useful to know whether nonenforcement is subject to judicial review. If the decision is subject to review, perhaps there is more reason to be confident that agency discretion has not been abused because judicial review may serve a disciplining role.¹⁴⁸ Of course, this is not to say that a nonenforcement regime without judicial review is always necessarily a worse one; review has costs of its own.¹⁴⁹ Yet in evaluating whether a nonenforcement scheme is susceptible to abuse, judicial review surely matters.¹⁵⁰

C. A Visual Taxonomy of Nonenforcement

When all of these factors are considered, a visual taxonomy of nonenforcement is possible. To be sure, it is imperfect, especially because many of these factors are best understood as a spectrum. Similarly, one can imagine other visual representations. Even so, this is a useful way to visualize nonenforcement. For instance, one agency may waive a statutory duty upon written request for a specific entity using specific standards while providing notice to the public of its nonenforcement decision. Another agency, by contrast, may exercise prosecutorial discretion *sua sponte* for a category of entities by applying an open-ended standard, without providing any notice to the public. Those two situations are distinct and should not be conflated.¹⁵¹

¹⁴⁸ See, e.g., Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 529 (“[A] world without aggressive judicial review might well suffer from increases in lawlessness, carelessness, overzealous regulatory controls, and inadequate regulatory protection.”).

¹⁴⁹ See, e.g., Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U.L. REV. 673 (2015) (arguing that some checks on discretion are not cost-justified).

¹⁵⁰ Cf. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59–60 (1975).

¹⁵¹ To be clear, that conclusion is not the only one that can be drawn. For instance, categorical nonenforcement may be less biased. See, e.g., Osofsky, *supra* note 115, at 73–75.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

Taxonomy of Nonenforcement				
		Pre-Violation		Post-Violation
		Waiver	Exemption	Prosecutorial Discretion
Who Decides	Agency Principals			
	Agency Staff			
Policy Nature	Policy-Driven			
	Technocratic			
Legal Duty	Statutory Duty			
	Regulatory Duty			
Instigate	<i>Sua Sponte</i>			
	Upon Request			
Criteria	Open-Ended			
	Specific			
Breadth Across Entities	Categorical			
	Individualized			
Breadth for Entity	Complete			
	Partial			
Public Notice	No Public Notice			
	Public Notice			
Agency Benefit	Within Program			
	Outside of Program			
Judicial Review	Unreviewable			
	Reviewable			

III. STUDY FINDINGS

With this conceptual understanding in mind, we can begin assessing how agencies behave in the real world. How often do they engage in nonenforcement, and is the rate comparable across agencies? What specifically drives nonenforcement decisions, and are those factors consistent across agencies? Which agencies publicize their procedures and decisions?

One of the purposes of this Report is to fill this knowledge gap. By examining certain agencies, complete with survey information and interviews with agency officials, it is possible to gain a better understanding of the nitty-gritty world of nonenforcement. To be clear, this Report does not analyze every federal agency and even within the agencies covered, it is possible that there may be additional types of nonenforcement. Yet despite these limitations, this Report provides new insights, and it also highlights areas where additional research would be valuable

A. Study Methodology

This study was conducted in three parts. First, in consultation with research assistants and through conversations with others, the author conducted a preliminary investigation of nonenforcement powers and procedures at a large number of agencies. This was done by reviewing the U.S. Code, the Code of Federal Regulations, law review articles, and agency websites. The purpose of this initial step was to identify agencies meriting additional research, for instance because they have robust nonenforcement powers or because they seem representative of other sorts of agencies.

Following that initial step, the author, working with an ACUS staff member, approached various agencies identified as potentially useful subjects. In particular, to gain a better appreciation of the reality “on the ground,” the author prepared a survey (included as the Appendix to this Report) that was sent to agencies that had indicated a willingness to participate in the study. This survey poses questions about how the agency at issue evaluates nonenforcement, and the various types of nonenforcement powers it has. The survey is divided into five parts. First, it asks about the agency’s statutory power to “waive” legal duties of private parties. Second, it asks about the agency’s power to “waive” legal duties for States, i.e., so-called “federalism waivers.”¹⁵²

¹⁵² Unfortunately, the agencies that participated in the survey do not report meaningful use of this type of waiver. Hence, it is not addressed in this Report.

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

Third, it asks about the agency's practices regarding "exemptions" from regulatory schemes. Fourth, it asks about the agency's practices regarding prosecutorial discretion, i.e., decisions to not enforce the law against violations that have already occurred. And fifth, it asks whether there are other sorts of nonenforcement programs worth considering, plus whether those outside of the agency participate in the process, whether the agency has best practices to recommend, and whether the agency has a response to the analysis set out in the D.C. Circuit's *NetworkIP* decision.¹⁵³

Again working through ACUS, several follow-up messages were sent to agencies in an effort to ensure robust participation in the survey. Following this effort, nine agencies submitted a survey response.¹⁵⁴ Unsurprisingly, not all agencies agreed to answer every question posed in the survey. Even so, officials graciously answered most of the questions and, importantly, often compiled and provided agency-specific data.

Following receipt of the completed surveys, the author—again in consultation with an ACUS staff member—approached the agencies that participated in the survey to ask whether they would be willing to participate in interviews, either in person or on the telephone. Representatives of four agencies agreed: the CFPB, FAA, MSHA, and TTB. To encourage a candid conversation, those interviews were not recorded. For these interviews, however, the author was accompanied by either one of two ACUS interns. These interns took detailed notes (which are on file with the author). The purpose of this step was to generate several case studies of how specific agencies make nonenforcement decisions. (Note, for this Report, the author has taken an agency's characterization of its authority as a given, e.g., the Report does not evaluate whether practices are consistent with statutory authority or whether an agency's characterization of a power as granting waiver or exemption authority is accurate.)

B. General Survey Findings

One of the most important findings from the survey is that agency practices regarding nonenforcement vary widely. Some agencies engage in robust

¹⁵³ This question was included in the survey because the D.C. Circuit's analysis is especially stark and because, as noted above, there is little precedent involving nonenforcement.

¹⁵⁴ As noted in the introduction, these agencies are: the TTB, CDFI, CFPB, EBSA, FAA, FMCSA, FTA, MSHA, and PHMSA. Two of these agencies are within the Department of Treasury (TTB and CDFI), two are within the Department of Labor (EBSA and MSHA), and four are within the Department of Transportation (FAA, FMCSA, FTA, and PHMSA). The CFPB is "an independent bureau" that is "established in the Federal Reserve System." 12 U.S.C. § 5491(a).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

nonenforcement; others essentially never do. All the while, some agencies grant requests quite often while others do so less frequently. Some agencies make their decisions public; others do not. In short, because the administrative state is not monolithic, with different agencies having different missions and histories, it is hardly surprising that agency nonenforcement is also not monolithic. The survey, however, illustrates just how diverse all of this really is.

Before addressing the *substantive* variety, however, it is important to recognize another result that comes from the survey: agencies use very different vocabularies. As explained above, for purposes of this Report, the terms “waiver” and “exemption” are assigned specific definitions. Waiver authority is power explicitly granted to an agency by Congress to prospectively not enforce either statutory or regulatory duties. Exemption authority, by contrast, is implicit power to prospectively not enforce statutory or regulatory duties because the agency has concluded (often by applying equity-like principles) that such nonenforcement is necessary to effectuate its other duties.¹⁵⁵

Yet after even a few moments in the real world, it is obvious that these terms have no fixed definitions. In fact, agencies may understand these terms at least somewhat differently, and it is possible that officials even within the same agency understand them differently. Nor has Congress consistently distinguished between the terms in legislation.¹⁵⁶ Indeed, before the FAA could begin to fill out the survey, it

¹⁵⁵ As explained above, the author recognizes that this distinction is not always easy to draw. By definition, an agency cannot act without congressional authorization. The level of abstraction, however, varies.

¹⁵⁶ See, e.g., 49 U.S.C. § 31315(a), (b) (distinguishing between “waivers” and “exemptions,” in part, by stating that waivers are of a shorter duration and exemptions apply to an individual person or class of persons); 33 U.S.C. § 1223a(2) (distinguishing between “waivers” and “exemptions” by stating that exemptions apply to a vessel while waivers apply to water bodies); 21 U.S.C. § 360eee-1(3)(A) (distinguishing between “waivers,” “exceptions,” and “exemptions,” with waivers allowing the agency to not enforce “any of the requirements set forth in this section” where there is “undue economic hardship” or “emergency medical reasons,” exceptions allowing the agency to change labeling requirements if there is not enough space on the packaging, and exemptions apparently granting the agency catchall authority “by which the Secretary may determine other products or transactions that shall be exempt from the requirements of this section”); 22 U.S.C. § 9228(a), (b) (Congress itself declaring that certain “activities shall be exempt from sanctions” but also stating that the President, in addition, “may waive” certain sanctions); cf. 15 U.S.C. § 2617(f)(1), (2) (under the general category “waivers,” including no separate discussion of waivers but instead including two subsections relating to “exemptions,” in which subsections waivers are discussed); 42 U.S.C. § 3057e(c)(2) (“The Assistant Secretary shall provide waivers and exemptions of the reporting requirements of subsection (a)(3) of this section for applicants that serve Indian populations in geographically isolated areas, or applicants that serve small Indian

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

required clarification regarding these terms. That said, although there is no well-defined line between waiver and exemption that commands universal approval, it appears that agencies generally appreciate the distinction between prospective nonenforcement (whether called waiver or exemption) and retrospective nonenforcement (prosecutorial discretion). One takeaway from this Report, therefore, may be that a distinction between waiver and exemption is not worth preserving, and certainly not worth fighting about.¹⁵⁷

(i) Findings Regarding Waiver

To begin, a majority of the agencies that participated in the survey identified authority to waive some statutory or regulatory requirements. In fact, FAA has so many potential authorizations of waiver that it was unable to catalog them all; it explained that “[t]he specific instances of statutory waiver authority are as varied as the agency’s authority is broad, encompassing Title 49 of the United States Code Subtitle VII and significant otherwise uncodified Public Laws.”¹⁵⁸ (The FAA did identify eight distinct grants of waiver authority, seven from the same title of the U.S. Code, which are discussed in more detail below.¹⁵⁹) The PHMSA can waive both statutory and regulatory duties under the Hazardous Materials Safety Program¹⁶⁰ and the Pipeline Safety Program,¹⁶¹ while the FMCSA has authority to not enforce motor carrier safety

populations, where the small scale of the project, the nature of the applicant, or other factors make the reporting requirements unreasonable under the circumstances.”).

¹⁵⁷ Given the taxonomy of nonenforcement set out above, it would be helpful to be able to map these agency practices onto the taxonomy. Unfortunately, instances of nonenforcement can be *sui generis* and the survey instrument was not detailed enough to capture the nuance. For the agencies that agreed to be interviewed, the author was able to delve more deeply into some of the issues set out in the taxonomy but even then, not at the detail necessary to map practices onto the taxonomy. Similarly, it is difficult to make apples-to-apples comparisons across agencies.

¹⁵⁸ FAA Survey Response (on file with author).

¹⁵⁹ See *infra*, Part III.C(ii).

¹⁶⁰ See 49 U.S.C. § 5117(a)(1) (“As provided under procedures prescribed by regulation, the Secretary may issue, modify, or terminate a special permit authorizing a variance from this chapter or a regulation prescribed under section 5103(b), 5104, 5110, or 5112 of this title to a person performing a function regulated by the Secretary under section 5103(b)(1) in a way that achieves a safety level—(A) at least equal to the safety level required under this chapter; or (B) consistent with the public interest and this chapter, if a required safety level does not exist.”).

¹⁶¹ See *id.* § 60118(c)(1)(A) (“On application of an owner or operator of a pipeline facility, the Secretary by order may waive compliance with any part of an applicable standard prescribed under this chapter with respect to such facility on terms the Secretary considers appropriate if the Secretary determines that the waiver is not inconsistent with pipeline safety.”); *id.* § 60118(c)(2)(A) (“The Secretary by order may

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

regulations¹⁶² and the FTA may waive requirements for certain grants and “Buy America” requirements.¹⁶³ The MSHA has authority to grant modifications of mine safety requirements under a process it calls “petitions for modification,” which is discussed in greater detail below.¹⁶⁴ Likewise, the TTB responded to the survey by listing eight grants of statutory authority.¹⁶⁵ Several of the laws administered by the CFPB grant authority akin to what this Report refers to as “waivers,” but, as explained below, the Bureau has not granted such waivers in its ordinary practice. The CDFI reports that it does not have waiver authority, and the EBSA classifies its nonenforcement authority as exemption authority rather than waiver authority.¹⁶⁶ Nevertheless, it is safe to say, at least *de jure*, that waiver authority is quite common.

wave compliance with any part of an applicable standard prescribed under this chapter on terms the Secretary considers appropriate without prior notice and comment if the Secretary determines that—(i) it is in the public interest to grant the waiver; (ii) the waiver is not inconsistent with pipeline safety; and (iii) the waiver is necessary to address an actual or impending emergency involving pipeline transportation, including an emergency caused by a natural or manmade disaster.”).

¹⁶² See *id.* § 31315(a) (“The Secretary may grant a waiver that relieves a person from compliance in whole or in part with a regulation issued under this chapter or section 31136 if the Secretary determines that it is in the public interest to grant the waiver and that the waiver is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver—(1) for a period not in excess of 3 months; (2) limited in scope and circumstances; (3) for nonemergency and unique events; and (4) subject to such conditions as the Secretary may impose.”); *id.* § 31136(e) (“The Secretary may grant in accordance with section 31315 waivers and exemptions from, or conduct pilot programs with respect to, any regulations prescribed under this section.”).

¹⁶³ See *id.* § 5324(e) (“The Secretary may waive, in whole or part, the non-Federal share required [under various provisions of federal law].”); *id.* § 5323(j)(2) (“The Secretary may waive paragraph (1) of this subsection if the Secretary finds that—(A) applying paragraph (1) would be inconsistent with the public interest; (B) the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; (C) [complex formula for rolling stock procurement]; (D) including domestic material will increase the cost of the overall project by more than 25 percent.”). The FTA also has nonenforcement authority regarding emergencies; it is unclear whether that authority should be deemed waiver authority or exemption authority. See *id.* § 5324(d).

¹⁶⁴ See *infra* Part III.C(iii).

¹⁶⁵ See 26 U.S.C. §§ 5181(b), 5201(b), 5312, 5417, 5554, 5556, 5561, 5162.

¹⁶⁶ EBSA Survey Response (on file with author). For what it is worth, one might classify at least some of the EBSA’s authority as “waiver” rather than “exemption” authority because Congress expressly allows the agency to not enforce the law. See 5 U.S.C. § 8477(c)(3) (“The Secretary of Labor may, in accordance with procedures which the Secretary shall by regulation prescribe, grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by paragraph (2).”). That said, because Congress called it an “exemption,” and the agency did too, this Report will discuss such power in the next section.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

De facto, the exercise of waiver authority differs a great deal. Indeed, the number of requests for waiver reported by these agencies varied markedly – no doubt because the nature of the regulatory missions of the relevant agencies also differ markedly. The TTB, for instance, reports that it receives “[l]ess than 25” requests for a waiver in any typical year, despite having eight potentially applicable statutes.¹⁶⁷ The PHMSA, by contrast, receives over 1,800 requests relating to hazardous materials alone.¹⁶⁸ The FMCSA listed just eight requests for waivers in a single year, and the MSHA receives approximately 50 per year (it reported 42 in one year and 64 in another). The FAA does not record the number of waiver requests that it receives (as explained below, however, the FAA does record the number of exemption requests that it receives, and the number is in the thousands).

Agencies vary in the percentage of requests that they grant. The FMCSA says it grants virtually all requests (“99 percent”),¹⁶⁹ as does the FTA for its two express statutory bases for nonenforcement.¹⁷⁰ By contrast, the MSHA grants a much smaller percentage – somewhere in the range of 36%.¹⁷¹ (As discussed in greater detail below, sometimes a request is neither granted nor denied. Instead, the request is withdrawn because the mine is able to find another approach to the problem that does not require a waiver.¹⁷²) The PHMSA simply says the grant rate “[v]aries,”¹⁷³ and the FAA has only

¹⁶⁷ TTB Survey Response (on file with author).

¹⁶⁸ PHMSA Survey Response (on file with author). Almost half of these, however, were request for renewals. The agency typically receives less than ten special permit requests for pipelines.

¹⁶⁹ FMCSA Survey Response (on file with author).

¹⁷⁰ See FTA Survey Response (on file with author) (reporting “[c]lose to 100%” under one and that it “has not denied any waive requests since passage of the FAST Act”).

¹⁷¹ MSHA Survey Response (on file with author).

¹⁷² It is interesting that some agencies essentially always grant waivers when requested and some do not. It is hard to draw any real conclusions from this, however, at least based on the raw data alone. Much, no doubt, depends on the nature of the duty being waived. Similarly, it is possible that regulated parties might learn over time what types of requests are granted and which types are not, and so engage in “self-sorting” before filing. Likewise, some regulated parties may engage in informal discussion with the agency that lets them know whether a waiver would likely be granted; if that happens with some agencies more than others, a cross-agency comparison may be misleading. These sorts of questions should be the focus of additional research.

¹⁷³ PHMSA Survey Response, *supra* note 168.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

recently “begun tracking waiver requests, but does not currently have enough data to reflect a typical year.”¹⁷⁴ The TTB grants “[a]pproximately 85%” of requests.¹⁷⁵

Similarly, of the agencies that report having waiver authority, *sua sponte* waiver of statutory or regulatory duties appears to be, in the FAA’s words, “rare.”¹⁷⁶ Indeed, the PHMSA, MSHA, and TTB say they never exercise waiver authority without a request. The FMCSA says it has only does so “once to date,” and that was only a “limited 90-day waiver” of certain “hours-of-service regulations.”¹⁷⁷ The FTA too only reports one such *sua sponte* waiver: “Subsequent to Hurricane Sandy, FTA issued blanket waivers for several statutory and regulatory provisions.”¹⁷⁸ To the extent that these agencies are representative of agencies generally, it thus appears uncommon for an agency to prospectively forego enforcement without a request from a regulated party for it to do so.

Agency procedures also vary. For instance, Congress set forth specific requirements for the PHMSA (including both procedural and substantive requirements),¹⁷⁹ and, interestingly, has also ordered the agency to deal with applications “promptly.”¹⁸⁰ Congress also specified how long such nonenforcement can

¹⁷⁴ FAA Survey Response, *supra* note 158.

¹⁷⁵ TTB Survey Response, *supra* note 167.

¹⁷⁶ See FAA Survey Response, *supra* note 158 (“The FAA has granted waivers under Title 51 without a request but they are rare.”) (minor typographical error omitted).

¹⁷⁷ FMCSA Survey Response, *supra* note 169.

¹⁷⁸ FTA Survey Response, *supra* note 170.

¹⁷⁹ See 49 U.S.C. § 5117(b) (“When applying for a special permit or renewal of a special permit under this section, the person must provide a safety analysis prescribed by the Secretary that justifies the special permit. The Secretary shall publish in the Federal Register notice that an application for a new special permit or a modification to an existing special permit has been filed and shall give the public an opportunity to inspect the safety analysis and comment on the application. The Secretary shall make available to the public on the Department of Transportation’s Internet Web site any special permit other than a new special permit or a modification to an existing special permit and shall give the public an opportunity to inspect the safety analysis and comment on the application for a period of not more than 15 days.”).

¹⁸⁰ See *id.* § 5117(c) (“The Secretary shall issue or renew a special permit or approval for which an application was filed or deny such issuance or renewal within 120 days after the first day of the month following the date of the filing of such application, or the Secretary shall make available to the public a statement of the reason why the Secretary’s decision on a special permit or approval is delayed, along with an estimate of the additional time necessary before the decision is made.”).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

continue.¹⁸¹ And as to pipelines, Congress specifically requires the PHMSA to give a reason for granting a waiver.¹⁸² The FMCSA requires a showing of equivalent safety, but has different limits; a waiver cannot exceed three months, must be “limited in scope and circumstances,” must be “for nonemergency and unique events,” and will be “subject to such conditions as the Secretary may impose.”¹⁸³ The FTA for its part will seek public comment and “will issue a formal determination, which also is published in the *Federal Register*.”¹⁸⁴ (The process used by the FAA, MSHA, and TTB is explained below.)

Finally, some but not all of these agencies make their waiver decisions public. The TTB, for instance, does not because “the decisions are fact-specific, and disclosure rules under the Internal Revenue Code generally prevent the agency from publicizing the decisions.”¹⁸⁵ Similarly, the FMCSA reports that it has authority “to grant short-term waivers for special situations without providing public notice.”¹⁸⁶ The MSHA, by contrast, “publishes all petitions for modification, as well as all granted modifications, in the Federal Register,” and “publishes all decisions (or dispositions of any type) on its website.”¹⁸⁷ The FTA also “publishes requests for waivers and responses in the emergency relief docket on www.regulations.gov,” and publishes other types of decisions on its own webpage or in the Federal Register.¹⁸⁸ The PHMSA also makes its

¹⁸¹ See *id.* § 5117(a)(2) (“A special permit issued under this section shall be effective for an initial period of not more than 2 years and may be renewed by the Secretary upon application for successive periods of not more than 4 years each [subject to certain exceptions].”).

¹⁸² See *id.* § 60118(c)(3). As to pipelines, Congress also set out both substantive and procedural requirements; the agency, for instance, must show that waiver “is not inconsistent with pipeline safety” and can only act “after notice and an opportunity for a hearing,” unless there is an emergency, in which case the agency can act without a hearing but must show “the waiver is necessary to address an actual or impending emergency involving pipeline transportation, including an emergency caused by a natural or manmade disaster.” *Id.* § 60118(c). Such emergency waivers “may be issued for a period of not more than 60 days and may be renewed . . . only after notice and an opportunity for a hearing on the waiver,” and the agency “shall immediately revoke the waiver if continuation of the waiver would not be consistent with the goals and objectives of this chapter.” *Id.* § 60118(c)(2)(B).

¹⁸³ 49 U.S.C. § 31315(a). The agency has supplemented the statute with more detailed regulations. See 49 C.F.R. § 381.210. The FMCSA then endeavors to provide an answer within 120 days.

¹⁸⁴ FTA Survey Response, *supra* note 170 (discussing 49 U.S.C. § 5323(m)(3) and 49 C.F.R. § 661.7).

¹⁸⁵ TTB Survey Response, *supra* note 167.

¹⁸⁶ MSHA Survey Response, *supra* note 171.

¹⁸⁷ FMCSA Survey Response, *supra* note 169.

¹⁸⁸ FTA Survey Response, *supra* note 170.

decisions publicly available—indeed, Congress requires it.¹⁸⁹ And as explained in greater detail in subsection (ii), “the FAA publishes those decisions in the Federal Register that are novel, significant, or are of first impression to alert the public to such determinations.”¹⁹⁰

(ii) Findings Regarding Exemptions

There also is a healthy exemption practice across agencies. The PHMSA responded that its “hazardous materials approvals program could potentially be considered to fall under the category of ‘equitable exemptions,’ insofar as it is not specifically listed in Chapter 51 of Title 49 of the U.S. Code.”¹⁹¹ This process involves “written consent, including a competent authority approval, from the Associate Administrator or other designated Department official, to perform a function that requires prior consent under the Hazardous Materials Regulations,” and can apply to “a wide array of activities in the hazardous materials industry.”¹⁹² The FAA, in turn, reports that it has “a robust practice,” especially because the agency included its treatment of “small unmanned aircraft systems”—often referred to as drones—as part of its exemption regime.¹⁹³ The TTB, FTA, CFPB and CDFI report that they do not have agency-created procedures to permit non-compliance that do not have an express statutory basis.

The number of exemption requests, moreover, can be astounding. The PHMSA, for instance, reports that it receives “[a]pproximately 16,000” requests per year, of which it grants between 70% to 85% depending on the type.¹⁹⁴ Since August 2016, when “the FAA published a final rule allowing civil operation” of unmanned aircraft systems under a set weight, it has received over 16,000 requests; of those, it has denied over 7,500 and granted about 4,000, and the rest remain pending.¹⁹⁵ Under other programs, it “receives approximately 400-500 requests for exemption per year,” of

¹⁸⁹ PHMSA Survey Response, *supra* note 168. See also 49 U.S.C. § 5117(b).

¹⁹⁰ FAA Survey Response, *supra* note 158.

¹⁹¹ PHMSA Survey Response, *supra* note 168.

¹⁹² *Id.*

¹⁹³ FAA Survey Response, *supra* note 158.

¹⁹⁴ PHMSA Survey Response, *supra* note 168. Requests involving explosives do better than those involving fireworks. See *id.*

¹⁹⁵ FAA Survey Response, *supra* note 158.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

which it grants 73%.¹⁹⁶ The FMCSA receives about 1,100 requests per year, and grants about 58%.¹⁹⁷ The EBSA noted that it has not granted any exemptions in 2017 (at least as of July 31, 2017), but that it typically receives less than 100 requests per year, which are spread across different programs.¹⁹⁸ However, for some types of exemptions, it grants about half of applications, whereas for applications that seek a reduction in civil penalties it grants less than 5%.¹⁹⁹

As with waivers, it appears that agencies do not often grant exemptions without a petition or application. The PHMSA, for instance, says it never does so²⁰⁰; the FAA says it generally does not, but that sometimes it will.²⁰¹ The EBSA reports that between 2012 and 2016, the agency “granted an exemption without a formal applicant approximately 9 times (2 new exemptions and 7 amendments to existing exemptions),” but also stressed that “[i]t is unlikely that EBSA would propose an individual exemption on its own motion.”²⁰² The FMCSA has only done so “once to date.”²⁰³

¹⁹⁶ *Id.*

¹⁹⁷ FMCSA Survey Response, *supra* note 169.

¹⁹⁸ EBSA Survey Response, *supra* note 166.

¹⁹⁹ See *id.* (explaining that the EBSA may approve three types of exemptions: exemptions allowed by § 408(a) of the Employee Retirement Income Security Act of 1977 and § 4975(c)(2) of the Internal Revenue Code or traditional exemptions, expedited exemptions, and 502(l) petitions; the agency estimates that it granted about 59 traditional exemptions, 29 expedited exemptions, and ten 502(l) petitions between 2007 and 2011, and that it granted about 54% of traditional exemption requests, 46% of the expedited requests, and about 5% of the 501(l) petitions, at least partially).

²⁰⁰ PHMSA Survey Response, *supra* note 168.

²⁰¹ See FAA Survey Response, *supra* note 158 (“Our exemption process, outlined in 14 CFR part 11, is well known in the industry. Typically, a petitioner requests exemption from a specific regulation (by section) for a limited period of time. The request must include what actions the petitioner plans to take to maintain a level of safety equivalent to that provided by the regulation, and why a grant would be in the public interest. In some instances, a petitioner will err in its assessment of what regulation applies to its situation or what relief it requires. In those instances, the FAA may grant relief from the necessary sections, explaining the issue in its disposition. Field personnel of the FAA may direct noncompliant operators to apply for an exemption when discrepancies are found.”).

²⁰² EBSA Survey Response, *supra* note 166.

²⁰³ FMCSA Survey Response, *supra* note 169.

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

The requirements for exemptions, like waivers, also vary. The PHMSA, for example, has a “desk guide,” among other resources, dedicated to the question.²⁰⁴ The FAA requires that requests be submitted on a public docket, and “[m]ost requests are reviewed by an attorney in the Regulations Division of the FAA’s Office of the Chief Counsel.”²⁰⁵ The FMCSA’s procedures are similar; it also has an office that is “responsible for reviewing exemption requests and making recommendations to the Administrator.”²⁰⁶ The EBSA’s procedures vary, depending on the type of exemption at issue.²⁰⁷ Each of these agencies generally makes its decisions publicly available.

²⁰⁴ PHMSA Survey Response, *supra* note 168; see also DEP’T OF TRANSP., PHMSA APPROVALS PROGRAM DESK GUIDE (2016), <https://www.phmsa.dot.gov/approvals-and-permits/hazmat/approvals-program-desk-guide> (last visited Oct. 31, 2017).

²⁰⁵ FAA Survey Response, *supra* note 158.

²⁰⁶ FMCSA Survey Response, *supra* note 169.

²⁰⁷ EBSA Survey Response, *supra* note 166. According to the agency’s survey response, it reviews written requests that comply with the regulations in 29 C.F.R. § 2570, and asks questions or requests further information “to the extent the application is deficient or raises additional questions.” *Id.* at 3. Generally, an application for a traditional exemption should include “[a] detailed discussion of the exemption transaction and relevant background facts,” the reasons why a plan would enter into the exemption transaction, complete descriptions of the prohibited transactions involved, and any other requested evidence. *Id.* This will all become part of the administrative record. *Id.* Applications are granted when, after careful evaluation, the exception “would be administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of the participants and beneficiaries . . .” *Id.* at 4. A notice of final exemption is then published in the Federal Register. *Id.* And if the agency cannot make its required findings, applicants are notified in writing of tentative determinations as well as the reasoning behind the decision. *Id.* at 3.

The main difference with an expedited application is the applicant may receive a “final authorization to engage in a transaction on a prospective basis” as little as 78 days after the application is received and acknowledged by the agency. EBSA Survey Response, *supra* note 166, at 4. However, the applicant must also show that the proposed transaction is substantially similar with either two exemptions that were granted within the last five years, or one exemption that was granted within the last ten years and a final authorization received in the last five years. *Id.* If the applicant is unable to do so, the agency offers the applicant the ability to convert the application into a traditional application. *Id.* But if the agency grants tentative authorization, the applicant is required to deliver notice to all interested parties, informing them of their right to submit comments or to request a hearing. *Id.* Then, after considering the commenters’ input, EBSA may grant an exemption. *Id.* No notice is published in the Federal Register. *Id.*

502(I) petitions are governed by 29 C.F.R. § 2570.85 and EBSA generally relies on established guidelines as to what constitutes good faith by a fiduciary when a fiduciary has engaged in a prohibited transaction. EBSA Survey Response, *supra* note 166, at 4. “All petitions must be in writing and contain the petitioner’s name, a detailed description of the breach or violation, a recitation of the facts which support the basis for waiver or reduction accompanied by supporting documentation, and a declaration under penalty of perjury as to the veracity of the information of the petition.” *Id.* EBSA does not publish copies of grants or denials of 502(I) petitions in the Federal Register. *Id.* at 5.

(iii) Findings Regarding Prosecutorial Discretion

Agencies were reticent to share too much information about their exercises of prosecutorial discretion. This is not altogether surprising. An agency's decision to not enforce the law where violations have occurred can be sensitive.²⁰⁸ Agencies may not want regulated parties to know exactly where the line is; if an agency's enforcement priorities are cloaked in mystery, more entities will comply with the law.²⁰⁹

The PHMSA, EBSA, MSHA, and CDFI did not respond to this section of the survey, and the FTA said that it does not engage in prosecutorial discretion, because "[t]o the extent possible violations are discovered, FTA requires grantees to take corrective action."²¹⁰ The TTB simply gave a one-word answer when asked whether it ever "choose[s] not to enforce the law against known violations": "No."²¹¹

Some of the survey responses were lengthier. The FAA, in particular, explained its approach to prosecutorial discretion in some detail:

[T]he FAA does not exempt persons who have violated FAA statutes or regulations from the requirements of those provisions. Rather, when an FAA inspection produces sufficient evidence to conclude that a regulated person has violated a statute or regulation, the FAA takes action appropriate to address the noncompliance. The types of actions the FAA takes, and the bases for selecting such actions, are detailed in FAA Order 2150.3B, chap. 5, at 5-1 to 5-9, which guides FAA personnel in the exercise of prosecutorial discretion (available online). Pursuant to this policy, the FAA may take compliance action, administrative action, or legal enforcement action.

The FAA generally uses compliance and administrative actions (which do not result in remedial or punitive FAA enforcement) to ensure that

²⁰⁸ See, e.g., Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345 (2013) (using Freedom of Information Act ("FOIA") to try to investigate prosecutorial discretion in the context of immigration).

²⁰⁹ See, e.g., *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1192-93 (D.C. Cir. 2009) ("[Freedom of Information Act] Exemption 7(E) shields information if 'disclosure could reasonably be expected to risk circumvention of the law.' If the FOIA request here sought a checklist used by agents to detect fraudulent tax schemes or the words most likely to trigger increased surveillance during a wiretap, the applicability of the exemption would be obvious.") (quoting 5 U.S.C. § 552(b)(7)(E)).

²¹⁰ FTA Survey Response, *supra* note 170.

²¹¹ TTB Survey Response, *supra* note 167.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

regulated persons return to full compliance and take measures to prevent recurrence. It is appropriate for FAA personnel to take legal enforcement action (for remedial or punitive purposes) against a regulated person for noncompliances resulting from: intentional conduct, reckless conduct, failure to complete corrective action, conduct creating or threatening to create an unacceptable risk to safety, conduct where legal enforcement action is required by law, repeated noncompliance, the provision of inaccurate data to the FAA, actions pertaining to competency or qualification, and law enforcement-related activities. Regardless of how a noncompliance is addressed, the regulated person must return to compliance, now and for the future, or legal enforcement action may be taken.²¹²

The FMCSA, after explaining its exemption procedure, also shared some thoughts on prosecutorial discretion that bear quoting:

In addition, FMCSA conducted almost 8,000 investigations in FY2016. Regulatory violations of varying severity are found in almost every investigation. The investigations resulted in the issuance of approximately 4,400 Notices of Claim alleging one or more violations of the safety, commercial, or hazardous materials regulations. As more fully described below, FMCSA regularly discovers violations for which it chooses not to take enforcement action. FMCSA's overarching goal is safety, so before it initiates an enforcement action, it considers whether that enforcement action is the best method for achieving compliance. . . . Because it is likely that regulatory violations were found in almost all of the investigations, FMCSA's decision to not issue Notices of Claim in the other 3,000+ investigations could be described as an exercise of prosecutorial discretion.²¹³

Ultimately, prosecutorial discretion is an area of administrative law that still in many respects is an empirical mystery. Exactly how agencies choose to exercise this power, the process they use, how often they do so, and the internal checks they employ, are all issues that merit additional study. Unfortunately, finding such answers will be difficult because agencies are understandably hesitant to provide detailed information. These extended remarks from the FAA and the FMCSA are greatly appreciated.

²¹² FAA Survey Response, *supra* note 158; see also DEP'T OF TRANSP., GUIDANCE FOR IMPLEMENTING THE FAA COMPLIANCE PHILOSOPHY (2015), https://www.faa.gov/documentLibrary/media/Order/2150.3B_Chg_9.pdf (last visited Oct. 31, 2017).

²¹³ FMCSA Survey Response, *supra* note 169.

(iv) Catchall Findings

One of the questions posed to the agencies addressed the role those outside the agency play in nonenforcement decisions. As explained in Part II, whether nonenforcement is driven by “political” or “technocratic” concerns may be relevant to one’s view of its propriety (recognizing, of course, that there is rarely a bright line separating the two). Presumably if officials outside of the agency participate in nonenforcement decisions, the potential for “political” influence increases. Here, each of the agencies that participated in the survey and that answered this question specifically stated that those outside of the agency did not participate in nonenforcement decisions—at least not “generally.”²¹⁴ Of course, this point does not necessarily extend to all agencies. Even so, it is noteworthy that at least in this cross-section of agencies, involvement by agency outsiders is not a regular occurrence.

Finally, most agencies, understandably, did not share their views of the D.C. Circuit’s analysis in *NetworkIP*. (Candidly, the author did not expect many responses, especially because so many agencies litigate before the D.C. Circuit.) Hence, most of the participating agencies ignored this question or said they had no opinion. Similarly, one simply said it agreed with the analysis with little explanation,²¹⁵ while another largely said the same.²¹⁶ None of this is surprising. Two agencies, however, did share some interesting views which merit being quoted in full because they are thoughtful and address the inherent tensions at issue.

The FMCSA addressed *NetworkIP* at some length, and agreed that a public interest standard may be susceptible to abuse. Specifically, the agency explained that:

FMCSA generally agrees with the court’s view in *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008). Criteria that set forth the special

²¹⁴ FAA Survey Response, *supra* note 158; *see also* FMCSA Survey Response, *supra* note 169 (“In some instances, the agency may consult with other federal entities if their interests warrant consideration, such as aircraft operations over national parks.”); EBSA Survey Response, *supra* note 166 (“With EBSA’s decisions to grant statutory waivers, administrative exemptions that are processed on a class rather than individual basis are processed much like regulatory initiatives and will undergo a Departmental Clearance process prior to submission to the Office of Management and Budget.”).

²¹⁵ TTB Survey Response, *supra* note 167.

²¹⁶ *See* CDFI Survey Response (on file with author) (agreeing that “grants of waivers should be determined in a fair and equitable manner”); TTB Survey Response, *supra* note 167 (“Yes. Because TTB’s waiver decisions are frequently fact-specific and generally subject to disclosure restrictions, criteria used to evaluate waiver requests should be clear and applied consistently to regulated parties.”).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

circumstances where waiver of or exemption from a rule is appropriate increase the likelihood of consistent and predictable outcomes. Nonetheless, the purpose of waivers and exemptions is to give an agency the flexibility to reach an equitable result in a particular situation. It is not feasible or efficient for an agency to contemplate the multitude of circumstances that would warrant waivers and exemptions across the broad spectrum of rules it administers. While more specific waiver and exemption criteria may be feasible in limited circumstances, such as in the case of the filing deadline considered by the court in *NetworkIP*, in many instances the decision regarding whether to grant a waiver or exemption is more appropriately based on the totality of the circumstances, particularly when significant policy considerations are present. As long as an agency adequately articulates the special circumstances that warrant deviation from the rule at issue, future parties are on notice as to how the agency will interpret its rule and judicial review is not frustrated. Moreover, such a view is consistent with the court's position in *NetworkIP* that an agency is afforded deference regarding its decision whether to waive one of its own rules.

As specifically concerns FMCSA's waiver and exemption authority and regulatory standards for exercising that authority, we would note incidentally that the Agency's exercise of discretion is defined by the requirement that relief from regulatory obligations in such circumstances would likely achieve a level of safety equivalent to or greater than the level that would be achieved absent the involved waiver or exemption. Accordingly, FMCSA's waiver and exemption statutory framework and regulatory structure is constrained by a safety-related standard that is inherently more stringent than "whatever is consistent with the public interest" as referenced by the D.C. Circuit's *NetworkIP* ruling.²¹⁷

The EBSA also addressed this question—and identified the downside of overly "rigid" requirements.

Greater clarity on the criteria used to make waiver determinations will instill the public's trust that its government institutions are not making decisions in an arbitrary manner. However, agencies need flexibility in applying criteria used to grant waivers in order to avoid treating all applications the same. Exemption applications submitted to EBSA are very fact-specific, and a decision whether or not to grant an exemption

²¹⁷ FMCSA Survey Response, *supra* note 169.

may turn on one small detail. A more rigid set of criteria that focuses less on the individual facts of an application may either cause EBSA to grant exemptions that it would not currently grant, or to deny applications otherwise deserving of exemptive relief.²¹⁸

C. Case Studies

In addition to the general findings discussed above, this study produced several case studies about how particular agencies—specifically, the CFPB, FAA, MSHA, and TTB—go about their business. These studies are based on agency responses to the survey, the author’s interview with agency officials, and other background research. Note that although this analysis goes into some detail, the Report does not claim to have a comprehensive take on these agencies. Agencies are large and complex. There is no guarantee that the agency officials interviewed have perfect information, and, even if they did, inevitably some nuance is lost in the communication process. Likewise, agency practices evolve; what was true when the surveys were completed may not remain true at later dates. Despite these limitations, however, a close analysis of the behavior of specific agencies is still useful.

(i) The CFPB

The first case study addresses the CFPB, a relatively new agency that, generally, has not engaged in nonenforcement, at least through a formal program. The CFPB was created in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act and is tasked with protecting American consumers who are in the market for consumer focused financial products and services.²¹⁹ It has robust regulatory powers, including authority to engage in rulemaking and to bring enforcement actions.

When it comes to the subject of this Report, the CFPB is interesting because, although several of the laws administered by the Bureau grant authority akin to what this Report refers to as “waivers,”²²⁰ the Bureau does not engage in much nonenforcement, at least prospectively on an individualized basis, although it may do so through notice-and-comment rulemaking for a category of parties. When implementing the statute through rulemaking, the CFPB may identify requirements that

²¹⁸ EBSA Survey Response, *supra* note 166.

²¹⁹ Creating the Consumer Bureau, <https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/> (last visited Oct. 31, 2017).

²²⁰ See, e.g., 12 U.S.C. § 5532; *id.* § 1831t; 15 U.S.C. § 1639; *id.* § 1691c-2.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

do not make sense as applied to certain types of circumstances, and thus, modify them. To the extent that this sort of decision is a form of nonenforcement, the agency routinely goes through the ordinary notice-and-comment process to do it.

Perhaps more interesting, the agency also has authority to not enforce the law for individual entities (by order) but it has only exercised this formal authority once.

Consider the agency's Trial Disclosure Program, which is described in some detail in the Federal Register.²²¹ In short, this program allows regulated parties to propose a new form of disclosure that conflicts with the agency's regulations. Congress explicitly gave the agency this power.²²² The idea is that perhaps a regulated party can produce a better disclosure than what the regulations currently require. In designing the program, the CFPB solicited public comments and responded to them. An applicant must submit a proposal that "[d]escribes how these changes are expected to improve upon existing disclosures, particularly with respect to consumer use, consumer understanding, and/or cost-effectiveness," and "[p]rovide a reasonable basis for expecting these improvements, and metrics for testing whether such improvements are realized."²²³ Thereafter, the Bureau evaluates the proposal according to a non-exhaustive set of factors, including "[t]he extent to which the program anticipates, controls for, and mitigates risks to consumers."²²⁴ If the proposal is accepted, the agency will publicize that fact.²²⁵ Despite being on the books for almost four years, however, the Trial Disclosure Program to date has not resulted in a single approved proposal. Nor does it appear that the agency has denied any requests.

²²¹ See Policy To Encourage Trial Disclosure Programs; Information Collection, 78 Fed. Reg. 64,389 (Oct. 29, 2013).

²²² See 12 U.S.C. § 5532(e) (stating that the agency, through a public process, "may permit a covered person to conduct a trial program that is limited in time and scope, subject to specified standards and procedures, for the purpose of providing trial disclosures to consumers[.]" and that such a person "shall be deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law").

²²³ Policy To Encourage Trial Disclosure Programs; Information Collection, 78 Fed. Reg. at 64,393.

²²⁴ *Id.*

²²⁵ See *id.* ("The Bureau will publish notice on its Web site of any trial disclosure program that it approves for a waiver. The notice will: (i) Identify the company or companies conducting the trial disclosure program; (ii) summarize the changed disclosures to be used, their intended purpose, and the duration of their intended use; (iii) summarize the scope of the waiver and the Bureau's reasons for granting it; and (iv) state that the waiver only applies to the testing company or companies in accordance with the approved terms of use.").

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

It is hard to say for certain why the program has not been used more. It could be because the current regulations are so well understood and institutionalized that regulated parties are reluctant to spend the resources necessary to prepare a proposal. It also is possible that regulated parties would like to see someone else do one first to see how the well the program works. Similarly, regulated parties may be wary of a public process. It is unlikely, however, that the lack of proposals is due to ignorance; indeed, the program is featured prominently on the agency's webpage.²²⁶

A similar story could be told about the Bureau's "no action" letters. If the agency gives one of these letters, it means that agency staff has no intention of recommending initiation of an enforcement or supervisory action. Although non-binding, such a letter should be valuable to a regulated party. The Bureau, moreover, has established a program for granting such letters, again after soliciting comments from the public about how the program should work.²²⁷ Agency staff is authorized to issue such letters "involving innovative financial products or services that promise substantial consumer benefit where there is substantial uncertainty whether or how specific provisions of statutes implemented or regulations issued by the Bureau would be applied" ²²⁸ These letters, moreover, "may be conditioned on particular undertakings by the applicant with respect to product or service usage and data-sharing with the Bureau."²²⁹ Such letters "generally would be publicly disclosed."²³⁰ Yet the program has only been used once – in September 2017.²³¹

²²⁶ Trial Disclosure Program <https://www.consumerfinance.gov/about-us/project-catalyst/trial-disclosure-program/> (last visited Oct. 31, 2017).

²²⁷ Policy on No-Action Letters; information collection 1 (2016), http://files.consumerfinance.gov/f/201602_cfpb_no-action-letter-policy.pdf (last visited Oct. 31, 2017). This policy was also published in the Federal Register. *See* 81 Fed. Reg. 8686 (Feb. 22, 2016).

²²⁸ *Id.* at 1–2.

²²⁹ *Id.* at 2.

²³⁰ *Id.*

²³¹ *See, e.g., CFPB Announces First No-Action Letter to Upstart Network* (Sept. 14, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/> ("The Consumer Financial Protection Bureau (CFPB) today announced a no-action letter issued to Upstart Network, Inc., a company that uses alternative data in making credit and pricing decisions. As a condition of the no-action letter, Upstart will regularly report lending and compliance information to the CFPB to mitigate risk to consumers and aid the Bureau's understanding of the real-world impact of alternative data on lending decision-making. This action comes as the Bureau continues to explore the use of alternative data to help make credit more accessible and affordable for consumers who are credit invisible or lack sufficient credit history.") (last visited Oct. 31, 2017).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

The Bureau also has systems in place to guide prosecutorial discretion. When it comes to supervising financial institutions (of which the nation has many), discretion is used to determine who is higher risk and needs to be supervised more closely versus an entity that is lower risk and does not need the same level of supervision. The CFPB uses an examination manual (which is publicly available) to help direct this process.²³² There also can be some discretion in the CFPB's public enforcement processes. Given the breadth of the agency's mission and the number of entities under its jurisdiction, there inevitably will be some prosecutorial discretion.

After speaking with CFPB officials, one gets the sense that the agency hopes to use nonenforcement to encourage more efficient use of regulatory power. Presumably that is the reason why Congress gave the agency authority to encourage experimentation regarding disclosures.²³³ The efforts the agency has undertaken to date to create the Trial Disclosure Program or a way to provide no action letters suggests that the agency recognizes that sometimes generalized requirements are a poor fit for individual entities. The fact that regulated parties have not availed themselves of these opportunities is noteworthy and merits further study.

(ii) The FAA

The second case study addresses the FAA, one of the nation's most established agencies. This is true as a matter of history (the agency was created in 1958), size (the agency has over 14,000 employees)²³⁴ and, for purposes here, nonenforcement. Indeed, the FAA engages in vast amounts of nonenforcement, and, importantly, has a highly regularized process to do so.

As explained above, the FAA identified eight sources of waiver authority; it also "has a robust practice in considering regulatory exemptions in general, as well as

²³² See CFPB Supervision and Examination Manual (Aug. 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201708_cfpb_supervision-and-examination-manual.pdf (last visited Oct. 31, 2017).

²³³ Regulatory experimentation is currently the focus on a separate study. See Regulatory Experimentation, <https://www.acus.gov/research-projects/regulatory-experimentation> (last visited Oct. 31, 2017).

²³⁴ A Brief History of the FAA, https://www.faa.gov/about/history/brief_history/ (last visited Oct. 31, 2017); Air Traffic by the Numbers, https://www.faa.gov/air_traffic/by_the_numbers/ (last visited Oct. 31, 2017).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

specific waiver programs that may be built into those regulations.”²³⁵ And although the agency has only recently begun tracking the number of waivers granted, its exemption practice is vigorous; indeed, it has received over 16,000 requests for nonenforcement regarding drones since August 2016 alone.²³⁶ Even apart from drones, it “receives approximately 400-500 requests for exemptions per year.”²³⁷ No doubt driven by this volume, the agency has developed a standardized approach to nonenforcement.²³⁸

The process begins with a formal request which is submitted to a public docket on Regulations.gov. The FAA’s Office of Rulemaking then handles the logistics of responding to the request. “They are assigned for review and disposition to the program office . . . that covers the particular regulations from which relief is requested.”²³⁹ Importantly, “[m]ost requests are reviewed by an attorney in the Regulations Division of the FAA’s Office of the Chief Counsel.”²⁴⁰ Afterwards, the agency gives its answer, whether “grant or denial,” on the public docket. The agency also allows for reconsideration, and “[s]uch requests are ultimately reviewed by the Administrator to be considered final agency action.”²⁴¹ Importantly, the public can comment on requests for nonenforcement, and the agency “regularly publishes a summary of requests for exemption in the Federal Register for requests that are novel, significant, or are of first impression to alert the public to such requests.”²⁴²

The agency also has a guide for “FAA personnel in the exercise of prosecutorial discretion,” and the agency “may take compliance action, administrative action, or legal enforcement action.”²⁴³ The agency, unsurprisingly, is more likely to pursue punitive

²³⁵ FAA Survey Response, *supra* note 158.

²³⁶ *See id.*

²³⁷ *Id.* (emphasis omitted).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ FAA Survey Response, *supra* note 158.

²⁴¹ *Id.* (citing 14 C.F.R. § 11.101).

²⁴² *Id.*

²⁴³ *Id.*; *see also* DEP’T OF TRANSP., GUIDANCE FOR IMPLEMENTING THE FAA COMPLIANCE PHILOSOPHY (2015), https://www.faa.gov/documentLibrary/media/Order/2150.3B_Chg_9.pdf (last visited Oct. 31, 2017).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

action against more serious violations.²⁴⁴ But the FAA reports that it “does not exempt persons who have violated FAA statutes or regulations from the requirements of those provisions.”²⁴⁵ Instead, if the agency determines that punitive measures are not necessary, it “generally uses compliance and administrative actions (which do not result in remedial or punitive FAA enforcement) to ensure that regulated persons return to full compliance and take measures to prevent recurrence.”²⁴⁶

During the interview, agency officials gave further details about this process. The agency stressed that safety is paramount. Hence, although regulated parties sometimes try to argue that compliance with a regulation is too costly, such an argument is unlikely to succeed. By contrast, the most typical successful petitions for nonenforcement are those where the regulated party shows that there will be no adverse harm to safety. Similarly, the agency generally gives exemptions on a plane-by-plane basis, but if an exemption is requested for something that is affecting an entire fleet of planes, a fleet-wide exemption is possible. Likewise, the FAA stressed that it tries to be accessible to the public. For example, it will fix an exemption request if the regulated party cites to the wrong authority.

It is noteworthy, moreover, that if a request for exemption is denied, it is quite unlikely that the petitioner will seek judicial review. Indeed, it is almost unheard of; those interviewed could only remember a single instance of a disappointed party going to court, and that suit was dropped once it was clear that the agency would not settle. It also appears to be the case that although the largest players in the industry are most aware of the agency’s nonenforcement process, even smaller regulated companies often know a great deal about it. Seeking exemptions tends to be most challenging for individuals (i.e., passengers). For example, if a disabled child needs to use a different type of restraint system, special permission must be sought from the FAA. Often the airline will handle the process for its passengers.

²⁴⁴ *Id.* (“It is appropriate for FAA personnel to take legal enforcement action (for remedial or punitive purposes) against a regulated person for noncompliances resulting from: intentional conduct, reckless conduct, failure to complete corrective action, conduct creating or threatening to create an unacceptable risk to safety, conduct where legal enforcement action is required by law, repeated noncompliance, the provision of inaccurate data to the FAA, actions pertaining to competency or qualification, and law enforcement-related activities.”).

²⁴⁵ FAA Survey Response, *supra* note 158.

²⁴⁶ *Id.*

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

The impression one takes away from the FAA is that they have regularized the process. The agency attempts to put almost everything in the open and has standardized its channels for resolving nonenforcement requests. The agency does not place summaries of all decisions in the Federal Register, but it tries to do so for the ones that break new ground.²⁴⁷ It also is open to receiving comments from the public.

(iii) The MSHA

The third case study addresses the MSHA, an important agency within the Department of Labor. Congress created the MSHA in 1977 and tasked it with overseeing the health and safety of those working in the mining industry.²⁴⁸ The MSHA does not address nearly as many requests for nonenforcement as the FAA, but it nonetheless addresses a fair number of such requests. Similar to the FAA, the agency's analysis is driven by safety.

The MSHA has set procedures for modifying future enforcement of a particular standard (often adding replacement requirements at the same time), which requests the agency dubs "petitions for modification." Indeed, the agency has an entire handbook, publicly accessible, that details how the agency processes such requests.²⁴⁹ A mine must formally request a modification, at which point the agency posts the request in the Federal Register.²⁵⁰ Interested parties thereafter can file comments. Ordinarily, not many comments are filed, but the officials observed that union representatives frequently file comments. The agency then conducts a field investigation to examine the facts on the ground. Higher level officials thereafter examine the request, any comments, and the field report to make a decision called a Proposed Decision and Order. That decision can be appealed to an administrative law judge, whose decision in turn can be appealed to the agency's assistant secretary.²⁵¹ Following that, it is possible to seek review in district court, but that is rare.

²⁴⁷ Of course, what is "novel" may be in the eye of the beholder. That said, the agency emphasized that it tries to be transparent in its nonenforcement decisions.

²⁴⁸ History, <https://www.msha.gov/about/history> (last visited Oct. 31, 2017).

²⁴⁹ See PETITIONS FOR MODIFICATION, COAL MINE SAFETY AND HEALTH AND METAL AND NONMETAL MINE SAFETY AND HEALTH, MSHA HANDBOOK SERIES, <https://arlweb.msha.gov/READROOM/HANDBOOK/PH08-I-2.pdf> (July 2008) (last visited Oct. 31, 2017).

²⁵⁰ The agency also "organizes them by year on its website." MSHA Survey Response, *supra* note 171.

²⁵¹ See 30 C.F.R. § 44.35 (2017).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

By statute, mines must raise one of two arguments in support of a modification to a safety standard.²⁵² First, that the mine will engage in another practice that is at least as safe as what the regulation hopes to achieve. Or second, that if the regulation is followed as written, it will result in a diminution of safety, at least for the specific location. The MSHA will not grant a modification if the result would be a less safe working environment for miners. For example, MSHA regulations require that coal mines maintain a “300 feet” diameter around oil and gas wells.²⁵³ (Coal mining could cause sparks, which would be very dangerous around an active or inactive gas or oil well.) If a mine wants to move closer to the well, it can request a modification. The MSHA will then consider granting such a modification if the mine can show that the proposal is as safe as the standard.²⁵⁴ Outside of coal, a typical situation involves use of pressurized air to dust off miners. Ordinarily, that is not permitted, but when an outside company constructed a safe machine to do it, the agency began readily authorizing such modifications.²⁵⁵

The process, on average, takes approximately nine months, although there are means for expedited consideration.²⁵⁶ Agency officials stressed that once granted, the permission is generally permanent.

As noted above, many requests, but not all, are granted. And, indeed, it is not especially difficult to make a request. Because the agency recognizes that mining conditions and technology change, it is willing to work with mines to find practical solutions. At the same time, the agency stressed that safety is paramount.

According to the agency’s numbers, it received 64 petitions for modification in 2014, and granted 23 of them “at least to some extent.”²⁵⁷ To be clear, however, that does not mean that all of the other petitions were denied. Sometimes they are withdrawn because the mine can find another way to accomplish its goal. Similarly, MSHA officials during the interview made an interesting observation. They explained

²⁵² See 30 U.S.C. § 811(c).

²⁵³ 30 C.F.R. § 75.1700.

²⁵⁴ See 30 C.F.R. § 44.16(e).

²⁵⁵ See, e.g., Annapolis Mine, 81 Fed. Reg. 8996 (Mine Safety & Health Admin. Feb. 23, 2016) (final admin. review).

²⁵⁶ See 30 C.F.R. § 34.16.

²⁵⁷ MSHA Survey Response, *supra* note 171.

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

that one reason that there are fewer requests for modifications of standards is that the mining industry is an established one; technological changes occur sometimes, but often not especially quickly. Thus, mines generally do not need regulatory modifications. Likewise, the agency's substantive standards themselves are often performance based (i.e., they are based on outcomes, not necessarily specific means), so it is fairly feasible and reasonable for mines to comply with them.

This agency stressed that it does not engage in prosecutorial discretion—inspectors must cite a violation if they see one. That said, the agency recognizes that infeasibility can be a defense and may delay enforcement in narrow instances to allow an industry or an operator to come into compliance. For instance, soon after a new standard is promulgated, the agency may not require immediate implementation so long as the regulated mine is making a good faith effort to comply. This sort of analysis is generally mine-specific. Sometimes, moreover, the agency uses infeasibility in a categorical way. One example involved self-contained self-rescuers (SCSRs), which are devices that provide breathable air to miners during emergencies. During the interview, it was recounted that once the agency required a certain type of SCSRs for coal miners, but that the SCSRs, although ordered, were not arriving in time for mines to comply with the new standard. The agency accordingly informed mines across the board that they would not be cited as long as they could show that they had ordered the required SCSRs.

The MSHA's approach shares many of the characteristics as the FAA's. It also uses a public process and evaluates modifications to standards based on safety. Unlike the FAA, however, this agency engages in much less nonenforcement or modification activity, at least judged by the number of requests. The thoughtful explanations given by the agency for the relatively small number of requests certainly has a ring of truth to it, and may have wider applicability than just the MSHA context.²⁵⁸

(iv) The TTB

Finally, the fourth case study is the TTB. The TTB is an interesting agency; it operates both as a taxing agency and as a consumer protection agency. Housed within

²⁵⁸ Another possibility is that, because decisions granting modifications are published, some regulated parties may be aware of the agency's willingness (or lack thereof) to grant particular types of modifications and under what conditions. Or perhaps smaller operations have less need for a modification or less ability to satisfy the requirements for one.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

the Treasury Department, it is tasked with “enforcing the provisions of the Federal Alcohol Administration Act . . . to ensure that only qualified persons engage in the alcohol beverage industry” by regulating alcohol and tobacco production, with a focus on taxation but also on product labeling.²⁵⁹ The TTB boasts 470 employees across the country.²⁶⁰

In some respects, the TTB is closer to the MSHA than it is to the FAA. Like the MSHA, the amount of nonenforcement is fairly limited; whereas the FAA may consider hundreds or even thousands of requests for waivers or exemptions in a single year, the TTB will often receive less than fifty. In other respects, however, the TTB is similar to both the FAA and the MSHA. Most obviously, the agency requires an application before it engages in nonenforcement and the agency does not grant all requests. It denies approximately 15% of them.

In other ways, however, the TTB is different from both the FAA and the MSHA. Whereas both the MSHA and the FAA make nonenforcement decisions public, the TTB typically does not place information about its nonenforcement decisions in the Federal Register or otherwise make them available.²⁶¹ The primary reason for this, according to the agency, is that confidentiality is especially important when it comes to taxes. Thus, the agency is reluctant to share too much information. That said, the agency emphasized that if there is an issue of widespread applicability, the agency is willing to

²⁵⁹ TTB’s Mission–What We Do, <https://ttb.gov/consumer/responsibilities.shtml> (last visited Oct. 31, 2017); *see, e.g.*, TTB Ruling 2016-2 (Sept. 29, 2016) (“As part of its ongoing efforts to reduce for industry members the regulatory burdens associated with formula approval and to increase administrative efficiencies for the Bureau, consistent with its mission to protect the public and collect the revenue, TTB has reviewed the formula requirements for certain agricultural wines to determine where its formula review process could be streamlined and modernized. As a result of this review, TTB has determined that its formula review process for certain standard agricultural wine products can be accomplished in a more efficient manner while still being consistent with TTB’s mission.”); TTB, Industry Circular, No. 2004-3 (Aug. 31, 2004) (“We are issuing this circular to announce an alternative procedure to allow you to request approval to retain export documentation at your premises.”).

²⁶⁰ *See* TTB’s Mission–What We Do, <https://ttb.gov/consumer/responsibilities.shtml> (last visited Oct. 31, 2017).

²⁶¹ TTB Survey Response, *supra* note 167.

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

issue guidance documents to the regulated community.²⁶² But the process under the TTB is different because, as a rule, it is not public.

The TTB uses what it calls “Alternate Methods or Procedure.”²⁶³ Through these the agency allows regulated parties to use other methods to achieve legal compliance. This device is used for prospective nonenforcement. By contrast, the agency typically pursues known violations, thus exercising prosecutorial discretion somewhat rarely. Typically, this occurs at the investigator-level. (Judicial review of any aspect of the agency’s nonenforcement is very unusual.)

In the TTB’s experience, more often it is the larger manufacturers that seek prospective nonenforcement. One potential explanation for this is that smaller players do not need exceptions as often as larger ones. Lack of knowledge certainly is possible, but given the amount of contact between the agency and those it regulates (e.g., licenses and inspections), this explanation may be less likely.

Finally, TTB offered wise counsel regarding how to think about nonenforcement. The agency considers the motivation behind the rule and judges the request against that motivation. The agency also explained that sometimes the better course is simply to amend the regulation itself, especially if it becomes clear that the regulation is no longer accomplishing the objective for which it was created.

IV. RECOMMENDED BEST PRACTICES

Nonenforcement, for all the reasons explained thus far, is an important tool for agencies, but one that carries with it risks. The degree of danger depends on the type of nonenforcement at issue and the checks that exist to prevent abuse. Accordingly, it is difficult to make any bright-line rules about how nonenforcement should be implemented in specific cases or even specific types of cases. Sometimes the world is too complicated for across-the-board answers. That said, it is possible to at least identify considerations that should inform nonenforcement, even if those considerations do not always lead to the same prescriptions in all circumstances. The purpose of this

²⁶² See, e.g., TTB Industry Circular 2017-3 (May 19, 2017). For more information on agency uses of guidance, see Agency Guidance, <https://www.acus.gov/research-projects/agency-guidance> (last visited Oct. 31, 2017).

²⁶³ See, e.g., 27 C.F.R. §§ 19.26, 19.27.

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

section is to recommend best practices that agencies should consider when evaluating their nonenforcement practices.

To be clear, the primary focus of these recommendations concerns agency decisions to not bring enforcement actions. Because nonenforcement is such a broad concept, it seemed prudent to limit the scope of the recommendations. Even so, these recommendations may also be relevant to other forms of nonenforcement. For instance, just as regularized and public procedures are useful when an agency decides whether to bring an enforcement action, such procedures are also useful when an agency decides whether to excuse a procedural failing in an administrative adjudication. Of course, there are limits to this comparison; it may be less realistic to open up a decision whether to waive a procedural failing to full public notice and comment. But principles developed in one context can still have some force in other contexts.

Accordingly, based on interviews with agency officials, a review of the nonenforcement literature, and background insights into administrative law more generally, the Report urges that the following best practices merit agency consideration.

A. If Possible, Save Nonenforcement for “Special” Cases

When reasonably possible, nonenforcement should be saved for “special” cases. This is so because if an agency too readily resorts to nonenforcement, the exception may become the rule, resulting in a world in which the law on the books does not reflect the law on the ground. This should be avoided. In such a world, “insiders” may have an unfair advantage and the public may lose confidence in the fairness of the system. To be sure, discretion is important because it is impossible to identify up front every possible scenario that might arise.²⁶⁴ Indeed, the impossibility of anticipating when application of a rule may be unjust or imprudent is one of the drivers behind nonenforcement.²⁶⁵ Yet the more unbridled the discretion, the greater risk of bias, or at least the perception of bias.²⁶⁶ Agencies need to strike a balance.

²⁶⁴ See, e.g., Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064 n.98 (1990).

²⁶⁵ *Id.*

²⁶⁶ See, e.g., Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 U. KAN. L. REV. 1327, 1354 (2004) (“As the discretion afforded to regulators increases, so does the potential for biased or inconsistent enforcement. There is considerable evidence showing that enforcement personnel exhibit systematic biases when they make discretionary decisions.”).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

The D.C. Circuit's analysis in *NetworkIP* is instructive (although, to be sure, it arose in the context of an agency's decision to waive a procedural rule and not in the context of an agency's refusal to bring an enforcement action). The court explained that an agency must be able to "articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation."²⁶⁷ The reason the D.C. Circuit did this was because it wanted to prevent nonenforcement from becoming too common, thus turning the exception into the (sometimes unwritten) rule. The interviews revealed that these agencies are aware of this danger. This is one reason, for instance, that the agencies require a strict showing that nonenforcement will not undermine the purposes of the relevant prohibition. Both the MSHA and the FAA stressed that safety is key and the burden is on the applicant to show that there will be no loss of safety. This point was echoed repeatedly.

Related to the idea that nonenforcement should be the exception rather than the rule is the notion that nonenforcement should also have objective criteria and a clear temporal dimension. Again, the D.C. Circuit's approach bears consideration. The agency needs to explain why it is objectively reasonable to grant a waiver; if the agency cannot do so, there is a danger that it is behaving in an arbitrary manner. Similarly, nonenforcement may be more appropriate if its duration is shorter, although this is not always the case. As the FAA explained, "most of our exemptions are granted only for the length of time needed, and generally not more than two years. Exemptions expire by their own terms unless renewal is requested and justified."²⁶⁸ The common denominator is that nonenforcement should be recognized as a significant power that is to be used sparingly and carefully.

B. Greater Use of Retrospective Review

Agencies, to the extent permitted by law, should also focus on amending outdated or ineffective prohibitions, which may be helpfully identified by the agency's willingness to grant requests for nonenforcement. Agencies, for example, often fall back on nonenforcement because the regulation in question no longer makes sense, sometimes in individual circumstances but often across the board. Rather than engage

²⁶⁷ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

²⁶⁸ FAA Survey Response, *supra* note 158. Of course, a deadline may not always make sense, for instance in situations in which an exemption requires a substantial capital investment or operational change that should have some permanence. In such situations, a longer period may be appropriate.

in nonenforcement in such circumstances, if possible, the better path may be to change the underlying prohibition.

This point came up during several of the interviews. The MSHA, for instance, explained that it has done this before. And the CFPB reasoned that using notice-and-comment rulemaking often makes sense; it can be both more efficient (because it applies across the board) and more transparent. The TTB also recognizes that nonenforcement should be not treated as a substitute for updating the rules.

In the past, ACUS has urged retrospective review of regulations to ensure that rules that are no longer serving their purpose, or are doing so in a suboptimal way, are eliminated.²⁶⁹ One of the insights of this Report is that retrospective review may not always be conceptually distinct from nonenforcement. Rather, multiple granted requests for nonenforcement can be a signal that it may be time to engage in retrospective review.

To be clear, there are costs associated with revising regulations. Generally, an agency will have to engage in notice-and-comment rulemaking to do so, which will require dedicated work by agency officials. No doubt, for some regulatory schemes, revision would be quite labor intensive. But particularly if an agency already opens up its nonenforcement decisions to the public, and has been doing so for a long time, formally amending the rules may not be especially onerous.

C. Publicize Nonenforcement Programs, Policies, and Procedures

The next recommendation is for agencies to inform the public regarding their nonenforcement programs and policies, and the procedures for each. One of the potential problems with nonenforcement is the risk of unequal treatment and arbitrariness. To the extent that not everyone has equal access to information about when and how agencies opt for nonenforcement, the risk of inequality or perceived inequality increases—especially when the agency in question will not engage in nonenforcement, either *de jure* or *de facto*, without a request. If that is the case (and it often is), agencies should ensure that everyone has equal access to the required information to make such a request.

²⁶⁹ See generally Retrospective Review of Agency Rules, <https://www.acus.gov/research-projects/retrospective-review-agency-rules> (last visited Oct. 31, 2017).

Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices

Transparency is valuable. And the costs of transparency are less now than they have been in the past.²⁷⁰ Agencies, for instance, have access to the internet. If agencies have programs, policies, and procedures in place to guide nonenforcement, it should be relatively straightforward for agency officials to make information about those programs, policies, and procedures available to the public.

Granted, there may be downsides to publicizing an agency's programs, policies, and procedures. For instance, if information about nonenforcement becomes more generally known, there may be more requests for nonenforcement. This may require more time and effort be shifted towards evaluating nonenforcement. Yet that may be a virtue. If agencies are going to engage in nonenforcement, the public presumptively should have access to that information.

More serious, disclosure may encourage illegality. If regulated parties do not know the contours of an agency's nonenforcement policy, there will be more law observance because such parties will not know the tripwires, thus causing them to be more cautious altogether.²⁷¹ But if there is no transparency, and no judicial review, how can the public be confident that agencies are properly using their nonenforcement authority? Although admittedly not a perfect answer, the most optimal approach is to disclose nonenforcement policies, practices, and procedures, unless doing so would have a significant effect on legal compliance.

The agency officials interviewed for this Report almost uniformly stated that transparency is important. The CFPB, for instance, used a public comment process for its two nonenforcement programs. Agencies that regulate entities of varying degrees of legal sophistication might also consider actively informing some of the smaller entities about nonenforcement options. And agencies that regulate a large number of entities should consider actively trying to inform the public about nonenforcement, perhaps by preparing simplified introductory materials that can be found via internet search engines. Agencies that regulate a smaller number of entities may want to distribute information through personal contacts.

²⁷⁰ See generally Adjudication Materials on Agency Websites, <https://www.acus.gov/recommendation/adjudication-materials-agency-websites-0> (last visited Oct. 31, 2017).

²⁷¹ As explained above, there may be good reasons not to publicly disclose an agency's approach.

D. Publicize Nonenforcement Decisions and Encourage Comments

Just as agencies can publicize their nonenforcement programs, policies, and procedures, they also can publicize their decisions whether to grant or deny requests for nonenforcement, including potentially doing so before making a final decision so that interested parties can submit comments. The EBSA is a good example. In response to the survey, the agency offered a recommended best practice that included the following:

Applicants must disclose, under penalty of perjury, all relevant factual information that may be used by EBSA to make its findings whether to grant an exemption. EBSA will only grant an exemption based on a fully developed record that is open to the public. Before granting an exemption, EBSA must publish a proposed exemption on the Federal Register and give interested persons the ability to comment and request a hearing. Only after considering commenters' input may EBSA then grant an exemption.²⁷²

Some agencies may be reluctant to do this because they are wary of sharing sensitive information about an application with outsiders. The TTB, for instance, expressed this concern; when dealing with tax information, it may not be possible to present all of the relevant materials to the public. Even if the agency does not wish to disclose individual nonenforcement decisions, however, it can present general statistics and trends. If a large number of entities are receiving a similar exemption, the agency may consider sharing that information with the public, even if it does not provide individualized information. Similarly, agencies in such situations may consider redacting confidential information. (To the extent that agencies worry about costs or resources, it is worth noting that this information can be disclosed in any number of ways and need not appear in a Federal Register notice.)

A good analogy is the judicial process. Courts generally make their decisions public because they recognize the public interest in transparency.²⁷³ Even though most cases are not important to the public in general (sometimes no one but the parties involved care about a specific contract dispute or the like), the judiciary still recognizes

²⁷² EBSA Survey Response, *supra* note 166.

²⁷³ See, e.g., Researching Judicial Decisions, <https://www.loc.gov/law/help/judicial-decisions.php> (explaining how cases are published) (last visited Oct. 31, 2017).

the importance of disclosure. And, in any event, courts do not want to be in the business of deciding whether a particular case is important or not, especially because it can be difficult to know what may become important.

Agencies could adopt the same attitude. Of course, there are downsides with this recommendation as well. For one thing, publicizing this information may result in increased scrutiny of agency decisions—which may include unfair characterizations of agency behavior. The public may not understand all of the factors that go into a nonenforcement decision. To avoid being misunderstood, agency officials may find themselves spending more time giving reasons for their decisions. Yet at the same time, doing so may increase the public’s confidence in the agency decision.

Similarly, agencies should, to the extent possible, encourage affected entities to comment about the desirability and appropriateness of nonenforcement. Particularly where other entities may be affected, the agency may be well served by enabling public input. Both the MSHA and the FAA stressed the value of public comments, and the MSHA observed that union representatives often provide them. It is easy to see how additional information can help an agency make a sound nonenforcement decision.

E. Use a Consistent Methodology, Including Written Justifications

Finally, agencies should also use a consistent methodology when evaluating nonenforcement, and part of that methodology should include giving reasons for their nonenforcement decisions (even if those decisions are not public). A consistent methodology should help agencies treat like cases alike. And the use of written explanations should do the same. Indeed, “[a]dministrative-law doctrine places reason giving at the center of agency policymaking”²⁷⁴ because, in part, doing so can encourage sound decision-making.²⁷⁵ If officials use a consistent methodology and explain in writing why nonenforcement makes sense in any particular case, there is a better chance that the ultimate decision will be, and will be perceived as being, evenhanded.

²⁷⁴ Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1887 (2012).

²⁷⁵ See, e.g., Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 56 (2015) (“Perhaps the primary objective of a reason-giving requirement is to encourage the decisionmaker to make rational, consistent decisions, considering all of the relevant factors. The idea is that a procedural requirement, by focusing attention on a particular danger, should foster better substantive outcomes. The practice of giving reasons, in other words, should improve the quality of decision making.”).

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

The EBSA process for nonenforcement illustrates the benefits of written justifications. As a rule, the agency prepares “a published proposed exemption” that “contains an analysis of how the record supports the regulatory finding,” and a “published grant of an exemption contains a discussion of any comments received in respect of a proposed exemption, an applicant’s response to such comments, and the EBSA’s consideration of such comments and responses.”²⁷⁶ Doing so forces the agency to carefully consider what it is doing and why.

Written reasons may be especially valuable if the agency prepares them with a goal of achieving consistency across cases. In agencies that must decide whether to engage in nonenforcement in a great many instances, with the decisions being made by different individuals, a written explanation may be essential to maintain uniformity. Granted, a thorough written explanation of all nonenforcement may not be realistic, especially in agencies that address hundreds or even thousands of waiver or exemption requests every year. The FAA has attempted to address this point by providing written explanations for decisions that address novel issues. That approach makes sense. Depending on the nature of an agency’s authority, other possible ways to determine whether a detailed explanation should be given may involve focusing on the number of people affected or the dollar amounts at issue. These considerations are not meant to be exhaustive; the idea is to identify the most important nonenforcement decisions. Some agencies, by contrast, do not confront that many waiver or exemption requests. For them, it may make sense to prepare a detailed written explanation of the agency’s decision, with reasons, for each one.

Giving reasons certainly makes sense if nonenforcement decisions are public. If agencies explain why they act, the public can have greater confidence that the agency’s decisions are coherent and proper. Well-articulated consistency thus can enhance public confidence in the regulatory process. Yet even if an agency determines that it does not wish to make its nonenforcement decisions public, it still may be benefited by articulating in writing the reasons for them. This is true because even apart from the public benefits of a written explanation, the very act of preparing an explanation should help the agency identify when nonenforcement does and does not make sense.

²⁷⁶ EBSA Survey Response, *supra* note 166.

CONCLUSION

Agencies often “bring the hammer down” when legal duties have been breached. But sometimes agencies stay their hand. Such nonenforcement raises important questions. There are good reasons for nonenforcement, but it also brings with it dangers. Like much in administrative law, the value of discretion must be balanced against the danger of discretion’s abuse. Just because there is tension, however, does not mean that nonenforcement should be rejected. Even if it were possible to eliminate nonenforcement altogether (and often it is not possible because of resource constraints), it would not be desirable. Nonenforcement has a place in administrative law. Even so, awareness of the tension—especially coupled with a more complete conceptual understanding, greater empirical information, and careful safeguards against abuse—will benefit the regulatory process.

APPENDIX: SURVEY INSTRUMENT

This appendix contains the questions—divided into five Parts—that were sent to agency officials. Note that at the end of Parts I to IV, the official was asked whether the agency would be willing to discuss its policy, either on or off the record, with an ACUS consultant.

Part I: Statutory or Regulatory Waivers

Question 1: Does [Agency] have specific statutory authority to waive statutory or regulatory requirements for parties that would otherwise be subject to them?

If yes, please list such statutory sources of authority and proceed to questions a) through f) below. If no, please skip to Part II.

[Clarification included as a footnote: Please do not include statutory provisions that authorize waivers to States as cooperative regulators but do include statutory provisions that authorize waivers to States as regulated entities.]

Question 1(a). Approximately how many requests for such waivers does [Agency] receive in a typical year?

Question 1(b). Approximately what percentage of such waiver requests does [Agency] grant?

Question 1(c). Does the agency ever grant such a waiver without a request? If so, how often?

Question 1(d). Please briefly describe the procedures [Agency] uses to review potential waivers.

Question 1(e). Does [Agency] publish its decisions regarding such waivers in the Federal Register or otherwise make them publicly available?

Question 1(f). Does [Agency] have any standing policy, whether internal or published, to guide its decisions regarding such waivers?

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

Part II: Waivers to States

Question 2. Some agencies grant “cooperative federalism” waivers to states, for instance where the state seeks authority to supplement or amend a federal program or where states are preempted from acting in a particular field but may seek a waiver from preemption to act. Does [Agency] oversee any programs in which states are statutorily eligible for waivers from otherwise-applicable statutory or regulatory requirements?

If yes, please list such “cooperative federalism” programs and proceed to questions a) through f) below. If no, please skip to Part III.

Question 2(a). Approximately how many requests for such “cooperative federalism” waivers does [Agency] receive in a typical year?

Question 2(b). Approximately what percentage of such waiver requests does [Agency] grant?

Question 2(c). Does the agency ever grant such a waiver to a State without a request? If so, how often?

Question 2(d). Please briefly describe the procedures [Agency] uses to review such waiver requests.

Question 2(e). Does [Agency] publish its decisions on such waiver requests in the Federal Register or otherwise make them publicly available?

Question 2(f). Does [Agency] have any standing policy, whether internal or published, to guide its decisions regarding “cooperative federalism” waivers to States?

Part III: Equitable Exemptions

Question 3. Does [Agency] ever exercise its equitable power to exempt from regulatory requirements any entity that would otherwise be subject to them?

If yes, please proceed to questions a) through f) below. If no, please skip to Part IV.

[Clarification included as a footnote: Please do not include exercises of prosecutorial discretion, which will be addressed in Part IV. Instead, please limit

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

your answer to written exemptions that are granted before any known violation has occurred. Likewise, the focus of this Part is also distinct from Part I. Part I addresses specific statutory authority to waive regulatory requirements while Part III is concerned with exemptions without such specific statutory authority.]

Question 3(a). Approximately how many requests for such exemptions does [Agency] receive in a typical year?

Question 3(b). Approximately what percentage of such requests does [Agency] grant?

Question 3(c). Does the agency ever grant such an equitable exemption without a request? If so, how often?

Question 3(d). Please briefly describe the procedures [Agency] uses to review such exemption requests.

Question 3(e). Does [Agency] publish its decisions on such exemption requests in the Federal Register or otherwise make them publicly available?

Question 3(f). Does [Agency] have any standing policy, whether internal or published, to guide its decisions regarding such exemptions?

Part IV: Prosecutorial Discretion

Question 4. Does [Agency] ever exercise its prosecutorial discretion (*i.e.*, choose not to enforce the law against known violations of statutory or regulatory requirements under [Agency]'s jurisdiction) to essentially exempt from statutory or regulatory requirements any entity that would otherwise be subject to them?

If yes, please proceed to questions a) through f) below. If no, please skip to Part V.

Question 4(a). Does an entity subject to statutory or regulatory requirements ever request [Agency] to exercise prosecutorial discretion? If so, approximately how often?

Question 4(b). Approximately how many times in a typical year does [Agency] exercise its prosecutorial discretion?

Waivers, Exemptions, and Prosecutorial Discretion:
An Examination of Agency Nonenforcement Practices

Question 4(c). Does [Agency] ever notify violators, complainants, or the public that it is choosing not to pursue a particular enforcement action because of prosecutorial discretion? If yes, are those notifications published in the Federal Register or otherwise publicly available?

Question 4(d). Does [Agency] have any standing policy, whether internal or published, to guide its exercises of prosecutorial discretion?

Part V: Miscellaneous

Question 5. Does [Agency] have practices or procedures akin to those mentioned above (i.e., ways to essentially exempt someone from complying with a statutory or regulatory requirement or to excuse a violation of a statutory or regulatory requirement) that has not yet been discussed? If yes, what are those practices and procedures and how do they work?

Question 6. Do government officials outside of [Agency] ever participate in decisions of [Agency] to grant a statutory waiver, a waiver to a State, an equitable exemption, an exercise of prosecutorial discretion, or the like? If yes, would [Agency] be willing to discuss such participation, either on or off the record, with an ACUS consultant?

Question 7. Can you think of “best practices” that would help agencies to evaluate whether to grant waivers or exemptions? If so, what are they and why do you think they would help?

Question 8. The U.S. Court of Appeals for the D.C. Circuit has emphasized the need for greater clarity on the criteria used to make waiver determinations to ensure fairness to all parties. Specifically, the court warned that: “If discretion is not restrained by a test more stringent than ‘whatever is consistent with the public interest (by the way, as best determined by the agency),’ then how to effectively ensure power is not abused?” Do you agree with this view? Why or why not?

THE TETHERED PRESIDENT: CONSISTENCY AND CONTINGENCY IN ADMINISTRATIVE LAW

WILLIAM W. BUZBEE*

INTRODUCTION	1358
I. THE REGULATORY WHIM AND POLICY CHANGE POWER	
CLAIMS	1365
A. <i>The Congressional Expectation of Agency Policy Adjustment</i>	1366
B. <i>The Justice Neil Gorsuch Regulatory “Whim” Theory</i>	1368
C. <i>The Ossification and Agency Inertia Theories</i>	1371
D. <i>Agency Overreach Concerns and the “Major Questions” Canon</i>	1373
E. <i>The Trump Administration and Embrace of Change Power</i>	1376
1. The Two-for-One Executive Order	1376
2. The Agency Stay and Delay Two-Step	1378
3. Splintering Deregulatory Steps.....	1378
4. Agency Statutory Abnegation Claims	1378
5. Environmental Deregulating with Inattention to Science and Past Reasoning	1381
II. AGENCIES, PRESIDENTS, AND POLICY CHANGE CONDITIONS	1390
A. <i>Enabling Act Constraints</i>	1390
B. <i>Policy Change Process, Deliberative Opportunities, and Integrity</i>	1392
C. <i>Inconsistency, Politics, and Facts</i>	1396
D. <i>Additional Consistency Meta-Rules</i>	1401
E. <i>Reasoned Decisionmaking as a Constraint</i>	1403
F. <i>Agency Record and Deliberative Conformity</i>	1407
G. <i>The Losing Track Record of Poorly Explained Policy Changes</i>	1408

* Professor of Law, Georgetown University Law Center, wwb11@law.georgetown.edu. The author thanks Vicki Arroyo, Robert Glicksman, Nicholas Parillo, Andrew Schoenholtz, Peter Strauss, David Vladeck, and Susannah Weaver; the faculty of Georgetown Law who provided workshop comments; Thanh Nguyen and Andrea Muto of Georgetown Law’s library; research assistants Samuel Gray and Kiernan Moran; participants in the 2017 Administrative Law Discussion Forum held in Paris, France; and the 2018 Legislative Roundtable held at Fordham Law School in New York City.

H. <i>The Trump Administration Regulatory Shortcuts and Judicial Rejections</i>	1412
III. DEREGULATION AND THE CONSTRAINTS OF AGENCY CONTINGENCY	1417
A. <i>Distilling and Diagramming Consistency Doctrine's Requirements</i>	1418
B. <i>Assessing Major Deregulatory Proposals by the Trump Administration</i>	1420
C. <i>Consistency Doctrine's Policy Merits</i>	1424
IV. DELIBERATIVE INTEGRITY AND TETHERING'S DEGREES	1426
A. <i>The Presidential Nudge and Enforcement Prioritization</i> ..	1427
B. <i>Turf Conflicts</i>	1429
C. <i>Broad New Deal Delegations</i>	1429
D. <i>Science-Based Judgments and the "Best"</i>	1430
E. <i>Presidential Adjudicatory Interventions</i>	1432
F. <i>Statutory Abnegation and Dodged Facts</i>	1433
CONCLUSION	1441

The law governing administrative agency policy change and the checking of unjustified inconsistency is rooted in a web of intertwined doctrine. The Supreme Court's 2016 opinion in Encino Motorcars modestly recast that doctrine to emphasize that the agency pursuing a change cannot leave "unexplained inconsistency" or neglect to address past relevant underlying facts, but reaffirmed its central stable precepts. Nonetheless, radically different views about broad, unaccountable, and agency power to make rapid policy changes have been articulated by Justice Neil Gorsuch while on the Tenth Circuit and by agencies pursuing deregulatory policy shifts under the leadership of President Donald J. Trump. This Article analyzes the mutually reinforcing strands of this body of law, shows the fundamental errors underpinning these claims of broad agency power to make policy changes, and explains how the "contingencies" underlying an initial policy action must always be engaged by a later advocate of policy change. Statutory language constrains agency action while usually leaving room for change, but facts and past agency reasoning—the heart of regulatory "contingencies" focused on in this Article—unavoidably must be engaged to surmount the sturdy core requirements of consistency doctrine. Recent efforts to overcome or recast consistency doctrine seek greater room for politics and presidential influence and downplay agency obligations to provide rational explanation and engage with regulatory contingencies. Due to the balanced interests protected by consistency doctrine, this Article argues that such a doctrinal reworking is unlikely and would be unwise.

INTRODUCTION

Indictments of the administrative state vary, but one strain—notably voiced by Justice Neil Gorsuch in a Tenth Circuit opinion shortly before he joined the

Supreme Court—is that under existing doctrine, agencies can abruptly shift policies and even act on a “policy whim.”¹ Regulatory reform advocates and others troubled by deference to agencies under the influential *Chevron* case have raised similar concerns about agency policy inconsistency.² But not all analysts of agency latitude for change condemn it. New presidential administrations, with the overtly deregulatory administration of President Donald J. Trump being a particularly salient example, at times embrace this alleged power, claiming broad presidential and agency authority to reverse agency policies and even direct agency adjudicatory outcomes.³

This Article unpacks different conceptions and doctrines framing agency power to change policy and the role of consistency-linked doctrine.⁴ Under current doctrinal frameworks, these recent claims of agency latitude for abrupt and politicized policy change are erroneous. Agencies and presidents remain tethered by statutory delegations’ terms, legal doctrine, and past legal actions. But such tethering implies restraint and limitations, not frozen regulation. Presidents can request agency policy reconsideration and agencies usually retain

¹ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016). Justice Gorsuch’s views are reviewed later in this Article. *See infra* Section I.B.

² *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). A discussion of *Chevron* deference appears later in this Article. *See infra* Section I.D; *infra* notes 188-197 and accompanying text.

³ The extent of presidential authority over agencies remains the subject of scholarly ferment. Compare Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 599 (1994) (arguing for expansive presidential control), and Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2320 (2001) (arguing that presidential regulatory authority should be presumed to be conferred by statute unless explicitly stated otherwise), with Kevin M. Stack, *The President’s Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263, 284 (2006) (arguing courts and presidents should respect different congressional choices about delegation to President versus to agency), and Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 977-79 (1997) (distinguishing among modes of political control and conceptions of discretion with emphasis on powers delegated to agencies by Congress and Constitution’s specified means of presidential control). For an article analyzing this issue historically, through presidential and agency interactions and revealed views about such power, see Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2495-500 (2011).

⁴ By “agency policy change,” this Article refers to the setting where statutory language remains stable, but an agency changes some regulatory policy previously set forth by the agency. A mere change in stringency, for example, is not a policy change. The forms of agency policy change can be numerous, but usually involve a change in approach to regulating a risk, or a changed claim about the nature of an agency’s power and related change in regulatory requirements. Such policy changes can be substantially rooted in statutory language, in empirical observations, or a mix of the two. Policy change examples and related cases are reviewed in Parts I and II.

room to make policy adjustments.⁵ Nonetheless, hurdles exist and can be substantial even though policy changes are not subject to a heightened standard of judicial review. Changes cannot be unjustified, purely political, or unacknowledged.⁶

Claims of broad agency policy change authority tend to exaggerate the freedom granted by statutory language and the often-applicable and deferential *Chevron* judicial review framework. The President's power to precipitate change also tends to be exaggerated without adequate attention to how the permissible degree of influence depends on the particular setting and regulatory posture. Broad claims of policy change power also tend to downplay the regulatory centrality of science, data, other empirical observations and predictions about the world, and linked agency explanations. Agency policy is rarely, if ever, generated due to statutory language alone; later leadership similarly cannot just point to language or presidential edict to justify a change.⁷

By building off of these intertwined doctrinal strains, this Article shows how agencies considering a policy change must engage with *the contingencies* underlying past and proposed new regulatory actions. Under this analytical frame, anyone evaluating room for a possible agency policy change needs first to assess the legal frameworks and powers they confer and, as is true of all power conferrals, the correlative constraints they state or imply.⁸ Always important are the statutory criteria, goals, and procedures that guide the agency's choices. Then, stakeholders must assess what factors outside the law's text—but made

⁵ Part IV reviews different policy change settings and the latitude they provide for change, especially change driven by political considerations.

⁶ See *infra* Part II (reviewing categories of actions and legal doctrine that frame and constrain policy change efforts).

⁷ For two earlier articles analyzing the puzzle of agency consistency, but preceding recent policy change power claims and case developments, see Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1029-30 (2005), which focuses upon procedural modes generating old and new policy; and Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 115 (2011), which distinguishes between "expository" policy declarations rooted in language and "prescriptive" reasoning that is based on policy choices, and calls for de novo review of expository-based changes.

⁸ For a modern case that both articulates the centrality of statutory criteria as a constraint and also emphasizes the agency's obligation to engage with underlying facts and science relevant to its task, see *Massachusetts v. EPA*, 549 U.S. 497 (2007). See also *Air All. Hous. v. EPA*, No. 17-1155, slip op. at 19 (D.C. Cir. Aug. 17, 2018) (stating that it "is axiomatic that administrative agencies may act only pursuant to authority delegated to them by Congress" and rejecting policy change for several statutory violations, inadequate explanations, and failures to address earlier factual findings (quotations and internal citations omitted)). For two cogent critiques of *Massachusetts v. EPA*, its "expertise-forcing" underpinnings, and its place in the prevalent ongoing tension between the roles of politics and expertise as sources of accountability and legitimacy in regulation, see David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51.

legally relevant due to that text—shaped and explained the earlier agency action and policy that is now proposed for change.⁹ The change advocate must then compare the old and new policy and justify the change through legally required procedures and public vetting, engaging with the old grounds and contingencies and any new variables.

As a shorthand, this Article refers to such non-statutory text variables as *contingencies*. Their legal significance is determined by each statute's procedural and substantive choices, but most statutes are drafted to leave room for agency policy change due to changed empirical assessments or policy rationales. The contingencies will themselves be external to the statutes and be observable. These are reality-based factors—including past legal documentation, history, regulatory experience, health impacts, science, data, models and predictions, past agency studies, and published explanations of the previous regulatory choice, to name a few such contingencies—that underpin any agency action. As explained below, as a matter of logic and under current doctrine, such contingencies unavoidably must remain part of the analysis and justification for future policy shifts.

Contingencies typically will be the social or physical manifestation of particular decisional criteria explicitly stated in legislation, but not always. Contingencies motivating acceptable agency policy change can, if statutory language leaves such room, involve some mix of trying better means to achieve constant ends, making policy adjustments in light of changing underlying scientific or social phenomena, or expert agency reassessment of the workability or fairness of past approaches.¹⁰ Although broad delegations to New Deal agencies offer little binding linguistic specificity, even those broadly empowered agencies will, through adjudications and other policymaking modes, identify social problems and devise remedial strategies that adjust and are

⁹ See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 575-89 (1985) (analyzing how Supreme Court in *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Auto. Insurance Co.* insisted on agency engagement with statutory criteria and rejected "interest representation" frame or model that would have allowed politics larger role in shaping agency actions). Judge Garland labeled the Court's approach as focused on agency "fidelity to th[e] delegation." *Id.* at 589.

¹⁰ *Chevron* itself involved such a setting. See *infra* Section II.B (discussing *Chevron*).

refined over time.¹¹ Such sequential development of policy will similarly identify and link to specified contingencies.¹²

Attention to such contingencies, since they involve far more than just word games, also serves to constrain arbitrary agency change and dampen the frequency and magnitude of policy shifts. Sometimes a policy shift will be rooted mainly in mere linguistic analysis, but that rarely happens.¹³ And close parsing of legislation to assess if Congress anticipated agency policy adjustments will necessarily influence the legality of an agency policy shift. Importantly, the Supreme Court in *Massachusetts v. EPA*¹⁴ rejected an agency policy change and declination to act that neglected statutory criteria and also avoided examination of relevant science.¹⁵ Some agency actions will be driven mostly by language, while others will be driven more by science or observations made salient by statutory language.¹⁶ Politics can, and indeed does, play a role, but not to the exclusion of other contingency variables and always subject to the need for conformity with statutory requirements.¹⁷ Administrative law doctrine

¹¹ See, e.g., *POM Wonderful v. FTC*, 777 F.3d 478, 484 (D.C. Cir. 2015) (upholding FTC claims of false representations, reviewing genesis of statutory and evolution of agency policy, and also rejecting one remedial claim as beyond agency power in light of facts, constitutional concerns, and past agency precedents); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 586, 589, 648-66 (2014) (discussing development of FTC's power and jurisprudence); see also *infra* Section IV.C (discussing permissible bounds of politics and deliberative integrity when agencies with broad delegations adjust policy).

¹² For discussion of how the FTC's privacy law has evolved in a common law-like way, with increasingly specific criteria, see Solove & Hartzog, *supra* note 11.

¹³ Professors Kozel and Pojanowski call such language-based policy derivation "expository." Kozel & Pojanowski, *supra* note 7, at 112. Statutory abnegation claims made by agencies under the Trump Administration—a new claim of no statutory power—has been a prevalent part of this Administration's many deregulatory policy shifts. See *infra* Sections I.A, III.B, IV.F (discussing policy shifts initiated by federal agencies under Trump Administration).

¹⁴ 549 U.S. 497 (2007).

¹⁵ *Id.* at 534-35 (holding agency action was arbitrary and capricious as agency gave "no reasoned explanation" for its refusal to act). For further discussion of the ways that statutory language shapes the permissible bounds and deliberative integrity of policy change, see *infra* Part IV.

¹⁶ As developed further below, see *infra* Part IV, the judicial role when reviewing a policy change will differ if language is broad or a statute requires an assessment of science, data, or (as commonly required) what is "best" among some category of risk creators. See Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 565-66 (2011) (distinguishing judicial review task when statute requires agency to provide "factually grounded explanation" as opposed to one grounded in "value judgment[s]").

¹⁷ See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6-8 (2009) (arguing there is "proper, even if limited, place for politics" in shaping policy choices beyond just "technocratic" approaches to policymaking, but also arguing that evidence and statutory criteria will limit room for presidential influence).

also creates some trans-agency and trans-law space for agency policy experimentation, but all policy changes are nonetheless cabined or shaped by what relevant statutory language dictates, as well as past regulatory choices and explanations.¹⁸

The crucial point about consistency doctrine and agency policy change power is that, as a matter of logic and doctrine, deviations from a past policy choice or approach—whether to deregulate, adjust strategies, or increase regulatory stringency—will rarely, if ever, involve just a language game.¹⁹ If language requires one particular policy action, then change cannot be made. But that is exceedingly rare. Policy change is pursued where language leaves room for adjustment and something about the world is viewed as justifying the change. Scholars and judges debate the degree to which politics can influence agency regulation.²⁰ Room for politics and the degree of judicial oversight will hinge on relevant law and the action at issue.²¹ But key governing precedents, whether new or old, always call for some variant of agency engagement with the past action, underlying facts, and earlier rationales or reason-giving explanations.

Because facts and experience are a sticky reality that an agency virtually always documents in justifications for past actions, policy shifts cannot be carried out by executive fiat.²² As stated in key consistency precedents,

Some have argued in favor of a more limited place for politics. See Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144 (2012) (distinguishing between political motivations and judgments, and agency justification under hard look review); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1849-50 (2012) (arguing against Watts and favoring limited room for politicized influence on agencies, even if disclosed).

¹⁸ For example, a new general interpretive presumption is that agencies should consider both regulatory benefits and costs. See *Michigan v. EPA*, 135 S. Ct. 2699, 2705, 2715 (2015) (embracing in majority and dissenting opinions general requirement that agencies assess costs and benefits unless statute clearly indicates otherwise). The Court has also indicated that agency actions that harness the benefits of market-based regulatory tools and confer regulatory flexibility on states receive what appears akin to a reviewing court “bonus.” See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1601, 1605-07 (2014) (affirming legality of agency program that provides states with implementation flexibility and harnesses market incentives, and speaking favorably of such designs); William W. Buzbee, *Federalism-Facilitated Regulatory Innovation and Regression in a Time of Environmental Legislative Gridlock*, 28 GEO. ENVTL. L. REV. 451, 474-75 (2016) (discussing these cases).

¹⁹ As discussed below, the deregulatory strategy of agency disavowal of power previously claimed, which this Article calls “statutory abnegation,” can involve a claim that language alone justifies a new claim of no power. It can also involve a few variants of rejection of earlier power claims. See *infra* Sections I.E, IV.F.

²⁰ See sources cited *supra* notes 3, 8-9; *infra* Part IV (describing this debate).

²¹ See *infra* Part IV (describing constraints on agency’s ability to change policy).

²² Kozel and Pojanowski describe agency attempts to establish stable policy as “gam[ing] the system” or “administrative machinations.” Kozel & Pojanowski, *supra* note 7, at 165-66. As explored below, this Article suggests that agency grounding of policy in strong evidence

including the recent decision, *Encino Motorcars, LLC v. Navarro*,²³ an agency must always supply a “good reason” for a policy revision, cannot leave “unexplained inconsistency,” and must address underlying “facts and circumstances” relevant to the earlier and new action.²⁴

The Supreme Court in *Chevron* did allow the Environmental Protection Agency (“EPA”) to redefine a term and even embraced agency reconsideration of policies, stating that agencies “must” do so to engage in “informed rulemaking.”²⁵ But room for change is separate from satisfying the conditions necessary to achieve it. Neither that case nor any other embraces untethered, erratic, or unjustified reversals or abandonment of statutory missions.²⁶

This theoretical frame’s deep doctrinal foundations have implications for strategies to reduce risks of erratic policy shifts and regulatory reversals. Agencies and others worried about subsequent regulatory backpedaling, ill-considered policy shifts, or just plain old judicial reversal can—through diligent engagement with underlying science, data, and rationales for a chosen regulatory course—raise hurdles that subsequent agencies, presidents, and even reviewing courts must overcome.²⁷ A lightly justified initial action, in contrast, will ease the path for a later policy shift. To succeed in making a policy change, agencies will always need to engage with, and with new persuasive reasoning explain, or perhaps explain away, the contingencies that underlay the past agency action.

For a President like Donald J. Trump, who after his 2017 inauguration quickly and aggressively asserted directive power to mandate deregulatory lookback analysis and ordered agencies to revisit specified actions,²⁸ the constraints of

and reasoning will create resistance against change, but does not view this practice as illegitimate or problematic.

²³ 136 S. Ct. 2117 (2016).

²⁴ *Id.* at 2126; *see also* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”).

²⁵ *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863-66 (1984).

²⁶ *See id.* at 853-66 (discussing impacts of old and new approaches, economics scholarship, and efforts to allow cost-effective regulation to achieve clean air as rational and consistent with statute in upholding EPA’s new “bubble” approach); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1268-69 (1997) (noting that although *Chevron*’s influential opinion alludes to task of “interpretation,” actual opinion involved assessment of how record supported agency’s reasoning).

²⁷ *See, e.g.*, *Pub. Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1505-07 (D.C. Cir. 1986) (reversing and remanding agency decision to carry out last-minute directive by White House Office of Management and Budget without any apparent justification in administrative record and requiring agency to utilize its expertise).

²⁸ *See infra* notes 88-157 and accompanying text (reviewing presidential orders and memoranda directing agencies to revisit and sometimes rescind or reverse past actions and agency policy changes and deregulatory actions that followed). For discussions of President Trump’s deregulatory attitude and initiatives, *see* Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump’s Deregulation Teams*, N.Y. TIMES, July 12, 2017, at A1

consistency doctrines and regulatory contingency analysis are of critical importance. If legal norms hold, these presidential requests should lead to far less radical agency actions than sought due to the constraints of statutory language and contingencies that must be engaged. Or, if agencies just acquiesce or follow presidential directions, such agency actions should provoke skeptical judicial review, as has been apparent in initial judicial opinions addressing deregulatory policy shifts.²⁹ Due to the uniformity of recent policy change power claims and strategies by President Trump and agencies under his leadership, they likely reveal an intentional effort to recast this body of doctrine to increase room for politicized efforts to revise policy. Or they might reflect a political strategy to push for deregulation that is justified by political gains even if ultimately destined for legal rejection.

Part I introduces standard views about agency policy change authority, reviews recent strong claims about such power made by Justice Gorsuch when he was a circuit court judge, and presents prevalent contrary observations about agency tendencies and expectations of the administrative state. Part I also introduces a substantial sampling of deregulatory actions taken by President Trump and agencies under his supervision, and the claims regarding the policy change authority they reveal. Part II then turns to the web of law governing how and when presidents and agencies can seek policy change. Part III assesses the legality of recent major policy shift proposals and actions, distills through a simplified schematic what agencies seeking to change policy must do, and offers a normative assessment of consistency doctrine. Part IV then reviews categories of agency actions, how consistency doctrine's constraints apply, and why apparent efforts to change this body of doctrine should be met with opposition from both those generally concerned with agency overreach and those worried about imprudent deregulation.

I. THE REGULATORY WHIM AND POLICY CHANGE POWER CLAIMS

Claims of agency power to change policy range from matter-of-fact descriptions of agency policy flexibility and responsiveness as the norm, to condemnations of such change as evidence of agency arbitrariness and excessive and unaccountable agency authority. Proposals and orders for agencies to make policy changes also reveal change proponents' claims about such power. This Part introduces such normative and manifested claims about room for agency

(discussing industry ties of teams making deregulatory proposals and potential for conflicts of interest); Eric Lipton & Danielle Ivory, *Trump Says His Regulatory Rollback Already Is the 'Most Far Reaching'*, N.Y. TIMES, Dec. 15, 2017, at A16 (summarizing President Trump's goals and deregulatory statements and agencies' many deregulatory actions).

²⁹ See, e.g., Percival, *supra* note 3, at 2534-35 (discussing *New York v. Reilly*, 969 F.2d 1147, 1149 (D.C. Cir. 1992), and underlying regulatory history where political pressure for deregulation likely contributed to insufficiently justified regulatory action); see also *infra* Section II.H (discussing judicial responses to, and frequent rejection of, Trump Administration agency deregulatory policy shifts).

policy change, with special emphasis on broad recent claims. The Parts that follow question the accuracy of these broad claims of agency power to change policy, explaining how a focus on the contingencies underpinning agency actions melds the cross-cutting requirements and interests held in equipoise by consistency doctrine.

A. *The Congressional Expectation of Agency Policy Adjustment*

In most writing about rationales for the modern administrative state, room for policy change and reliance on agencies go hand in hand. Policy change is expected.³⁰ Reliance on agencies rather than legislatures or courts to flesh out a body of law is linked to agency expertise and the related need for regulatory learning and adjustment in the development of sound policy.³¹

Legislatures, in contrast, generally lack particular subject matter expertise and cannot enact laws with details sufficient to anticipate complexities and changing circumstances.³² Courts are even more generalist in focus and poorly suited to develop policy due to lack of knowledge of broader legal and societal context.³³ Courts are also often unfamiliar with affected constituencies' practices and concerns, and lack institutional means to gather and assess data and science relevant to a regulatory goal.³⁴ In addition, the ways in which webs of law and regulation work together will be known to agencies but seldom understood by legislators or judges.³⁵

Agencies are not directly subject to electoral accountability, but they answer to the President and are often held to account by congressional committees. Agencies are also subject to participatory and reason-giving modes of

³⁰ See Dotan, *supra* note 7, at 1031-32 (discussing this expectation).

³¹ See PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES & COMMENTS 1-50 (9th ed. 2011) (presenting rationales for reliance on agencies).

³² The Third Circuit Court of Appeals explored agency power in the context of an agency adjusting its policies. See *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 243-44, 252 (3d Cir. 2015) (upholding most of FTC's action alleging unfair and deceptive trade practice in setting of lax cybersecurity and discussing agency's subject expertise and policy evolution).

³³ See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1359-70 (2012) (discussing agencies' expertise and institutional competence in comparison to courts in discussing administrative law's development in common law-like manner).

³⁴ For a discussion of the relative roles of presidents and agencies in developing policy, but emphasizing congressional delegations to particular agency actors and the expertise-based underpinning of such delegations, see Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 750-53 (2007).

³⁵ *Id.* at 750-52; see also Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1099 (2015) (exploring nature of expertise and its underpinning of deference rationales, especially due to pragmatically developed "craft" expertise).

democratic accountability.³⁶ Furthermore, neither courts nor legislatures are institutionally capable of implementing and enforcing laws; these two agency tasks result in at least tacit development and revelation of policy.³⁷

As a result, agencies will become experts in a delegated field.³⁸ They will come to know deeply the web of laws that they are delegated to administer or those that intersect with their turf, plus subsequent implementing regulations, guidance documents, and court decisions.³⁹ As repeat players in frequent political contact with congressional committees, the public, and more directly implicated stakeholders, agencies will come to know how various regulatory choices work or could be improved.⁴⁰ In this polycentric and dynamic setting, they will develop a sensitivity to practical complexities and tradeoffs, the interacting players, and regulatory dynamics.⁴¹ Agencies over time will see how policy choices ripple through the law, linked markets, and underlying protected amenities, such as workplaces, markets, the environment, or educational institutions.⁴²

Due to this experience and these interactions, agencies will regularly adjust policy choices based on gained experience or new science or data, even though underlying statutes often remain unchanged. Regulating, under these views, should and ordinarily does involve sequential policy adjustments in light of

³⁶ See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96-99 (1985) (identifying ways agencies are more “responsive” and subject to more accountability and obligations to provide reasons than are legislatures).

³⁷ Here, the reference to “enforcing” is referring to monitoring and policing compliance with the law, not judicial enforcement of the law through a court decision.

³⁸ See generally Shapiro, *supra* note 35 (discussing functioning and creation of agency expertise).

³⁹ Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1843 (2015) (analyzing constitutional duty to supervise and discussing courts’ lack of accountability and expertise compared to agencies).

⁴⁰ See Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2026-27 (2015) (observing that “multiple, overlapping public and scientific processes constrain the agencies’ discretion and improve the rigor and transparency of their decisions” and seeing benefits in this “deliberative approach” and how it subjects regulatory science claims to “rigorous questioning and constant, skeptical double-checking”).

⁴¹ Jeffery A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 849 (2010) (discussing polycentric policymaking and link to deference regimes).

⁴² See Shapiro, *supra* note 35, at 1140 (stating that due to “cacophony of inputs,” “regulatory governance” by agencies requires them to “rely on craft expertise to arrive at satisfactory solutions to the regulatory problems that [they are] addressing”).

pragmatic learning and efforts to better achieve statutory goals.⁴³ Political leanings and changing attitudes about regulations, often due to changes in presidential administrations, will further influence what political appointees heading agencies view as “better” or in need of change.⁴⁴ What must accompany such attempted changes, however, is a separate issue discussed below.

Analysts of the modern administrative state often divide into two opposed camps that clash in their sentiments about agency policy change authority. Regulatory skeptics often characterize agencies as tending to engage in overreach and excess in the form of expansive claims of power or too-frequent policy shifts.⁴⁵ At the other end of the spectrum, many students of regulation highlight a near opposite set of problems, instead seeing agencies as tending more to inertia, neglect of newly emergent risks and areas of shared or uncertain regulatory turf, inaction in assessing the efficacy of old regulations, or craven deregulation due to capture or political pressure.⁴⁶ These fundamental disagreements about regulatory proclivities lead to clashing policy prescriptions about the need to chill or encourage agency activity.

Thus, despite disagreements about the value of regulation and the administrative state, the reality of at least some agency power to make policy changes should be a source of little consternation. Recent claims and actions, however, reveal dramatically different and changing views about agency power to change policy.

B. *The Justice Neil Gorsuch Regulatory “Whim” Theory*

Justice Neil Gorsuch, while on the Tenth Circuit, was far from sanguine about agency power to change policy. As a circuit court judge, he wrote several opinions that, in no uncertain terms, saw agency policy change as an extreme and constitutionally problematic power, especially if that agency shift followed some earlier judicial policy exegesis.⁴⁷ And, in his rhetoric, his condemnation of agency power to change policies closely echoed broader condemnations of the

⁴³ See SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 14-30 (2003) (exploring prevalence and benefits of pragmatic learning in regulation).

⁴⁴ The persistent question of limitations or constraints on such politicized oversight and control is a strain analyzed throughout this Article. See *infra* Section II.C, Part IV (describing such constraints).

⁴⁵ See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 923-37 (2005) (questioning agencies’ desire and ability to engage in overreach).

⁴⁶ See *infra* Section I.C (discussing problem of regulatory “inertia”).

⁴⁷ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015) (rejecting retroactive application of agency interpretation because it represented executive attempt to wield legislative power without traditional limitations on scope of legislative action); *United States v. Nichols*, 784 F.3d 666, 667-77 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc) (arguing for reinvigoration of nondelegation doctrine).

administrative state and regulation heard from anti-regulatory think-tanks and others calling for reform of the world of regulation.⁴⁸

Then-Court of Appeals Judge Gorsuch condemned an order of the Board of Immigration Appeals and the underlying policy shift regarding the immigrant status it reflected.⁴⁹ But he also used the case as a vehicle to condemn more broadly agency policy inconsistency. In his majority opinion, he wrote that an agency can “exploit a gap in the statute to implement its own (continuously revisable) policy-influenced vision of what the law should be.”⁵⁰ He alludes to the risk that an agency will retroactively shift policy based on “shifting political winds.”⁵¹ Further, he sees a broad risk that agency latitude to shift policies, even when earlier court precedents exist, means that agencies can “impos[e] . . . uncertainty on an entire class of persons with significant interests at stake.”⁵²

In an unusual concurrence to his own majority opinion, now-Justice Gorsuch writes in even broader strokes, characterizing the leading deference and consistency cases as permitting agencies to “swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems [hard] to square with the Constitution of the framers’ design.”⁵³ He suggests it may be time to “face the behemoth.”⁵⁴

⁴⁸ See, e.g., Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323-24 (2017) (reviewing reasons why the federal judge-author finds *Chevron* deference problematic, especially ambiguity claims by agencies to “support the policy result that the agency wants to reach” that are akin to “judicial activism” and “arrogation” of power by agencies and agencies’ “palpable sense of entitlement” due to deferential review); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 104 (2018) (reviewing jurisprudence and scholarship criticizing deference regimes). Some offer a more journalistic and overtly anti-regulatory critique. See, e.g., Iain Murray, *Stopping the Bureaucrats Requires an End to Chevron Deference*, NAT’L REV. (May 11, 2016, 6:53 PM), <https://www.nationalreview.com/corner/stop-bureaucrats-ending-chevron-deference-through-sopra/> [<https://perma.cc/FH6V-4X6Y>]; see also *infra* Section I.C (further citing and discussing such concerns). For a critique focused on the applied indeterminacy and manipulability of *Chevron* deference, and suggesting a return to pre-*Chevron* deference regimes, see Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why it Can and Should be Overruled*, 42 CONN. L. REV. 779 (2010).

⁴⁹ *Gutierrez-Brizuela*, 834 F.3d at 1150 (“If [the order] doesn’t qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we’ve forgotten what might.”).

⁵⁰ *Id.* at 1146 n.1 (majority opinion).

⁵¹ *Id.* at 1146.

⁵² *Id.* at 1147. The Tenth Circuit here is parsing the logic and consequences of the intersection of several major cases that together generally give agencies room to choose procedural modes and adjust policy. See *id.* Those cases are introduced and analyzed later in this Article. See *infra* Section II.B.

⁵³ *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

⁵⁴ *Id.*

After parsing deference doctrine, he makes his strongest assertions about agency power to vacillate, linking policy change power to the risk of agencies “exploit[ing] ambiguous laws . . . for their own prerogative.”⁵⁵ He says regulatory stakeholders “must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail.”⁵⁶ He says that agencies may do so based on “their own preferences about optimal public policy when a statute is ambiguous.”⁵⁷ Or, even more strongly, he says an agency can seek “to pursue whatever policy whim may rule the day.”⁵⁸

The claimed risk of day-to-day vacillation is a repeated theme, with Justice Gorsuch stating that “an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next” and a few lines later repeats the “reverse itself the next day” claim.⁵⁹ Later, he returns to the “whim” theme, reading the *Chevron* case as permitting “agencies to upset the settled expectation of the people by changing policy direction depending on the agency’s mood at the moment.”⁶⁰ He suggests de novo judicial review of a law’s meaning as a way to provide assurance to the public or those regulated that “the rug will not be pulled from under them tomorrow, the next day, or after the next election.”⁶¹

In this discussion, Justice Gorsuch relies on cases and case language with little attention to the underlying agency procedural mode or which framework and presumptions apply in which settings.⁶² Most of his cases and framework discussion err if they reflect an assumption that an agency policy generated via informal adjudication is governed by *Chevron*. This isn’t impossible, but after *United States v. Mead Corp.*,⁶³ quasi-democratic participatory methods are

⁵⁵ *Id.* at 1152.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1153. Four Supreme Court dissenters articulated a somewhat similar concern with policy change based on “regulatory whim,” but argued that it is not permissible and advocated for a narrow reading of new Court language about such power. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 552 (2009) (Breyer, J., dissenting) (“Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?”).

⁵⁹ *Gutierrez-Brizuela*, 834 F.3d at 1154.

⁶⁰ *Id.* at 1158.

⁶¹ *Id.*

⁶² Professor Dotan correctly suggests that procedural modes do and must shape judicial review of agency policy changes. *See* Dotan, *supra* note 7, at 1062 (“The procedural approach acknowledges the relative advantage that agencies have over courts in terms of professionalism and democratic accountability.”).

⁶³ 533 U.S. 218 (2001).

generally the antecedent to agency ability to rely on the *Chevron* deference framework.⁶⁴

Still, now-Justice Gorsuch seems to read doctrine to at least tempt agencies to make abrupt, whim-based policy changes and sees agencies as likely to abuse such power. He makes virtually no mention of how statutory choices, facts, agency reasoning, or current doctrine might already check such claimed agency power.⁶⁵ As explained below, this is a major omission that perhaps explains these overly broad claims.⁶⁶

C. *The Ossification and Agency Inertia Theories*

It is hard to reconcile these views about agency power, especially their alleged tendency to act on a “whim” and create uncertainty by changing policy day-to-day, with the realities of onerous modern notice-and-comment rulemaking. They also run counter to most studies of actual agency behavior and agency proclivities. A prominent opposing normative and empirical claim is that agencies change policy too infrequently. Federal Register notices, especially final rules, are often lengthy and engage with massive rulemaking records. Major regulations typically follow years of work and include dozens or hundreds of pages of “preamble” explanation plus often additional referenced analysis and comment responses.⁶⁷ And because promulgated regulations announcing a policy shift require notice, receive a wave of comments, and end with lengthy

⁶⁴ *Mead* itself calls for courts to analyze if Congress has given the agency power to act with the “force of law” and identifies legislative requirements of procedural formality and use of procedures like notice-and-comment rulemaking or formal agency adjudication as ordinarily a prerequisite for *Chevron* deference. *Id.* at 229-31; see also Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1171-72 (2014) (discussing usual procedural prerequisites for agency claims of deference after *Mead*).

⁶⁵ Some of then-Judge Gorsuch’s rhetoric seems focused upon *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), and how it allows an agency to interpret a statute differently than an earlier judicial construction. That case, however, is more about the contours and logic of *Chevron* deference following an earlier judicial interpretation of a statutory provision than an important precedent about conditions shaping and constraining an agency’s ability to make a shift in its own policies.

⁶⁶ Then-Judge Gorsuch’s powerful anti-regulatory and anti-*Chevron* deference language did garner notice and support among anti-regulatory scholars. See, e.g., Ilya Somin, *Gorsuch Is Right About Chevron Deference*, WASH. POST (Mar. 25, 2017), https://www.washingtonpost.com/news/voikh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference/?noredirect=on&utm_term=.12429b0ec632 (noting Justice Gorsuch’s opinion and agreeing with its anti-regulatory underpinnings).

⁶⁷ For example, the EPA’s Clean Power Plan (“CPP”) rule was issued with a Federal Register preamble of 459 pages, plus accompanying memoranda on legal issues, empirical studies, and responses to particular comments. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

agency responses and explanations for their choices, regulations (whether new or policy shifts) neither come as surprise to anyone, nor emerge in anything remotely resembling a “day” or as a result of “whim.”⁶⁸ As noted in recent scholarship, when agencies have failed to utilize participatory deliberative procedures, they have triggered significant Supreme Court rejections even when the actions were linked to presidents’ preferences.⁶⁹

Relatedly, the literature on the nature and roots of regulatory “ossification” clashes with Justice Gorsuch’s claims.⁷⁰ Due to rigorous procedural and explanation requirements imposed by courts, presidents, and Congress, especially under modern “hard look review,” rulemaking tends to be a slow process involving massive documentation and written justification.⁷¹

And if one digs deeper, especially into “new governance” and democratic experimentalism literature, but also into literature on regulatory slippage, the regulatory commons, and rulemaking “ruts,” one finds yet more contradiction of the abrupt whim-based change claim.⁷² Likewise, calls for agencies to

⁶⁸ For Justice Gorsuch’s “whim” and day-to-day change claims, see *supra* Part I.B.

⁶⁹ Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 789-90 (2007) (arguing that despite *Chevron*’s discussion linking deference to agency political accountability through Presidents’ electoral accountability, more recent cases reject actions where agencies “acted undemocratically” without opportunities for public input and where statutory cues raised authority questions).

⁷⁰ Ossification theory posits that demanding judicial review of agency action and other analytical hurdles imposed by statutes and executive orders lead agencies to engage in slow work, produce massive, detailed explanations, and even dissuades agencies from beginning rulemakings. See, e.g., Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1462 (1992) (blaming judicial and political reversals for ossification); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 300-02 (explaining causes and effects of agency ossification). Compare Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1357-59, 1369 (2016) (questioning ossification thesis and arguing for less rigorous judicial review of agency reasoning), and Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1481-82 (2012) (questioning ossification thesis), with Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1503 (2012) (arguing despite Professors Yackees’ research that ossification remains pervasive phenomenon), and Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2420-21 (2018) (reading recent Supreme Court cases as invigorating judicial scrutiny and questioning claims of Gersen and Vermeule).

⁷¹ See McGarity, *supra* note 70, at 1419-20 (stating that because “reviewing courts are inconsistent in the degree to which they are deferential, [agencies] are constrained to prepare for the worst-case scenario on judicial review,” leading to “resource-intensive and time-consuming” work).

⁷² See, e.g., Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1711-15 (2008) (discussing problem of long-unamended regulations); William W. Buzbee, *Recognizing the Regulatory*

undertake “regulatory lookback” are rooted in concerns, often by anti-regulatory advocates, that old policies live on and on, causing confusion and hindering beneficial societal or market change.⁷³

These somewhat overlapping bodies of scholarship document problems of agency inaction, failure to update and improve policy, and agency reluctance to act. Instead of “empire” building, turf expansion, or overly frequent policy shifts, these empirical, historical, and sometimes theoretical explorations end up identifying the opposite problem.⁷⁴ They identify such problems, then suggest means to overcome pervasive problems of agency inertia, inaction, and frozen law.⁷⁵

D. *Agency Overreach Concerns and the “Major Questions” Canon*

Nonetheless, in calls for regulatory reform, critics of the administrative state often assert a similar mixed claim of agency overreach, concern with agency actions based on whim or mere political preferences, and regret that deregulatory policy change is not easier.⁷⁶ Senator Orrin Hatch, for example, supported a regulatory reform bill with claims of regulatory excess and by characterizing

Commons: A Theory of Regulatory Gaps, 89 IOWA L. REV. 1, 5-6 (2003) (identifying as “regulatory commons” challenges settings where multiple jurisdictions or entities have potential regulation over one issue, identifying areas of missing regulation, and analyzing incentives for potential regulators to leave social ills unaddressed); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 297-98 (1998) (identifying problems of rigidified law and regulation, and arguing for benefits of continuous generation of new information and adjustment and improvement in array of legal areas); Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 304 (1999) (discussing delay among other forms of agency “slippage”); Levinson, *supra* note 45, at 956-57 (challenging theory anticipating agency empire building and explaining why contrary proclivities are more likely).

⁷³ See Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 588-96 (2014) (describing arguments for regulatory lookback and extent to which it already occurs).

⁷⁴ See Levinson, *supra* note 45 (discussing and criticizing “empire building” thesis); see also MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 151-72* (2000) (questioning “rational actor” theory expectations of self-interested agency official behavior resulting in shirking and budget maximization, and observing “hunkering down,” “compliant,” and “cooperative” interactions between anti-regulatory political appointees and agencies’ top career officials).

⁷⁵ See, e.g., Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1337 (2013) (identifying agency inaction as consequence of capture and suggesting solutions for limiting instances of such inaction).

⁷⁶ Some scholars suggest that greater presidential and political involvement could rectify several of these problems. See Levin, *supra* note 16, at 555 (reading *FCC v. Fox Television Stations, Inc.* as allowing for greater agency policy latitude after elections and calling this “salutary” development); Watts, *supra* note 17, at 7-9 (supporting greater acceptance of politics’ place in regulatory decisionmaking, subject to respect for statutory constraints and facts).

Chevron deference as a disappointingly failed strategy to shield deregulatory efforts from judicial rejection.⁷⁷ He stated that “experience has . . . seriously undermined the conservative case for *Chevron* deference,” especially past hopes that through *Chevron*, a “conservative administration would be able to administratively roll back the federal regulatory burden.”⁷⁸

Similarly, defenders of the Office of Information and Regulatory Affairs (“OIRA”), which supervises regulatory cost-benefit analyses pursuant to executive orders, see OIRA and such analyses as a valuable check on regulatory excess.⁷⁹ But regulatory power, rationality, stringency, and policy shifts or vacillations are distinct phenomena. They raise different concerns and are subject to somewhat different doctrinal and political constraints.

Still, one doctrinal strain regarding agency change includes rhetoric and underlying concerns that, in their normative leaning, are fairly consistent with Justice Gorsuch’s indictment of agencies and regulation. This discussion is in the line of Supreme Court cases setting forth the “major question” and “power” canons.⁸⁰ These deference-neutralizing canons of interpretation so far have been triggered by agency actions involving the confluence of a changed or new assertion of regulatory power, major economic impacts, and other statutory signals casting doubt on the logic and legality of a power claim which is usually also a policy shift.⁸¹ Justice Scalia’s majority opinion in *Utility Air Regulatory*

⁷⁷ *The Second Hoover Commission’s 60th Anniversary*, HOOVER INST. (Mar. 16, 2016), <https://www.hoover.org/events/second-hoover-commissions-60th-anniversary> [<https://perma.cc/6TNM-V3SS>] (containing comments of Sen. Orin Hatch at around 3:40:30).

⁷⁸ *Id.*

⁷⁹ The literature on OIRA and cost-benefit analyses is now massive. For two recent countervailing perspectives, compare Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840-41 (2013), in which a former head of OIRA explains and defends OIRA’s role and importance of cost-benefit analysis, with FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 91-122 (2004), which highlights the manipulability of cost-benefit analysis and questions its legality and morality.

⁸⁰ See Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1933 (2017) (arguing that Supreme Court’s decisions in *Utility Air Regulatory Group v. EPA*, *King v. Burwell*, and *Michigan v. EPA* created new trio of canons of statutory interpretation which together “not only rearrange the *Chevron*-dominated relationship between the courts and administrative agencies; [but they] also realign the relationship between the courts and Congress”).

⁸¹ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543-46 (2012) (declining to defer to Internal Revenue Service regulation and judicially resolving question of statutory power due to contextual indications that there was no intent to grant such extensive power to agency); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (declining to afford usual *Chevron* deference to FDA regulation categorizing tobacco as drug due to conclusion that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (discussing *Chevron* and finding it “highly

*Group v. EPA*⁸² (“*UARG*”) reads most like Justice Gorsuch’s concurrence, especially in its blistering language criticizing the EPA as unlawfully “seizing expansive power” by claiming new authority to regulate thousands of air pollution sources.⁸³ And *UARG* was itself substantially based on language in *FDA v. Brown & Williamson Tobacco Corp.*,⁸⁴ which rejected the FDA’s new foray into regulation of tobacco products.⁸⁵

However, while these cases often condemn particular agency claims of power to change policy or reach new targets of regulation, these Supreme Court opinions do so en route to *rejecting* the agency power claims.⁸⁶ Thus, while Justice Gorsuch as a judge assumed agencies under existing doctrine could get away with major self-serving policy shifts or actions based on a “whim,” the Supreme Court in the “major questions” cases has rejected such shifting agency claims of power and also reduced or eliminated deferential reviewing frames in such settings. Litigants opposed to regulation rely heavily on this line of cases.⁸⁷

unlikely” that Congress would entrust “essential characteristic” of statutory scheme to agency discretion).

⁸² 134 S. Ct. 2427 (2014).

⁸³ *Id.* at 2444.

⁸⁴ 529 U.S. 120 (2000).

⁸⁵ *Id.* at 160-61; see *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159). Professor Sharkey reads these cases, as well as *Michigan v. EPA* and *Encino Motorcars*, as revealing an appropriate Supreme Court move towards a form of *Chevron* Step Two review that incorporates the rigorous factual, responsiveness, and reasoning scrutiny required by *State Farm* and other cases articulating the requirements of “hard look review” and “reasoned decisionmaking.” Sharkey, *supra* note 70, *passim*; see also William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1547-80 (2009) (finding Supreme Court review of agency claims of preemptive impact to resemble closely hard look review, especially in seeking agency engagement with and justification grounded in facts); *infra* Sections II.B, II.C, II.E (discussing these cases, their doctrinal overlap, and rigorous engagement they require of agencies making policy change).

⁸⁶ The Court in *UARG* stated that the “EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ . . . we typically greet its announcement with a measure of skepticism.” *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159).

⁸⁷ For example, in litigation opposing Obama Administration regulation of greenhouse gas emissions, challengers relied heavily on this same blend of the “major questions” canon, claims of abrupt agency changes in statutory interpretation that also resulted in expanded agency power, and claims of massive economic impacts. See generally LINDA TSANG & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN *WEST VIRGINIA V. EPA* (2017) (describing underlying regulation and court challenges).

E. *The Trump Administration and Embrace of Change Power*

Early proposals and actions by the Trump Administration, especially in the environmental law arena, reflect a broad claim of presidential and agency power to reverse course with little constraint. As of mid-2018, policy change orders, directives, proposals, or actions have overwhelmingly been in a deregulatory direction. Few have completed the regulatory process or been reviewed in the courts, but the proposals reveal the Administration's view of policy change power.

Under the Trump Administration, most agencies announcing policy change proposals or actions have offered little legal analysis, usually just referring to the result sought or quoting language acknowledging the role of politics in regulation and room for policy change.⁸⁸ Presidential and executive policy shift proposals, as initiated by agencies, have reflected little effort to satisfy the conditions constraining such change.⁸⁹ Most of these policy change actions or proposals have included minimal engagement with what this Article collectively labels "contingencies," namely facts underlying earlier regulatory policies and the accompanying reasoning of earlier actions. This Part reviews such power claims. Later Parts critique their legal validity under governing doctrine and illuminate the legal importance of contingencies shaping past actions and proposed changes.⁹⁰

1. The Two-for-One Executive Order

The largest scale action by the Trump Administration calling for agency policy changes is the "two-for-one" executive order. In Executive Order 13,771, President Trump "ordered" agencies, as a "policy of the executive branch," to accompany any new regulation with identification of "two prior regulations . . . for elimination."⁹¹ The only exception provided was if such

⁸⁸ See *infra* Section II.C.

⁸⁹ See *infra* notes 102-111 and accompanying text (discussing recent policy shift proposals justified on grounds that agencies lack power previously asserted, and noting how FCC has been more thorough on issues of law and fact than other executive agencies during the Trump Administration).

⁹⁰ With both chambers of Congress and the presidency in the same party's hands, Congress passed, and President Trump signed, fifteen Congressional Review Act resolutions invalidating late Obama Administration regulations. See Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AM. PROSPECT (Feb. 6, 2018), <http://prospect.org/article/congressional-review-act-damage-assessment> [<https://perma.cc/G6K2-JKQF>] (reviewing invalidations and their impacts). Because these involved a form of legislative action, they are not discussed here despite their major deregulatory impact.

⁹¹ Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Feb. 3, 2017).

elimination is “prohibited by law.”⁹² In addition, agency actions are to result in no increased regulatory costs and new regulations must to be “offset by the elimination of existing costs associated with at least two prior regulations.”⁹³ Thus, the President directed all agencies to make deregulatory policy shifts, but without regard to the net benefits, legislative edicts, and societal conditions that led to the earlier regulatory actions. Nothing in the Order’s text, apart from typical executive order boilerplate language about respect for other legal requirements and prohibitions, called for rigorous engagement with relevant law, facts, and earlier reasoning.

Due to the Order’s asymmetry and lack of attention to the benefits of earlier regulation, let alone analysis of net regulatory costs or benefits, a broad coalition filed suit alleging that Executive Order 13,771 could never be followed in compliance with the law and would unavoidably taint all agencies’ actions.⁹⁴ That initial challenge, made before any agency had completed actions in compliance with the Order’s edicts that could be traced to particularized palpable effects, was dismissed on standing grounds despite the deciding judge’s critical comments and observations about the Order’s effects, legality, and logic.⁹⁵ OIRA refined the Order’s skewed requirements, but still largely followed the President’s mandates.⁹⁶

⁹² *Id.* Section 5 of the order adds that it should not “be construed to impair or otherwise affect: (i) the authority granted by law to an executive department or agency” and notes that it “shall be implemented consistent with applicable law.” *Id.* at 9340.

⁹³ *Id.* at 9339.

⁹⁴ Complaint for Declaratory and Injunctive Relief at 5, *Public Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6 (D.D.C. 2018) (No. 17-cv-00253) (“Rulemaking in compliance with the Executive Order’s ‘1-in, 2-out’ requirement cannot be undertaken without violating the statutes from which the agencies derive their rulemaking authority and the Administrative Procedure Act ([“]APA[”]).”). The plaintiffs detail their theory regarding the order’s illegality in their Motion for Summary Judgment. Plaintiffs’ Motion for Summary Judgment at 2, *Pub. Citizen, Inc.*, 297 F. Supp. 3d 6 (No. 17-cv-00253).

⁹⁵ *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 20-22, 27 (dismissing for lack of standing mostly due to inability to trace particular harms to any potential future resulting actions or foregone actions, but also noting delay that will result and pointing out puzzling logic of assessing costs without regard to benefits).

⁹⁶ Memorandum from Dominic J. Mancini, Acting Adm’r, Office of Info. & Regulatory Affairs, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs” (Feb. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017> [<https://perma.cc/DS7K-URS3>] (reviewing order and providing guidance on agency compliance, but repeatedly mentioning only “costs” without reference to “benefits” or “net benefits”). An OIRA memorandum setting forth agency obligations to prepare their regulatory agenda for the coming year alluded to the order, but in a few places also mentioned costs and benefits, although not in direct reference to that order’s instructions. See Memorandum from Neomi Rao, Adm’r, Office of Info. & Regulatory Affairs, Data Call for the Fall 2017 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions 1, 8 (Aug. 18, 2017) (quoting “cost” language of order

2. The Agency Stay and Delay Two-Step

Numerous agencies pursued a two-step process to render inoperative existing regulations, often with a promise of some future replacement.⁹⁷ In Federal Register notices and briefs, agencies referenced some future anticipated or possible policy change, but, in the meantime, sought to stay, suspend, and not implement pending regulations, or through similar language or strategies proposed to render an already finalized regulation a nullity. Here too, agencies or their attorneys cited cases mentioning presidential powers and acknowledging that agencies can seek policy change, but without attention to other requirements.⁹⁸ As detailed and analyzed below, because these agencies did not yet seek to replace or justify the abandonment of the earlier regulation, but were effectively rendering it a nullity, reviewing courts during 2017 and 2018 overwhelmingly rejected such a strategy.⁹⁹

3. Splintering Deregulatory Steps

In other settings, Trump Administration agencies took initial steps to undo a regulation, but divided up the steps to getting there and, because of this division, sought to limit comments on the legality or overall wisdom of the earlier regulations' choices or some future change.¹⁰⁰ It is not yet clear if agencies in future finalized policy shifts will be attentive to the contingencies and antecedent regulatory actions in justifying some new policy.¹⁰¹

4. Agency Statutory Abnegation Claims

Numerous agencies' policy reversals were quite summary, relying on what this Article calls "agency statutory abnegation" claims: the agencies newly claim

and mentioning agency assessment of both "costs and benefits," but in connection with another applicable order, Executive Order 12,866).

⁹⁷ See Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 16-47 (2018) (describing array of stay and delay type of actions, judicial rejections, and analyzing such actions' legality); Jennifer Dlouhy & Alan Levin, *Trump Tests Legal Limits by Delaying Dozens of Obama's Rules*, BLOOMBERG (July 13, 2017 4:00 AM), <https://www.bloomberg.com/news/articles/2017-07-13/trump-tests-legal-limits-by-delaying-dozens-of-obama-s-rules> (identifying rules proposed for delay, stay, or non-enforcement); *infra* Section II.H (introducing and analyzing several of these actions).

⁹⁸ See generally Heinzerling, *supra* note 97 (discussing and analyzing such actions' legality); *infra* Section II.H (discussing further such postponement, delay actions, and judicial rejections).

⁹⁹ See *infra* Section II.H (analyzing recent decisions).

¹⁰⁰ See *infra* Sections II.H, III.B (assessing some of Trump Administration's deregulatory efforts).

¹⁰¹ One finalized action delaying the "applicability date" of the Clean Water Rule still omits such analysis. See *infra* Section III.B (discussing Clean Water Rule and related divided deregulatory steps).

that they lack power previously asserted, and state that this new reading of the law requires a policy reversal. Agencies have occasionally used such a strategy in the past, most famously in the EPA actions during the George W. Bush Administration leading to *Massachusetts v. EPA*, but it also appears in other decisions.¹⁰² Its use exploded during 2017 and 2018.¹⁰³ A few examples are reviewed here.

¹⁰² See *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 35, 41-43, 45 & n.18, 50-51 (D.D.C. 2003) (noting agency disclaiming power previously asserted, concluding one such view by Interior Department Solicitor was in error, though it was not adopted in final agency action, while another claim of no legal power over “unclaimed lands” was in error and required judicial rejection); *supra* note 8 and *infra* notes 215-224 and accompanying text (discussing *Massachusetts v. EPA*).

¹⁰³ During 2017 and 2018, many agency proposals and actions relied in whole or in part on claims of statutory abnegation. See, e.g., Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,037 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60) (proposing to repeal Clean Power Plan); *infra* notes 133-146 and accompanying text (discussing Clean Power Plan and actions taken to repeal it, including new interpretation of statute and claim of lack of power to regulate as claimed in 2015); *infra* notes 113-132 and accompanying text (discussing several divided steps taken to delay or abandon Clean Water Rule and proposing to adopt plurality opinion view of Justice Scalia that would substantially change and limit federal authority). Statutory abnegation was also a substantial element of many other policy change actions. Take, for example, the Deferred Action for Childhood Arrivals (“DACA”) Program. See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1022-23 (N.D. Cal. 2018) (reviewing history of DACA); *infra* notes 353-365 and accompanying text. There are yet more examples in the EPA context. See Memorandum from William L. Wehrum, Assistant Adm’r, Env’tl. Prot. Agency on Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act to Reg’l Air Div. Dir. 2-3 (Jan. 25, 2018), available at <https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112-clean> [<https://perma.cc/BYP4-ST7Q>] (abandoning twenty-two year old EPA view of when sources are subject to hazardous air pollutant regulation and calling previous policy “contrary to the plain language” of statute in using temporal variable that made old policy “once in, always in”). For analysis of the shift described in the Wehrum memorandum, see Michelle West, “*Once In, Always In*” Now Out: How the EPA Is Reducing Regulations on Hazardous Air Pollutant Emitters, GEO. ENVTL. L. REV. (Mar. 3, 2018), <https://gelr.org/2018/03/03/once-in-always-in-now-out-how-the-epa-is-reducing-regulations-on-hazardous-air-pollutant-emitters/> [<https://perma.cc/E98G-33WK>], which notes that the EPA’s new take on the “once in, always in” policy “will likely result in a remand, if and when it is challenged.”

There are still more EPA examples. See, e.g., Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53,442, 53,443 (proposed Nov. 16, 2017) (to be codified at 40 C.F.R. pts. 1037, 1068) (proposing to reverse earlier policy that regulated air emissions from refurbished trucks and engines known as “gliders” and claiming that EPA had no such authority under language in Clean Air Act). The Department of Labor has also engaged in this practice. Tip Regulations Under the Fair Labor Standards Act (“FLSA”), 82 Fed. Reg. 57,395, 57,399 (Dec. 5, 2017) (proposing to abandon previous regulation regarding tips policy, claiming that agency had earlier misinterpreted extent of its

In the immigration arena, the Department of Homeland Security ended the Temporary Protected Status (“TPS”) of citizens of two foreign nations.¹⁰⁴ In those actions, however, the Department of Homeland Security not only changed

statutory authority). The Department of Agriculture has engaged in this practice as well. National Organic Program (“NOP”); Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59,988, 59,988-90 (proposed Dec. 18, 2017) (to be codified at 7 C.F.R. pt. 205) (proposing to repeal regulation governing animal care practices and claiming agency lacked authority to issue regulation).

The FCC’s repeal of net neutrality also claimed the earlier policy exceeded the agency’s power under the governing statute. Restoring Internet Freedom, 82 Fed. Reg. 25,568, 25,573 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8, 20) (concluding that there is “nothing in the [Telecommunications] Act that would extend [the FCC’s] jurisdiction” such that it could exercise utility-style regulation to Internet as it did in 2015 rule). The FCC revealed its likely policy change choice and rationale in a declaratory ruling. Declaratory Ruling, Report and Order, and Order on Restoring Internet Freedom, FCC Rcd. CIRC1712-04. But the declaratory ruling document does not preclude further comment and FCC adjustment. *Id.* at 1. The Bureau of Land Management’s (“BLM”) rescission and suspension of a rule about waste and royalties from oil and gas extraction was similarly based on a claim of illegal overreach of statutory authority, although included a fallback claim of discretionary authority to adjust the policy even if the earlier policy did not violate the statute. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,050 (Dec. 8, 2017) (to be codified at 43 C.F.R. pts. 3160, 3170) (pointing out challenge of prior rule surviving judicial review); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924, 7927 (proposed Feb. 22, 2018) (to be codified at 43 C.F.R. pts. 3160, 3170) (stating that “BLM is not confident that all provisions of the 2016 final rule [the previous rule] would survive judicial review” and highlighting critical comments arguing that “BLM’s proposed rule exceeded the BLM’s statutory authority”).

¹⁰⁴ Compare Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23,830, 23,831-32 (May 24, 2017) (extending TPS due to lingering earthquake effects but also other risks to safety, such as compounding storm events, agricultural harvest problems, weak public health system, cholera epidemic, lack of safe water, extreme poverty, corruption, and government instability), and Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,647 (July 8, 2016) (extending TPS status due to safety risks from initial TPS-triggering earthquake but noting other statutorily specified sources of risks to safety to explain extending TPS status), with Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648, 2650 (Jan. 18, 2018) (terminating status because “conditions for Haiti’s designation . . . relating to the 2010 earthquake . . . are no longer met” and limiting analysis to effects of that one event), and Press Release, Kirstjen M. Nielsen, Sec’y of Homeland Sec., Dept. of Homeland Sec., Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018), available at <https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected> [<https://perma.cc/ZS8X-H34Z>] (announcing termination of TPS status because “original conditions caused by the 2001 earthquakes no longer exist” and stating that therefore, “under the applicable statute, the current TPS designation must be terminated”).

its longstanding interpretation of the underlying statute to justify the actions, but it failed to acknowledge that shift or to address additional risks to immigrant safety that it had earlier viewed as legally relevant to determining TPS status.¹⁰⁵ It now states that it “must” terminate the TPS designation when the conditions for it no longer apply.¹⁰⁶ Under previous administrations and even in an early Trump Administration action, the agency considered all of the criteria that can justify TPS designations for a nation and ongoing risks to safety, not just the initial triggering event.¹⁰⁷

In 2017, the FCC, an independent agency, took substantial steps toward abandoning the net neutrality regulation it promulgated in 2015.¹⁰⁸ This proposal and the later tentative final order engaged more than most of the other Trump Administration agencies with the earlier action’s content and rationales and relied heavily on “predictive judgment” about “increase[d] investment.”¹⁰⁹ In the proposal and nominally final order, the FCC also stated that the earlier action was founded on unsound “statutory construction” and claimed the new action is based on a “better reading of the statute.”¹¹⁰ This order, in contrast to other actions of Trump Administration executive agencies, devoted substantial attention to the underlying regulatory history, identified relevant case law about the contours of agency authority, and devoted pages to satisfying the cases setting forth both the FCC’s power and the constraints of consistency doctrine.¹¹¹ While the substantive policy reversal is major and its ultimate fate uncertain, its approach to the law regarding policy change is much more consistent with the norm established over multiple administrations.

5. Environmental Deregulating with Inattention to Science and Past Reasoning

The Trump Administration’s efforts to reverse several high conflict environmental actions by the Obama Administration further reveal aggressive

¹⁰⁵ See Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. at 2650; Press Release, Dep’t of Homeland Sec., *supra* note 104.

¹⁰⁶ See Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. at 2649-50 (“If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation . . .”).

¹⁰⁷ See Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. at 23,832 (extending TPS due to lingering earthquake effects but also other risks, including “Haiti’s weak sanitation infrastructure”).

¹⁰⁸ See Restoring Internet Freedom, 82 Fed. Reg. 25,568, 25,573 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8, 20).

¹⁰⁹ *Id.*; see also Declaratory Ruling, Report and Order, and Order on Restoring Internet Freedom, FCC Rcd. CIRC1712-04, ¶¶ 155-200 (reviewing both administrative law constraints and communications law provisions to justify policy change).

¹¹⁰ Restoring Internet Freedom, 82 Fed. Reg. at 25,575.

¹¹¹ See *id.* at 25,570-72 (tracing history and rationales behind past policies and new policy); *id.* at 25,580-82 (reviewing consistency doctrine case law and explaining basis for its policy change).

views about broad presidential and agency power to change policy. These actions simultaneously use several of the change strategies just discussed, but most are especially notable in their minimal engagement with underlying science, past findings, and past agency reasoning. Here, they are reviewed for the power claims they manifest.¹¹²

For example, in 2015 during the Obama Administration, the EPA and the Army Corps of Engineers (“Corps”) finalized the Clean Water Rule, which sets forth definitions and tests for determining if a particular “water” is subject to federal jurisdiction as a “water[] of the United States.”¹¹³ This status is of huge economic and environmental significance: it determines if industrial discharge permits are required for pollution (under Section 402 of the Clean Water Act) and if dredging and filling of such waters is subject to a strong prohibitory presumption (under Section 404 of the Clean Water Act).¹¹⁴ As part of generating this 2015 rule, the EPA and the Corps simultaneously sought comment on and finalized a massive document—the Connectivity Report—that summarized all peer-reviewed science regarding the functions of various sorts of waters.¹¹⁵ The Clean Water Rule itself followed the Supreme Court’s creation of an increasingly unsettled body of law due to three related decisions, one of which resulted in splintered opinions and questions about what constituted the majority view.¹¹⁶ The rule was finalized, but it engendered fierce attacks, including an expansive “Ditch the Rule” public relations campaign, and was subsequently stayed by a federal appeals court late in the Obama

¹¹² Analysis of their legal adequacy is provided later in this Article to apply and illuminate this body of doctrine and the contingencies they frame. *See infra* Part III.

¹¹³ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015).

¹¹⁴ *See* 33 U.S.C. §§ 1342, 1344 (2012).

¹¹⁵ U.S. ENVTL. PROT. AGENCY, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE ES-1 (2015).

¹¹⁶ *See Rapanos v. United States*, 547 U.S. 715, 732 (2006) (stating, in plurality opinion announcing the Court’s judgment, that definition of “‘waters of the United States’ includes only relatively permanent, standing or flowing bodies of water” but with concurring opinion by Justice Kennedy and opinion of four dissenters finding broader federal authority and explicitly sharing common views on most rationales and waters that would be protected); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 171-72 (2001) (rejecting claim of federal jurisdiction under Clean Water Act (“CWA”) over wholly intrastate, isolated waters such as ponds, gravel pits, and seasonal waters due to their use as migratory bird habitats); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985) (upholding broad definition of navigable waters with focus on unavoidable judgment calls in resolving border of land and water in complex hydrological system and due to Act’s integrity goals).

Administration.¹¹⁷ In early 2018, the Supreme Court entered the fray, ruling that challenges to this rule had to be filed in district court, not a court of appeals.¹¹⁸

The Trump Administration targeted the Clean Water Rule shortly after the President's inauguration. President Trump specifically referenced the rule in an Executive Order, asking the agencies to "review" the rule to "rescind[]" or "revis[e]" it "as appropriate and consistent with law."¹¹⁹ But the President's Order went further than just to tilt the agencies in a deregulatory direction. He asked the agencies to "consider interpreting the" underlying statutory language "in a manner consistent with the opinion of Justice Antonin Scalia" in *Rapanos v. United States*.¹²⁰

It is the next steps that reveal how consistency doctrine can be embraced—even if distorted—by a President and agencies seeking a major deregulatory shift. In March 2017, the EPA—under the leadership of President Trump's initial appointee as Administrator, Scott Pruitt—and the Corps published a Notice of Intent to reconsider the Clean Water Rule, referencing President Trump's "directive," and also stating that they would consider adopting Justice Scalia's opinion rationales.¹²¹ The agencies cited *FCC v. Fox Television Stations, Inc.*¹²² ("Fox") and *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*¹²³ as confirming the agency's power to reconsider a past "decision," then went on to embrace the untethered view of

¹¹⁷ *Murray Energy Corp. v. U.S. Dep't of Def.*, 817 F.3d 261, 274 (6th Cir. 2016) (denying defendants' motion to dismiss on procedural grounds by determining challenges to rule are subject to direct circuit court review), *rev'd sub nom.* *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). There have been public relations efforts to influence this and other regulatory actions. *See, e.g.*, Rachel Augustine Potter, *More Than Spam? Lobbying the EPA Through Public Comment Campaigns*, BROOKINGS (Nov. 29, 2017), <https://www.brookings.edu/research/more-than-spam-lobbying-the-epa-through-public-comment-campaigns/> [<https://perma.cc/8KE2-FELE>] (discussing interest groups eliciting massive numbers of comments and attributing "Ditch the Rule" campaign to American Farm Bureau Federation).

¹¹⁸ *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 624.

¹¹⁹ Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The Order is titled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." *Id.* at 12,497.

¹²⁰ 547 U.S. 715 (2006) (plurality opinion); Exec. Order No. 13,778, 82 Fed. Reg. at 12,497. Because Justice Scalia's opinion represented a plurality of the Court, and two different majorities read the statute and regulatory power differently, it is questionable if the agency could adopt Justice Scalia's approach. Moreover, unlike the agencies that issued the Clean Water Rule, Justice Scalia's opinion was not grounded in science, hydrology, or the agencies' expertise, but instead derived from his parsing of statutory and dictionary language. *See Rapanos*, 547 U.S. at 731-32.

¹²¹ Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532, 12,532 (Mar. 6, 2017).

¹²² 556 U.S. 502 (2009).

¹²³ 463 U.S. 29 (1983).

agency policy change power.¹²⁴ This is apparent in both what the agencies said and what they omitted.

Quoting portions of these cases, the agencies stated that “such a revised decision need not be based upon a change of facts or circumstances,” but can be based “on a revaluation of which policy would be better in light of the facts” and a “change in administration brought about by the people casting their votes.”¹²⁵ But the notice grappled with no past science, did not mention the Connectivity Report, did not proffer any analysis of the environmental impacts of dropping the Clean Water Rule, and did not include any legal analysis of the contours of what the agency thought in the past and at the time of the new proposal as to what it is permissible under the law. In proposing to adopt Justice Scalia’s view of what waters are protected, the agencies were engaging in another variant of statutory abnegation, substantially shrinking their claimed regulatory power from that asserted in 2015.¹²⁶

And in a related solicitation of public comments about pursuing this policy change in two steps, with the first characterized as restoring the law to where it stood before the 2015 Clean Water Rule, the agencies even sought to limit public comments such that they would not address underlying science or policy impacts or the overall repercussions of the regulatory shift.¹²⁷ It, too, ignored science and environmental impacts. Yet a third notice and then finalized rule added an “applicability date” delaying any implementation of the Clean Water Rule for two years.¹²⁸ That action also provided no engagement with science, facts, or

¹²⁴ Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. at 12,532. These are two of the three recent major cases regarding policy consistency doctrine. *Fox*, 556 U.S. at 515 (finding FCC’s policy on censoring language is acceptable on grounds that “it suffices that the new policy is permissible under the statute”); *State Farm*, 463 U.S. at 42 (holding that “agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”). See Section II.C for further analysis of these cases.

¹²⁵ Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. at 12,532 (quoting *Nat’l Ass’n of Homebuilders v. EPA*, 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012)).

¹²⁶ Justice Scalia’s opinion did not garner a Court majority. See *supra* notes 115-120 and accompanying text. Moreover, in counting votes and positions, this quite clearly was a minority view on the extent of government power to protect waters. If adopted as the final view of agency power, it would also disclaim a substantial portion of federal authority earlier stated under the Clean Water Rule, federal briefing, and in light of relevant science and the Connectivity Report.

¹²⁷ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,903 (proposed July 27, 2017) (stating that agencies were not seeking comment on pre-2015 rules or “scope of the definition of ‘waters of the United States’” until second step of two-step process).

¹²⁸ See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542, 55,544-45 (proposed Nov. 22, 2017) (proposing applicability date and reiterating that agencies were not soliciting comment on scope of definition of “waters of the United States” “[b]ecause the agencies propose to simply add the

past reasoning, let alone law regarding agency policy change or judicial rejections of similar stay or postponement strategies.¹²⁹

Then, in June of 2018, EPA and the Corps published yet another waters-related notice, this time a new “Supplemental Notice of Proposed Rulemaking” that provided additional questions and proposals linked back to the July 2017 repeal proposal, which remained pending a year after its proposal.¹³⁰ This Supplemental Notice, for the first time in deregulatory actions related to the Clean Waters Rule, delved in more than a cursory manner into issues of science and also discussed the Connectivity Report.¹³¹ Similar language and advocacy relying on language snippets from *Fox* and *State Farm* appeared in several other EPA policy change notices.¹³²

A similar combination of citation, justification, limiting of comment, splintering of regulatory actions, and lack of engagement with materials previously viewed as central was evident in the late 2017 and 2018 EPA proposals to repeal the Obama Administration’s Clean Power Plan (“CPP”). The CPP regulation was finalized in 2015. It was designed to limit greenhouse gas (“GHG”) emissions from power plants due to their climate impacts.¹³³ The CPP was issued following three Supreme Court decisions that affirmed EPA authority to regulate GHGs, one of which specifically referenced Section 111(d) of the Clean Air Act as providing EPA authority to regulate existing power plant

applicability date and ensure continuance of the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking”); *see also* Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5202-03 (Feb. 6, 2018) (emphasizing lack of associated costs and benefits due to claimed maintenance of legal status quo of Clean Water Rule finalized but not yet in effect due to judicial stays). For a discussion of the legal adequacy of this rule and its judicial rejection, see *infra* note 372 and accompanying text.

¹²⁹ Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. at 5205 (addressing public comments on delay and avoiding any discussion of substance of underlying rule by claiming that agencies satisfied their duty under APA by explaining their rationale as “provid[ing] for regulatory certainty and . . . maintain[ing] the legal *status quo*” and seeking public comment).

¹³⁰ Definition of “Waters of the United States—Recodification of Preexisting Rule, Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227, 32,231-50 (July 12, 2018).

¹³¹ *Id.* at 32,228-29, 32,240-42 (focusing on science issues, “significant nexus” analysis, and implications of Connectivity Report).

¹³² *See infra* note 368-369 and accompanying text (reporting on Federal Register notices relying on similar foundation).

¹³³ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,662 (Oct. 23, 2015) (“[T]his action . . . establish[es] final emission guidelines for states to follow in developing plans to reduce greenhouse gas (GHG) emissions from existing fossil fuel-fired electric generating units . . .”).

emissions.¹³⁴ Furthermore, the EPA had, in a separate finalized and judicially upheld rulemaking, extensively documented climate science and associated health and environmental “endangerments” resulting from GHG emissions and climate change.¹³⁵ That finding, plus the Court’s precedents, had been viewed by EPA as triggering a mandatory duty to regulate due to the “shall” language in Section 111(d).¹³⁶

In 2017, however, the EPA proposed to repeal the CPP. Its notice proffered a different read of the statute that focused on coal plant hardships and claimed consistency with an earlier “inside the fenceline” EPA approach to sources regulated under Section 111(d).¹³⁷ The EPA proposed a complete repeal of the CPP, but without committing to any replacement rule.¹³⁸ It too cited a few consistency doctrine precedents and, as with the Clean Water Rule repeal proposals, sought to limit public comment.¹³⁹ It offered a new power-limiting interpretation of the statute similar to other agencies’ statutory abnegation

¹³⁴ See William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1071-81 (reviewing cases and regulatory actions leading to creation of CPP).

¹³⁵ *Id.* at 1075 (reviewing risks of climate change and “the ‘car deal’ that was issued with industry, state, and federal agreement to future auto emissions reductions to comply with transportation and environmental laws”).

¹³⁶ Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. at 64,707-25 (summarizing legal history and basis for design of CPP). In the CPP, the EPA explained its approach as consistent with past rulemakings that required pollution control in light of each industries’ particular attributes. It emphasized that power plants were already adjusting pollution levels through use of the interconnected and integrated energy grid. *Id.* at 64,727-33 (reviewing “measures available because of the integrated electricity system”).

¹³⁷ See Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,038 (proposed Oct. 16, 2017) (explaining that EPA proposal to repeal CPP is based on its determination that “performance standards that the CPP established for existing sources” were based upon three inputs, two of which “exceed the EPA’s authority under CAA section 111”). The CPP rejected an “inside the fenceline” approach, looking instead at pollution and energy use reductions achieved through trading and adjustments linked to the interconnected electrical grid. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. at 64723-27, 64758-60, 64768-69. News releases accompanying the repeal proposal explicitly characterized the repeal as abandoning reliance on actions “outside the fence line.” Press Release, Env’tl. Prot. Agency, U.S. EPA Takes Another Step to Advance President Trump’s America First Strategy, Proposes Repeal of “Clean Power Plan” (Oct. 10, 2017), *available at* <https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal> [<https://perma.cc/ZLM4-LWTM>] (stating EPA would return to its “traditional[] . . . inside the fence line” approach).

¹³⁸ See Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. at 48,036.

¹³⁹ *E.g., id.* (“EPA is not soliciting comments on such information with this proposal”); *see also id.* at 48,039 (citing change power cases).

rationales referenced earlier.¹⁴⁰ In the repeal proposal, the EPA did not cite other relevant statutory language, cases, and past rulemakings the EPA analyzed in 2015; ignored the EPA's detailed 2014, 2015, and 2017 studies of the electricity sector; ignored state regulatory trends and accomplishments; and nowhere engaged with the EPA's own earlier pro-CPP reasoning.¹⁴¹ The EPA did not compare or quantify environmental and health costs flowing from the repeal proposal. While an accompanying Regulatory Impact Analysis contained some relevant numbers and comparisons, the agency there also shifted its analytical framework.¹⁴² In 2017, the EPA also sidestepped discussion of predicted increases in particulate matter pollution accompanying GHG emissions and thousands of additional predicted deaths, though it had previously viewed such impacts as legally relevant to the CPP due to statutory language requiring agency consideration of the impacts on public health.¹⁴³

Then, in August 2018, the EPA proposed a substantially weakened replacement rule for the CPP, labeling the new proposal the Affordable Clean Energy ("ACE") Rule.¹⁴⁴ This proposal and accompanying documents again claimed that the CPP exceeded the EPA's statutory authority.¹⁴⁵ In summary

¹⁴⁰ *Id.* at 48,035-39.

¹⁴¹ The proposed repeal ignored a 2017 action finding post-2015 to 2017 acceleration of clean energy trends and at decreased costs than predicted in 2015. *See* U.S. ENVTL. PROT. AGENCY, BASIS FOR DENIAL OF PETITIONS TO RECONSIDER AND PETITIONS TO STAY THE CAA SECTION 111(d) EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS AND COMPLIANCE TIMES FOR ELECTRIC UTILITY GENERATING UNITS 22-30 (2017) (explaining how, in wake of CPP, there was growing trend toward low- and zero-emitting energy).

¹⁴² *See* U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE REVIEW OF THE CLEAN POWER PLAN: PROPOSAL 27 (2017) ("This [Regulatory Impact Analysis ("RIA")] addresses the avoided regulatory compliance costs, forgone emission reduction benefits of the final emission guidelines that are the focus of this action. Additionally, this RIA includes information about potential impacts of the proposed rule on electricity markets, employment, and markets outside the electricity sector. The RIA also presents a discussion of uncertainties and limitations of the analysis.").

¹⁴³ The CPP discussed such impacts on health. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,682-83 (Oct. 23, 2015) (discussing how "climate change is expected to increase ozone pollution over broad areas of the U.S. . . . with impacts on other areas of public health, such as the potential for increased deaths, injuries, infectious and waterborne diseases, and stress-related disorders"). The repeal proposal, however, does not discuss them despite CAA Section 111(a)'s mandate that the agency consider "health . . . impact[s]." 42 U.S.C. § 7411(a)(1) (2012).

¹⁴⁴ Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,716 (proposed Aug. 31, 2018).

¹⁴⁵ *Id.* at 44,748 (referring to CPP's "legal flaws"); *id.* at 44,752-53 (stating that CPP "generation shifting" strategy violated statute that EPA in new proposal views as "unambiguously intended to be source specific" (citation omitted)). In other discussion, it characterizes its new focus on "unit-specific" or "within-the-fenceline" improvements as

form, EPA alluded to electricity sector trends and resulting lowered emissions, but did not cite or discuss in detail the EPA's own January 2017 petitions denial that discussed acceleration of clean energy trends and also lower than expected associated costs.¹⁴⁶ The EPA seemed to assume that the CPP created no reliance interests or effects—none are discussed. Apples-to-apples comparisons of the CPP versus the ACE proposal and their benefits and costs, especially GHG reductions, were partly avoided because the EPA in the ACE proposal declined to set an emissions cap for the sector as it had in the CPP. Other comparisons of costs and benefits were analyzed under a different, solely domestic focus, but with changed and largely unexplained estimates of costs and lives lost under the CPP, earlier related proposals, and under the ACE proposal itself.¹⁴⁷ Unlike in several of the other proposals discussed, the EPA did not in this proposal seek to limit the public's comment or overall arguments about the new proposal's comparative merits.

The Clean Water Rule, the CPP rollback, the replacement proposals, and the final waters "applicability date" rule as described here are only the beginning of lengthy legal battles. Nonetheless, they reveal broad change power claims. The initial wave of actions engaged minimally with previous agency reasoning justifying the preceding actions, limited comments, did not quantify the impacts of their actions, provided scant information on environmental effects, and divided their regulatory steps. They mentioned some relevant case law, but only to emphasize presidential change power. By the summer of 2018, EPA actions (under the leadership of a new administrator, Andrew Wheeler), provided greater justifications and more attention to the usual practices of agencies proposing a policy change.¹⁴⁸ Most neglect the more recent *Encino Motorcars* case that spoke in a clear, singular majority opinion and required agencies proposing change to do far more than just point to votes or a view of "better" policy, but also provide "good reasons,"¹⁴⁹ a "rational connection between the facts found and the choice made,"¹⁵⁰ and leave no "[u]nexplained

within EPA's power or reasonable and past CPP approach "unreasonable." *Id.* at 44,753-54, 47,775.

¹⁴⁶ See BASIS FOR DENIAL OF PETITIONS TO RECONSIDER AND PETITIONS TO STAY THE CAA SECTION 111(d) EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS AND COMPLIANCE TIMES FOR ELECTRIC UTILITY GENERATING UNITS, *supra* note 141.

¹⁴⁷ Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. at 44,783-96 (discussing impacts); *see also* U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS; REVISIONS TO EMISSIONS GUIDELINES IMPLEMENTING REGULATIONS; REVISIONS TO NEW SOURCE REVIEW PROGRAM (2018).

¹⁴⁸ For these more fleshed out change proposals, see *supra* notes 130, 144.

¹⁴⁹ *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

¹⁵⁰ *Id.*

inconsistency.”¹⁵¹ And by fragmenting the undoing of rules and often seeking to limit comments, most of these actions avoided the fundamental regulatory rescission question: should the agencies be abandoning a past finalized regulation and, if so, why and at what costs?

In a significantly different procedural setting that also involves the environment, President Trump ordered the Corps to reverse its previous commitment to undertake additional environmental review prior to deciding on an easement permit needed for the conflict-laden Dakota Access Pipeline.¹⁵² His memorandum directed the Corps to “approve in an expedited manner” the project.¹⁵³ The memorandum contained language retaining some role for law and facts—“to the extent permitted by law and as warranted”—but clearly stated the outcome sought.¹⁵⁴ A couple of weeks later, with a reference to President Trump’s “direction,” the Corps announced it would grant the easement, rely on earlier analyses, reverse itself, and not undertake any of the additional review it had earlier said was needed.¹⁵⁵ Here, the President was directing an agency outcome in an adjudicatory setting—albeit an informal adjudication—where private stakeholders were in conflict over a wealth-generating, but also risk-creating, project. As explained below, this sort of explicit presidential direction in an adjudicatory setting is problematic and likely unprecedented.¹⁵⁶ Legal skirmishing over this permit and pipeline continued, but one court ruling, in a mixed opinion, faulted the agency for bypassing analysis required by the National Environmental Policy Act (“NEPA”).¹⁵⁷

¹⁵¹ *Id.* (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). For analysis of the key consistency precedents, see *infra* Section II.C.

¹⁵² Construction of the Dakota Access Pipeline, Memorandum for the Secretary of the Army, 82 Fed. Reg. 11,129 (Jan. 24, 2017).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Letter from Paul D. Cramer, Deputy Assistant Sec’y of the Army, to Representative Raul Grijalva, Ranking Member, U.S. House of Representatives Comm. on Nat. Res. (Feb. 7, 2017) (providing notice to Congress of Army’s intent to grant Dakota Access easement).

¹⁵⁶ Despite broad agreement that presidents cannot claim directive authority over—or have ex parte contacts in connection with—formal adjudicatory procedures, informal adjudicatory actions are generally viewed as providing more latitude for presidential directions and political nudges, but with risks remaining due to bias and prejudgment in settings of competing interests and fact and context-specific judgments. For further analysis see *infra* Section IV.D. See also Percival, *supra* note 3, at 2487-532 (tracing assertions of directive authority and regulatory review by presidential administrations from Nixon to Obama); Strauss, *supra* note 3, at 967-68 (questioning whether President’s role in, and potential control over, rulemaking should be cause for concern).

¹⁵⁷ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 136-43 (D.D.C. 2017) (finding several elements of Corps’ analysis of its environmental risks arbitrary and capricious, but rejecting arguments of illegal failure to follow policy change precedents’ requirements).

This Article now turns to an analysis of the most relevant governing precedents and bodies of law making up consistency doctrine. It returns later to assess the legality and accuracy of these strong claims of largely unfettered agency change power.

II. AGENCIES, PRESIDENTS, AND POLICY CHANGE CONDITIONS

It is indisputable that the baseline norm is that agencies can change their policies over time as they gain experience.¹⁵⁸ Nonetheless, the power to adjust policy is separate from the conditions and requirements an agency must satisfy to justify such changes.¹⁵⁹ This Article suggests that the conception of a tethered president, and tethered agencies as well, is an important frame to emphasize that while there is ordinarily room for some policy movement, that movement is always subject to constraints. And under an array of cases and linked doctrine, the obligation of agencies to engage with regulatory contingencies is at the heart of tethering constraints and analysis of the legality of agency policy shifts.

A. *Enabling Act Constraints*

The first and most important constraint is the statutory language that authorizes the disputed regulatory act.¹⁶⁰ The most fundamental obligation of a President and executive branch agencies is to “take Care” that the thousands of laws they must implement and enforce “be faithfully executed.”¹⁶¹ Such faithful legal execution includes several necessary elements.¹⁶² First, statutes reflect a congressional choice of delegate. Sometimes they confer authority and obligations on a President, but, more often, such enabling acts confer authority on a particular department or regulator.¹⁶³ The specificity or breadth of that delegation is itself an implicit constraint on the President.¹⁶⁴

¹⁵⁸ See *supra* Section I.A (discussing expectation and reasoning behind agencies creating and changing policy).

¹⁵⁹ See *infra* Section II.C (reviewing major decisions regarding consistency doctrine and agency justification for change); Section II.G (discussing pitfalls of poorly explained policy).

¹⁶⁰ See *Massachusetts v. EPA*, 549 U.S. 497, 532-33 (2007) (emphasizing centrality of statutory criteria in guiding agency action); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (stating “an agency literally has no power to act . . . unless and until Congress confers power upon it”).

¹⁶¹ U.S. CONST. art. II, § 3.

¹⁶² Metzger, *supra* note 33, at 1332-42; Metzger, *supra* note 39, at 1875-78 (discussing President’s role in supervision of agencies and parsing Take Care Clause).

¹⁶³ See Stack, *supra* note 3, at 267 (documenting different congressional statutory choices to delegate power to President or to agencies and arguing that President only has statutory authority to act under statutes that directly grant such authority to him).

¹⁶⁴ See Percival, *supra* note 3, at 2495 (“Traditional principles of statutory interpretation dictate that if Congress deems it necessary in some circumstances to specify when the President may exercise authority to override an agency decision, such authority should not be inferred when Congress has not so specified.”); Stack, *supra* note 3, at 267, 284 (arguing for

Second, statutes will state their purposes and in operative provisions the particular tasks, means, and criteria shaping how the agency is to achieve statutory goals.¹⁶⁵ And barring an enabling act offering some additional or contrary process, the Administrative Procedure Act's ("APA") notice-and-comment procedures must precede an agency promulgation of a rule that ends up being explained in the Federal Register and finally codified in the Code of Federal Regulations.¹⁶⁶ Importantly, as reviewed below, these notice-and-comment obligations exist for brand new regulations, revisions to them, or deregulatory rulemakings. Hence, laws provide goals, criteria, and procedural choices. Any agency making new policy, whether a new initiative or a change to an existing one, will need to abide by this combination of substantive and procedural constraints.¹⁶⁷

One caveat is necessary here. Barring statutory or regulatory language mandating action, a line of cases dating back to the 1970s gives the President and agencies presumptive control over when and how they will implement and enforce the law, especially where that choice involves resource allocation

enforcement of congressional choices despite President's role as head of executive branch, due to varying congressional choices regarding delegations to agencies or presidents); *cf.* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 115 (2d Cir. 2018) (en banc) (stating that broad statutory language provides room for statutory coverage beyond "principal evil to cover reasonably comparable evils" and is not limited by "the principal concerns of our legislators" (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998))). Both linguistic breadth and specificity can impose constraints since an agency might claim expansive or limited powers. In either setting, the delegation language would shape the reasonableness of those power claims. For a defense of delegations of broad authority to agencies due to their expertise, transparent process, and rigorous judicial review and the "public trust" thereby engendered, see Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 637-40, 672 (2018).

¹⁶⁵ Professor Metzger argues that congressional structural, procedural, and agency role allocations should be given more weight by reviewing courts. Metzger, *supra* note 33, at 1366-69. The Supreme Court in *Massachusetts v. EPA* did focus on such factors and rejected agency reliance on other considerations. See *Massachusetts v. EPA*, 549 U.S. 497, 526-28 (2007); *supra* note 8 (citing scholarship analyzing *Massachusetts v. EPA* and its statutory and expertise-based focus); see also *Gonzales v. Oregon*, 546 U.S. 243, 244 (2006) (rejecting authority of interpretive rule issued by Attorney General in light of specificity of allocated and preserved regulatory roles for several regulators, federalism concerns and divisions reflected in statute, and also rejecting claim of deference due to lack of process preceding rule's issuance).

¹⁶⁶ See Metzger, *supra* note 33, at 1348-52 (discussing role of APA and how it sometimes constrains courts' ability to develop administrative law doctrine in common law-like manner).

¹⁶⁷ See *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 21-23, 30, 40 (D.D.C. 2010) (analyzing statutory goals guiding National Park Service agency power and discretion to revise policies, but stating "that discretion is 'bounded by the terms of the Organic Act itself'" and rejecting as inadequate agency's attention to facts behind old and new actions (citations omitted)).

choices delegated by Congress to the agency.¹⁶⁸ A degree of deregulatory impact can be achieved simply through non-enforcement, although citizen suit provisions and other private causes of action, plus enforcement by state and local governments, often ensure the law does not become a dead letter.¹⁶⁹ Weak implementation and enforcement of laws and regulations that may remain unchanged is often difficult or even impossible to challenge in court.¹⁷⁰ It might, however, be different if an agency overtly adopted a policy of legal “abdication,” as noted in *Heckler v. Chaney*.¹⁷¹ Such agency and presidential choices about priorities and their regulatory agenda are likely at the apex of room for discretionary choice.¹⁷² Nonetheless, as strongly stated in *Massachusetts v. EPA*, when an agency does act, it must root its choices in what the underlying statute requires.¹⁷³

B. *Policy Change Process, Deliberative Opportunities, and Integrity*

When agencies seek to change policy, they will ordinarily be subject to stakeholder input either because it is required or to strengthen the agency’s position when reviewed in court.¹⁷⁴ Agencies that short-circuit such processes and deliberative opportunities, as seen in major policy change actions just reviewed, make their actions vulnerable to judicial invalidation.

Agencies can change policies under an unchanged enabling act due either to intentional congressional conferral of power that mandates periodic reassessments, or statutory language that confers substantial discretion to agencies, or often by virtue of implicit delegations of authority. Long before

¹⁶⁸ For an analysis of agencies’ latitude to choose procedurally how to make policy, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004). For an analysis of general unreviewability of agency choices not to enforce or how to allocate resources, see Ronald Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 702-34 (1990).

¹⁶⁹ See generally Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008) (arguing that there is no real difference between decision to regulate or not to regulate under APA); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 797 (2010) (discussing issue and citing to Biber and other scholars analyzing inaction law).

¹⁷⁰ See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 55 (2004) (unanimously holding that APA only allows courts to examine government agencies’ failures to act where action is required and discrete); *Heckler v. Chaney*, 470 U.S. 821, 821 (1985) (concluding that nonenforcement choices by agencies are presumptively unreviewable in federal courts); Levin, *supra* note 168, at 704-05 (discussing Supreme Court’s decision in *Citizens to Preserve Overton Park v. Volpe* and its treatment of unreviewability under APA).

¹⁷¹ 470 U.S. 821, 833 (1985).

¹⁷² See Watts, *supra* note 17, at 2 (arguing for legitimacy of political involvement and considerations in setting priorities and allocating resources if not subject to countervailing or constraining congressional framework).

¹⁷³ See *supra* note 8 and accompanying text.

¹⁷⁴ See Bressman, *supra* note 69, at 776; Magill, *supra* note 168, at 1390.

modern deference framework cases, courts deferred to agency interpretations of their enabling acts due to their expertise and congressional choice of the regulators, even without explicit delegation of agency power to act through rulemaking.¹⁷⁵ Today, which deference framework shapes judicial review generally hinges on the procedural mode through which the agency acts.¹⁷⁶

An agency's procedural choices about how to act and make policy, unless constrained by statute or an agency's own regulations or policy developed over time, have long been viewed as within the agency's discretion.¹⁷⁷ Agencies can make policy through regulations, usually using a notice-and-comment process, but also can make policy on a case-by-case basis through adjudications or also through guidance and policy documents not vetted in a notice-and-comment process.¹⁷⁸ The authoritativeness of the derived policy, its durability, and deference frames will vary depending on the policymaking mode.¹⁷⁹

A meta-rule is critical to understanding consistency doctrine: an agency can only change policy through an equal or more formal procedural mode than initially utilized.¹⁸⁰ And in the modern era, when formal agency actions are a rarity, this usually means that regulations generated through a notice-and-comment process stand at the top of the authority hierarchy. To state it more simply, to amend a fully effective rule promulgated through a notice-and-comment process requires another rulemaking—it takes a regulation to displace

¹⁷⁵ There are two foundational pre-APA cases explaining rationales for judicial deference to agencies, but with analysis that blends review of legal and factual determinations. *See* *Skidmore v. Swift & Co.*, 323 U.S. 134, 139, 140 (1944) (explaining why agency views about law and facts deserve “respect,” deference, and “in some cases decisive weight” since agency will have “more specialized experience”); *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130 (1944) (stating that “it is not the court’s function to substitute its own inferences of fact for the [NLRB’s]” because “Congress entrusted” to NLRB such determinations).

¹⁷⁶ *See infra* notes 182-197 (discussing deference frameworks).

¹⁷⁷ *See* Magill, *supra* note 168, at 1398 (acknowledging “ability of agencies to choose among a range of policymaking forms”).

¹⁷⁸ *See id.* at 1386-97 (describing and evaluating process and effects of different modes of policymaking); *see also, e.g.,* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (holding that federal agencies need only utilize notice-and-comment procedures when enacting or changing “force of law” legislative rules, not when altering interpretive rules); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 520 (1978) (holding that APA imposes maximum procedural requirements that courts can impose on agencies unless more is required by enabling act or agency’s own regulations); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (stating that “choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”).

¹⁷⁹ *See generally* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

¹⁸⁰ *Perez v. Mortgage Bankers Association* confirms this basic proposition, although it does so in reversing a lower court decision calling for notice-and-comment rulemaking before abandoning a policy announced in a guidance interpretive document. *See Perez*, 135 S. Ct. at 1206.

another regulation.¹⁸¹ And, as further analyzed below, that basic rule of law proposition involves a requirement that an agency fully engage with the issues, disputes, and past reasoning of the linked earlier agency action.

When an agency is construing substantive provisions of an enabling act, versus choosing procedurally how to act, it will receive deference too. After the *Mead* and *State Farm* decisions, agencies hoping to maximize judicial deference generally will act through a notice-and-comment process.¹⁸² Due to the prevalence of statutory gaps, silences, and ambiguities, most agency regulations involving interpretation of statutory language will trigger deference under Step Two of the *Chevron* framework.¹⁸³ If the disputed policy and underlying interpretation is generated through some less formal mode, such as in a guidance document, in a brief, or through other modes lacking an advance participatory vetting process, then review will usually be under the *Skidmore v. Swift & Co.*¹⁸⁴ standard.¹⁸⁵ *Skidmore* provides for a “sliding scale” review looking at numerous factors, especially the thoroughness of the agency’s consideration and its persuasiveness.¹⁸⁶ As further developed below, the more thorough the process and agency reasoning accompanying notice-and-comment rulemaking, the more the agency will be aided when subsequently faced with judicial “hard look review” and linked “reasoned decisionmaking” obligations that focus on disputed contentions and agency responsiveness.¹⁸⁷ But the very thoroughness of resulting agency process and explanation erects hurdles for later proponents of policy change.

¹⁸¹ See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (stating that “amendment to a legislative rule must itself be legislative” (quoting *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)) (internal quotation marks omitted)); *Env’tl. Def. Fund v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983) (highlighting APA Section 551(5)’s inclusion of “repeal of a rule” as among forms of rulemaking).

¹⁸² See Magill, *supra* note 168, at 1384–85 (describing shift from agencies mostly deciding individual cases to agencies promulgating more legislative rules).

¹⁸³ Levin, *supra* note 26, at 1254 (explaining *Chevron* two-step framework and noting second step’s overlap with “arbitrary and capricious review”).

¹⁸⁴ 323 U.S. 134 (1944).

¹⁸⁵ *Id.* at 140. For non-notice-and-comment rules or other forms of agency action, the framework for judicial review is generally stated in *Skidmore*. *Id.* *Perez* affirmed this. See *Perez*, 135 S. Ct. at 1204 (noting that “interpretative rules do not have the force and effect of law” (quoting *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995)) (internal quotation marks omitted)). For an exploration of the differences between the logic and analyses required under *Chevron* and *Skidmore*, see Peter L. Strauss, “*Deference is Too Confusing—Let’s Call Them ‘Chevron Space’ and ‘Skidmore Weight,’*” 112 COLUM. L. REV. 1143, 1153–72 (2012).

¹⁸⁶ *Skidmore*, 323 U.S. at 140 (noting factors for review are “thoroughness evident in [the rule’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . .”).

¹⁸⁷ See *infra* Section II.E (explaining “reasoned decisionmaking” requirement).

When it comes to consistency and agency latitude for change, *Chevron* and *Skidmore* are in tension in their language. In *Chevron*, a notice-and-comment rulemaking resulted in a major change in policy that was upheld by the Supreme Court.¹⁸⁸ The agency shifted from interpreting “stationary source” to create a stack-by-stack trigger for pollution control upgrade obligations to allowing states to utilize a “bubble” strategy.¹⁸⁹ Under the bubble strategy, polluters could, through internal pollution trading, save money by not triggering heightened pollution control obligations.¹⁹⁰ The agency explained how the stack-by-stack approach could chill new investments and raise costs, but at little or perhaps no environmental benefit since upgrades might not be made.¹⁹¹

Instead of viewing the policy change by the EPA as a problem, the *Chevron* Court actually saw policy reconsiderations, and especially the EPA shift under review, as laudable. To engage in “informed rulemaking,” the Court declared, an agency “must consider varying interpretations and the wisdom of its policy on a continuing basis.”¹⁹² And this obligation, and accompanying judicial deference, was viewed as especially necessary “in the context of implementing policy decisions in a technical and complex arena.”¹⁹³ But, importantly, the Court also emphasized that, under the statute, the agency unavoidably had to reconcile competing policy goals of economic growth and clean air, and found that rulemaking comments, empirical observations, and economic theory supported the agency’s policy shift.¹⁹⁴

In contrast, the *Skidmore* case retains “consistency” as one of its sliding scale factors weighing in favor of the agency’s policy, and, after *Mead*, the *Skidmore* framework applies to pretty much all modes of agency action other than formal action or notice-and-comment rulemaking.¹⁹⁵ However, despite *Chevron*’s language, judges often still consider consistency when assessing the reasonableness of an agency decision, even in settings that seem to fall into the

¹⁸⁸ See *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (upholding regulation and articulating deference framework now known as *Chevron* Two-Step).

¹⁸⁹ *Id.* at 840-42, 851-59, 863 (reviewing derivation of “bubble” strategy and reasons for its adoption).

¹⁹⁰ See *id.* at 863 (noting economic growth as justification for agency’s rule).

¹⁹¹ *Id.* at 855-63 (emphasizing policy rationales for rule).

¹⁹² *Id.* at 863-64.

¹⁹³ *Id.* at 863. For discussion of this *Chevron* language, see Kozel & Pojanowski, *supra* note 7, at 125. This element of *Chevron* has spawned a massive body of scholarship. See, e.g., JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 970-92 (3d ed. 2017) (reviewing leading scholarly analyses of *Chevron*).

¹⁹⁴ See *Chevron*, 467 U.S. at 863-64.

¹⁹⁵ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting “consistency” as factor for review). *Mead* made clear that *Skidmore* provides the scope of review framework when the underlying law or agency’s procedural choices render *Chevron* deference inapplicable. *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001).

heart of *Chevron* deference.¹⁹⁶ One recent study found that consistency was a still a prevalent, if not dominant, factor assessed by reviewing courts.¹⁹⁷

C. *Inconsistency, Politics, and Facts*

Three major, modern Supreme Court decisions contain extended analyses of consistency doctrine and, in particular, the role that politics versus fact-linked contingencies can play when agencies seek to justify a policy shift. And a fourth, *Massachusetts v. EPA*, also involved a policy change and discussion of permissible grounds for such a shift, although with less of a focus on consistency doctrine. In ways that are either being overlooked or mischaracterized in the recent change power claims reviewed in Part I, these cases do not embrace politics as a sufficient rationale for a policy shift. They do not permit regulatory shifts based on regulatory whim. Instead, they note that politics can motivate a reexamination of policy, that policy shifts are possible, and say that close policy judgment calls go to the agency. But these decisions also emphasize the need for an agency to confront fully its earlier actions, its past explanations, and especially facts or circumstances relevant to the old and possible new policy. Agencies cannot ignore the contingencies—which are made relevant by the applicable statutes—that underlie initial actions proposed for later policy change.

The foundational modern case is the Supreme Court's decision in *Motor Vehicle Manufacturers Association v. State Farm*. The case is most known for its embrace of "hard look review" and its articulation of the key elements of "reasoned decisionmaking."¹⁹⁸ Nonetheless, in its rejection of a Reagan-era rescission of promulgated car safety standards, the Court set forth the key elements of consistency doctrine.¹⁹⁹ The Court was confronted with the National

¹⁹⁶ See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014) (rejecting EPA's newly claimed authority due to several factors, among them its novelty under longstanding law); *Gonzales v. Oregon*, 546 U.S. 243, 255-75 (2006) (declining to uphold Attorney General's interpretive regulation in part due to inconsistency with past authority claims, lack of adequate notice and opportunity for comment, and statute's allocation of particular roles to particular actors); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 747 (1996) (upholding bank regulation as reasonable under *Chevron* framework); *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (rejecting consistency-based challenge to deference and upholding new interpretation of Federal Housing Administration ("FHA") regulation); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423-24 (1987) (rejecting *Chevron* deference due to change in statutory construction that contradicted clear congressional intent and historically held agency interpretation).

¹⁹⁷ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1150 (2008) (finding correlation between win-rate and use of consistency as factor, even in cases where *Chevron* is applied).

¹⁹⁸ *Id.* at 42-52 (embracing and setting forth key elements of "hard look review" and "reasoned decisionmaking").

¹⁹⁹ *Id.* at 41-44.

Highway Traffic and Safety Administration's rejection of Standard 208, a regulation that required cars to be equipped with either air bags or automatic seatbelts.²⁰⁰ The agency, however, only offered an explanation for one of the regulatory reversals and argued for minimal judicial scrutiny of its deregulatory action.²⁰¹

The Court rejected this argument for minimal scrutiny, emphasizing the need for an agency to confront its old policy and offer explanation for the change. An agency, the Court stated, when "changing its course" is required to "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."²⁰² Half of the agency's action was easy to find arbitrary and capricious because the agency "apparently gave no consideration whatever" to keeping one of the safety strategies.²⁰³ "Not one sentence of its rulemaking statement discusses the airbags-only option," the Court emphasized.²⁰⁴

The *State Farm* Court explained why it declined to subject a deregulatory policy change to some less rigorous standard of review. First, the APA made no such distinction.²⁰⁵ Second, the enabling act language made no distinction between initial regulatory actions and rescissions of past actions.²⁰⁶ Third, the Court explained that the usually minimal review of agency declinations to act was "substantially different" from an agency's "revocation of an extant regulation."²⁰⁷ Such revocation "constitutes a reversal of an agency's former views as to the proper course."²⁰⁸ And, quoting an earlier precedent's language, the Court stated that a "settled course of behavior embodies the agency's informed judgment" that the earlier action "will carry out the policies committed to it by Congress."²⁰⁹ This creates "at least a presumption that those policies will be carried out best if the settled rule is adhered to."²¹⁰

²⁰⁰ *Id.* at 34.

²⁰¹ *Id.* at 41.

²⁰² *Id.* at 42. The tail clause, stating that more is required than "when an agency does not act in the first instance," is rejecting arguments that a deregulatory act is akin to an agency's choice not to act or regulate, a setting subject either to no judicial review or deferential review. *Id.*; see *supra* notes 168-172 and accompanying text (discussing literature and cases on unreviewability).

²⁰³ *State Farm*, 463 U.S. at 46.

²⁰⁴ *Id.* at 48; see also *id.* at 50 (stating that "agency submitted no reasons at all").

²⁰⁵ See *id.* at 41.

²⁰⁶ *Id.* (noting that National Traffic and Motor Vehicle Safety Act "expressly equates orders 'revoking' and 'establishing' safety standards").

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 41-42 (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973)) (internal quotation marks omitted).

²¹⁰ *Id.* For an analysis of statutory interpretation and judicial review standards for "longstanding" agency law interpretations, see Anita Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015). Professor Krishnakumar calls for more

Of course, the Court continued, agencies can seek to change policy.²¹¹ But even with that language, the Court linked the possibility of change not to politics or just examination of statutory language, but to the need for “ample latitude to ‘adopt their rules and policies to the demands of changing circumstances.’”²¹² It reiterated the “changing circumstances” language and stated that the presumption is “against changes in current policy that are not justified by the rulemaking record.”²¹³ Hence, the *State Farm* Court left room for agency policy change, but emphasized how past agency reasoning, the record, and underlying circumstances would need to be engaged and overcome to justify a change.

Chief Justice Rehnquist, in a partial dissent, suggested that a change of administration and policy priorities could be among the grounds for an agency policy shift, although his embrace of politics as a justification for change is actually quite modest. He only stated that they could be a “reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”²¹⁴ This view did not gain majority support.

The Court’s *Massachusetts v. EPA* decision did not focus on doctrine governing consistency and policy change, but it too involved a policy change grounded in both a new statutory interpretation, as well as presidential priorities and discretion.²¹⁵ A petition sought EPA regulation under the Clean Air Act of GHG emissions from motor vehicles.²¹⁶ The EPA had earlier claimed authority to regulate GHGs as an “air pollutant” in two agency general counsel memoranda and related affirmations to Congress.²¹⁷ Under the new George W. Bush Administration, however, the EPA reversed itself, grounding this policy change in both a statutory abnegation strategy under which the EPA disavowed authority it had earlier claimed, as well as variables linked to presidential priorities.²¹⁸

The Supreme Court rejected the EPA’s interpretation of the statute as unsound.²¹⁹ It also faulted the EPA for justifying that declination with reference

rigorous review of agency change if based on political factors, but deference if rooted in analysis of changing facts, expertise and “experience-based reasons,” and workability. *Id.* at 1877-79.

²¹¹ See *State Farm*, 463 U.S. at 42.

²¹² *Id.* (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

²¹³ *Id.* (emphasis omitted).

²¹⁴ *Id.* at 59 (Rehnquist, C.J., concurring in part and dissenting in part); see also *id.* (“As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” (footnote omitted)).

²¹⁵ See *Massachusetts v. EPA*, 549 U.S. 497, 510-14 (2007) (describing background of how EPA came to its decision not to regulate).

²¹⁶ See *id.* at 505.

²¹⁷ See *id.* at 510-14 (chronicling history of EPA’s interpretation of Clean Air Act).

²¹⁸ *Id.* at 511-14 (describing EPA’s change in policy).

²¹⁹ *Id.* at 528-35 (explaining why EPA’s interpretation was untenable).

to factors unrelated to the governing statute's criteria.²²⁰ The agency, the Court held, had to base its decision on the statutory criteria and relevant science, not extra-textual considerations and politics. It could not "rest[] on reasoning divorced from the statutory text."²²¹ The Court viewed the statute's broad reach and specificity regarding criteria for action as "constrain[ing]" the agency and the President—this was "the congressional design."²²² The agency had to make a "reasoned judgment" based on the science, "ground[ing] its reasons for action or inaction in the statute."²²³ The Court required the agency to base its choices on the contingencies made relevant by the Clean Air Act, namely whether the effects of GHGs and climate change caused "endangerment" within the meaning of the statute.²²⁴

The more recent *Fox* decision and the 2016 *Encino Motorcars* case further flesh out the general framework for the permissible role of politics in agency policy change.²²⁵ In *Fox*, the agency had penalized a broadcaster based on a policy change regarding "fleeting use" of obscenities on television.²²⁶ The splintered opinions in *Fox* render difficult the determination of exactly what views regarding policy change garnered majority support.²²⁷ Change itself was stated not to trigger any significantly heightened standard of judicial scrutiny, but all agreed the agency would have to confront the old policy and explain the new policy.²²⁸ The Justices differed on what had to be weighed. Politics could play a part, and for Justice Scalia and an apparent majority aligned with him, agencies would have to "show that there are good reasons for the new policy."²²⁹ All Justices appeared to agree on this need for "good reasons."²³⁰

Justice Scalia's opinion, ostensibly for a majority but eliciting some pointed differences in the Justice Kennedy concurrence, also stated the following: the agency "need not demonstrate to a court's satisfaction that the reasons for the

²²⁰ See *id.* at 532-35 ("The . . . basis for EPA's decision . . . rests on reasoning divorced from the statutory text.").

²²¹ *Id.* at 532.

²²² *Id.* at 533.

²²³ *Id.* at 534-35.

²²⁴ *Id.* at 534.

²²⁵ For a review of cases between *State Farm* and *Fox* discussing policy change and justification, see Kozel & Pojanowski, *supra* note 7, at 129-32. *Encino Motorcars* post-dates that article's analysis, as do the recent policy change power claims reviewed here.

²²⁶ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 505-10 (2009) (reviewing history of policy and agency action).

²²⁷ See Kozel & Pojanowski, *supra* note 7, at 129 (highlighting reasons for splintered *Fox* opinion, especially differences between opinions of Justices Scalia and Kennedy, and characterizing result as "both thought provoking and deeply enigmatic").

²²⁸ *Fox*, 556 U.S. at 514 (reaffirming holding in *State Farm*, which held that change in policy has to be explained by agency).

²²⁹ *Id.* at 515.

²³⁰ The dissenters would have required more, but indicated no disagreement with the need for "good reasons." See *id.* at 550 (Breyer, J., dissenting).

new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better”²³¹ The opinions of Justice Scalia and Justice Kennedy both also acknowledged that because past policies will tend to change the status quo by engendering reliance interests and because prior agency actions often involve “factual findings,” reviewing courts may have to look at a more developed record with a policy change than with a policy generated anew.²³² The dissenters argued that agencies will always have to explain why the change was made, sharing the expectation that agencies must engage with prior facts and justifications.²³³

The *Encino Motorcars* decision, in a majority opinion by Justice Kennedy post-dating the death of Justice Scalia, linked this line of cases into one quite coherent exegesis that also lacked the uncertainty in *Fox* that was created by multiple opinions. Agencies making a policy change must, as always, “give adequate reasons” for their decisions.²³⁴ And that, as under typical “hard look review” articulated in *State Farm*, means an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”²³⁵ The Court again emphasized the need for assessment of any “reliance interests” and, quoting from *Fox*, stated that a “‘reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.’”²³⁶ An “[u]nexplained inconsistency” is a justification for holding a new agency action “arbitrary and capricious.”²³⁷ The *Encino Motorcars* Court notably did not quote or refine the *Fox* language about the agency change not needing to be “better” or that an agency’s belief that the new policy was better would be enough, leaving its precedential weight and exact meaning still uncertain.²³⁸

²³¹ *Id.* at 515 (plurality opinion). This language appears to have garnered majority support, but Justice Kennedy’s concurrence, which was needed to form a majority, more heavily emphasized the importance of factual justification and the need to check agencies from exercising “unbridled discretion” or ignoring contrary or “inconvenient” facts, especially since many agency actions are built on “factual findings.” *Id.* at 536-37 (Kennedy, J., concurring in part and concurring in the judgment). *Encino Motorcars* did so with even greater emphasis. *See infra* notes 234-241 and accompanying text.

²³² *See Fox*, 556 U.S. at 515 (noting some cases in which change in policy will require more explanation than for initial rule).

²³³ *Id.* at 551 (Breyer, J., dissenting).

²³⁴ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

²³⁵ *Id.* at 2125 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).

²³⁶ *Id.* at 2126 (quoting *Fox*, 556 U.S. at 515-16 (plurality opinion)).

²³⁷ *Id.* at 2125 (quoting *Nat’l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (alteration in original).

²³⁸ This language, however, is probably best read to embrace a deferential judicial attitude, not permission for unfounded agency action based merely on “belief.” Combining the “good reasons” language and “believe it to be better” language is best read to require something akin

Importantly, all of these cases share the requirement that agencies engage with the “facts and circumstances that underl[ay]” an earlier action.²³⁹ Such underlying facts and circumstances—which constitute a substantial part of what this Article collectively refers to as “contingencies”—will usually be repeatedly stated and linked to relevant law by agencies. These cases hence require substantial engagement with these contingencies by the later agency proposing the policy change. Such underlying facts, linked reasoning, and agency choices are virtually always discussed in referenced agency studies, the notice of proposed rulemaking, the preamble explaining the final agency rule choices, and agency responses to comments that must be provided to satisfy the requirements of reasoned decisionmaking.²⁴⁰ They are usually relevant to the assessment of the problem triggering agency regulation and also discussed in the agency’s justification of the ultimate regulatory choice.

Hence, under the Court’s express language, a subsequent agency effort to amend or roll back a previous regulatory policy will require engagement with these materials and related sources of contestation. “Unexplained inconsistency” is not permissible.²⁴¹ As introduced above and analyzed in greater detail below, several major deregulatory proposals emphasize the possibility of policy change and a place for politics, but barely acknowledge the Supreme Court’s persistent doctrinal emphasis over thirty years that an agency must address contingencies, namely underlying facts, science, circumstances, the record, and the agency’s past reasoning.

D. *Additional Consistency Meta-Rules*

Several other administrative law meta-rules further constrain agencies, especially if they are tempted to deviate from past policy and practices but sidestep contrary evidence, arguments, or try to avoid direct declaration that they are doing so.

Perhaps most important is the agency’s obligation to act consistently with its own commitments and practices. If an agency has, in a promulgated regulation, made a substantive or procedural choice, then it (along with affected stakeholders and courts as well) will, under the *United States ex rel. Accardi v. Shaughnessy*²⁴² doctrine, have to abide by that commitment.²⁴³ Change, if it is

to “reasonable belief” in the proffered good reasons for the policy change, not proof that it is “better” than the initial policy. This makes it like most deference regimes, leaving agencies a space within which they can make and remake policy, if they provide adequate justifications. See Levin, *supra* note 16, at 573 (interpreting this language as consistent with *Chevron*, *Brand X*, and basic requirements of explanation under arbitrary and capricious review standards).

²³⁹ *Fox*, 556 U.S. at 516.

²⁴⁰ In fact, as explained below, during litigation, those justifications will be reiterated and likely sharpened. See *infra* notes 275-280 and accompanying text.

²⁴¹ *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Brand X*, 545 U.S. at 981).

²⁴² 347 U.S. 260 (1954).

²⁴³ *Id.* at 265-68.

to be made, will need to be done at the same level of procedural formality.²⁴⁴ Until changed, the agency and all others will need to follow that rule—the promulgated regulation remains governing law until validly changed.²⁴⁵

Even without a promulgated regulatory commitment, agency practices and policies revealed or declared over time through other modes, especially adjudications, create the agency’s working law and will also constrain an agency and require ongoing consistency or rational explanation for change.²⁴⁶ Only by confronting and, in a reasoned explanation, justifying some change can an agency deviate.²⁴⁷ Agencies cannot vacillate all over the map.²⁴⁸ They must treat similarly situated people alike. Should agencies be erratic, they will usually be held arbitrary in their policies.²⁴⁹ And, as clarified in the *Allentown Mack Sales & Service v. NLRB*²⁵⁰ decision, if an agency has declared one rule but perhaps deviated in practice, the Supreme Court has declared that the governing standard must be what is declared: “the rule announced [must be] the rule applied.”²⁵¹

As further revealed by *Judulang v. Holder*,²⁵² erratic agency actions in the form of overall inconsistency, or consistent inconsistency, will also lead to judicial rejection.²⁵³ Agency action cannot “hang[] on the fortuity of an

²⁴⁴ See *Sierra Club v. EPA*, 873 F.3d 946, 952 (D.C. Cir. 2017); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

²⁴⁵ Judicial rejection of postponement and stay strategies emphasize this point. See *infra* Section II.G.

²⁴⁶ *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973) (stating agency adjudications can “serve as vehicles for the formulation of agency policies” and that agency departing from established policy must “explain its departure from prior norms”); see also *supra* notes 11-12 and accompanying text (analyzing more modern cases involving court scrutiny of agencies changing policy over series of adjudicatory actions and related policy revelations).

²⁴⁷ See *Atchison*, 412 U.S. at 802, 807-08 (stating that there is “at least a presumption that those policies will be carried out best if the settled rule is adhered to” but then identifying permissible grounds for policy).

²⁴⁸ Todd D. Rakoff, *Shaw’s Supermarkets, Inc. v. NLRB—A First Circuit Opinion*, 128 HARV. L. REV. 477, 478-79 (2014) (discussing then-Judge Breyer’s opinion in *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37, 41 (1st Cir. 1989), and its call for agencies to “follow[] or consciously change[]” policy but not “have one rule for Monday, another for Tuesday” (citations omitted)).

²⁴⁹ See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious . . .”).

²⁵⁰ 522 U.S. 359 (1998).

²⁵¹ *Id.* at 375.

²⁵² 565 U.S. 42 (2011).

²⁵³ See *Id.* at 61 (emphasizing that “longstanding capriciousness receives no special exemption from the APA” and finding that “BIA has repeatedly vacillated in its method for applying § 212(c) to deportable aliens”).

individual official's decision."²⁵⁴ The Court condemned the agency tribunal (the Board of Immigration Appeals) for lacking decisional criteria connected to "the goals of the deportation process or the rational operation of immigration laws," making it a "sport of chance."²⁵⁵ Such agency policy, or really lack of a consistent policy, was hence illegal arbitrary and capricious action under the APA.²⁵⁶

In addition, a related meta-rule is evident in the practices of government rulemaking itself. Agency rulemakings must give all fair notice of what is proposed.²⁵⁷ A final rule that differs too much from a proposal can be rejected as not a "logical outgrowth" of the proposal and remanded for more adequate notice-and-comment opportunities.²⁵⁸ Courts will also decline to defer to an agency's newly declared policy if it goes beyond what the public would have expected and addressed in comments. This is especially evident in recent preemption case law. Agencies that claim preemptive impact of federal approvals or actions in litigation or possibly regulatory preambles will be ignored or reviewed with no deference if that preemption claim is inconsistent with the earlier noticed commitments.²⁵⁹ Hence, a vague or conclusory proposal to change policy, or major changes between a proposal and final rule, can also lead to rejection of a changed policy. Yet again, courts expect and police for agency consistency with procedural norms and with the agency's stated commitments or proposals.

E. *Reasoned Decisionmaking as a Constraint*

Perhaps most importantly, the long-established requirement that agencies engage in "reasoned decisionmaking" provides a brake on erratic or unexplained sudden change, or actions that disregard statutory criteria and process. The obligation of agencies to engage in reasoned decisionmaking is among the most

²⁵⁴ *Id.* at 58.

²⁵⁵ *Id.* (citing *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947)) (internal quotation marks omitted).

²⁵⁶ *See id.* at 59.

²⁵⁷ *See Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985).

²⁵⁸ *See id.*; Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 744-46 (2016) (characterizing modern "logical outgrowth" doctrine as requiring that proposals "be detailed and specific enough to alert potential commentators," including initial disclosure of "key data and studies they relied upon").

²⁵⁹ *See Wyeth v. Levine*, 555 U.S. 555, 581 (2009) (rejecting FDA claim that its less stringent FDA actions could preempt stricter state requirements, but in opinion focusing on lack of notice of such plan); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (rejecting Attorney General's claim of power without express statutory authority, specific statutory allocations of regulatory authority, and no preceding notice or deliberation over such power claim). Some have analyzed these rejections as partly attributable to lack of agency opportunities for political input. *See Bressman, supra* note 69, at 775-89. For a discussion of how courts reviewing agency claims of preemptive impact utilize a variant of "hard look review," see *Buzbee, supra* note 85, at 1547-80.

endurable of administrative law tenets due to its roots in several overlapping facets of the APA and the doctrine framing judicial review of agency action.²⁶⁰ This term and the obligations it imposes involve an overlapping amalgam of statutory interpretation frames, *Chevron* Step Two “reasonableness” review, the fleshing out of arbitrary and capricious review and, relatedly, what “hard look review” requires of courts and agencies subjected to judicial review, especially regarding a policy change.²⁶¹

First, reasoned decisionmaking law establishes—as do virtually all administrative law doctrines—that all agency decisionmaking must be framed by what governing statutes identify as relevant goals, criteria, and process.²⁶² Any failures to abide by those statutory mandates will flunk. *Citizens to Preserve Overton Park, Inc. v. Volpe*²⁶³ (“*Overton Park*”) and *State Farm* both require agencies to base their decisions on the “relevant factors.”²⁶⁴ Likewise, in rejecting the agency’s explanation for turning down a petition, the Supreme Court in *Massachusetts v. EPA* emphasized that the agency had to base its actions (or choices not to act) on assessments called for by statutory criteria.²⁶⁵ By so rejecting reliance on non-statutory political considerations, agency latitude to follow the political winds or expediency was constrained. As others have noted, the case called for a more expertise-based mode of decisionmaking that required attention to facts made relevant by the governing statute.²⁶⁶

Second, *SEC v. Chenery Corp. (Chenery I)*²⁶⁷ requires that agencies provide a reasoned contemporaneous explanation when they act and then consistently

²⁶⁰ Much of this doctrine is rooted in judicial constructions of the APA’s judicial review provisions. 5 U.S.C. §§ 701-706 (2012).

²⁶¹ *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983) (linking cases and explaining contours of required agency explanation and judicial review). For an analysis of, and argument in favor of, the overlap of *Chevron* Step Two reasonableness review, *State Farm* “hard look review,” and the need for courts to distinguish language interpretation choices from factually-contingent and expertise-based derivation of policy governed by “reasoned decisionmaking” precedents, see Sharkey, *supra* note 70 at 2384, 2394-96.

²⁶² *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007), similarly confirms the importance of reasoned decisionmaking by emphasizing the agency obligation to ground its actions in assessment of factors in the statutory text. See *supra* note 8 and accompanying text.

²⁶³ 401 U.S. 402 (1971).

²⁶⁴ *State Farm*, 463 U.S. at 43 (linking *Overton Park* and other precedents and factors that are now referred to as heart of “hard look review”).

²⁶⁵ *Massachusetts v. EPA*, 549 U.S. at 532-33 (stating agency cannot rely on “reasoning divorced from the statutory text” and rejecting political “laundry list of reasons not to regulate”).

²⁶⁶ See Freeman & Vermeule, *supra* note 8, at 54, 66, 99-101 (describing *Massachusetts v. EPA* as “expertise forcing” and constraining influence of politics); Watts, *supra* note 17, at 21-22 (same).

²⁶⁷ 318 U.S. 80 (1943).

stick with that explanation.²⁶⁸ Agencies in any rulemaking thus cannot strategically adjust their rationales to fend off attacks, but will also have to amplify on the reasonableness of the initial explanation.²⁶⁹ Hence, an agency considering a policy change will not only confront an earlier initial agency choice that necessarily grapples with underlying contested issues and facts, but also later consistent, though likely more fulsome, explanation defending that policy in court.²⁷⁰

Furthermore, *Overton Park* creates similar incentives.²⁷¹ It authorizes more intrusive judicial review of agency actions, and possibly even court testimony and cross examination of regulators, when an agency does not adequately explain its choices initially or make clear reference to a supportive record.²⁷² To avoid such judicial probing, agencies are usually careful to provide findings or explicitly stated rationales that engage relevant law, comments, and facts.²⁷³ Because stakeholders know the importance of an agency getting its initial choice right, all will make sure that studies, comments, data, and supporting submissions to the agency (and later, courts) weave an additional, but still consistent, supportive tapestry of rationales and evidence.²⁷⁴

²⁶⁸ *Id.* at 90.

²⁶⁹ See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (stating that courts “must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process”).

²⁷⁰ Justice Kennedy’s *Fox* concurrence appears to be describing this sort of agency amplification of the factual grounds for an initial action. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (explaining why agency record “may be much more developed”).

²⁷¹ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-19 (1971).

²⁷² See *id.* at 419-20.

²⁷³ See generally Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992) (discussing politics influencing *Overton Park* battle and incentives created by Court’s decision).

²⁷⁴ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* goes further, in the NEPA context, by requiring commenters to make clear their views or later be foreclosed. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 554 (1978). NEPA-specific “hard look” obligations now overlap in logic and language with “reasoned decisionmaking” requirements and “hard look review” as embraced in *State Farm*. See, e.g., *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374-78 (1989) (stating that NEPA requires agencies to take “hard look” at environmental effects of planned action and citing APA precedents for roots of judicial review under NEPA); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302-03 (D.C. Cir. 2011) (describing NEPA as “essentially procedural” statute that obligates agency to consider every significant impact of proposed action and requires “informed decision making”); *Powder River Basin Res. Council v. U.S. Bureau of Land Mgmt.*, 37 F. Supp. 3d 59, 71 (D.D.C. 2014) (stating that reviewing court must ensure that agency acting under NEPA has examined relevant data, articulated rational connection between facts found and choices made, and that agency made no “clear error of judgment”).

Relatedly, reasoned decisionmaking scrutiny often focuses on how the agency responded not just to disputes over statutory interpretation, but disputes over on-the-ground realities such as relevant risks, business practices, science, costs, and the like. An agency that ignores salient issues or sweeps away cogent challenges and criticisms faces quick and easy rejection in the courts.²⁷⁵ A well-counseled agency, assuming the agency has a firm legal and factual basis for its regulatory choice, will therefore directly engage with its challengers' and supporters' key claims and issues in dispute and explain why the agency's action is well justified.²⁷⁶ This will occur both within a rulemaking procedure and again in the courts.

This process of contestation and cogent response results in a dialectical, iterative sort of tightening of explanations due to close engagement with contested claims and arguments.²⁷⁷ Much as reply briefs often provide the most incisive analysis, fiercely challenged regulations result in ever more cogent agency explanations that virtually always engage and reject the very facts and claims that later change advocates embrace.

This hybrid of substantive and process review of an agency's initial regulation results in a hefty body of reason-giving and related identification of which studies, facts and related policy predictions matter. When, at a later time, a president or agency seeks to reverse course and jettison the old rule, all of those contingent facts and reasoning will need to be engaged. It is a near certainty that the circumstances in *Encino Motorcars* will arise again, such that changes will require substantial agency explanation. Not only are reliance interests likely, but "facts and circumstances that underlay" the initial action will also be many and will have been repeatedly identified, articulated, and sharpened during the regulatory and later adversarial process.²⁷⁸

²⁷⁵ For a discussion of lead cases on such rejections in the setting of policy changes, see *infra* Sections II.G, II.H. Judicial rejections of agency actions due to lack of adequate notice or agency failures to respond to salient comments and criticism are legion. See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-41 (D.C. Cir. 2008) (rejecting agency action for failure to provide adequate notice regarding studies relied on and failure to respond to comments); *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199-206 (D.C. Cir. 2007) (faulting agency for failing to provide adequate notice, especially for undisclosed change in methodology); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 813-18 (D.C. Cir. 1983) (remanding regulation because agency failed to explain rejection of alternatives identified in salient comments made by state officials, and discussing *State Farm's* confirmation of agency obligation to explain its choices).

²⁷⁶ Scholarship on regulatory ossification links such frozen or slowly changing regulation to the rigor of such review. See *supra* note 70 and accompanying text.

²⁷⁷ See generally Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011) (analyzing how sequences of cases over same or linked agency actions can lead to agency-court dialog providing deliberative benefits and sharpening of analysis).

²⁷⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2008).

An agency pursuing a policy change will thus have to confront outside stakeholders' submissions and explain its own rejection of materials, explanations, and arguments that it previously identified as justifying a contrary earlier choice.²⁷⁹ Even if the agency hopes somehow to avoid such engagement, stakeholders supportive of the initial policy will put the agency's own earlier words and logic back before it and again later before the courts. With such comments and arguments back before it, the agency will need to respond, leave no "unexplained inconsistency," and justify its choice with "good reasons" or face judicial rejection.²⁸⁰

Policy change is thus possible, but an agency that proposes a policy change while also trying to sidestep science, studies, data, and the agency's own past explanations will, due to these linked facets of reasoned decisionmaking's requirements, be vulnerable to judicial rejection. Because few agencies will set themselves up for failure, cases involving agency policy change and addressing inadequate explanation and engagement are rarer than might be expected. Still, their conclusions are remarkably consistent.²⁸¹

F. *Agency Record and Deliberative Conformity*

One sometimes overlooked facet of consistency doctrine is how agencies, in a sequence of deliberations leading to action, will create a constraining set of materials, especially where they are based on conclusions about evidence, data, or science. Much of this law arises out of the early doctrinal development of administrative law, building on the declaration in *Universal Camera Corp. v. NLRB*²⁸² of what "substantial evidence" review requires.²⁸³ Courts had to devise rules guiding the obligations of agencies and courts where administrative law judges or other subordinate agency officials assess evidence underpinning an action that then moves up the regulatory hierarchy.

Although the nuances of this early law are of little significance to this Article, one central tenet remains settled and important: agency officials cannot disregard the evidentiary, science, or data-based judgments generated by, and

²⁷⁹ Justice Kennedy notes this. *Id.* at 535, 537 (Kennedy, J., concurring in part and concurring in the judgment) (discussing "reasoned explanation" obligation, and stating that "agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate").

²⁸⁰ See *supra* Section II.C (discussing this element of *Fox* and *Encino Motorcars*).

²⁸¹ See *infra* Sections II.G, II.H (discussing cases of judicial rejection of agency policy changes).

²⁸² 340 U.S. 474 (1951).

²⁸³ *Id.* at 491 (clarifying that courts must look at supportive and contrary evidence, and also indicating that reviewing courts need to include subordinate administrative judge's finding in evidence assessed). This logic has been applied to tax court decisions. See *Ballard v. Comm'r*, 544 U.S. 40, 59 (2005) (holding that record on appeal must include special tax court judges' reports).

then moving through, the agency's process and hierarchy.²⁸⁴ Some types of determinations may be binding while others may not be, but senior regulators cannot wholly disregard what was generated earlier by hierarchical subordinates. Here too, like the requirements of reasoned decisionmaking, agency decisionmakers must engage with what came before.

The *Alaska Department of Environmental Conservation v. EPA*²⁸⁵ case is illustrative, although with a state-federal wrinkle. The Supreme Court upheld the EPA's power to issue orders declaring that a state air pollution permit was illegally lax, in part because career state regulators, and then EPA officials, documented better methods of pollution control. State political leadership had embraced a more relaxed approach with little factual support.²⁸⁶ The Court, like the EPA, looked at the underlying regulatory stringency with close attention to the findings of regulatory subordinates and how senior regulators grappled with that information.²⁸⁷ The EPA and the Supreme Court rejected the unfounded politicized state embrace of laxity.²⁸⁸

Similarly, and also in a federalism-laden case, the Supreme Court in *Wyeth v. Levine*²⁸⁹ rejected FDA's new claim that its regulatory approvals preempted common law regimes, but without the agency offering advance public notice of such a plan.²⁹⁰ The Court noted the agency's failure to notify the world of this possible claim of preemptive impact, as well as the agency's failure to explain what justified the change in policy, failure to engage contrary views, and other lack of factual and reasoned justification.²⁹¹

G. *The Losing Track Record of Poorly Explained Policy Changes*

Several key precedents, in applying these intertwined bodies of doctrine, illuminate both what agencies can and should do in changing policies, but also illuminate grounds for judicial rejection. These precedents also reveal that the rigor with which administrations justify their policy changes shapes the judicial reception. Courts take this body of doctrine seriously.

²⁸⁴ See, e.g., *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (rejecting EPA licensing use of pesticide due to failure to reconcile earlier statements about needed additional analysis and final action taken without such data).

²⁸⁵ 540 U.S. 461 (2004).

²⁸⁶ See *id.* at 484-88 (contrasting professional staff's conclusions and contrary lax decision by heads of state agency and noting lack of record support for business hardship claim seeking permit in Court opinion upholding EPA's powers to reject permit).

²⁸⁷ *Id.*

²⁸⁸ See *id.* at 485.

²⁸⁹ 555 U.S. 555 (2009).

²⁹⁰ *Id.* at 581. For a discussion of how *Wyeth* embraces a variant of "hard look review" and emphasizes need for adequate agency process and engagement with claims about impacts of policy choices, see Buzbee, *supra* note 85, at 1566-73.

²⁹¹ See *Wyeth*, 555 U.S. at 563-581.

Both advocates of politically-driven policy change and critics of the alleged ease of change, such as Justice Gorsuch, refer to the *Chevron* case to confirm their views.²⁹² It is true that the Supreme Court in *Chevron* upheld an agency's (the EPA's) policy change, and even praised agency policy reconsideration as something an agency "must" do.²⁹³ However, the change at issue—allowing states regulating "stationary sources" to utilize a facility-wide bubble strategy that allowed internal pollution trading instead of a stack-by-stack regulatory approach—actually was far from radical and was not justified based on some version of presidential power to rule by fiat.²⁹⁴ The agency utilized a notice-and-comment process, still pursued cleaner air, and still was regulating the sources.²⁹⁵ The agency, and later the Supreme Court, justified the new bubble strategy as appropriately "reconciling" dueling goals of the Clean Air Act, namely clean air and economic growth.²⁹⁶ Moreover, the agency and commenters directly engaged with the earlier approach in explaining the new bubble strategy, offered economic analyses and observations about how previous stack-by-stack regulation could deter operational improvements, and explained how such a bubble strategy should lead to more cost-effective regulation.²⁹⁷ The case involved changed means to achieve a consistently defined end, with careful hewing to the statute's relevant factors, and basis in logic and the record for the choice. A rule was replaced with another rule.

As a case upholding a policy change, therefore, *Chevron* does provide guidance. But it is rooted in far more than just identification of a linguistic ambiguity or presidential leanings.²⁹⁸ In upholding the new approach under what today would be called *Chevron* Step Two, the Court and agency both examined the rationales for the old and new policy, and looked for and found good reasons for the new policy. Its logic and conclusions neatly fit within the consistency law frameworks set forth years later in *Fox* and *Encino Motorcars*, although

²⁹² See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153-54 (10th Cir. 2016) (Gorsuch, J., concurring).

²⁹³ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984).

²⁹⁴ See *id.* at 855-66 (reviewing policy rationales, incentives for new investments created by policy options, economics literature, record support, and legislative history as part of Court's upholding of EPA's bubble rule as reasonable).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 865.

²⁹⁷ *Id.* at 863; see also *supra* note 26 and accompanying text.

²⁹⁸ The Court did identify presidential electoral accountability as among the grounds for deference to the agency's new policy. See *Chevron*, 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choice."). *Mead* later emphasized the quasi-democratic accountability of notice-and-comment rulemaking as a usual precondition for *Chevron* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001).

those two cases' policy shifts met varied fates due to the inconsistent rigor of their agencies' change explanations.²⁹⁹

State Farm is at the other end of the lessons spectrum, illustrating what agencies absolutely cannot do in changing policy.³⁰⁰ The abandonment by the National Highway Traffic and Safety Administration ("NHTSA") of the previous regulatory requirement of seatbelts or airbags, with no explanation for the abandonment of the airbag alternative, was firmly rejected.³⁰¹ Similarly, the agency's poor logic in abandoning the requirement of seatbelts also led to rejection.³⁰²

Agencies still sometimes fail to heed the guidance provided by these cases, seeking to change policy but without full engagement with the earlier rules' rationales, evidence, and finalized requirements. Courts reject such agency actions. Several appellate cases addressing regulatory policy shifts under several different presidential administrations offer such analysis after *Fox* and even in one case after *Encino Motorcars* as well.

For example, in *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*,³⁰³ the Fourth Circuit rejected as unlawful an action during the Obama Administration by the Department of Labor.³⁰⁴ The Department sought to suspend current regulations and return to earlier regulations, while also trying to restrict comments so they would not focus on the substance of the regulations to be abandoned or the overall regulatory result.³⁰⁵ The agency lost across the board.³⁰⁶ First, it made no difference that the agency claimed to be "reinstating" an old rule; a rule change was a rule change and had to surmount the same

²⁹⁹ *Fox* involved a new interpretation of a broad authority grant, and a "value judgment" about policing of obscenity on television. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512 (2009). The Court upheld the policy shift, noting how the FCC had engaged with its past policy and explained its new choice. *Id.* at 513-16. *Encino Motorcars* rejected the Department of Labor's policy shift, emphasizing the need for full and forthright agency acknowledgment of its past policies and explanation for a policy shift. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2123-24, 2126-27 (2016).

³⁰⁰ *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

³⁰¹ *Id.* at 46-51.

³⁰² *Id.* at 51-57 (reviewing and rejecting seatbelt reversal logic and factual basis); see also GOLDEN, *supra* note 74, at 40-60 (exploring internal NHTSA dynamics leading to this poorly pursued policy change, with political appointees pursuing pre-ordained outcome and failing to allow agency professionals input or opportunity to strengthen deregulatory shift).

³⁰³ 702 F.3d 755 (4th Cir. 2012).

³⁰⁴ *Id.* at 759 ("[W]e hold that the district court did not err in invalidating the Department's action on the ground that it was arbitrary and capricious.").

³⁰⁵ See *id.* at 760-62.

³⁰⁶ *Id.* at 759.

process to be effective.³⁰⁷ The court also restricted the agency justification to that offered at the time, as required by *Chenery I*.³⁰⁸

Of greatest importance to this Article, the court in *North Carolina Growers* stated that the agency's effort to constrain comment content while trying to change a policy violated both the APA's notice-and-comment provisions and the core "reasoned decisionmaking" requirements set forth by the Supreme Court in the *State Farm* case.³⁰⁹ Because an agency has to "consider . . . important aspect[s] of the problem" underlying the regulation, it must allow comment on and respond to "relevant, significant issues raised during those proceedings."³¹⁰ The court further faulted the agency for refusing to receive comments on issues "integral" to sorting out the rationales for the actions under reconsideration. This denied commenters the "meaningful opportunity" for comment required by the APA and hence "ignored important aspects of the problem."³¹¹

In a concurrence, Judge Wilkinson offered a concise but powerful essay.³¹² He distinguished between an agency's power to revisit a policy—a "seesaw" he said was permissible since "[n]o one expects agency views to be frozen in time"—and "changes in course" that "cannot be solely a matter of political winds and currents."³¹³ A policy "pivot" must be "accomplished with at least some fidelity to law and legal process."³¹⁴ If not, then "whim and caprice" will rule and "business planning" will be disrupted.³¹⁵ Agency change must be accompanied by "a measure of deliberation and, hopefully, some fair grounding in statutory text and evidence."³¹⁶ To allow the agency's sidestepping of comment and engagement with the record would "generate a blueprint for agency unaccountability."³¹⁷ Judge Wilkinson's formulation closely tracks the logic and requirements of the Supreme Court's consistency cases, acknowledging the change power but pointing out why policy change must be accompanied by full and adequate process, show engagement with past facts and rationales, and find justification in the law's text and relevant evidence. Unlike Justice Gorsuch, he views the prevailing law as not allowing such policy shifts without full participation, engagement, and agency justification.

³⁰⁷ See *id.* at 765 ("We are not persuaded by the Farm Workers' textual argument that, under the APA, the act of 'reinstating' a rule does not qualify as 'formulating' a rule.").

³⁰⁸ *Id.* at 767-68 ("We consider an explanation for good cause that the agency has advanced at the time of the rule making.").

³⁰⁹ *Id.* (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 23 (1983)).

³¹⁰ *Id.* at 769.

³¹¹ *Id.* at 769-70 (citations omitted) (internal quotation marks omitted).

³¹² *Id.* at 771-72 (Wilkinson, J., concurring).

³¹³ *Id.* at 772.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

Similarly, in the *Public Citizen Health Research Group v. Tyson*³¹⁸ case from the Reagan Administration, the D.C. Circuit firmly rejected an Occupational Safety and Health Administration (“OSHA”) action for violating several fundamental tenets of consistency doctrine, emphasizing an agency’s obligation to engage with salient issues and choices it or stakeholders raised.³¹⁹ The agency had proposed, but ultimately did not issue, a short-term workplace exposure standard for ethylene oxide.³²⁰ In explaining its own precedents as applied to the Occupational Safety and Health Act’s “substantial evidence” standard, the court emphasized the agency obligation “to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting any significant contrary evidence and argument.”³²¹ Even though the agency choice involved the cutting edge of knowledge, and imperfect science and predictive judgment, the changed agency choice had to be rejected because the agency “simply [did] not exercise[] its expertise.”³²² By failing to engage with key questions, OSHA had violated the *State Farm* mandate that agencies cannot “entirely fail[] to consider an important aspect of the problem.”³²³

H. *The Trump Administration Regulatory Shortcuts and Judicial Rejections*

In several of the Trump Administration’s early regulatory actions, agencies similarly sought to sidestep engagement with evidence and rationales underpinning earlier finalized actions, usually promulgated notice-and-comment regulations. These agencies proposed in one form or another to stay, suspend, or postpone these earlier finalized regulations or in other ways sought a shortcut to achieve deregulation.³²⁴ They also sometimes intimated that they might later issue a new rule. In seeking to undo earlier finalized regulations in this several-step manner, they also sought to limit comment. This appears to be a strategy pursued in over a dozen regulatory settings.³²⁵ By mid-2018, this strategy

³¹⁸ 796 F.2d 1479 (D.C. Cir. 1986).

³¹⁹ *Id.* at 1481, 1507.

³²⁰ *See id.* at 1482.

³²¹ *Id.* at 1485 (quoting *United Steelworkers v. Marshall*, 647 F.2d 1189, 1207 (D.C. Cir. 1980)) (internal quotation marks omitted).

³²² *Id.* at 1505.

³²³ *Id.* at 1507 (quoting *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).

³²⁴ *See supra* notes 89-97 and accompanying text.

³²⁵ *See, e.g.,* Dlouhy & Levin, *supra* note 97. The EPA’s 2018 promulgation of an “applicability date” rule suspending the effect of the still-valid Clean Water Rule utilized a similar strategy. *See supra* notes 128-129 and accompanying text. Just before this Article’s publication, a federal district court invalidated the “applicability date” regulation—referred to as the Suspension Rule—due to splintering of the regulatory process, failures to provide “meaningful opportunity for comment,” and failures to comply with the APA, including minimal engagement with science underpinning the Clean Water Rule. S.C. Coastal

resulted in numerous judicial rejections similarly concluding that such sidestepping of earlier regulatory substance, rationales, and basic APA procedures is an illegal circumvention of fundamental administrative law precepts.

These cases substantially followed the reasoning of decisions from the Reagan era that rejected several agencies' efforts to postpone or sidestep the effect of finalized regulations, but without full use of a new notice and comment process.³²⁶ A few are summarized here.³²⁷

After the EPA in 2017 granted industry stay and reconsideration petitions regarding a final promulgated rule regulating methane leaks from oil and gas operations, the D.C. Circuit in *Clean Air Council v. Pruitt*³²⁸ ("*Clean Air Council*") found that the agency's action suffered from several illegalities.³²⁹ It ran afoul of the particular statutory requirements of the Clean Air Act ("CAA"), the implications of the underlying record, and administrative law principles.³³⁰ The agency could not rely on a special CAA provision authorizing reconsideration and stays for overlooked issues, which were both raised and

Conservation League v. Pruitt, No. 2:18-cv-00330, slip op. at 6-18 (D.S.C. Aug. 16, 2018); see also *infra* notes 329-337 and accompanying text.

³²⁶ See *Env'tl. Def. Fund v. Gorsuch*, 713 F.2d 802, 808, 814-18 (D.C. Cir. 1983) (rejecting agency's postponements and deferrals of regulatory obligations under finalized regulation as inconsistent with obligation to change rule with rule, and discussing cases addressing same issue and reaching same result).

³²⁷ Several notable other 2017 and 2018 rejections of deregulatory actions involving assorted shortcuts from usual full notice-and-comment process are not discussed in the text. See *Pineros Y Campesinos Unidos Del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066-67 (N.D. Cal. 2018) (rejecting pesticide application regulation delay as unlawful and emphasizing need to allow comment on substantive change to finalized regulation); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057-61 (N.D. Cal. 2018) (rejecting yearlong delay in implementation of formaldehyde emissions regulation as violation of enabling act and APA); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 570-76 (E.D. Pa. 2017) (rejecting for APA and statutory violations multi-agency effort to create expansive new exemptions from Affordable Care Act contraceptive coverage mandate but without providing any advance notice-and-comment process). One decision linked to the BLM methane waste prevention rule issued a judicial stay of the rule's "phase-in provisions" during the pendency of a timely challenge to that rule and in light of a pending substantive revision expected to be completed "within a period of months." *Wyoming v. U.S. Dept. of the Interior*, No. 2:16-cv-0280, slip op. at 10 (D. Wyo. Apr. 4, 2018). The rejection of the Suspension Rule in *South Carolina Coastal Conservation League v. Pruitt* includes text and footnote collection of judicial rejections of other "hastily enacted rules." *S.C. Coastal Conservation League*, slip op. at 11-12 & n.2.

³²⁸ 862 F.3d 1 (D.C. Cir. 2017).

³²⁹ *Id.* at 14 (holding that EPA's decision to grant industry stay was arbitrary and capricious).

³³⁰ See *id.* (holding that administrative record made clear that "industry groups had ample opportunity to comment" during notice-and-comment period and Clean Air Act "did not authorize" EPA to issue stay).

addressed.³³¹ Petitioners and the agency also could not claim some agency final rule surprise flunking “logical outgrowth” requirements as justification for a stay.³³² Furthermore, the *Clean Air Council* court stuck with long established law that an agency cannot “suspend” a rule’s compliance deadlines or alter the effective date because “such orders are tantamount to amending or revoking a rule.”³³³ Any such amendment or revocation required a new notice-and-comment process because “an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked[,]” and that would require notice-and-comment.³³⁴ To allow such a stay of a rule would be contrary to APA consistency and rule of law norms, would lack a statutory basis, and could only be upheld on grounds contemporaneously offered by the agency.³³⁵ None were offered that were legally sufficient. The stay was therefore itself arbitrary and capricious.³³⁶ The court acknowledged that policy change remained a possibility, but quoted the Supreme Court’s *Fox* opinion and its call for “good reasons” for a change.³³⁷

Likewise, the D.C. Circuit later rejected with similar logic and substantially overlapping statutory analysis another CAA-based rule, in this case an effort to promulgate a “Delay Rule” to delay the effective date of the 2017 “Chemical Disaster Rule” for twenty months.³³⁸ The court found that the statute set forth constraining and specific conditions for delayed regulatory effectiveness and allowed only a limited three month delay, both of which were violated by the EPA’s Delay Rule.³³⁹ The court also faulted the EPA for not engaging with its own earlier “determinations and findings,” or its new “departure from its [earlier] stated reasoning.”³⁴⁰ It thereby violated its “reasoned decisionmaking” obligations under consistency cases and other foundational APA precedents, rendering its action arbitrary and capricious.³⁴¹

³³¹ *Id.* at 9-14 (discussing four issues raised during notice-and-comment period and observing that EPA incorporated comments directly into final rule).

³³² *Id.* (holding that EPA’s initial final rule proposed for change did not fail logical outgrowth test).

³³³ *Id.* at 6.

³³⁴ *Id.* at 9 (quoting *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)) (internal quotation marks omitted).

³³⁵ *Id.* (holding that EPA did not establish it had inherent authority to issue stay of final rule under statute).

³³⁶ *Id.* at 14.

³³⁷ *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (internal quotation marks omitted).

³³⁸ *Air All. Hous. v. EPA*, No. 17-1155, slip op. at 19-36 (D.C. Cir. Aug. 17, 2018).

³³⁹ *Id.* at 19-27 (reviewing statutory limitations on delaying effectiveness of initial rule, even if done through another rulemaking).

³⁴⁰ *Id.* at 27-36.

³⁴¹ *Id.* at 31-37; *see also* *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814, 829 (9th Cir. 2018). The *Wheeler* case reviewed and rejected another accelerated EPA regulatory action—a reversal of course by the EPA in deciding not to regulate chlorpyrifos.

Becerra v. United States Department of the Interior,³⁴² a district court opinion, involved a similar agency attempt to stay and not enforce a final regulation through a “postponement.”³⁴³ The government’s lawyers heavily relied on Section 705 of the APA, a provision that authorizes, in specified settings, an agency to “postpone the effective date of action taken by it”³⁴⁴ But following one earlier decision addressing this argument, the court held that this provision by its terms does not apply to a finalized rule that has “gone into effect.”³⁴⁵

The *Becerra* court, like *Clean Air Council* and *Air Alliance Houston v. EPA*,³⁴⁶ drew support from the same rule of law and administrative regularity principles reviewed above: the judge found “no precedent or legislative history to support a Congressional delegation of such broad authority to bypass the APA repeal process for a duly promulgated regulation.”³⁴⁷ To allow the Department’s postponement would undercut fundamental tenets about the binding nature of regulations and the need for a new rulemaking to undo an earlier rule.³⁴⁸ Otherwise, an agency could, with lengthy postponements in effect, abandon a rule but without opportunities for “comment on the wisdom of repeal,” or agency justification of a policy change.³⁴⁹

A fourth decision similarly faulted a regulatory stay effort by the Bureau of Land Management as an illegal effort to circumvent the binding nature of finalized regulations.³⁵⁰ Judge Elizabeth LaPorte’s decision was especially

Under EPA’s reversal, it declined to revoke permissible “tolerance” levels for the pesticide after several preceding notices and findings indicated that its substantial health risks required revocation of such tolerances. *Id.* at 818-21 (reviewing regulatory history). The court rejected EPA’s claim that the court lacked jurisdiction, noted that it received no pro-government merits arguments, but concluded that the EPA’s failure to engage with contrary past findings and science coupled with the statute’s protective mandates rendered the action unlawful. *Id.* at 821-29.

³⁴² 276 F. Supp. 3d 953 (N.D. Cal. 2017).

³⁴³ *Id. passim* (discussing state agency’s postponement action).

³⁴⁴ *Id.* at 963 (quoting 5 U.S.C. § 705 (2012)).

³⁴⁵ *Id.* at 963-64. The earlier decision was *Safety-Kleen Corp. v. EPA*, 111 F.3d 963 (D.C. Cir. 1997) (unpublished table decision).

³⁴⁶ No. 17-1155, slip op. (D.C. Cir. Aug. 17, 2018).

³⁴⁷ *Becerra*, 276 F. Supp. 3d at 964-65.

³⁴⁸ *Id.* (citing *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982), and *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff’d mem.*, *Process Gas Consumers v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983)).

³⁴⁹ *Becerra*, 276 F. Supp. 3d at 966 (quoting *Consumer Energy Council of Am.*, 673 F.2d at 446). *Air Alliance* similarly stated that EPA may not employ “delay tactics” to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits. *Air All. Hous. v. EPA*, No. 17-1155, slip op. at 27 (D.C. Cir. Aug. 17, 2018).

³⁵⁰ *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017).

thorough in linking precedent regarding reasoned decisionmaking to analysis of when and how an agency can abandon a previous regulation. “New presidential administrations are entitled to change policy decisions, but to meet the requirements of the APA they must give reasoned explanations for those changes and ‘address [the] prior factual findings’ underpinning a prior regulatory regime.”³⁵¹ Failure to do so is arbitrary and capricious.³⁵²

Although involving a different sort of regulatory sidestep and hence a different setting for judicial review, the Trump Administration in 2017, through a legal opinion of the Attorney General and then action by the Department of Homeland Security (“DHS”), declared it would abandon the Obama Administration’s Deferred Action for Childhood Arrivals (“DACA”) program.³⁵³ Unlike the initial regulations underlying the three earlier decisions just reviewed, the DACA program was not a finalized notice-and-comment regulation, but instead a written, factually explained policy of regulatory forbearance.³⁵⁴ The Obama Administration had justified this program with reference to precedents supporting such agency forbearance and prioritization of activities, as well as statutory language providing this latitude.³⁵⁵ And, in explaining itself, it discussed the children’s plight and ways DACA would be sound policy and comply with the law.³⁵⁶

Under the Trump Administration, the 2017 DHS policy change, like other stay and postponement actions that sidestepped the usual policy change process, similarly was rejected for flouting the requirements of the consistency doctrine.³⁵⁷ President Trump’s DHS relied only on a largely conclusory statement rooted substantially in the view that DACA had violated the Constitution.³⁵⁸ Here too, the Trump Administration did not engage with the policy and factual underpinnings of the earlier policy.³⁵⁹

³⁵¹ *Id.* at 1123 (alteration in original) (quoting *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc)).

³⁵² *Id.*

³⁵³ *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1025-26 (N.D. Cal. 2018) (reviewing history of rescinding DACA).

³⁵⁴ *Id.* at 1022-24 (discussing DACA Program as announced in June 15, 2012 memo issued by Secretary of Homeland Security Janet Napolitano).

³⁵⁵ *Id.* (describing Obama Administration’s DACA memo legally justifying program).

³⁵⁶ *See id.* (“Secretary Napolitano found leniency ‘especially justified’ for the DACA-eligible, whom she described as ‘productive young people’ who ‘have already contributed to our country in significant ways.’”).

³⁵⁷ *Id.* at 1045 (holding that DHS failed to provide “reasoned explanation” for its change in position).

³⁵⁸ *See id.* at 1025-26 (reviewing rescission’s stated legal grounds).

³⁵⁹ The statutory and constitutional views offered to justified DACA’s abandonment constituted a form of statutory abnegation, since the agency’s new legal view substantially undercut its earlier claimed authority. *See supra* notes 102-103 and accompanying text; *infra* Section IV.F (introducing and analyzing such statutory abnegation justifications for deregulatory actions).

Judge William Allsup analyzed the legal underpinnings of the DACA program and found that all were legally sound.³⁶⁰ Hence, the claim of illegality was rooted in a “flawed legal premise” and, because a court cannot supply a rationale not supplied by the agency, the action had to be rejected.³⁶¹ Since the agency had failed to engage with underlying facts and the Obama Administration DHS’s stated policy rationales, the Trump Administration regulatory reversal also failed to pass muster under *Encino Motorcars* and *Fox*.³⁶² The Judge further noted that an agency action that altogether fails to assess overall benefits and costs, or advantages and disadvantages, also runs afoul of the Supreme Court’s new default rule in *Michigan v. EPA*³⁶³ that agencies must engage in such broader analysis unless it is statutorily precluded.³⁶⁴ The agency’s failure to engage with the particular facts and administrative record justifying the earlier policy was fatal to the Trump policy.³⁶⁵

III. DEREGULATION AND THE CONSTRAINTS OF AGENCY CONTINGENCY

Consistency doctrine shapes the contours of when and how agencies can pursue policy change, as well as how courts should police such change. As just shown, these legal constraints are derived from a complex, intertwined, but remarkably consistent and mutually reinforcing body of doctrine. Presidents and agencies usually have latitude to pursue policy change, but that change must follow what is substantively and procedurally required by enabling legislation and the APA. Agencies must fully engage with both their own original findings, data, reasoning, and the arguments and data offered by outside parties. These intertwined sources of doctrine all call for agencies to confront the contingencies

³⁶⁰ See *Regents of Univ. of Cal.*, 279 F. Supp. 3d at 1037-43.

³⁶¹ *Id.* at 1042.

³⁶² See *id.* at 1046 (finding rescission “arbitrary, capricious, and an abuse of discretion under *Encino Motorcars*”).

³⁶³ 135 S. Ct. 2699 (2015).

³⁶⁴ *Id.* at 2707; see also *Regents of Univ. of Cal.*, 279 F. Supp. 3d at 1046 (citing *Michigan v. EPA*, 135 S. Ct. at 2707) (holding that EPA did not adequately consider reliance interests).

³⁶⁵ See *Regents of Univ. of Cal.*, 279 F. Supp. 3d at 1043-45 (applying principles from *Encino Motorcars*, *Fox*, and *State Farm*). This decision shares attributes with the other decisions rejecting deregulatory actions pursued through delay and splintering of the process, but because agency actions rooted in forbearance and enforcement discretion are generally open to later changes in regulatory attitude, the ultimate fate of DACA is far from uncertain. If an appellate court or the Supreme Court disagrees with the judge’s “mistake of law” conclusion, the decision could be reversed. Even if the decision is upheld, the Trump Administration DHS on remand could, by offering a correct view of the law, engaging with relevant facts and policy decisions, and offering “good reasons” for its change, possibly reach the same result. See also *NAACP v. Trump*, 298 F. Supp. 3d 209, 235-44 (D.D.C. 2018) (holding DACA rescission illegal due to failure to provide analysis required by consistency precedents and finding agency rationale inadequate).

that underlay the initial action, provide opportunity for comment, and provide “good reasons” for a policy change.

That these constraints on erratic or unjustified agency policy change derive from a web of interrelated doctrine has both salutary and challenging effects. On the positive side, this web of mutually reinforcing doctrine makes it unlikely that substantial doctrinal change will suddenly occur and allow the sort of erratic, day-to-day abrupt, and unjustified policy shifts that Justice Gorsuch condemned. These rule of law benefits of consistency doctrine in all fields of regulation are unlikely to disappear. To put it more plainly: consistency doctrine is itself deeply rooted, enduring, and likely to remain consistent.

Part III first offers a schematic distilling of the workings of consistency doctrine. Then it turns to an analysis of a few of the major deregulatory policy shifts proposed by the Trump Administration but that have not yet resulted in judicial opinions. This Part concludes with normative discussion of the merits of consistency doctrine before Part IV closes the Article with an assessment of a range of agency settings and the room they leave for political influence.

A. *Distilling and Diagramming Consistency Doctrine’s Requirements*

As shown, these many interrelated doctrinal strains governing agency policy change and consistency obligations share a cross-cutting element that is sometimes neglected, especially in recent deregulatory change proposals: an agency seeking to make a policy change always must address the *contingencies* it originally addressed en route to offering its reasoned elaboration for its initial policy choice.³⁶⁶ And it must allow commenters to engage with them as well. Similarly, those and later contingencies—changes in related conditions, the regulatory track record, or reliance interests, for example—will also need to be directly and rationally addressed by the agency proposing change. By recognizing and continuing to enforce this simple but consistent agency obligation—that agencies must forthrightly engage and rationally address past and current contingent factors relevant to the statutorily delegated task—courts substantially reduce the risks of erratic, unjustified action or skirting of science or stakeholders’ arguments. Nonetheless, the views and actions reviewed above in Parts I and II indicate either that this body of law is misunderstood or that administrations are sometimes eager to recast or dodge consistency doctrine. Advocates of policy changes and doctrinal adjustment appear to seek greater room for politics and presidents to shape policy changes. Or perhaps change proponents who skip required and challenging antecedent conditions see political gain in granting regulatory relief to their supporters, even if destined for future judicial rejection.

This agency obligation under current doctrine can be captured by two simple diagrams, one setting forth what is required for ordinary “reasoned

³⁶⁶ See *supra* Section II.C (discussing cases that require agencies to address underlying contingencies when changing policies).

decisionmaking” generating an initial policy, and the other analytical obligations of agencies pursuing a later change in policy.

Diagram 1 illustrates what agencies necessarily engage in setting an Initial Regulatory Policy (“IRP”). Agencies will always identify what they view as the most relevant Statutory Language (SL1, SL2, etc.) and linked Policy goals and predictions (P1, P2, etc.), and will need to engage with issues that are central to and often contested about the regulatory choice. These are often the focus of stakeholder Comments (C1, C2, C3) and frequently concern facts, empirical claims about conditions or regulatory impacts, and science. The Policy (“P”) and Comment (“C”) factors are often what this Article calls contingencies. However, because an agency’s legal analysis often involves judgments melding law and facts, it is in some sense contingent too, but more in the sense that it reflects an agency choice about statutory issues to emphasize. That choice, in turn, will shape the final agency action. And, finally, in the regulatory preamble (and often other accompanying memoranda and appendices), the agency will weave its final choice into a Reasoned Decision (“RD”) that will engage with all of these SL, P, and C factors or else will risk judicial rejection.

Diagram 1. Initial Regulatory Policy.

SL1, SL2, SL3

+

P1, P2, P3, P4

+

C1, C2, C3

⇒ Initial Regulatory Policy Reasoned Decision (“IRP RD”) engaging these factors and setting the IRP

Diagram 2 shows how all of the Diagram 1 elements will necessarily become part of the Regulatory Policy Change Proposal (“RPCP”), plus other elements will be added. Those supporting the IRP will surely draw on all explanations provided in the IRP, including the Reasoned Decision itself, while those advocating change will argue against those factors, in comments supplying new facts and arguments, and also questioning the wisdom of the RD justifying the IRP. The RD and IRP will themselves become new mandatory analysis elements because they will be contested, as will any intervening change or IRP impacts. The new agency leadership proposing policy change may focus on new language and likely some new science, data, or empirical claims about the world, even though it will need to address the old justifications.

Hence, consistency doctrine’s web of law will require the agency to address the following in seeking to make a policy change.

Diagram 2. Regulatory Policy Change Proposal.

SL1, SL2, SL3 plus new SL4

+

P1, P2, P3 plus new P4, P5

+

C1, C2, C3, C4 plus new developments, facts, science, regulatory experience, and reliance interests C5, C6

+ IRP RD and IRP

⇒ RD for Policy Change

As illustrated by these simple diagrams, the basics of reasoned decisionmaking and consistency doctrine mean that policy changes will require more analysis and justification by an agency. Note that this does not mean that policy change triggers a different standard of review; instead, an agency proposing a policy shift must engage in more explanation to provide “good reasons” for the change and explain why the choice is reasonable.³⁶⁷

B. Assessing Major Deregulatory Proposals by the Trump Administration

The Trump Administration’s many deregulatory actions constitute the most concerted deregulatory push since the *State Farm* decision and linked deregulatory efforts of the Reagan Administration.³⁶⁸ Where agencies and lawyers have addressed policy change law, they have usually relied on near cookie-cutter citations to *State Farm* and *Fox* in deregulatory actions that provide a rationale, often also including some references to *Chevron*.³⁶⁹

³⁶⁷ This logic illuminates the “more is needed” language in *State Farm*, *Fox*, and *Encino Motorcars*. See *supra* Section II.C. (analyzing these cases).

³⁶⁸ See *President Donald J. Trump Is Delivering on Deregulation*, THE WHITE HOUSE (Dec. 14, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/> [https://perma.cc/D9RU-ZLYB] (stating deregulatory goals and tallying claimed deregulatory progress).

³⁶⁹ As of January 2018, a Westlaw search limited to the Trump Administration Federal Register notices finds twenty policy change proposals citing to some or all of these cases. The Trump Administration has claimed a vast number of deregulatory actions. See *id.* But early analysis indicates some are quite minor, some are preliminary, and many are merely finalizing policy shifts that had started under earlier administrations. See *Press Briefing by Office of Information and Regulatory Affairs Administrator Neomi Rao on the Unified Agenda of Regulatory and Deregulatory Actions*, THE WHITE HOUSE (Dec. 14, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-office-information-regulatory-affairs-administrator-neomi-rao-unified-agenda-regulatory-deregulatory-actions/> [https://perma.cc/M78V-AQMZ] (summarizing 2017 deregulatory actions, anticipated 2018 actions, and providing numerical tallies of such action); *The Trump Assault on Our Safeguards*, CENTER FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/>

Administration advocates describe these cases as allowing policy change due to a change in administrations and presidential priorities, but so far provide little effort to satisfy the other legal requirements set forth in these cases.³⁷⁰ They are correct that change is possible and is not subject to some special heightened, skeptical standard of review.³⁷¹ However, several recent major regulatory policy change actions fail to engage with most of the contingencies—especially “underlying facts” and past agency reasoning—that the same agencies in earlier actions identified to justify their initial actions. Although, as reviewed in Section II.H, a raft of rapid deregulatory actions that involved regulatory shortcuts and avoidance of usual APA process resulted in judicial rejections, several of the highest visibility and high stakes actions are, as of this Article’s publication, either in the regulatory pipeline or not yet reviewed. This Part assesses their conformity with consistency doctrine’s requirements.

As introduced earlier, the two most significant environmental policy reversal initiatives seek to abandon the Clean Water Rule, a rule defining what sorts of waters are jurisdictional “Waters of the United States,” and the Clean Power Plan, a rule regulating existing power plants to restrict their emissions of GHGs.³⁷² Both were initially pursued with little effort to satisfy consistency doctrine’s requirements for agencies making a policy change.

For example, the one finalized action of these various proposals is the EPA and the Corps adding a new “applicability date” that would delay any application of the finalized 2015 Clean Water Rule. Yet despite litigation and regulatory claims of the Clean Water Rule’s opponents that it would impose massive hardship, the agencies in this final action claimed that a return to the pre-2015 landscape would result in no costs.³⁷³ They identified no changes in environmental conditions that would result from the 2015 rule going into effect, versus its suspension for two years. In this action, they nowhere even mentioned the implications of the Connectivity Report the EPA had earlier created that summarized categories of waters and their functions.³⁷⁴ Hence, in this one

trumpassault.cfm [https://perma.cc/KF8X-6VMS] (last visited Sept. 10, 2018) (analyzing President Trump’s use of executory power for regulatory actions).

³⁷⁰ See *supra* Section I.E (discussing Trump Administration’s deregulatory proposals and frequent lack of reasoning or engagement with facts in policy changes sought).

³⁷¹ *Fox* and *State Farm* make explicit that the usual standard of review applies, but both also explain why policy change will usually require greater explanation than creation of an initial policy. See *supra* Section II.C (discussing these cases).

³⁷² See *supra* Sections I.E, II.C (introducing and analyzing legality of Clean Water Rule and Clean Power Plan change proposals).

³⁷³ Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542, 55,544 (proposed Nov. 22, 2017) (stating that there are “no economic costs or benefits associated with this action”).

³⁷⁴ In the 2018 Supplemental Notice, the EPA and the Corps did—for the first time in the sequence of actions linked to the Clean Water Rule’s repeal or change in the effective or “applicability” date—refer to and raise some questions about the Connectivity Report and the agencies’ reliance on it. See Definition of “Waters of the United States”—Recodification of

finalized action, the agencies omitted any discussion or concession of real-world impacts of the two legal choices on the table: application of the Clean Water Rule or its suspension and possible eventual revocation.³⁷⁵

Clean Power Plan change proposals by the Trump Administration have also been splintered, with most providing little or no discussion of clean energy trends or impacts of abandonment.³⁷⁶ The EPA's initial explanation in 2017 for preferring its "inside the fenceline" approach nowhere provides textual and fact-based analysis of how this interpretation, in the setting of power plants integrated into the grid, satisfies the statutory requirement that pollution limitations be set based on the "best system of emissions reduction . . . adequately demonstrated."³⁷⁷ Hence, with this rule change too, the earliest documents indicate a declination to engage with salient contingencies and, by limiting comment, fracturing the change proposals, and offering no replacement, squelch commenters from raising them.³⁷⁸ Late 2018 agency proposals regarding both "waters" jurisdiction and power plant GHG regulation, which followed a string of judicial losses for these and other agencies pursuing deregulatory impacts through shortcuts, provided more substantial justifications and at least passing engagement with earlier science, findings, and impacts.³⁷⁹

Most of these splintered proposals in their texts failed to address the fundamental questions and tasks called for by consistency doctrine: Are there "good reasons" for the change? What is the agency's current view of "underlying

Preexisting Rule, Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227, 32,241-42 (July 12, 2018).

³⁷⁵ As this Article goes to print, a federal district court had rejected the legal sufficiency of the Applicability Date rule (which it called "the Suspension Rule"), focusing on the consistency doctrine infirmities addressed in the text and connecting the action's legal inadequacies to other "hastily" crafted deregulatory actions. *S.C. Coastal Conversation League v. Pruitt*, No. 2:18-cv-00330, slip op. at 6-18 (D.S.C. Aug. 16, 2018). That court did not address the merits of Clean Water Rule itself or latitude for a revised rule. *See id.*

³⁷⁶ The EPA under the Trump Administration appears to have removed from its own active public databases studies and analytical memoranda that accompanied and explained the final CPP.

³⁷⁷ *See* Clean Air Act § 111(a), 42 U.S.C. § 7411(a) (2012) (providing definitional language that ties into § 111(d)).

³⁷⁸ Several recent decisions on other regulatory policy shifts in the form of postponements, stays, or summary policy shifts without notice-and-comment rulemaking opportunities reject similar sidestepping of agency obligations to directly confront and explain a policy shift. *See supra* Section II.H (discussing these decisions).

³⁷⁹ *See* Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746, 44,746 (proposed Aug. 31, 2018) (proposing to replace CPP with unit-based focus and technological improvements, offering more substantial analysis and justification, and imposing no comment limitations); Definition of "Waters of the United States"—Recodification of Preexisting Rule, Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. at 32,231-50 (engaging more fully merits of Clean Water Rule and its proposed repeal).

facts” that justified the initial action? Are there any changes in conditions or reliance interests? Has the agency made sure there are no “unexplained inconsistencies” between the new and old policy?

In fact, by trying to effect change without required legal and factual engagement, the string of Trump Administration regulatory actions seeking to undo these two major environmental rules present circumstances similar to those underlying the many 2017 and 2018 judicial rejections of agency stays and postponements that had in effect sought to render finalized regulations ineffective.³⁸⁰ The EPA has sought to accelerate regulatory change by abandoning the old rules, but without required engagement with the contingencies that justified the earlier actions and where such science or facts might be difficult to overcome.³⁸¹ These larger-impact policy shifts hence also seem vulnerable to judicial rejection.³⁸² Other agencies’ deregulatory actions have also triggered criticism for agency dodging of studies that contradict their claimed benefits.³⁸³ However, one agency, the independent Federal Energy Regulatory Commission (“FERC”), unanimously declined a request by the Department of Energy to change policies to support the coal industry, finding it legally and factually without merit.³⁸⁴

In later final agency rules and related court briefing, agencies and their lawyers may engage more fully with the contingencies addressed earlier.³⁸⁵ They

³⁸⁰ See *supra* Section I.E.5 (presenting these actions); *supra* Section II.H (discussing these judicial rejections of Trump agency deregulatory efforts).

³⁸¹ In particular, both initial actions were accompanied by massive empirical studies that would be hard to controvert. See *supra* notes 113-50 and accompanying text (discussing Clean Water Rule and Clean Power Plan rollbacks and lack of justification by Trump administration).

³⁸² See *supra* Sections II.B, II.C (reviewing two-step deregulatory efforts by Trump Administration and earlier administrations’ unsuccessful efforts to shift policy without full engagement with relevant facts and past reasoning).

³⁸³ See, e.g., Ben Penn, *Labor Dept. Ditches Data Showing Bosses Could Skim Waiters’ Tips*, BLOOMBERG L. DAILY LAB. REP. (Feb. 1, 2018, 6:01 AM), <https://bna.news.bna.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips> [<https://perma.cc/K8L9-PE69>] (reporting that Labor Department “scrubbed an unfavorable internal analysis” showing that change to tip retention regulations would result in employees “los[ing] out on billions . . . in gratuities”). There was an underlying regulatory proposal. See *generally* Tip Regulations Under the Fair Labor Standards Act (“FLSA”), 82 Fed. Reg. 57,395 (Dec. 5, 2017). The proposal traces the earlier regulation’s history but provides little detail on impacts of the old rule or under the new rule. *Id.* at 57,396-401 (reviewing history of proposal and stating that department “lacks data to quantify possible reallocations of tips” and hence presents “primarily qualitative approach”). This regulatory skirmish was ultimately resolved with a legislative deal.

³⁸⁴ Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018) (ordering federal agencies to submit additional information supporting proposed rulemaking).

³⁸⁵ For example, the FCC’s Restoring Internet Freedom action is near final and more carefully addresses legal requirements regarding policy change. See *supra* notes 108-111 and

should learn from the judicial rejections, as perhaps reflected in the EPA's more substantial proposals published in late 2018. However, when an agency splinters its actions, sidesteps or cherry-picks relevant studies, and constrains comment, the agency has likely already doomed the actions to judicial rejection due to an agency's obligations at the notice stage to disclose its planned action and rationale.³⁸⁶

C. *Consistency Doctrine's Policy Merits*

The question remains, of course, whether this body of consistency doctrine and the agency obligation to address policy contingencies add up to a sound policy result. This Article argues that the very consistency of the consistency doctrine over many years, especially its many mutually reinforcing elements, reflects its soundness and deep rule of law roots. It also reflects the compromises and balancing acts that pervade administrative law. Congress can set policies leaving room for policy adjustments by agencies, and presidents can in an array of ways seek to nudge agencies in a particular direction. But congressional delegations regarding chosen actors, procedures, and criteria for action must be respected by presidents, agencies, and reviewing courts, regardless of whether the agency is setting an initial policy or seeking change. Current doctrine balances stability with responsiveness, and provides comfort to those worried about either overregulation or unwarranted deregulation.

Further, by prohibiting erratic or abrupt policy shifts and requiring agency engagement with facts, this body of doctrine checks sloppy, corrupt, or opportunistic regulatory capitulation to powerful stakeholders.³⁸⁷ Congressional goals and means set forth in statutes are protected and enforced by consistency doctrine. It is rooted in respect for legislative supremacy. By compelling agencies to engage with underlying facts, science, and points of contestation underlying a choice (be it an initial choice or a later change proposal), this body of law buttresses the quasi-democratic virtues of stakeholder voice, agency explanation obligations, and related accountability and rule of law virtues.³⁸⁸ If an agency cannot confront data or science and justify a regulatory change under

accompanying text (discussing FCC's abandonment of Net Neutrality regulation promulgated in 2015 and noting agency's proffered reasoning for policy change).

³⁸⁶ See *supra* Section II.H (describing recent judicial rejections of such agency actions); *supra* note 258 and accompanying text (discussing "logical outgrowth" obligations and policy change).

³⁸⁷ See Gersen & Vermeule, *supra* note 70, at 1396 (stating that agency obligations to engage comments and justify choices serves to "flush out illicit motivations"); Short, *supra* note 17, at 1821-23 (exploring how rational public explanation serves to discipline agencies); Stiglitz, *supra* note 164, at 637-40 (analyzing how agency obligations to provide process transparency, explain choices, and surmount judicial review address public distrust and concerns about comparatively less open legislative process).

³⁸⁸ Cf. Bressman, *supra* note 69, at 764-66 (noting that Supreme Court values political accountability in form of electoral accountability, quasi-democratic participatory opportunities, and agency responsiveness to input and criticisms).

relevant law, then the proposed change should be abandoned. By requiring agencies to engage with “circumstances” and the “record,” and provide a “reasoned analysis for the change,”³⁸⁹ consistency doctrine largely prevents an agency from ignoring or sweeping under the rug a salient and potent criticism or contrary study.³⁹⁰ And when an agency makes a policy change with full and adequate explanation, then all facets of political accountability are reinforced. The agency is subject to political accountability when it respects legislatively-set priorities, engages with relevant data, science and stakeholder comments, and takes political responsibility for its own regulatory choices.³⁹¹

Similarly, when *Fox* and *Encino Motorcars* state that agencies must offer “good reasons” for a change, and must address “facts and circumstances that underlay or were engendered by the prior policy” and address “findings that contradict” the prior policy, the Court also is precluding agencies hoping to dodge reality.³⁹² And in stating that “unexplained inconsistency” is grounds for rejection, the *Encino Motorcars* Court (drawing on the *Brand X* case’s language and logic) is necessarily stating that the agency proposing a policy change must engage with the previous action and its rationales and explain the later change.³⁹³

Could agencies and departments substantially revise the many rules that during 2017 and 2018 were subject to delay proposals, proposed for rescission, or under reconsideration? Probably so. Neither agencies nor presidents are obligated to stick with earlier administrations’ regulatory choices if they lean in a different direction. But they must satisfy other prerequisites for a change, especially compliance with statutory criteria and procedures. Even if the President weighs in, the agencies would need to fully confront the earlier rationales, science, disputes, and allow full ventilation of comments, usually in a notice-and-comment process. Some degree of change is almost always possible because statutes, regulatory design choices, and underlying science or data rarely point only to one acceptable action.

But as emphasized in these cases, especially in *Massachusetts v. EPA*, agencies need to ground their policy choices or changes in what the statutes set forth as criteria for action.³⁹⁴ By requiring “fidelity” to underlying statutory requirements as well as open and reasoned deliberation and justification,

³⁸⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

³⁹⁰ See *supra* Section II.C (discussing relevant case law regarding consistency doctrine).

³⁹¹ Judge Bates stated in *NAACP v. Trump*, “an official cannot claim that the law ties her hands while at the same time denying the courts’ power to unbind her. She may escape political accountability or judicial review, but not both.” *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

³⁹² *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)); *Fox*, 556 U.S. at 515.

³⁹³ *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

³⁹⁴ See *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *supra* notes 8 and accompanying text (discussing requirements set forth in *Massachusetts v. EPA*).

consistency doctrine reinforces the three types of political accountability that underpin regulatory legitimacy: (1) legislative supremacy (in Congress choosing the regulator and devising criteria and procedures for the agency's work); (2) responsiveness to presidential leadership; and (3) an open, transparent process and reasoning that constitutes a form of responsive and quasi-democratic action.³⁹⁵

Hence, to satisfy the law and judicial statements about policy change, agencies must avoid gamesmanship and show frank and accountable engagement.³⁹⁶ They must engage in reasoned decisionmaking that frankly addresses both supportive and contrary evidence, shaped as always by what statutes allow. Political predilections of a president and his leadership can shape choices at the margins, and often will have major latitude to shape general agency directions and priorities.³⁹⁷ No cases or laws, however, allow an agency to short-circuit the regulatory process or dodge salient contingencies. In requiring agencies and presidents to make policy with integrity and respect for what the law allows and what the data and science indicate, and provide "good reasons" for a change, this body of law creates sound incentives. If properly understood and followed, this body of law should address fears of critics focused on overregulation and arbitrariness, as well as those focused on political overreach or unjustified deregulation.

IV. DELIBERATIVE INTEGRITY AND TETHERING'S DEGREES

Despite the clear collective import of consistency doctrine's multiple facets, a remaining task is to identify policy change contexts and the degree of tethering constraints faced by agencies, political appointee leadership, and presidents. The degree of tethering links to the obligation of agencies to pursue policy change in ways reflecting what this Part will refer to as "deliberative integrity." These elements of deliberative integrity are drawn from the cases creating consistency doctrine and the linked enduring requirements of reasoned decisionmaking.³⁹⁸ Deliberative integrity in the setting of a policy change involves three central elements: (1) the action must be congruent with the underlying statute's substantive choices and mandated procedures; (2) it must fairly address the factual underpinnings and reasoning behind the earlier policy action, and justify

³⁹⁵ See Garland, *supra* note 9, at 553-56 (describing *State Farm*'s requirements as designed to ensure agency "fidelity" in sense of prioritizing legislative policy choices set forth in statutes over mere political responsiveness to presidential or agency views); Stiglitz, *supra* note 164, at 649-72 (exploring how trust-creating legitimacy in agency process and subsequent judicial review can explain legislative reliance on agencies).

³⁹⁶ For a similar emphasis on integrity, see Kozel & Pojanowski, *supra* note 7, at 148-49 which emphasizes the need for agency "sincerity," "fidelity," and "candid reason-giving."

³⁹⁷ See *supra* note 17 and accompanying text (citing Watts, Seidenfeld, and Short regarding balance of politics and rationality in shaping agency actions).

³⁹⁸ See *supra* Part II (discussing requirements of consistency doctrine and of "reasoned decisionmaking").

the new action with “good reasons”; and (3) it must provide meaningful opportunities for engagement of all affected by the earlier and proposed new policy. The following Sections start with the least constrained settings and move to contexts where agencies and presidents face the greatest hurdles in changing policy.

A. *The Presidential Nudge and Enforcement Prioritization*

Scholars and doctrine share the view that agencies can appropriately be subject to presidential nudging and politicized input in selecting priorities for action, especially when setting a regulatory agenda.³⁹⁹ Few laws set priorities among the many assigned agency tasks. Even rarer are laws that instruct agencies how to juggle tasks delegated under multiple laws. Because most agencies have hundreds of finalized regulations on the books, typically those agencies and the President face no statutory constraint in deciding which are most in need of reexamination.

Justice Kagan (then-Professor Kagan) noted and applauded presidential involvement in rulemaking rollouts and agency initiatives.⁴⁰⁰ Similarly, presidential agenda-setting and oversight, nowadays usually through OIRA, is also generally unproblematic. On the other hand, where a statute sets a deadline, an agency cannot disregard it due to an administration’s anti-regulatory leanings or cost-benefit analysis delays or hurdles.⁴⁰¹

A tougher question concerns prioritization of cost-benefit analysis in driving regulatory revisions.⁴⁰² For almost forty years, presidents of both parties have ordered agencies to weigh costs and benefits of major rulemakings and subjected rulemakings to OIRA’s oversight.⁴⁰³ Such considerations and oversight are not necessarily or blatantly illegal, but their legality is critically reliant on their stated and actually applied subservience to statutory requirements.⁴⁰⁴ Whether

³⁹⁹ See *supra* note 3 and accompanying text (citing to and discussing scholarship regarding extent of presidential authority over agencies).

⁴⁰⁰ See Kagan, *supra* note 3, at 2333 (characterizing President Clinton’s high degree of involvement in rulemaking process as “more desirable”).

⁴⁰¹ See *Env’tl. Def. Fund v. Gorsuch*, 713 F.2d 802, 817-18 (D.C. Cir. 1983) (enforcing deadlines and invalidating suspension of regulation for lack of required preceding process); *Env’tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 571-72 (D.D.C. 1986) (stating agency cannot miss statutory deadline due to Office of Management and Budget review); Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 966 (2008) (analyzing use and constitutionality of deadlines in administrative law statutes).

⁴⁰² President Trump’s two-for-one deregulatory order raises this issue. See *supra* notes 91-96 and accompanying text (discussing two-for-one deregulatory order).

⁴⁰³ Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 327 (2014) (discussing agencies’ use of cost-benefit analysis throughout presidential administrations since Reagan).

⁴⁰⁴ See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (stating that order’s requirements do not apply if contrary to other law).

OIRA, agencies, and presidents respect this primacy of statutory choices is far from clear.⁴⁰⁵ Presidents can indicate their personal priority of cost-benefit justified regulations and minimization of regulatory costs, and easily provide input on regulatory actions to undertake. In addition, *Michigan v. EPA* has created a default rule that broad delegations to agencies should be read to leave room for balanced assessments of both regulatory benefits and costs. It provides agency leaders and presidents with enhanced latitude to nudge agencies to consider such effects.⁴⁰⁶ Within each action, however, such orders can only be interpreted as requests due to the stated primacy of statutory criteria and procedures.⁴⁰⁷ Through appointments and perhaps also appropriations requests, the President can legitimately stack an agency with personnel sharing such leanings. Similarly, a President's request for agencies to report on their work is a constitutionally rooted power, as Professor Strauss observes.⁴⁰⁸

But to avoid questionable assertions of power, a President and agency political appointees must still respect the congressional choices of the delegate for assigned tasks and the criteria for those tasks.⁴⁰⁹ They must allow action based on that delegate's application of those criteria, through congressionally devised procedures, applying the contingent factors and in light of contingent facts made relevant by law.⁴¹⁰ The more the statutory language sets forth specifics about what is required, the less agency leadership or the President (perhaps through OIRA) can seek to change the agency action.⁴¹¹

One common setting involving generally permissible political considerations is agency decisions to accelerate or delay discretionary regulatory actions that are underway, but not yet finalized or in effect. The APA, in Section 705, allows agencies to take such action before rules take effect.⁴¹² And many agencies start, but never finish, regulatory proceedings. It is, of course, quite different if a

⁴⁰⁵ For analysis questioning the legality of OIRA's oversight as actually applied, see Heinzerling, *supra* note 403.

⁴⁰⁶ See *Michigan v. EPA*, 135 S. Ct. 2699, 2707-11 (2015).

⁴⁰⁷ But see Heinzerling, *supra* note 403, at 325-27 (questioning legality of OIRA's actual work).

⁴⁰⁸ See Strauss, *supra* note 3, at 977-79 (discussing amount of discretion delegated to President regarding administrative state).

⁴⁰⁹ See *supra* Sections I.D, II.A (discussing this issue).

⁴¹⁰ See *supra* note 8 and accompanying text (discussing *Massachusetts v. EPA*); *supra* Section II.A (discussing enabling act constraints on agencies).

⁴¹¹ Executive Order 12,866 even if followed as written, adds a decisionmaker not empowered by Congress in the enabling act, changes the criteria for decision (or at least adds a final additional cost-benefit filter), and changes congressionally set process. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Consequently, a strong argument exists that OIRA's work is inherently illegal whenever it goes beyond calls for analysis.

⁴¹² Administrative Procedure Act § 705, 5 U.S.C. § 705 (2012). For discussion of agencies relying on this section and judicial responses, see Section II.H.

statute sets deadlines for required actions—courts will enforce such mandates.⁴¹³ One caveat remains: agencies that generate data, studies, and reasoning, even if resulting in an abandoned action, could later need to engage with those materials if taking a related action where they remain relevant.⁴¹⁴

B. *Turf Conflicts*

Agencies and presidents can broadly engage in politicized direction when agencies come into conflict over particular actions, or perhaps conflict over who has primacy over a regulatory turf. Such settings of uncertain and potential overlapping turf are quite common and can create problems of conflicting mandates and inefficient duplication of work.⁴¹⁵ Regulatory obligations can accumulate over time.⁴¹⁶ Such overlaps can also result in “regulatory commons” dynamics, where stakeholders and potential regulators fail to act either out of fear of waste, free riding incentives, or because the magnitude of need for action may not be apparent to any single actor.⁴¹⁷ Statutes may create rules of decision for how to handle conflicts. But if such regulatory overlaps and collisions are not anticipated by the statutes, then White House leadership provides one of the few means to sort things out. No statutory language would guide and hence constrain the president or affected agencies in resolving turf conflicts. And, as with agenda-setting and determination of priorities, this reality means turf conflicts are often legitimately subject to a degree of politicized presidential and agency problem solving that is subject to few constraints, provided that each agency’s congressionally delegated role is respected.

C. *Broad New Deal Delegations*

Many agencies, often in the form of commissions dating back to the New Deal, have long acted under statutes with remarkably broad delegations. Such laws often do little more than empower an agency with broad regulatory goals, such as to act in the public interest, to protect the integrity of markets, to police

⁴¹³ See, e.g., *Env’tl. Def. Fund v. Gorsuch*, 713 F.2d 802, 814-18 (D.C. Cir. 1983) (discussing and enforcing deadlines, and rejecting claimed postponements that had effect of undoing valid regulations but without required process).

⁴¹⁴ See, e.g., *Pub. Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1505-07 (D.C. Cir. 1986) (requiring agency engagement with earlier studies in changed agency action).

⁴¹⁵ See Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 67, 69 (forthcoming 2018) (identifying many settings of overlap but also congressional awareness and rules for resolving conflict).

⁴¹⁶ See generally J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003) (discussing how regulations accrete in modern administrative state).

⁴¹⁷ See Buzbee, *supra* note 72, at 5 (explaining that regulators often leave social ills unaddressed due to uncertain regulatory domains and resulting political and economic incentives).

unfair marketing, or to provide a safe workplace.⁴¹⁸ At first blush, one might think that broad delegations would automatically imply broad latitude for politicized redirection of policy. However, agencies pursuing policy change are constrained both by the tasks assigned by legislation and by the line of preceding policies and actions taken by an agency, as well as possibly relevant judicial precedents. Such agencies often engage in technical and context-sensitive policy creation about, for example, what workplace actions are veiled threats and hence unfair labor practices, or which market actions are the result of legitimate aggressive competition, or reflect illegal, unfair, or anticompetitive behavior.⁴¹⁹

Policy devised through a sequence of adjudicatory actions and resulting opinions, usually with some additional guidance documents and perhaps linked notice-and-comment rulemakings, can create a complex web of policy with diverse policy rationale contingencies.⁴²⁰ As a result, such an agency pursuing a policy change may face little constraint from broad statutory language, but that does not mean lack of tethering. Constraining contingencies may be many and hard to overcome. Even if each preceding policy step is modest and clear, their sequential accumulation and their on-the-ground effects can create a formidable hurdle to any large-scale abrupt policy change.⁴²¹ And due to the development of reliance interests, stakeholders will rarely sit out a possible regulatory upheaval. As a result, the agency pursuing change will be forced to engage with its own accumulated regulatory law, empirical data, and stakeholders' advocacy about the implications of retaining or changing a policy.

D. *Science-Based Judgments and the "Best"*

Since the late 1960s, many statutes have, at great length and detail, regulated risks to safety, health, and the environment.⁴²² The specificity in these laws' criteria and procedures constrain agencies and presidents who might otherwise weigh politics heavily in making a regulatory choice. In contrast to broad New

⁴¹⁸ Cf. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474-75 (2001) (rejecting delegation doctrine challenge while citing to cases upholding constitutionality of broad delegations). See generally Magill, *supra* note 168, at 1400-02 (reviewing broad delegation language and its implications for agency choice); Solove & Hartzog, *supra* note 11 (reviewing FTC policy development under broad language).

⁴¹⁹ See, e.g., *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d. 34, 37-41 (1st Cir. 1989) (discussing NLRB's policy evolution regarding "bargaining from scratch" threats but requiring agency to "follow[] or consciously change" policy with explanation). See generally Solove & Hartzog, *supra* note 11 (discussing FTC's policy evolution).

⁴²⁰ See generally, e.g., Solove & Hartzog, *supra* note 11 (analyzing such policy development).

⁴²¹ See generally Ruhl & Salzman, *supra* note 416 (explaining dynamics leading to regulatory accretion).

⁴²² See THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* 18-32 (Yale Univ. Press 2013) (describing establishment of modern administrative state's protective regimes in book tracing emergence of opposing "laissez faire revival").

Deal delegations, these modern risk regulation laws often include micro-managing instructions about the assigned task, triggers to justify action, and criteria for the agency to apply in regulating.⁴²³ Moreover, many such laws, especially in the environmental area, require agencies to set performance standards benchmarked against what the “best” in some category can achieve, often to meet some health or endangerment-based target.⁴²⁴ Because such standard setting is data-based and often fiercely contested, policy revision efforts are laden with every imaginable constraint. The actor is usually specified, the criteria for action chosen by Congress, and data about the risk intensively gathered and distilled to meet the inevitable judicial challenge to any high-stakes economic regulation. Such legal criteria are unlike laws that call for broad value judgments, such as the FCC’s changing views of obscenity on television in *Fox*, or laws calling for agencies to juggle many potentially clashing mandates.⁴²⁵

In the setting of these science and data-based “best” determinations, nothing is likely to present clean questions of law interpretation untethered to a raft of contingencies and stated agency rationales. Agencies draw on their knowledge of the regulatory regime’s interconnections, affected stakeholders’ interests, relevant science and data, and the results of different choices.⁴²⁶ Little is left to political discretion in its broadest sense, or to mere agency analysis of words.

Deliberative integrity in such settings will involve respect for congressional choices of delegate, procedures for action, compliance with often highly reticulated criteria for action, and grappling with contingent data.⁴²⁷ Agencies cannot, out of nowhere, put procedures and substantive choices all back in play, especially if at the direction of the President or a political appointee, without raising warning flags for later reviewing courts.⁴²⁸ Of course, some change at the margins will seldom present a problem. But pre-judging, political pressures, dodging of comment on a de facto regulatory abandonment, or ignoring of a body of science or data previously viewed as determinative, will all raise

⁴²³ See, e.g., Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 175-82 (1992) (analyzing increasing statutory specificity).

⁴²⁴ See, e.g., Clean Air Act of 1963 §§ 109, 111, 112, 42 U.S.C. §§ 7409, 7411, 7412 (2012) (setting up such “best” achievable benchmarked regulation for different sorts of pollution, sources, and contexts).

⁴²⁵ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 505-10 (2009) (reviewing history of policy and agency action); Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 196 (1986) (discussing prevalence of laws requiring agencies to “weigh . . . competing policies” and latitude they provide for regulatory changes).

⁴²⁶ See *supra* Section I.A (describing Congress’ reliance on agencies to develop regulatory policy based on their respective expertise).

⁴²⁷ See Stack, *supra* note 3, at 284 (arguing courts and presidents should respect different congressional choices about delegation to President versus to an agency); Strauss, *supra* note 3, at 968.

⁴²⁸ *Judulang v. Holder*, 565 U.S. 42, 56-57 (2011); see also *supra* notes 252-256 and accompanying text (discussing *Judulang*).

concerns about lack of deliberative integrity and reasoned decisionmaking, thereby increasing the odds of judicial rejection.⁴²⁹

For this reason, the initial high-stakes efforts by the Trump Administration to abandon environmental regulations have foundered and are likely to continue to do so. Most of these actions did not directly engage or engage in depth in the merits of earlier policy choices.⁴³⁰ Deliberative comment was constrained.⁴³¹ Agencies often avoided comment on the fundamental issue of whether an agency can or should abandon an earlier regulatory choice.⁴³² Or the agency proposed a fundamental new limiting construction of statutory language, yet without explaining why this new read was better or even required.⁴³³

E. *Presidential Adjudicatory Interventions*

Not all presidential nudges or agency weighing of politicized considerations are unproblematic. Most policy shifts discussed in this Article involve policies developed through rulemakings or over a series of regulatory actions. These are settings where some degree of presidential or political appointee involvement is typical. However, presidential interventions can occur in adjudicatory settings.⁴³⁴ As mentioned above, President Trump issued a legal memorandum that indicated the outcome he sought in a highly-publicized battle over a pipeline threatening Native American lands and waters.⁴³⁵ The Army Corps subsequently complied, even referring to the President's memorandum as constituting a presidential "direction," but the Army Corps' minimal regulatory analysis and explanation were later found lacking in a court.⁴³⁶

⁴²⁹ See, e.g., *Sierra Club v. EPA*, 884 F.3d 1185, 1195-97 (D.C. Cir. 2018) (rejecting EPA changes to rule regarding industrial boiler pollution due to record inadequacy, especially unexplained inconsistencies in characterization of reliability of data in earlier and changed rule explanations).

⁴³⁰ See *supra* Sections I.E, II.H, III.B (describing Trump Administration's claims of broad agency authority to reverse course with little constraint, courts' treatment of such claims, and analyzing constraints on agency policy change).

⁴³¹ See *supra* Sections I.E, II.H, III.B (describing Trump Administration's change power claims); see e.g., *supra* notes 100-101 and accompanying text (discussing splintering of deregulatory moves and agency instructions for commenters to limit focus, and judicial rejection of such limitations).

⁴³² See *supra* Sections I.E, II.H, III.B (presenting and analyzing Trump Administration's policy change authority claims and how many such change efforts have not included discussion of relative merits of old policy to be abandoned or new replacement policies).

⁴³³ See *supra* Sections I.E, II.H, III.B (presenting many such actions); *supra* notes 102-111 (presenting such authority-limiting actions, including many agency statutory abnegations that have often included only summary explanation, as well as cases rejecting poorly justified changes); *infra* Section IV.F (explaining unlikelihood of success of such proposals).

⁴³⁴ See *Percival*, *supra* note 3, at 2534.

⁴³⁵ See *supra* notes 153-157 and accompanying text.

⁴³⁶ See *supra* notes 153-157 and accompanying text.

This disputed Dakota Access Pipeline permit did not involve a formal adjudicatory action. Due to the APA's protections against ex parte communication, bias, and prejudgment, an agency action driven by politicized variables or presidential pressures in such a formal setting would have clearly been illegal.⁴³⁷ Still, even in an informal adjudicatory setting involving numerous diverse opportunities for input, a presidential directive is problematic.⁴³⁸ After all, the deciding agency will, as with the Pipeline, face competing interests with substantial localized and personalized stakes hanging in the balance. A President is exceedingly unlikely to know about the risks, choices, and competing interests in play. A President is similarly unlikely to have any exposure to record materials that a delegated, responsible agency would have before it. A presidential directive about the desired outcome in such settings could, if obeyed, taint the regulatory action by introducing risks of bias or prejudgment violating the obligation of agencies to maintain an "open mind."⁴³⁹

This action by President Trump—seeking to direct an outcome in a contentious informal adjudicatory setting over a permit—may have been without modern precedent. Other than a possible intervention in a formal proceeding, it is at the most problematic end of the spectrum, involving a micro-scale politicized intervention raising questions about legal fealty and attention to facts.⁴⁴⁰

F. *Statutory Abnegation and Dodged Facts*

Whether problematic policy change efforts reviewed above reflect well counseled strategic choices or blundering is hard to know. At least a few misguided or poorly justified policy change efforts are found during almost all administrations, and all have been met with a harsh judicial reception.⁴⁴¹ But

⁴³⁷ See, e.g., *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1536 (9th Cir. 1993) (holding illegal White House interference with formal procedures required for deliberations of Endangered Species Committee).

⁴³⁸ See *Sierra Club v. Costle*, 657 F.2d 298, 397-410 (D.C. Cir. 1981) (reviewing huge number of communications from private entities, Congress, and executive branch officials in connection with notice-and-comment rulemaking, rejecting claim that they constituted illegal ex parte contacts, but stating unrecorded communications would raise different concerns in an adjudicatory context and that adequacy of rulemaking record was a separate issue).

⁴³⁹ "Open mind" and anti-bias constraints exist even in informal agency settings. See, e.g., *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (noting anti-bias constraints); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979) (discussing bias concerns and holding that Chairman of FTC could participate in pending rulemaking proceeding concerning advertising to children).

⁴⁴⁰ See Percival, *supra* note 3, at 2509-10, 2536-37 & n.395 (discussing and citing literature on risks of presidential involvement in adjudications, facts as constraint, and discussing differences in formal and informal proceedings).

⁴⁴¹ See *supra* Sections II.G, II.H (discussing judicial hostility to insufficiently explained agency policy change, including those initiated by Trump Administration).

when a series of policy change proposals over a short period and under the same leadership reveal a fairly uniform series of justifications and strategies, then they may reflect a considered, intentional effort to move the law in a new doctrinal direction.⁴⁴² The Trump Administration's many deregulatory actions share a fairly uniform set of justifications and even often the same citations. As discussed above, *State Farm* and *Fox* are often cited, with emphasis on the power of a President to push a new attitude about regulation, and then the somewhat questionable citation to the disputed *Fox* language from Justice Scalia's opinion about an agency not needing to show "better" reasons for the action.⁴⁴³ Some actions include the "underlying facts" language from *Fox*, but agencies have generally omitted analysis of consistency doctrine as articulated in *Encino Motorcars*—that majority opinion did not focus on the "better" language, but on the more standard need for agencies to provide "good reasons" for a change, leave no "unexplained inconsistency," and engage with "facts . . . underlying" the initial action.⁴⁴⁴ None consider the implications of *Massachusetts v. EPA*, or the implications of the majority's rejection of the policy change at issue in *State Farm* due to the lack of an adequate explanation.

In these Trump Administration proposals and actions, however, agencies proposing change only cursorily engaged with the extensive documentation of facts and rationales provided by the very same agencies under the leadership of previous administrations. Instead, in a substantial number of major recent deregulatory actions, the agencies engaged in statutory abnegation, claiming either limited power due to a new statutory interpretation, or sometimes claiming they completely lack earlier claimed power.⁴⁴⁵

In positing such new constraining legal reads but then not engaging with previously critical facts and agency reasoning, these agencies implicitly seem to have manifested the following belief: that if an agency claims new limits on its own power through a new statutory interpretation, then it can avoid engagement with the empirical and scientific data earlier gathered and relied upon, the earlier reason-giving by the agency, and assessment of the effects of the different regulatory choices.

Such a strategy is unlikely to succeed, although in one highly unlikely narrow setting might be found acceptable despite its apparent violation of consistency

⁴⁴² During the presidency of George W. Bush, an analogous series of fairly uniform shifts in preemption policy triggered scholarly and judicial scrutiny. *See generally* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009) (analyzing these preemption policy developments).

⁴⁴³ *Encino Motorcars*'s more recent clear majority opinion omitted this language. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (focusing on need for explanations and attention to underlying facts).

⁴⁴⁴ *See supra* Section II.C (discussing *Encino Motorcars* decision).

⁴⁴⁵ *See supra* Sections I.E, II.H (discussing Trump Administration policy reversals and claims of lack of statutory authority).

doctrine precedents.⁴⁴⁶ The strength or vulnerability of this revealed new strategy hinges on both the reasonableness of the agency's statutory view as well as ongoing judicial fealty to Supreme Court precedents requiring agencies proposing a policy change to engage with "underlying facts" and leave no "unexplained inconsistency."⁴⁴⁷

If both the old and new statutory interpretations are tenable, then under the consistency-linked doctrines above, the agency cannot just embrace a new statutory view and policy yet not explain why it has done so. All of the consistency doctrine cases require the agency to provide a reasoned comparative analysis. The obligation to provide "good reasons" will require assessment of the rationales for and consequences of the new read and explanation why it is congruent with what the statute sets forth. The agency will need to offer "good reasons" for the change despite its previous embrace of a different policy.⁴⁴⁸ A claim about a new "better" or "belie[ved] to be better" policy provides some policy space for agency judgment, but requires agency discussion that compares the old and new approaches.⁴⁴⁹ None of these cases state that an agency's reliance on a changed view of statutory powers excuses the need for such analysis. Instead, they insist upon "good reasons."

Furthermore, if an agency errs about the nature of its authority, including an erroneous claim of lack of statutory ambiguity or erroneously narrow view of its own power, that is itself grounds for judicial rejection.⁴⁵⁰ A close judgment call will always go to the agency, but even such an agency victory requires correct statutory analysis, engagement with earlier actions, and persuasive explanation.

It is important to note that the EPA's statutory abnegation in *Massachusetts v. EPA* was a claim of no power to act regarding GHGs as an air pollutant, coupled with arguments rooted in agency and presidential discretion regarding policy priorities and even foreign policy.⁴⁵¹ The EPA basically constructed an argument, built off of the *Brown & Williamson* decision. It argued in its Federal Register preamble that, due to the breadth of the regulatory impacts, the generality of the statutory language, and the specificity of a few climate-related legislative authorizations, Congress had sent a collective legislative signal that

⁴⁴⁶ See *infra* note 454 and accompanying text (describing possible narrow use of such strategy that might be successful).

⁴⁴⁷ See *supra* Section II.C (reviewing cases setting forth these obligations).

⁴⁴⁸ See *supra* Section II.C.

⁴⁴⁹ See *supra* Section II.C; *supra* text accompanying notes 226-233 (discussing key language in *Fox* and various Court opinions).

⁴⁵⁰ See *NextEra Desert Ctr. Blythe v. Fed. Energy Regulatory Comm'n*, 852 F.3d 1118, 1122-23 (D.C. Cir. 2017) (finding agency erred regarding its own statutory authority); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 818-21 (2017) (analyzing cases holding that agency errors about nature of their own authority must be rejected).

⁴⁵¹ See *supra* notes 215-224 and accompanying text (discussing actions leading to *Massachusetts v. EPA* and Court's ultimate decision).

the agency had no power at all to regulate GHG emissions.⁴⁵² The Supreme Court, however, rejected the reading as erroneous, and saw no space for the other claimed political factors to excuse inaction. The Court insisted that the agency ground its decision in a correct application of the statute's criteria and required the agency to engage with relevant underlying science and make the judgments mandated by the statute.⁴⁵³

The only possible doctrinal space for a successful statutory abnegation move that neglects earlier contingencies is if both the agency and the reviewing court agree that the abnegating agency was correct, as a *Chevron* Step One matter, that the agency never had *any* power to act *in any way* as it earlier claimed and did.⁴⁵⁴ Perhaps in the setting of a complete regulatory turf disavowal, a later reviewing court would, despite the absence of supporting Supreme Court consistency doctrine language, allow the policy change without full provision of "good reasons," or full engagement with "underlying facts" and possible reliance interests. The argument would likely be that such context-specific contingency analyses were always legally irrelevant or illegal. And, were the abnegating agency and a reviewing court later to agree that the agency, in taking its earlier actions, had no such power to act in the first place, perhaps that limited rationale and reasoning would suffice.

The very circumstance of such agreement is unlikely, however. After all, the agency would need to successfully claim, contrary to its own earlier fully explicated view, that only a single contrary reading of the law is tenable. Moreover, if the abnegation is in any way factually contingent, or is really a claim of past overreach in a particular application, it would be far from a power disavowal that might arguably excuse a lack of agency justification and lack of engagement with regulatory contingencies. A later agency claim of initial illegal excess is actually, at most, either a new slightly different read of the agency's power, or a mere professing of past arbitrary and capricious action. Or, most likely, it would actually involve a *Chevron* Step Two interpretation proffering a new and (allegedly) better read and policy.

If such statutory abnegation is actually rooted in such claims of agency excess or a new choice among several options, then the agency would still need to fully explain and justify itself. Such actions would involve an agency *choice* to change

⁴⁵² *Massachusetts v. EPA*, 549 U.S. 497, 512-13 (2007) (referencing EPA's reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). This sort of interpretive move under the "major questions" or "power" canon is sometimes characterized as a conclusion of no power under *Chevron* Step One, but in others as a setting that leads to "no power" or "no deference" conclusions, basically bypassing the *Chevron* framework altogether. See generally Heinzerling, *supra* note 80 (discussing what author calls "power canons").

⁴⁵³ See *Massachusetts v. EPA*, 549 U.S. at 534 (holding that proffered reasons for lack of action by EPA were arbitrary and capricious).

⁴⁵⁴ For discussion of *Chevron* and its implication for policy change, see *supra* notes 183-197 and accompanying text. For additional discussion of the "major questions" or "power canon," see *supra* notes 80-81 and accompanying text.

policy, not mere compliance with what statutorily must be. As stated in the major consistency doctrine cases, an agency choosing to change policy must provide “good reasons” for the change.⁴⁵⁵ Such policy changes would really not be driven by language, but by claims about what range of choices are legally allowed or best.

And when one considers the “major questions” or “power” canon’s foundations and logic, even those possible rationales for abnegation would, upon closer examination, not logically excuse an agency’s lack of engagement with key contingencies and past reasoning. Much of that canon’s reasoning is based on claims that particular interpretive choices would result in massive regulatory consequences.⁴⁵⁶ If a new agency action is designed to mitigate claimed regulatory excess, then there too the apparent claim of “no power” might actually just involve a degree of agency forbearance or pullback. To draw that line between illegal excess or prudent self-limitation in asserting regulatory authority would logically, under the consistency cases, call for the agency and reviewing courts to engage fully in comparative analysis of statutorily relevant contingencies and regulatory consequences. Hence, a later complete disavowal of agency power to act is highly unlikely to thread this jurisprudential needle.

Where the relevant statutory language mandates that an agency engage in some variant of “best” achievable analysis, an agency abnegation claim is especially unlikely to succeed.⁴⁵⁷ The nature of the statutory requirement creates substantial constraint.⁴⁵⁸ Undoubtedly, some judgment calls shape agency definition of the relevant category for comparison.⁴⁵⁹ But leapfrogging back to some claimed consistency with a distant “best” benchmarking while ignoring an intervening agency interpretation, justifications, reasoning, and regulatory effects would seem to flunk all of consistency doctrine’s requirements.⁴⁶⁰ An agency explaining what is “best” to achieve a statutory goal will, in a policy change setting, necessarily require comparative assessments.

⁴⁵⁵ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (requiring “good reasons”).

⁴⁵⁶ For discussion of this canon, see *supra* notes 80-83 and accompanying text.

⁴⁵⁷ Such statutory mandates and their data and science-intensive nature are presented and analyzed elsewhere in this Article. See *supra* notes 422-433 and accompanying text.

⁴⁵⁸ See *supra* Section IV.D.

⁴⁵⁹ Battles over the Clean Power Plan and consideration of capabilities “inside the fenceline,” as advocated by the Trump Administration, or of how power plants and their owners already achieve substantial GHG reductions through trading and other shifts that may physically occur off-site (the Obama Administration EPA view), involve just such questions about comparators under regulatory benchmarking.

⁴⁶⁰ Early Clean Power Plan and Waters of the United States deregulatory actions never grappled with empirical and peer reviewed studies previously documented. By late 2018, following a series of judicial rejections of agency deregulatory actions, the EPA engaged in more substantial analysis. See *supra* Section I.E.5 (presenting such actions); Section II.H (discussing cases assessing actions); Section III.B (providing broader assessment of legality of these regulatory shifts).

Moreover, in major recent opinions, the Supreme Court has increasingly been emphasizing the need to read key language with attention to surrounding context.⁴⁶¹ These cases also reflect a focus on the consequences of interpretive choices and whether they can be reconciled with all statutory signals about a statute's meaning and stated purposes.⁴⁶² The Court has castigated agencies for "interpretive gerrymanders," where an agency strategically and unnecessarily refuses to consider all costs and benefits—also referred to as "advantages" and "disadvantages"—that result from a regulatory choice.⁴⁶³ An agency cannot keep "parts of statutory context it likes while throwing away parts it does not."⁴⁶⁴ Recent scholarship investigating appellate judges' interpretive practices reveals similar broad pluralistic and pragmatic inquiry, and little actual use of a purely textualist approach as espoused by Justice Scalia.⁴⁶⁵ Thus, both under consistency precedents and a related line of statutory interpretation opinions, for an agency to show deliberative integrity will require the following: the agency will have to engage with all salient language, the on-the-ground effects of choices permitted by the law's relevant operative text, and surrounding contextual language and other clues as to permissible meanings.

With the Clean Power Plan's proposed abandonment or change under the Trump administration, for example, courts reviewing the agency's actions will assess if the agency justified its proposed new fenceline-bound statutory reading according to the relevant emission standard, which requires identifying what is the: 1) best 2) system (not technology) of 3) emissions reduction that has 4) been adequately demonstrated.⁴⁶⁶ The linked language provides numerous levels of

⁴⁶¹ See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (working with language from *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), about attention to context, but looking more broadly at functionality and impacts); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439-49 (2014) (looking at context, structure, and impacts to conclude EPA lacked power to regulate small emitters despite literal language reaching them).

⁴⁶² See *King*, 135 S. Ct. at 2488-89; *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133; *Util. Air Regulatory Grp.*, 134 S. Ct. at 2439-49.

⁴⁶³ See *Michigan v. EPA*, 135 S. Ct. 2699, 2707-11 (2015) (rejecting EPA claim of no power also to consider costs associated with its regulation to reduce risks of mercury pollution from power plants). The dissent, written by Justice Kagan for herself and three other Justices, agreed with a general default rule that reasonable agency action requires consideration of costs unless precluded by the statute, but thought the EPA did so. *Id.* at 2716 (Kagan, J., dissenting). Hence, the whole Court appears to have embraced this new substantive canon regarding consideration of both benefits and costs of agency actions, but the justices differ in its application.

⁴⁶⁴ *Id.* at 2708 (majority opinion).

⁴⁶⁵ Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1309-15 (2018) (summarizing these findings).

⁴⁶⁶ See Clean Air Act of 1963 §§ 111(a)(1), (d), 42 U.S.C. §§ 7411(a)(1), (d) (2012) (providing operative and definitional provisions underpinning CPP and guiding any policy change).

tethering, as do past EPA studies and reason-giving that discussed what is actually happening in the states, pollution control, and clean energy trends.⁴⁶⁷ So far, however, we do not know *why* the EPA thinks the “inside-the-fenceline” approach satisfies these criteria for setting of a performance standard, how it is “best” to reduce emissions, let alone “good reasons” for the change.⁴⁶⁸ Regulatory materials so far leave “unexplained inconsistency” and minimal acknowledgement of changed views of “underlying facts.”⁴⁶⁹

Under the very different Clean Water Act “waters of the United States” regulation, the statutory language is, viewed alone, both broad in its reach and quite indeterminate.⁴⁷⁰ But the 2015 Clean Water Rule was woven out of close attention to three decades of regulatory experience, three major Supreme Court decisions, the Connectivity Report’s survey of peer-reviewed science about waters, and the Clean Water Rule’s explanation for its line-drawing choices about what waters should be protected.⁴⁷¹ They collectively created a substantial body of contingent analysis that under current consistency doctrine must be engaged with by the agency when revising policies. So far, however, the agencies that proposed these changes (the EPA and the Army Corps) have, through their divided steps and notice choices, in addition to limiting comment, substantially limited discussion of these issues. These shortcuts led to judicial rejection of the “Applicability Date” regulation due to the agencies’ failure to make policy changes in conformity with requirement of the Clean Water Act and APA.⁴⁷² So far, in these various actions, the EPA and the Army Corps imply something illegal in the past approach. They also, in compliance with a presidential order, have proposed adopting Justice Scalia’s non-majority view of federal power. Until the 2018 Supplemental Notice, the agencies had avoided explanation for how these approaches would be permissible under the law and analysis of related effects.⁴⁷³

Finding the correct answer to these particular policy shifts is beyond the scope of this Article, not least because the finality and legality of most of these actions and subsequent litigation will not be resolved for years. However, they reveal questionable self-constraining reads of statutory power to justify lack of

⁴⁶⁷ Both 2015 and 2017 studies and agency actions will need to be engaged. *See supra* notes 133-143 and accompanying text.

⁴⁶⁸ This series of actions is presented elsewhere in this Article. *See supra* notes 133-147 and accompanying text.

⁴⁶⁹ *See supra* notes 133-147 and accompanying text.

⁴⁷⁰ *See supra* notes 113-132 and accompanying text.

⁴⁷¹ *See supra* notes 113-132 and accompanying text.

⁴⁷² *See* S.C. Coastal Conservation League v. Pruitt, No. 2:18-cv-00330, slip op. at 6-18 (D.S.C. Aug. 16, 2018).

⁴⁷³ The 2018 Supplemental Notice offers more in-depth discussion, but may still be based on a statutory interpretation that is illegal and only provides limited engagement with the relevant science and the effects of the old and likely new regulatory approaches. *See supra* notes 130-132 and accompanying text (citing and presenting action); *supra* notes 372-375 and accompanying text (discussing actions’ legality).

engagement with the heart of the statutory tasks, goals, and direct comparative assessment of regulatory effects of the old and new actions.

If courts accept this new statutory abnegation strategy to achieve policy change—a new agency-proffered self-limiting statutory read, and minimal engagement with underlying facts and past reason-giving—then agencies would have broad newfound ability to sidestep the linked requirements of consistency doctrine and “reasoned decisionmaking” jurisprudence. Statutory abnegation, in particular, would become the new means to deregulate or achieve major policy changes. If accepted by reviewing courts, agencies could avoid discussion of on-the-ground repercussions of the choice, their own past reason-giving, and also the agencies’ earlier explanations for why different, more broadly empowering reads were embraced. Courts would have to abandon a vast body of longstanding administrative law doctrine.

Furthermore, such an embrace of this policy change strategy as legal would exacerbate Justice Gorsuch’s concerns—although he overstated them—with agency power to shift policy day-to-day, based on regulatory “whim.”⁴⁷⁴ Such a change would also undercut the values of stability and the judicially enforced norm that agency policymaking should be rigorous, offer publicly accessible and rational explanation, and be based on the best data and science.⁴⁷⁵ Administrative law doctrine generally tries to hold in equipoise room for political responsiveness while also looking for expert, fact-based agency policymaking guided by congressional criteria. If such a shift in doctrine were permitted, it would decidedly skew agencies in a politicized direction and allow more rapid and unpredictable policy change. A focus on language and power disavowal could be used to avoid expertise-based analysis of choices and their effects.

But consistency doctrine’s many facets make such doctrinal upheaval unlikely. To embrace such agency power to disavow power and thereby avoid justification obligations would involve at least the following major doctrinal adjustments. *Chevron* deference would be substantially expanded, with Step Two reasonableness oversight weakened. The whole line of “hard look review” and “reasoned decisionmaking” precedents would be substantially weakened and susceptible to strategic agency sidestepping of criticisms and engagement with data and past agency policy explanations. The still uncertain middle of consistency doctrine’s major cases—how much can a President’s or political appointees’ regulatory predilections shape an agency’s actions—would expand; agencies and presidents would have broadened latitude to follow their preference for laxity or stringency. Agency obligations to look both backwards and forwards to explain fully and frankly a policy shift would be weakened. The key

⁴⁷⁴ See *supra* Section I.B (describing these views).

⁴⁷⁵ Although many laws do not mandate reliance on such best available science or data, the rigor of “hard look review” and linked reasoned decisionmaking expectations will generally lead agencies in high stakes policymaking settings to rely on best available data to avoid later judicial rejection.

lessons of *Massachusetts v. EPA* and *State Farm* about fealty to statutory criteria over statutorily untethered political preferences would be subject to a new gaping exclusion. “Unexplained inconsistency,” which is now prohibited, would become common.⁴⁷⁶ Abrupt statutory interpretation shifts would become more frequent, and agencies could disregard more of their past work, others’ views, and facts.

Even if judges assessing these deregulatory justifications shared a preference for less regulation, the long-term systemic costs of freeing agencies and presidents to make more abrupt and politically driven policy changes under the guise of power disavowals would—or should—give them pause. Such a doctrinal shift would create associated increases in discretionary agency power, heighten legal instability, and reduce political accountability to affected stakeholders. It would also undercut rule of law virtues like stability, predictability, and reasoned explanation by lawmakers.⁴⁷⁷

For these reasons, jettisoning of consistency doctrine through embrace of this apparent new strategy of agency statutory abnegation is unlikely. It might work in the rare and unlikely setting of agency and court agreement that the agency never had any authority to act at all in a setting where it previously claimed power. But narrower and contingent forms of abnegation should not excuse full agency engagement with contingencies or allow agency bypassing of burdens of justification. Broader embrace of this strategy would destroy the stability-responsiveness equipoise of current consistency doctrine. And several decades of case law governing agency consistency, as well as the first judicial opinions assessing the 2017 and 2018 deregulatory wave of actions, consistently hew to these longstanding requirements.

CONCLUSION

The law shaping agency power to change policy is built on a web of legal doctrine that shares common expectations and requirements. Contrary to recent claims of broad agency and presidential power to change policy with little constraint—claims that were stated with condemnation by now-Justice Gorsuch but embraced by administration agencies during the early years of the Trump Administration—policy change is subject to numerous hurdles. Agencies cannot run from underlying facts, contested issues, or past statutory interpretations and associated reasoning explaining past policy choices. Agencies must engage with these statutorily shaped contingencies. This body of doctrine tethers both presidents and agencies, but leaves substantial room for improved regulation and adjustment to new circumstances. If broad recent assertions about unfettered change power meet with success, that will likely mean a substantial change in

⁴⁷⁶ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

⁴⁷⁷ Cf. Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1947-55 (2018) (discussing “rule of law” values, consistency doctrine, and reliance interests in analysis of “morality” of administrative law as reflected in core modern doctrine and framed by jurisprudential writings).

the contours of consistency doctrine. Many of the current checks on agency lawlessness and arbitrariness would be weakened. The web of doctrines making up consistency law are well founded, however, and should endure, checking unjustified and unaccountable agency policy shifts.

Fundamental Virtues for Business and Regulation

William W. Buzbee

Professor of Law, Georgetown University Law Center

Wwb11@law.georgetown.edu

Outline of Comments for ABA Administrative Law Meeting, Panel on Business and Regulation

November 1, 2018

I. Respect for Markets vs. Capitulation to Business

Insights of foundational law and economics literature

Pervasive efforts to play the regulators and politicians; skew of contacts and influence

Unsubtle deregulatory games

II. Assuming the Bad Man: Holmes and Regulatory Virtues for All Seasons

Pervasive risk of bad targets of regulation and bad regulators, therefore need:

Clarity of process and substance

Responsiveness—to fix policy; provide guidance; be timely

Regulation based on reputable science and data; best, not perfect

If CBA overlay, must be balanced, not like 13771

Frank and reasoned explanation

Parity of treatment, esp. among competitors

Stability of regulatory regimes as norm, with room for change

Need for enforcement

Importance of citizen enforcement, private actions

III. Consistency Virtues and Deregulatory Risks

Policy change as a sound option

But risks of vacillating policy

Risks of targeted bailouts, unreasoned deregulation, selective inaction

IV. Agency Proclivities and Responses

Need to distinguish among:

Aggregate burdens due to different regulators and laws (true risk)

Stringency of regulation

Risk of torpor, risk avoidance, passing the buck

Mission vision vs. capture risks

Inaction's minimal reviewability problem for all

V. Lobbying Associations vs. Actual Business Views

VI. Deregulatory Warning Tales

Gliders

Clean energy trends and regulatory rescues

Science, data, and reasoned decisionmaking



National Small Business Poll

NFIB National

Volume 13, Issue 3
2017

Small Business Poll

Regulations

NFIB National Small Business Poll

The **National Small Poll** is a series of regularly published survey reports based on data collected from national samples of small business employers. The initial volume was published in 2001. The **Poll** is designed to address small business oriented topics about which little is known but interest is high. Each survey report looks into a different subject matter.

The survey reports in this series generally contain three sections. The first section is a brief Executive Summary outlining a small number of themes or salient points from the survey. The second is a longer, generally descriptive, exposition of the results. This section is not intended to be a thorough analysis of the data collected nor to explore a group of formal hypotheses. Rather, it is intended to textually describe that which appears subsequently in tabular form. The third section consists of a single series of tables. The tables display each question posed in the survey broken out by employee size of firm.

Individual reports are publicly accessible on the NFIB web site www.411sbfacts.com. The 411 site also allows the user to search the entire data base. It searches all the questions in all of the individual **Polls** with a user-friendly key word, topic, or **Poll** sort facility.

NFIB National
Small Business
Poll



Regulations

Volume 13, Issue 3
2017
ISSN - 1534-8326

Holly S. Wade
NFIB Research Foundation
Series Editor



1201 "F" Street, NW
Suite 200
Washington, DC 20004
nfib.com

National Small Business Poll



Regulations

Table of Contents

Executive Summary	1
Regulations	3
Tables	6
Data Collection Methods	17

Executive Summary

- One-quarter of small employers find government regulations a “very serious” problem in operating their business (Q#1), regulations are a “somewhat serious” problem for another 24 percent of small employers.
- Roughly half of small employers have experienced an increase in the number of regulations they must comply with in the last three years compared to only 2 percent who experienced a decline (Q#2).
- The single greatest regulatory problem for small employers is the *cost* of compliance (Q#3). About 28 percent of small employers cite compliance costs as their largest regulatory issue followed by 18 percent citing the difficulty of understanding what they must do to comply. Seventeen percent are most burdened by the extra paperwork required.
- The volume of regulations is the largest problem for 55 percent of small employers compared to 37 percent who are most troubled by a few specific regulations coming from one or two sources (Q#11).
- One-third of small employers have had a government official enter their place of business to inspect or examine their records and/or licenses or otherwise check on their compliance with some government requirement in the last 12 months (Q#18). For larger small business, 57 percent were visited in the last 12 months compared to 28 percent for the smallest ones.
- Over the last three years, 41 percent of small employers have reached out to talk with someone at a government agency for help complying with a regulation (Q#19). About 19 percent of small employers who contacted a government agency were very satisfied with their experience (Q#20).
- Almost one-in-ten small employers have been fined, sued or penalized for a regulatory related violation in the last 3 years (Q#21). Larger businesses are twice as likely to have this occur compared to smaller ones.
- Twenty percent find regulations affecting their business of limited value and 31 percent find them of little or no value for customers or consumers and not worth the cost of compliance (Q#22).

Regulations

Small-business owners frequently cite regulations as one of the largest obstacles in operating their businesses. The regulatory obstacles faced by owners vary in specificity. Some owners are overwhelmed by the general volume of regulatory compliances, some are burdened by one or two. The *NFIB Small Business Problems and Priorities* survey found “unreasonable government regulations” is a critical issue for one-third of small-business owners. Unlike tax policy, which broadly impacts all firms in much the same way, regulations are administered by a myriad of government agencies, at different levels of government impacting sometimes very narrowly defined types of businesses. Thus, it is difficult to construct a comprehensive approach to easing the burden. However, the better policy makers understand the impact of regulations on small-business owners, the more able they will be to lessen the burden. This edition of the *National Small Business Poll* series examines Regulations. The NFIB Research Foundation published similar surveys on regulations in 2001 and 2012. This edition offers an update to those publications to highlight differences over time and new regulatory challenges.

Problem Severity

One-quarter of small employers find government regulations a “very serious” problem in operating their business (Q#1). This is down 20 percentage points from the 2012 survey but similar to 2001 results. In 2012, small-business owners were struggling though the regulatory upheaval caused by the sweeping healthcare law, Dodd-Frank, labor related regulations and others reform efforts. Over the last four years, owners have adjusted to their new regulatory reality, absorbing new paperwork burdens and costs into business operations. While 25 percent find regulatory compliance a “very serious” problem, it is a “somewhat serious” problem for another 24 percent of small employers, about the same population size as in 2012. About one-in-five small employers find regulations “not too serious” a problem and 28 percent do not find regulations to be a serious problem at all.

Roughly half of small employers have experienced an increase in the number of regulations they must comply with compared

to only 2 percent who experienced a decline (Q#2). Another 45 percent of owners did not experience a change one way or another. The increase in regulatory compliance costs over the last three years has affected a greater number of large small businesses than small ones. Sixty-five percent of larger small employers (20 to 249 employees) experienced an increase in the number of regulations they must comply with over the last three years compared to 49 percent of smaller small employers, those with 1 to 9 employees.

Problem Source

The single greatest regulatory problem for small-business owners is the cost of compliance (Q#3). About 28 percent of small employers cite compliance costs as their largest regulatory issue followed by 18 percent citing the difficulty of understanding what they must do to comply. Seventeen percent find the extra paperwork required as their biggest issue. Time delays caused by regulations are the biggest problem for one-

in-ten owners and 6 percent cite the difficulty discovering new regulations.

All levels of government contribute to the regulatory compliance burden. Each level of government imposes its own regulatory burden on small businesses. But the main culprit for half of small employers is the federal government (Q#4). Thirty percent find regulations promulgated at the state level most burdensome while 15 percent are most impacted on the local level. These are roughly unchanged from the 2012 and 2001 surveys.

The economic burden varies substantially across regulators and the type of regulation. About 28 percent of owners are most burdened by tax-related regulations (Q#5). Seventeen percent each are most impacted by employee-related, environmental, land and zoning, and operational regulations. Fifteen percent are most bothered by regulations related to health and safety.

The type of health and safety regulations most burdensome for 19 percent of small employers are OSHA related followed by 16 percent who are most affected by drug and medical treatment regulations (Q#6). Fifteen percent are most impacted by health and safety regulations related to the health care law. Forty percent of respondents did not select a specific category.

Wage and hour rules are the most significant problem for those who are most impacted by employment related regulations (Q#7). Nearly half of those most affected by employee related issues cite wage and hour rules as the problem. Hiring and firing regulations cause the greatest problem for 17 percent in this category and 14 percent are most troubled by issues related to workers' compensation.

Of those most affected by tax-related regulations, 29 percent are most troubled by withholding or employment rules, and 25 percent are most affected by sales and use tax rules (Q#8). The biggest tax-related problem for 13 percent are the reporting requirements.

Zoning, land use or run-off is the greatest problem for over half (52 percent) of those owners most impacted by environmental regulations (Q#9). Fifteen percent of owners in this category are most impacted by hazardous or toxic substance related regulations. And, of those most burdened by operational type regulations, understanding and complying with the rules are most are the biggest problem for 43 percent of small employers (Q#10).

The volume of regulations is the largest problem for 55 percent of small employers compared to 37 percent who are most troubled by a few specific regulations coming from one or two sources (Q#11).

Regulatory Information

Often small employers face a variety of regulations coming from more than one level of government.

Small-business owners discover new regulations from a variety of sources. Outside advisors and direct contact from regulatory agencies are the two most frequently cited sources (Q#13, Q#15). A less frequently cited source of information, although still at 43 percent, is general web site searches (Q#12). About 47 percent of small employer receive information from a trade or business association (Q#14). And about half of small business owner learn about new regulations from other business owners (Q#16).

Once owners are aware of a new regulation, the vast majority of them learn about the specifics of the regulation on their own. About 69 percent of small employers check out the compliance requirements themselves (Q#17). Roughly 15 percent of owners rely on an expert to find out more information. Only 7 percent assign the task to an employee. Larger, small businesses though are more reliant on employees and experts for information gathering than smaller businesses.

Interactions with the Regulators

One-third of small employers have had a government official enter their place of business to inspect or examine their records and/or licenses or otherwise check on their compliance with some government requirement in the last 12 months (Q#18). For larger small business, 57 percent were visited in the last 12 months compared to 28 percent for the smallest ones.

Over the last three years, 41 percent of small employers have reached out to talk with someone at a government agency for help complying with a regulation (Q#19). About 19 percent of small employers who contacted a government agency were very satisfied with their experience (Q#20). Another 50 percent were generally satisfied. Thirty percent evaluated their experience as generally unsatisfactory or very unsatisfactory.

Almost one-in-ten small employers have been fined, sued or penalized for a regulatory

related violation in the last 3 years (Q#21). Larger businesses are twice as likely to have this occur compared to smaller ones.

About 16 percent of small employers characterize the regulations for which they comply as very valuable for customers or consumers and worth the cost of compliance (Q#22). One-quarter of small employers believe the regulations that they must comply with are of moderate value for customers or consumers and are worth the cost of compliance. Twenty percent find them of limited value, and 31 percent find them of little or no value for customers or consumers and not worth the cost of compliance.

Final Comments

Small businesses have two major assets: the capital they can accumulate through earnings to grow the business and the time and energy of the business owner. Both of these are managed to provide goods and services to consumers, earn a profit and grow the business and the firm's employment to get the job done. Regulations force owners to do things that they would not ordinarily choose to do in the course of business. In some cases, regulations deal with "externalities" which compel owners to deal with costs they impose on others in operating their firms. But imposing regulations uses up valuable financial capital and owner time, and this slows the growth of the firm. For this reason, "cost/benefit" criteria are imposed on many regulatory agencies (with some exceptions including the EPA), requiring them to assess the benefits of a proposed regulation and compare these to the resource cost of implementing it. The fact that this is difficult sometimes is no excuse for not doing it. Over the past eight years, record volumes of regulations have been imposed by the federal government as well as state and local authorities with little or no concern given to the net value of the regulations to society in comparison to the costs of compliance. Few if any regulatory agencies consider the overall costs of all regulations on firms when considering their own. Each agency acts as if there is no limit to the amount of money that firms can collectively spend on compliance; there is no coordination, no priorities set.

Half of the small business owners in this study consider the regulatory morass as a "serious" problem, threatening their growth or existence..Less than 1 in 5 business owners

think that the regulations they deal with are of value to customers and consumers and their surrounding community. In simple terms, regulatory compliance uses up valuable human and financial capital which is not limitless. The more spent on compliance, the less that is available to finance growth and development. It is important that collectively we become much more concerned about "getting our money's worth" from the trillions of dollars the private sector is forced to spend on regulatory compliance.

Regulations

(Please review notes at the table's end.)

		Employee Size of Firm			
		1-9 emp	10-19 emp	20-249 emp	All Firms
1.	Is government regulation in the United States a very serious, somewhat serious, not too serious, or not at all serious problem for your business?				
	1. Very serious	23.7%	21.8%	37.5%	24.8%
	2. Somewhat serious	23.4	29.5	26.4	24.3
	3. Not too serious	21.2	25.6	16.7	21.1
	4. Not at all serious	30.2	21.8	18.1	28.2
	5. (DK/Refuse)	1.5	1.3	1.4	1.5
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
2.	In the last 3 years have the number of regulations affecting your business increased, decreased or basically remained the same?				
	1. Increased	49.0%	51.6%	65.0%	51.1%
	2. Decreased	2.9	1.6	—	2.4
	3. Remained the same	46.9	45.2	33.3	45.2
	4. (DK/Refuse)	1.2	1.6	1.7	1.3
	Total	100.0%	100.0%	100.0%	100.0%
	N	243	157	164	564
3.	What is the single greatest problem created for your business by government regulation? Is it the:				
	1. Limits placed on actions you want to take	8.0%	6.5%	5.0%	7.4%
	2. The extra paperwork required	16.4	17.7	21.7	17.1
	3. Time delays that it causes	10.6	9.7	8.3	10.2
	4. Difficulty discovering new regulations	6.5	4.8	5.0	6.1
	5. Difficulty understanding what you have to do to comply	18.6	17.7	13.3	17.9
	6. Dollars spent to comply	27.2	27.4	30.0	27.6
	7. (All of the above)	2.4	1.6	5.0	2.6
	8. (Something else)	7.0	4.8	5.0	6.5
	9. None	3.4	8.1	5.0	4.1
	10. (DK/Refuse)	—	1.6	1.7	0.4
	Total	100.0%	100.0%	100.0%	100.0%
	N	243	157	164	564

4. Which level of American government creates the most serious regulatory problems for you? Is it the:

1. Federal government	49.3%	46.8%	57.6%	49.9%
2. State government	28.8	38.7	32.2	30.4
3. Local government	16.8	11.3	8.5	15.3
4. (DK/Refuse)	5.0	3.2	1.7	4.5
Total	100.0%	100.0%	100.0%	100.0%
N	243	157	164	564

5. What type of regulations, federal, state or local, cause the greatest difficulties for you? Is it:

1. Health and safety	14.4%	16.4%	16.7%	14.9%
2. Employee-related, except health and safety	15.6	21.7	21.7	16.9
3. Tax-related	30.5	21.3	20.0	28.3
4. Environmental, land use, and zoning	18.0	14.8	11.7	16.9
5. Operational	15.6	21.3	20.0	16.8
6. All of the above	2.2	—	3.3	2.0
7. Other	2.9	3.3	5.0	3.2
8. (DK/Refuse)	0.7	1.6	1.7	0.9
Total	100.0%	100.0%	100.0%	100.0%
N	243	157	164	564

6. What type of health and safety regulations cause the greatest problems for you?

1. Food related	8.3%	10.0%	10.0%	8.8%
2. OSHA	15.0	40.0	20.0	18.8
3. Construction design or quality	—	10.0	—	1.3
4. Drug or medical treatment	16.7	10.0	20.0	16.3
5. Health insurance/ACA	16.7	10.0	10.0	15.0
6. (Other)	—	—	—	—
7. (DK/Refuse)	43.3	20.0	40.0	40.0
Total	100.0%	100.0%	100.0%	100.0%
N	35	25	27	87

Employee Size of Firm
1-9 emp 10-19 emp 20-249 emp All Firms

7. What type of employment-related regulations cause the greatest problems for you?

1. Wages and hour rules	42.2%	50.0%	58.3%	45.5%
2. Immigration	7.8	8.3	—	6.8
3. Disabilities or civil rights	4.7	—	—	3.4
4. Union organizing activity	—	—	—	0.0
5. Hiring and Firing	18.8	8.3	16.7	17.0
6. Workers compensation	14.1	16.7	8.3	13.6
7. Unemployment	4.7	16.7	—	5.7
8. (Other)	7.8	—	16.7	8.0
Total	100.0%	100.0%	100.0%	100.0%
N	38	32	35	105

8. What type of tax-related regulations cause the greatest problems for you?

1. Depreciation	3.9%	—%	—%	3.3%
2. Capital gains rules	3.9	—	—	3.3
3. Sales and use tax rules	24.4	25.0	27.3	24.7
4. Withholding or employment	30.7	25.0	18.2	29.3
5. Reporting requirements	13.4	16.7	9.1	13.3
6. (Other)	16.5	16.7	27.3	17.3
7. (DK/Refuse)	7.1	16.7	18.2	8.7
Total	100.0%	100.0%	100.0%	100.0%
N	74	33	33	140

9. What type of environmental regulations cause the greatest problems for you?

1. Zoning, land use, or run-off	54.7%	22.2%	57.1%	51.6%
2. Hazardous or toxic substances	13.3	44.4	—	15.4
3. Clean water	6.7	11.1	14.3	7.7
4. Clean air	4.0	—	14.3	4.4
5. Solid waste disposal	2.7	—	—	2.2
6. (Other)	16.0	22.2	—	15.4
7. (DK/Refuse)	2.7	—	14.3	3.3
Total	100.0%	100.0%	100.0%	100.0%
N	44	23	19	86

	Employee Size of Firm			
	1-9 emp	10-19 emp	20-249 emp	All Firms
10. What type of operational regulations cause the greatest problems for you?				
1. Occupational licenses	10.8%	15.4%	8.3%	11.1%
2. Limits on production or work	4.6	7.7	—	4.4
3. Government reimbursement for services or procurement	3.1	—	8.3	3.3
4. Operations rules	44.6	46.2	33.3	43.3
5. Finance, insurance or securities requirements	29.2	7.7	16.7	24.4
6. (Other)	7.7	15.4	16.7	10.0
7. (DK/Refuse)	—	7.7	16.7	3.3
Total	100.0%	100.0%	100.0%	100.0%
N	38	34	34	106

11. Which BEST describes the source of your regulatory problems?				
1. A few specific regulations coming from one or two sources	38.2%	32.8%	28.8%	36.6%
2. The volume coming from many sources	52.6	60.7	64.4	54.9
3. (DK/Refuse)	9.1	6.6	6.8	8.6
Total	100.0%	100.0%	100.0%	100.0%
N	243	157	164	564

How do you normally learn about new regulations?

12. General Web site search				
1. Yes	42.2%	44.3%	43.7%	42.6%
2. No	56.6	53.2	54.9	56.1
3. (DK/Refuse)	1.2	2.5	1.4	1.3
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

13. Direct contact from a regulatory agency, such as inspectors, advisory letters or flyers				
1. Yes	54.3%	68.4%	62.5%	56.6%
2. No	45.2	31.6	36.1	42.9
3. (DK/Refuse)	0.5	—	1.4	0.5
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

		Employee Size of Firm			
		1-9 emp	10-19 emp	20-249 emp	All Firms
14.	A trade or business association				
	1. Yes	45.7%	46.8%	55.6%	46.8%
	2. No	53.4	51.9	41.7	52.1
	3. (DK/Refuse)	0.8	1.3	2.8	1.1
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
15.	Outside advisors such as an accountant or lawyer				
	1. Yes	55.9%	54.4%	64.4%	56.6%
	2. No	42.9	44.3	34.2	42.2
	3. (DK/Refuse)	1.2	1.3	1.4	1.2
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
16.	Other business owners				
	1. Yes	50.8%	49.4%	48.6%	50.5%
	2. No	47.3	48.1	50.0	47.7
	3. (DK/Refuse)	1.8	2.5	1.4	1.9
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
17.	Once you learn that a new government requirement affects you, how do you learn about the specific requirements?				
	1. Assign an employee to check out compliance requirements	5.5%	11.4%	11.0%	6.7%
	2. Check out compliance requirements yourself	72.0	59.5	56.2	69.1
	3. Find an expert to check out the compliance requirements for you	14.5	15.2	19.2	15.0
	4. All of the above	2.8	2.5	2.7	2.8
	5. (Other)	3.2	8.9	11.0	4.5
	6. (DK/Refuse)	2.0	2.5	—	1.6
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750

Employee Size of Firm
1-9 emp 10-19 emp 20-249 emp All Firms

- 18. Within the last 12 months, has one or more government officials entered your place of business to inspect it, examine your records and/or licenses, or otherwise check on your compliance with some government requirement?**

1. Yes	28.1%	51.9%	56.9%	33.4%
2. No	70.9	46.8	43.1	65.7
3. (DK/Refuse)	1.0	1.3	—	0.9
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

- 19. In the last 3 years have you reached out to talk with someone at a government agency for help complying with a regulation?**

1. Yes	39.4%	50.0%	45.8%	41.1%
2. No	57.9	47.4	48.6	55.9
3. (DK/Refuse)	2.6	2.6	5.6	3.0
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

- 20. Was your experience contacting the agency very satisfactory, generally satisfactory, generally unsatisfactory, or very unsatisfactory?**

1. Very satisfactory	19.4%	21.1%	14.7%	19.1%
2. Generally satisfactory	46.4	52.6	38.2	46.3
3. Neither satisfactory nor unsatisfactory	3.0	2.6	8.8	3.6
4. Generally unsatisfactory	16.5	13.2	14.7	15.9
5. Very unsatisfactory	13.9	10.5	20.6	14.2
6. (DK/Refuse)	0.8	—	2.9	1.0
Total	100.0%	100.0%	100.0%	100.0%
N	138	99	92	329

- 21. In the last 3 years have you been fined, sued or penalized for a regulatory related violation?**

1. Yes	8.0%	13.9%	16.7%	9.5%
2. No	91.2	84.8	81.9	89.6
3. (DK/Refuse)	0.8	1.3	1.4	0.9
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

22. Overall, would you characterize the regulations you must comply with:?

1. Very valuable for customers or consumers and worth the cost of compliance	15.7%	16.7%	16.7%	15.9%
2. Of moderate value for customers or consumers and worth the cost of compliance	23.4	29.5	29.2	24.6
3. Of limited value for customers or consumers but not worth the cost of compliance	20.0	19.2	19.4	19.9
4. Of little or no value for customers or consumers and not worth the cost of compliance	31.4	30.8	27.8	31.0
5. (DK/Refuse)	9.5	3.8	7.0	8.7
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

Regulations Demographics

	Employee Size of Firm			
	1-9 emp	10-19 emp	20-249 emp	All Firms
D1. What title best describes your position in the business?				
1. Owner and Manager	85.5%	62.0%	59.7%	80.5%
2. Owner, but not a Manager	2.5	5.1	5.6	3.1
3. Manager, but not an Owner	12.0	32.9	34.7	16.4
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750
D2. What is your age?				
1. Less than 25 years old	1.5%	1.3%	4.2%	1.7%
2. 25 – 34 years old	5.7	10.1	6.9	6.3
3. 35 – 44 years old	11.4	19.0	15.3	12.6
4. 45 – 54 years old	19.4	22.8	23.6	20.2
5. 55 – 64 years old	31.8	27.8	26.4	30.8
6. 65 years or older	26.3	13.9	18.1	24.2
7. (DK/Refuse)	4.0	5.1	5.6	4.3
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750
D3. What is your highest level of formal education?				
1. Did not complete high school	1.7%	1.3%	1.4%	1.6%
2. High school diploma/GED	14.4	13.9	11.1	14.0
3. Some college or an associate's degree	27.2	20.3	22.2	26.0
3. Vocational or technical school degree	2.5	3.8	1.4	2.5
4. College diploma	30.6	39.2	40.3	32.4
5. Advanced or professional degree	21.4	19.0	19.4	20.9
6. (DK/Refuse)	2.3	2.5	4.2	2.5
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

Employee Size of Firm

	1-9 emp	10-19 emp	20-249 emp	All Firms
--	---------	-----------	------------	-----------

D4. How long have you owned, operated or been employed by this business?

1. 1 – 2 years	7.2%	10.1%	8.5%	7.6%
2. 3 – 5 years	12.0	11.4	15.5	12.3
3. 6 – 10 years	15.4	13.9	12.7	15.0
4. 11 – 20 years	27.4	31.6	22.5	27.4
5. 21 – 30 years	16.4	16.5	18.3	16.6
6. 31 or more years	19.4	13.9	19.7	18.8
7. (DK/Refuse)	2.3	2.5	2.8	2.4

Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D6. Is this business operated primarily from the home, including any associated structures such as a garage or a barn?

1. Yes	43.4%	11.4%	5.6%	36.4%
2. No	54.9	87.3	91.7	61.9
3. (DK/Refuse)	1.7	1.3	2.8	1.7

Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D7. Would you describe the primary or majority of your business locations as in areas that are:?

1. Downtown/Major city	14.0%	16.7%	19.4%	14.8%
2. Urban	13.4	12.8	15.3	13.5
3. Inner suburban	14.9	14.1	13.9	14.7
4. Outer suburban	11.4	9.0	11.1	11.1
5. Small town	25.4	29.5	23.6	25.7
6. Rural	14.0	14.1	11.1	13.8
7. (DK/Refuse)	6.8	3.9	5.6	6.4

Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D8. For the last calendar year, what were the gross sales for your business?

1. Less than \$250,000	31.6%	8.9%	4.2%	26.6%
2. \$250,000 - \$499,999	11.1	6.3	2.8	9.8
3. \$500,000 - \$999,999	9.2	13.9	5.6	9.3
4. \$1 million - \$4.9 million	14.3	29.1	36.1	18.0
5. \$5 million - \$9.9 million	2.0	5.1	8.3	2.9
6. \$10 million or higher	0.3	2.5	8.3	1.3
7. (DK/Refuse)	31.4	34.2	34.7	32.0

Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D9. Over the last two years, how have your real volume sales changed?

1. Increased by 30 percent or more	5.5%	6.3%	5.6%	5.6%
2. Increased by 20-29 percent	7.2	10.0	7.0	7.5
3. Increased by 10-19 percent	15.4	21.3	19.7	16.4
4. Increased by less than 10 percent	7.7	8.8	14.1	8.4
5. Decreased by less than 10 percent	10.9	13.8	9.9	11.1
6. Decreased by 10 percent or more	15.7	10.0	7.0	14.3
7. Stayed about the same	24.0	21.3	16.9	23.1
8. (DK/Refuse)	13.7	8.8	19.8	13.7
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D10. Gender

1. Male	63.9%	58.2%	62.5%	63.2%
2. Female	36.1	41.8	37.5	36.8
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

Table Notes

1. All percentages appearing are based on weighted data.
2. All "Ns" appearing are based on unweighted data.
3. Data are not presented where there are fewer than 50 unweighted cases.
4. ()s around an answer indicate a volunteered response.

WARNING – When reviewing the table, care should be taken to distinguish between the percentage of the population and the percentage of those asked a particular question. Not every respondent was asked every question. All percentages appearing on the table use the number asked the question as the denominator.

Data Collection Methods

The data for this survey report were collected for the NFIB Research Foundation by Susquehanna Polling and Research. The interviews for this edition of the *Poll* were conducted between August 29 - October 14, 2016 from a sample of small employers. "Small employer" was defined for purposes of this survey as a business owner employing no fewer than one individual in addition to the owner(s) and no more than 249.

The sampling frame used for the survey was drawn at the Foundation's direction from the files of the Dun & Bradstreet Corporation, an imperfect file but the best currently available for public use. A random stratified sample design was employed to compensate for the

highly skewed distribution of small business owners by employee size of firm (Table A1). Almost 60 percent of employers in the United States employ just one to four people meaning that a random sample would yield comparatively few larger small employers to interview. Since size within the small business population is often an important differentiating variable, it is important that an adequate number of interviews be conducted among those employing more than 10 people. The interview quotas established to achieve these added interviews from larger, small-business owners were arbitrary but adequate to allow independent examination of the 10-19 and 20-249 employee size classes as well as the 1-9 employee size group.

TABLE A1
SAMPLE COMPOSITION UNDER VARYING SCENARIOS

Employee Size of Firm	Expected from Random Sample*		Obtained from Stratified Random Sample			
	Interviews Expected	Percent Distribution	Interview Quotas	Percent Distribution	Completed Interviews	Percent Distribution
1-9	599	80	350	47	350	46
10-19	79	11	200	27	200	27
20-249	72	10	200	27	200	27
All Firms	750	101	750	101	750	100

* Sample universe developed from the U.S. Small Business Administration's Office of Advocacy data on Statistics of U.S. Businesses.

The Sponsors

The **NFIB Research Foundation** is a small business oriented research organization affiliated with the National Federation of Independent Business, the nation's largest small and independent business advocacy organization. Located in Washington, D.C., the Foundation was established in 1980 to explore the policy related problems small business owners encounter. It's periodic reports include ***Small Business Economic Trends, Small Business Problems and Priorities***, and the ***National Small Business Poll*** series. The Foundation also produced ad hoc reports on issues of concern to small-business owners including regulatory analyses of selected proposed regulations through its Business Size Insight Module (BSIM).

NFIB | Research
The Voice of Small Business. | Foundation

1201 "F" Street, NW
Suite 200
Washington, DC 20004
nfib.com



NFIB | Research
The Voice of Small Business. Foundation

1201 "F" Street, NW
Suite 200
Washington, DC 20004
nfib.com

Walker, Chris

From: American Constitution Society <info@acslaw.org>
Sent: Wednesday, October 3, 2018 10:55 AM
To: Walker, Chris
Subject: ACS Issue Brief: Reforming "Regulatory Reform"

by Daniel Farber, Lisa Heinzerling, and Peter Shane

[View online](#)



NEW ACS ISSUE BRIEF

Reforming "Regulatory Reform"

A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST

by Dan Farber, Lisa Heinzerling, and Peter Shane

In the wake of decades of increased corporate influence in politics, regulatory reform has become synonymous with deregulation. The current administration has taken on the mantle of deregulation through executive action, budgetary constraints, and rulemakings – leaving federal agencies without the financial resources to ensure safe working conditions, clean water, and safe pharmaceuticals for all Americans. In this Issue Brief, Professors Dan Farber, Lisa Heinzerling, and Peter Shane envision what regulatory reform might look like if approached with the view that regulation is in the public interest. Recognizing that “[n]o human institution is perfect, including administrative agencies,” the authors argue that these agencies have provided “incalculable value to American families, consumers, workers, patients, and students – everyone” and propose a series of changes to administrative rulemaking that would make the process more “inclusive, transparent, accountable, and evidence-based.”

READ BRIEF



Richard D. Cudahy Writing Competition

Deadline to apply is Feb. 3, 2019

ACS is pleased to announce its 12th annual Richard D. Cudahy Writing Competition on Regulatory and Administrative Law. Winning authors will receive a cash prize of \$1,500, and special recognition at the 2019 ACS National Convention.

View full contest description [here](#).



Junior Scholars Public Law Workshop

Deadline to apply is Oct. 19, 2018

ACS is pleased to announce a "Call for Papers" for a workshop on public law being held the afternoon of Thursday, January 3, 2019, at the 2019 AALS Annual Meeting in New Orleans.

More information [here](#).

DEFEND THE RULE OF LAW

At this critical moment for the rule of law, ACS needs your support more now than ever.

DONATE NOW



American Constitution Society
1899 L St NW, Suite 200 Washington, DC 20036

[Forward](#) | [Email Preferences](#)

Copyright © 2018, All rights reserved.

Circular A-4

September 17, 2003

TO THE HEADS OF EXECUTIVE AGENCIES AND ESTABLISHMENTS

Subject: Regulatory Analysis

This Circular provides the Office of Management and Budget's (OMB's) guidance to Federal agencies on the development of regulatory analysis as required under Section 6(a)(3)(c) of Executive Order 12866, "Regulatory Planning and Review," the Regulatory Right-to-Know Act, and a variety of related authorities. The Circular also provides guidance to agencies on the regulatory accounting statements that are required under the Regulatory Right-to-Know Act.

This Circular refines OMB's "best practices" document of 1996 (<http://www.whitehouse.gov/omb/inforeg/riaguide.html>), which was issued as a guidance in 2000 (<http://www.whitehouse.gov/omb/memoranda/m00-08.pdf>), and reaffirmed in 2001 (<http://www.whitehouse.gov/omb/memoranda/m01-23.html>). It replaces both the 1996 "best practices" and the 2000 guidance.

In developing this Circular, OMB first developed a draft that was subject to public comment, interagency review, and peer review. Peer reviewers included Cass Sunstein, University of Chicago; Lester Lave, Carnegie Mellon University; Milton C. Weinstein and James K. Hammitt of the Harvard School of Public Health; Kerry Smith, North Carolina State University; Jonathan Weiner, Duke University Law School; Douglas K. Owens, Stanford University; and W. Kip Viscusi, Harvard Law School. Although these individuals submitted comments, OMB is solely responsible for the final content of this Circular.

A. Introduction

This Circular is designed to assist analysts in the regulatory agencies by defining good regulatory analysis – called either "regulatory analysis" or "analysis" for brevity – and standardizing the way benefits and costs of Federal regulatory actions are measured and reported. Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1). This requirement applies to rulemakings that rescind or modify existing rules as well as to rulemakings that establish new requirements.

The Need for Analysis of Proposed Regulatory Actions¹

Regulatory analysis is a tool regulatory agencies use to anticipate and evaluate the likely consequences of rules. It provides a formal way of organizing the evidence on the key effects –

¹ We use the term "proposed" to refer to any regulatory actions under consideration regardless of the stage of the regulatory process.

good and bad – of the various alternatives that should be considered in developing regulations. The motivation is to (1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective.

A good regulatory analysis is designed to inform the public and other parts of the Government (as well as the agency conducting the analysis) of the effects of alternative actions. Regulatory analysis sometimes will show that a proposed action is misguided, but it can also demonstrate that well-conceived actions are reasonable and justified.

Benefit-cost analysis is a primary tool used for regulatory analysis.² Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects). This is useful information for decision makers and the public to receive, even when economic efficiency is not the only or the overriding public policy objective.

It will not always be possible to express in monetary units all of the important benefits and costs. When it is not, the most efficient alternative will not necessarily be the one with the largest quantified and monetized net-benefit estimate. In such cases, you should exercise professional judgment in determining how important the non-quantified benefits or costs may be in the context of the overall analysis. If the non-quantified benefits and costs are likely to be important, you should carry out a “threshold” analysis to evaluate their significance. Threshold or “break-even” analysis answers the question, “How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?” In addition to threshold analysis you should indicate, where possible, which non-quantified effects are most important and why.

Key Elements of a Regulatory Analysis

A good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.

To evaluate properly the benefits and costs of regulations and their alternatives, you will need to do the following:

- Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks. A similar analysis should be done for each of the alternatives.
- Identify a baseline. Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a “no action” baseline: what the world will be like if the proposed rule is not adopted. Comparisons to a “next best” alternative are also especially useful.

² See Mishan EJ (1994), *Cost-Benefit Analysis*, fourth edition, Routledge, New York.

- Identify the expected undesirable side-effects and ancillary benefits of the proposed regulatory action and the alternatives. These should be added to the direct benefits and costs as appropriate.

With this information, you should be able to assess quantitatively the benefits and costs of the proposed rule and its alternatives. A complete regulatory analysis includes a discussion of non-quantified as well as quantified benefits and costs. A non-quantified outcome is a benefit or cost that has not been quantified or monetized in the analysis. When there are important non-monetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs. When your analysis is complete, you should present a summary of the benefit and cost estimates for each alternative, including the qualitative and non-monetized factors affected by the rule, so that readers can evaluate them.

As you design, execute, and write your regulatory analysis, you should seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues. Consultation can be useful in ensuring that your analysis addresses all of the relevant issues and that you have access to all pertinent data. Early consultation can be especially helpful. You should not limit consultation to the final stages of your analytical efforts.

You will find that you cannot conduct a good regulatory analysis according to a formula. Conducting high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.

A good analysis is transparent. It should be possible for a qualified third party reading the report to see clearly how you arrived at your estimates and conclusions. For transparency's sake, you should state in your report what assumptions were used, such as the time horizon for the analysis and the discount rates applied to future benefits and costs. It is usually necessary to provide a sensitivity analysis to reveal whether, and to what extent, the results of the analysis are sensitive to plausible changes in the main assumptions and numeric inputs.

A good analysis provides specific references to all sources of data, appendices with documentation of models (where necessary), and the results of formal sensitivity and other uncertainty analyses. Your analysis should also have an executive summary, including a standardized accounting statement.

B. The Need for Federal Regulatory Action

Before recommending Federal regulatory action, an agency must demonstrate that the proposed action is necessary. If the regulatory intervention results from a statutory or judicial directive, you should describe the specific authority for your action, the extent of discretion available to you, and the regulatory instruments you might use. Executive Order 12866 states that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material

failures of private markets to protect or improve the health and safety of the public, the environment, or the well being of the American people”

Executive Order 12866 also states that “Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.” Thus, you should try to explain whether the action is intended to address a significant market failure or to meet some other compelling public need such as improving governmental processes or promoting intangible values such as distributional fairness or privacy. If the regulation is designed to correct a significant market failure, you should describe the failure both qualitatively and (where feasible) quantitatively. You should show that a government intervention is likely to do more good than harm. For other interventions, you should also provide a demonstration of compelling social purpose and the likelihood of effective action. Although intangible rationales do not need to be quantified, the analysis should present and evaluate the strengths and limitations of the relevant arguments for these intangible values.

Market Failure or Other Social Purpose

The major types of market failure include: externality, market power, and inadequate or asymmetric information. Correcting market failures is a reason for regulation, but it is not the only reason. Other possible justifications include improving the functioning of government, removing distributional unfairness, or promoting privacy and personal freedom.

1. Externality, common property resource and public good

An externality occurs when one party's actions impose uncompensated benefits or costs on another party. Environmental problems are a classic case of externality. For example, the smoke from a factory may adversely affect the health of local residents while soiling the property in nearby neighborhoods. If bargaining were costless and all property rights were well defined, people would eliminate externalities through bargaining without the need for government regulation.³ From this perspective, externalities arise from high transactions costs and/or poorly defined property rights that prevent people from reaching efficient outcomes through market transactions.

Resources that may become congested or overused, such as fisheries or the broadcast spectrum, represent common property resources. “Public goods,” such as defense or basic scientific research, are goods where provision of the good to some individuals cannot occur without providing the same level of benefits free of charge to other individuals.

2. Market Power

Firms exercise market power when they reduce output below what would be offered in a competitive industry in order to obtain higher prices. They may exercise market power collectively or unilaterally. Government action can be a source of market power, such as when regulatory actions exclude low-cost imports. Generally, regulations that increase market power

³ See Coase RH (1960), *Journal of Law and Economics*, 3, 1-44.

for selected entities should be avoided. However, there are some circumstances in which government may choose to validate a monopoly. If a market can be served at lowest cost only when production is limited to a single producer – local gas and electricity distribution services, for example – a natural monopoly is said to exist. In such cases, the government may choose to approve the monopoly and to regulate its prices and/or production decisions. Nevertheless, you should keep in mind that technological advances often affect economies of scale. This can, in turn, transform what was once considered a natural monopoly into a market where competition can flourish.

3. Inadequate or Asymmetric Information

Market failures may also result from inadequate or asymmetric information. Because information, like other goods, is costly to produce and disseminate, your evaluation will need to do more than demonstrate the possible existence of incomplete or asymmetric information. Even though the market may supply less than the full amount of information, the amount it does supply may be reasonably adequate and therefore not require government regulation. Sellers have an incentive to provide information through advertising that can increase sales by highlighting distinctive characteristics of their products. Buyers may also obtain reasonably adequate information about product characteristics through other channels, such as a seller offering a warranty or a third party providing information.

Even when adequate information is available, people can make mistakes by processing it poorly. Poor information-processing often occurs in cases of low probability, high-consequence events, but it is not limited to such situations. For instance, people sometimes rely on mental rules-of-thumb that produce errors. If they have a clear mental image of an incident which makes it cognitively “available,” they might overstate the probability that it will occur. Individuals sometimes process information in a biased manner, by being too optimistic or pessimistic, without taking sufficient account of the fact that the outcome is exceedingly unlikely to occur. When mistakes in information processing occur, markets may overreact. When it is time-consuming or costly for consumers to evaluate complex information about products or services (e.g., medical therapies), they may expect government to ensure that minimum quality standards are met. However, the mere possibility of poor information processing is not enough to justify regulation. If you think there is a problem of information processing that needs to be addressed, it should be carefully documented.

4. Other Social Purposes

There are justifications for regulations in addition to correcting market failures. A regulation may be appropriate when you have a clearly identified measure that can make government operate more efficiently. In addition, Congress establishes some regulatory programs to redistribute resources to select groups. Such regulations should be examined to ensure that they are both effective and cost-effective. Congress also authorizes some regulations to prohibit discrimination that conflicts with generally accepted norms within our society. Rulemaking may also be appropriate to protect privacy, permit more personal freedom or promote other democratic aspirations.

Showing That Regulation at the Federal Level Is the Best Way to Solve the Problem

Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation. Alternatives to Federal regulation include antitrust enforcement, consumer-initiated litigation in the product liability system, or administrative compensation systems.

In assessing whether Federal regulation is the best solution, you should also consider the possibility of regulation at the State or local level. In some cases, the nature of the market failure may itself suggest the most appropriate governmental level of regulation. For example, problems that spill across State lines (such as acid rain whose precursors are transported widely in the atmosphere) are probably best addressed by Federal regulation. More localized problems, including those that are common to many areas, may be more efficiently addressed locally.

The advantages of leaving regulatory issues to State and local authorities can be substantial. If public values and preferences differ by region, those differences can be reflected in varying State and local regulatory policies. Moreover, States and localities can serve as a testing ground for experimentation with alternative regulatory policies. One State can learn from another's experience while local jurisdictions may compete with each other to establish the best regulatory policies. You should examine the proper extent of State and local discretion in your rulemaking context.

A diversity of rules may generate gains for the public as governmental units compete with each other to serve the public, but duplicative regulations can also be costly. Where Federal regulation is clearly appropriate to address interstate commerce issues, you should try to examine whether it would be more efficient to retain or reduce State and local regulation. The local benefits of State regulation may not justify the national costs of a fragmented regulatory system. For example, the increased compliance costs for firms to meet different State and local regulations may exceed any advantages associated with the diversity of State and local regulation. Your analysis should consider the possibility of reducing as well as expanding State and local rulemaking.

The role of Federal regulation in facilitating U.S. participation in global markets should also be considered. Harmonization of U.S. and international rules may require a strong Federal regulatory role. Concerns that new U.S. rules could act as non-tariff barriers to imported goods should be evaluated carefully.

The Presumption Against Economic Regulation

Government actions can be unintentionally harmful, and even useful regulations can impede market efficiency. For this reason, there is a presumption against certain types of regulatory action. In light of both economic theory and actual experience, a particularly demanding burden of proof is required to demonstrate the need for any of the following types of regulations:

- price controls in competitive markets;

- production or sales quotas in competitive markets;
- mandatory uniform quality standards for goods or services if the potential problem can be adequately dealt with through voluntary standards or by disclosing information of the hazard to buyers or users; or
- controls on entry into employment or production, except (a) where indispensable to protect health and safety (e.g., FAA tests for commercial pilots) or (b) to manage the use of common property resources (e.g., fisheries, airwaves, Federal lands, and offshore areas).

C. Alternative Regulatory Approaches

Once you have determined that Federal regulatory action is appropriate, you will need to consider alternative regulatory approaches. Ordinarily, you will be able to eliminate some alternatives through a preliminary analysis, leaving a manageable number of alternatives to be evaluated according to the formal principles of the Executive Order. The number and choice of alternatives selected for detailed analysis is a matter of judgment. There must be some balance between thoroughness and the practical limits on your analytical capacity. With this qualification in mind, you should nevertheless explore modifications of some or all of a regulation's attributes or provisions to identify appropriate alternatives. The following is a list of alternative regulatory actions that you should consider.

Different Choices Defined by Statute

When a statute establishes a specific regulatory requirement and the agency is considering a more stringent standard, you should examine the benefits and costs of reasonable alternatives that reflect the range of the agency's statutory discretion, including the specific statutory requirement.

Different Compliance Dates

The timing of a regulation may also have an important effect on its net benefits. Benefits may vary significantly with different compliance dates where a delay in implementation may result in a substantial loss in future benefits (e.g., a delay in implementation could result in a significant reduction in spawning stock and jeopardize a fishery). Similarly, the cost of a regulation may vary substantially with different compliance dates for an industry that requires a year or more to plan its production runs. In this instance, a regulation that provides sufficient lead time is likely to achieve its goals at a much lower overall cost than a regulation that is effective immediately.

Different Enforcement Methods

Compliance alternatives for Federal, State, or local enforcement include on-site inspections, periodic reporting, and noncompliance penalties structured to provide the most appropriate incentives. When alternative monitoring and reporting methods vary in their benefits and costs, you should identify the most appropriate enforcement framework. For example, in

some circumstances random monitoring or parametric monitoring will be less expensive and nearly as effective as continuous monitoring.

Different Degrees of Stringency

In general, both the benefits and costs associated with a regulation will increase with the level of stringency (although marginal costs generally increase with stringency, whereas marginal benefits may decrease). You should study alternative levels of stringency to understand more fully the relationship between stringency and the size and distribution of benefits and costs among different groups.

Different Requirements for Different Sized Firms

You should consider setting different requirements for large and small firms, basing the requirements on estimated differences in the expected costs of compliance or in the expected benefits. The balance of benefits and costs can shift depending on the size of the firms being regulated. Small firms may find it more costly to comply with regulation, especially if there are large fixed costs required for regulatory compliance. On the other hand, it is not efficient to place a heavier burden on one segment of a regulated industry solely because it can better afford the higher cost. This has the potential to load costs on the most productive firms, costs that are disproportionate to the damages they create. You should also remember that a rule with a significant impact on a substantial number of small entities will trigger the requirements set forth in the Regulatory Flexibility Act. (5 U.S.C. 603(c), 604).

Different Requirements for Different Geographic Regions

Rarely do all regions of the country benefit uniformly from government regulation. It is also unlikely that costs will be uniformly distributed across the country. Where there are significant regional variations in benefits and/or costs, you should consider the possibility of setting different requirements for the different regions.

Performance Standards Rather than Design Standards

Performance standards express requirements in terms of outcomes rather than specifying the means to those ends. They are generally superior to engineering or design standards because performance standards give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way. In general, you should take into account both the cost savings to the regulated parties of the greater flexibility and the costs of assuring compliance through monitoring or some other means.

Market-Oriented Approaches Rather than Direct Controls

Market-oriented approaches that use economic incentives should be explored. These alternatives include fees, penalties, subsidies, marketable permits or offsets, changes in liability or property rights (including policies that alter the incentives of insurers and insured parties), and required bonds, insurance or warranties. One example of a market-oriented approach is a

program that allows for averaging, banking, and/or trading (ABT) of credits for achieving additional emission reductions beyond the required air emission standards. ABT programs can be extremely valuable in reducing costs or achieving earlier or greater benefits, particularly when the costs of achieving compliance vary across production lines, facilities, or firms. ABT can be allowed on a plant-wide, firm-wide, or region-wide basis rather than vent by vent, provided this does not produce unacceptable local air quality outcomes (such as “hot spots” from local pollution concentration).

Informational Measures Rather than Regulation

If intervention is contemplated to address a market failure that arises from inadequate or asymmetric information, informational remedies will often be preferred. Measures to improve the availability of information include government establishment of a standardized testing and rating system (the use of which could be mandatory or voluntary), mandatory disclosure requirements (e.g., by advertising, labeling, or enclosures), and government provision of information (e.g., by government publications, telephone hotlines, or public interest broadcast announcements). A regulatory measure to improve the availability of information, particularly about the concealed characteristics of products, provides consumers a greater choice than a mandatory product standard or ban.

Specific informational measures should be evaluated in terms of their benefits and costs. Some effects of informational measures are easily overlooked. The costs of a mandatory disclosure requirement for a consumer product will include not only the cost of gathering and communicating the required information, but also the loss of net benefits of any information displaced by the mandated information. The other costs also may include the effect of providing information that is ignored or misinterpreted, and inefficiencies arising from the incentive that mandatory disclosure may give to overinvest in a particular characteristic of a product or service.

Where information on the benefits and costs of alternative informational measures is insufficient to provide a clear choice between them, you should consider the least intrusive informational alternative sufficient to accomplish the regulatory objective. To correct an informational market failure it may be sufficient for government to establish a standardized testing and rating system without mandating its use, because competing firms that score well according to the system should thereby have an incentive to publicize the fact.

D. Analytical Approaches

Both benefit-cost analysis (BCA) and cost-effectiveness analysis (CEA) provide a systematic framework for identifying and evaluating the likely outcomes of alternative regulatory choices. A major rulemaking should be supported by both types of analysis wherever possible. Specifically, you should prepare a CEA for all major rulemakings for which the primary benefits are improved public health and safety to the extent that a valid effectiveness measure can be developed to represent expected health and safety outcomes. You should also perform a BCA for major health and safety rulemakings to the extent that valid monetary values can be assigned to the primary expected health and safety outcomes. In undertaking these analyses, it is important to keep in mind the larger objective of analytical consistency in

estimating benefits and costs across regulations and agencies, subject to statutory limitations. Failure to maintain such consistency may prevent achievement of the most risk reduction for a given level of resource expenditure. For all other major rulemakings, you should carry out a BCA. If some of the primary benefit categories cannot be expressed in monetary units, you should also conduct a CEA. In unusual cases where no quantified information on benefits, costs and effectiveness can be produced, the regulatory analysis should present a qualitative discussion of the issues and evidence.

Benefit-Cost Analysis

A distinctive feature of BCA is that both benefits and costs are expressed in monetary units, which allows you to evaluate different regulatory options with a variety of attributes using a common measure.⁴ By measuring incremental benefits and costs of successively more stringent regulatory alternatives, you can identify the alternative that maximizes net benefits.

The size of net benefits, the absolute difference between the projected benefits and costs, indicates whether one policy is more efficient than another. The ratio of benefits to costs is not a meaningful indicator of net benefits and should not be used for that purpose. It is well known that considering such ratios alone can yield misleading results.

Even when a benefit or cost cannot be expressed in monetary units, you should still try to measure it in terms of its physical units. If it is not possible to measure the physical units, you should still describe the benefit or cost qualitatively. For more information on describing qualitative information, see the section “*Developing Benefit and Cost Estimates*.”

When important benefits and costs cannot be expressed in monetary units, BCA is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs.

You should exercise professional judgment in identifying the importance of non-quantified factors and assess as best you can how they might change the ranking of alternatives based on estimated net benefits. If the non-quantified benefits and costs are likely to be important, you should recommend which of the non-quantified factors are of sufficient importance to justify consideration in the regulatory decision. This discussion should also include a clear explanation that support designating these non-quantified factors as important. In this case, you should also consider conducting a threshold analysis to help decision makers and other users of the analysis to understand the potential significance of these factors to the overall analysis.

Cost-Effectiveness Analysis⁵

⁴ Mishan EJ (1994), *Cost-Benefit Analysis*, fourth edition, Routledge, New York.

⁵ For a full discussion of CEA, see Gold, ML, Siegel, JE, Russell, LB, and Weinstein, MC (1996), *Cost Effectiveness in Health and Medicine: The Report of the Panel on Cost-Effectiveness in Health and Medicine*, Oxford University Press, New York.

Cost-effectiveness analysis can provide a rigorous way to identify options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs. Generally, cost-effectiveness analysis is designed to compare a set of regulatory actions with the same primary outcome (e.g., an increase in the acres of wetlands protected) or multiple outcomes that can be integrated into a single numerical index (e.g., units of health improvement).

Cost-effectiveness results based on averages need to be treated with great care. They suffer from the same drawbacks as benefit-cost ratios. The alternative that exhibits the smallest cost-effectiveness ratio may not be the best option, just as the alternative with the highest benefit-cost ratio is not always the one that maximizes net benefits. Incremental cost-effectiveness analysis (discussed below) can help to avoid mistakes that can occur when policy choices are based on average cost-effectiveness.

CEA can also be misleading when the “effectiveness” measure does not appropriately weight the consequences of the alternatives. For example, when effectiveness is measured in tons of reduced pollutant emissions, cost-effectiveness estimates will be misleading unless the reduced emissions of diverse pollutants result in the same health and environmental benefits.

When you have identified a range of alternatives (e.g., different levels of stringency), you should determine the cost-effectiveness of each option compared with the baseline as well as its incremental cost-effectiveness compared with successively more stringent requirements. Ideally, your CEA would present an array of cost-effectiveness estimates that would allow comparison across different alternatives. However, analyzing all possible combinations is not practical when there are many options (including possible interaction effects). In these cases, you should use your judgment to choose reasonable alternatives for careful consideration.

When constructing and comparing incremental cost-effectiveness ratios, you should be careful to determine whether the various alternatives are mutually exclusive or whether they can be combined. If they can be combined, you should consider which might be favored under different regulatory budget constraints (implicit or explicit). You should also make sure that inferior alternatives identified by the principles of strong and weak dominance are eliminated from consideration.⁶

The value of CEA is enhanced when there is consistency in the analysis across a diverse set of possible regulatory actions. To achieve consistency, you need to carefully construct the two key components of any CEA: the cost and the “effectiveness” or performance measures for the alternative policy options.

With regard to measuring costs, you should be sure to include all the relevant costs to society – whether public or private. Rulemakings may also yield cost savings (e.g., energy savings associated with new technologies). The numerator in the cost-effectiveness ratio should reflect net costs, defined as the gross cost incurred to comply with the requirements (sometimes

⁶ Gold ML, Siegel JE, Russell LB, and Weinstein MC (1996), *Cost Effectiveness in Health and Medicine: The Report of the Panel on Cost-Effectiveness in Health and Medicine*, Oxford University Press, New York, pp. 284-285.

called “total” costs) minus any cost savings. You should be careful to avoid double-counting effects in both the numerator and the denominator of the cost-effectiveness ratios. For example, it would be incorrect to reduce gross costs by an estimated monetary value on life extension if life-years are already used as the effectiveness measure in the denominator.

In constructing measures of “effectiveness”, final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as tons of pollution reduced, crashes avoided, or cases of disease avoided. Where the quality of the measured unit varies (e.g., acres of wetlands vary substantially in terms of their ecological benefits), it is important that the measure capture the variability in the value of the selected “outcome” measure. You should provide an explanation of your choice of effectiveness measure.

Where regulation may yield several different beneficial outcomes, a cost-effectiveness comparison becomes more difficult to interpret because there is more than one measure of effectiveness to incorporate in the analysis. To arrive at a single measure you will need to weight the value of disparate benefit categories, but this computation raises some of the same difficulties you will encounter in BCA. If you can assign a reasonable monetary value to all of the regulation’s different benefits, then you should do so. But in this case, you will be doing BCA, not CEA.

When you can estimate the monetary value of *some* but not all of the ancillary benefits of a regulation, but cannot assign a monetary value to the primary measure of effectiveness, you should subtract the monetary estimate of the ancillary benefits from the gross cost estimate to yield an estimated net cost. (This net cost estimate for the rule may turn out to be negative – that is, the monetized benefits exceed the cost of the rule.) If you are unable to estimate the value of some of the ancillary benefits, the cost-effectiveness ratio will be overstated, and this should be acknowledged in your analysis. CEA does not yield an unambiguous choice when there are benefits or costs that have not been incorporated in the net-cost estimates. You also may use CEA to compare regulatory alternatives in cases where the statute specifies the level of benefits to be achieved.

The Effectiveness Metric for Public Health and Safety Rulemakings

When CEA is applied to public health and safety rulemakings, one or more measures of effectiveness must be selected that permits comparison of regulatory alternatives. Agencies currently use a variety of effectiveness measures.

There are relatively simple measures such as the number of lives saved, cases of cancer reduced, and cases of paraplegia prevented. Sometimes these measures account only for mortality information, such as the number of lives saved and the number of years of life saved. There are also more comprehensive, integrated measures of effectiveness such as the number of “equivalent lives” (ELs) saved and the number of “quality-adjusted life years” (QALYs) saved.

The main advantage of the integrated measures of effectiveness is that they account for a rule’s impact on morbidity (nonfatal illness, injury, impairment and quality of life) as well as premature death. The inclusion of morbidity effects is important because (a) some illnesses (e.g.,

asthma) cause more instances of pain and suffering than they do premature death, (b) some population groups are known to experience elevated rates of morbidity (e.g., the elderly and the poor) and thus have a strong interest in morbidity measurement⁷, and (c) some regulatory alternatives may be more effective at preventing morbidity than premature death (e.g., some advanced airbag designs may diminish the nonfatal injuries caused by airbag inflation without changing the frequency of fatal injury prevented by airbags).

However, the main drawback of these integrated measures is that they must meet some restrictive assumptions to represent a valid measure of individual preferences.⁸ For example, a QALY measure implicitly assumes that the fraction of remaining lifespan an individual would give up for an improvement in health-related quality of life does not depend on the remaining lifespan. Thus, if an individual is willing to give up 10 years of life among 50 remaining years for a given health improvement, he or she would also be willing to give up 1 year of life among 5 remaining years. To the extent that individual preferences deviate from these assumptions, analytic results from CEA using QALYs could differ from analytic results based on willingness-to-pay-measures.⁹ Though willingness to pay is generally the preferred economic method for evaluating preferences, the CEA method, as applied in medicine and health, does not evaluate health changes using individual willingness to pay. When performing CEA, you should consider using at least one integrated measure of effectiveness when a rule creates a significant impact on both mortality and morbidity.

When CEA is performed in specific rulemaking contexts, you should be prepared to make appropriate adjustments to ensure fair treatment of all segments of the population. Fairness is important in the choice and execution of effectiveness measures. For example, if QALYs are used to evaluate a lifesaving rule aimed at a population that happens to experience a high rate of disability (i.e., where the rule is not designed to affect the disability), the number of life years saved should not necessarily be diminished simply because the rule saves the lives of people with life-shortening disabilities. Both analytic simplicity and fairness suggest that the estimated number of life years saved for the disabled population should be based on average life expectancy information for the relevant age cohorts. More generally, when numeric adjustments are made for life expectancy or quality of life, analysts should prefer use of population averages rather than information derived from subgroups dominated by a particular demographic or income group.

OMB does not require agencies to use any specific measure of effectiveness. In fact, OMB encourages agencies to report results with multiple measures of effectiveness that offer different insights and perspectives. The regulatory analysis should explain which measures were selected and why, and how they were implemented.

The analytic discretion provided in choice of effectiveness measure will create some inconsistency in how agencies evaluate the same injuries and diseases, and it will be difficult for

⁷ Russell LB and Sisk JE (2000), "Modeling Age Differences in Cost Effectiveness Analysis", *International Journal of Technology Assessment in Health Care*, 16(4), 1158-1167.

⁸ Pliskin JS, Shepard DS, and Weinstein MC (1980), "Utility Functions for Life Years and Health Status," *Operations Research*, 28(1), 206-224.

⁹ Hammitt JK (2002), "QALYs Versus WTP," *Risk Analysis*, 22(5), pp. 985-1002.

OMB and the public to draw meaningful comparisons between rulemakings that employ different effectiveness measures. As a result, agencies should use their web site to provide OMB and the public with the underlying data, including mortality and morbidity data, the age distribution of the affected populations, and the severity and duration of disease conditions and trauma, so that OMB and the public can construct apples-to-apples comparisons between rulemakings that employ different measures.

There are sensitive technical and ethical issues associated with choosing one or more of these integrated measures for use throughout the Federal government. The Institute of Medicine (IOM) may assemble a panel of specialists in cost-effectiveness analysis and bioethics to evaluate the advantages and disadvantages of these different measures and other measures that have been suggested in the academic literature. OMB believes that the IOM guidance will provide Federal agencies and OMB useful insight into how to improve the measurement of effectiveness of public health and safety regulations.

Distributional Effects

Those who bear the costs of a regulation and those who enjoy its benefits often are not the same people. The term “distributional effect” refers to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography). Benefits and costs of a regulation may also be distributed unevenly over time, perhaps spanning several generations. Distributional effects may arise through “transfer payments” that stem from a regulatory action as well. For example, the revenue collected through a fee, surcharge in excess of the cost of services provided, or tax is a transfer payment.

Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency. Executive Order 12866 authorizes this approach. Where distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups. You should be alert for situations in which regulatory alternatives result in significant changes in treatment or outcomes for different groups. Effects on the distribution of income that are transmitted through changes in market prices can be important, albeit sometimes difficult to assess. Your analysis should also present information on the streams of benefits and costs over time in order to provide a basis for assessing intertemporal distributional consequences, particularly where intergenerational effects are concerned.

E. Identifying and Measuring Benefits and Costs

This Section provides guidelines for your preparation of the benefit and cost estimates required by Executive Order 12866 and the “Regulatory Right-to-Know Act.” The discussions in previous sections will help you identify a workable number of alternatives for consideration in your analysis and an appropriate analytical approach to use.

General Issues

1. Scope of Analysis

Your analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately. The time frame for your analysis should cover a period long enough to encompass all the important benefits and costs likely to result from the rule.

2. Developing a Baseline

You need to measure the benefits and costs of a rule against a baseline. This baseline should be the best assessment of the way the world would look absent the proposed action. The choice of an appropriate baseline may require consideration of a wide range of potential factors, including:

- evolution of the market,
- changes in external factors affecting expected benefits and costs,
- changes in regulations promulgated by the agency or other government entities, and
- the degree of compliance by regulated entities with other regulations.

It may be reasonable to forecast that the world absent the regulation will resemble the present. If this is the case, however, your baseline should reflect the future effect of current government programs and policies. For review of an existing regulation, a baseline assuming “no change” in the regulatory program generally provides an appropriate basis for evaluating regulatory alternatives. When more than one baseline is reasonable and the choice of baseline will significantly affect estimated benefits and costs, you should consider measuring benefits and costs against alternative baselines. In doing so you can analyze the effects on benefits and costs of making different assumptions about other agencies’ regulations, or the degree of compliance with your own existing rules. In all cases, you must evaluate benefits and costs against the same baseline. You should also discuss the reasonableness of the baselines used in the sensitivity analyses. For each baseline you use, you should identify the key uncertainties in your forecast.

EPA’s 1998 final PCB disposal rule provides a good example of using different baselines. EPA used several alternative baselines, each reflecting a different interpretation of existing regulatory requirements. In particular, one baseline reflected a literal interpretation of EPA’s 1979 rule and another the actual implementation of that rule in the year immediately preceding the 1998 revision. The use of multiple baselines illustrated the substantial effect changes in EPA’s implementation policy could have on the cost of a regulatory program. In the years after EPA adopted the 1979 PCB disposal rule, changes in EPA policy -- especially allowing the disposal of automobile “shredder fluff” in municipal landfills -- reduced the cost of the program by more than \$500 million per year.

In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases,

you should use a pre-statute baseline. If you are able to separate out those areas where the agency has discretion, you may also use a post-statute baseline to evaluate the discretionary elements of the action.

3. Evaluation of Alternatives

You should describe the alternatives available to you and the reasons for choosing one alternative over another. As noted previously, alternatives that rely on incentives and offer increased flexibility are often more cost-effective than more prescriptive approaches. For instance, user fees and information dissemination may be good alternatives to direct command-and-control regulation. Within a command-and-control regulatory program, performance-based standards generally offer advantages over standards specifying design, behavior, or manner of compliance.

You should carefully consider all appropriate alternatives for the key attributes or provisions of the rule. The previous discussion outlines examples of appropriate alternatives. Where there is a “continuum” of alternatives for a standard (such as the level of stringency), you generally should analyze at least three options: the preferred option; a more stringent option that achieves additional benefits (and presumably costs more) beyond those realized by the preferred option; and a less stringent option that costs less (and presumably generates fewer benefits) than the preferred option.

You should choose reasonable alternatives deserving careful consideration. In some cases, a regulatory program will focus on an option that is near or at the limit of technical feasibility. In this case, the analysis would not need to examine a more stringent option. For each of the options analyzed, you should compare the anticipated benefits to the corresponding costs.

It is not adequate simply to report a comparison of the agency’s preferred option to the chosen baseline. Whenever you report the benefits and costs of alternative options, you should present both total and incremental benefits and costs. You should present incremental benefits and costs as differences from the corresponding estimates associated with the next less-stringent alternative.¹⁰ It is important to emphasize that incremental effects are simply differences between successively more stringent alternatives. Results involving a comparison to a “next best” alternative may be especially useful.

In some cases, you may decide to analyze a wide array of options. In 1998, DOE analyzed a large number of options in setting new energy efficiency standards for refrigerators and freezers and produced a rich amount of information on their relative effects. This analysis -- examining more than 20 alternative performance standards for one class of refrigerators with top-mounted freezers -- enabled DOE to select an option that produced \$200 more in estimated net benefits per refrigerator than the least attractive option.

¹⁰ For the least stringent alternative, you should estimate the incremental benefits and costs relative to the baseline. Thus, for this alternative, the incremental effects would be the same as the corresponding totals. For each alternative that is more stringent than the least stringent alternative, you should estimate the incremental benefits and costs relative to the closest less-stringent alternative.

You should analyze the benefits and costs of different regulatory provisions separately when a rule includes a number of distinct provisions. If the existence of one provision affects the benefits or costs arising from another provision, the analysis becomes more complicated, but the need to examine provisions separately remains. In this case, you should evaluate each specific provision by determining the net benefits of the proposed regulation with and without it.

Analyzing all possible combinations of provisions is impractical if the number is large and interaction effects are widespread. You need to use judgment to select the most significant or relevant provisions for such analysis. You are expected to document all of the alternatives that were considered in a list or table and which were selected for emphasis in the main analysis.

You should also discuss the statutory requirements that affect the selection of regulatory approaches. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, you should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.

4. Transparency and Reproducibility of Results

Because of its influential nature and its special role in the rulemaking process, it is appropriate to set minimum quality standards for regulatory analysis. You should provide documentation that the analysis is based on the best reasonably obtainable scientific, technical, and economic information available. To achieve this, you should rely on peer-reviewed literature, where available, and provide the source for all original information.

A good analysis should be transparent and your results must be reproducible. You should clearly set out the basic assumptions, methods, and data underlying the analysis and discuss the uncertainties associated with the estimates. A qualified third party reading the analysis should be able to understand the basic elements of your analysis and the way in which you developed your estimates.

To provide greater access to your analysis, you should generally post it, with all the supporting documents, on the internet so the public can review the findings. You should also disclose the use of outside consultants, their qualifications, and history of contracts and employment with the agency (e.g., in a preface to the RIA). Where other compelling interests (such as privacy, intellectual property, trade secrets, etc.) prevent the public release of data or key elements of the analysis, you should apply especially rigorous robustness checks to analytic results and document the analytical checks used.

Finally, you should assure compliance with the Information Quality Guidelines for your agency and OMB's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" ("data quality guidelines") <http://www.whitehouse.gov/omb/fedreg/reproducible.html>.

Developing Benefit and Cost Estimates

1. Some General Considerations

The analysis document should discuss the expected benefits and costs of the selected regulatory option and any reasonable alternatives. How is the proposed action expected to provide the anticipated benefits and costs? What are the monetized values of the potential real incremental benefits and costs to society? To present your results, you should:

- include separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs, and express the estimates in this table in constant, undiscounted dollars (for more on discounting see “*Discount Rates*” below);
- list the benefits and costs you can quantify, but cannot monetize, including their timing;
- describe benefits and costs you cannot quantify; and
- identify or cross-reference the data or studies on which you base the benefit and cost estimates.

When benefit and cost estimates are uncertain (for more on this see “*Treatment of Uncertainty*” below), you should report benefit and cost estimates (including benefits of risk reductions) that reflect the full probability distribution of potential consequences. Where possible, present probability distributions of benefits and costs and include the upper and lower bound estimates as complements to central tendency and other estimates.

If fundamental scientific disagreement or lack of knowledge prevents construction of a scientifically defensible probability distribution, you should describe benefits or costs under plausible scenarios and characterize the evidence and assumptions underlying each alternative scenario.

2. The Key Concepts Needed to Estimate Benefits and Costs

“Opportunity cost” is the appropriate concept for valuing both benefits and costs. The principle of “willingness-to-pay” (WTP) captures the notion of opportunity cost by measuring what individuals are willing to forgo to enjoy a particular benefit. In general, economists tend to view WTP as the most appropriate measure of opportunity cost, but an individual’s “willingness-to-accept” (WTA) compensation for not receiving the improvement can also provide a valid measure of opportunity cost.

WTP and WTA are comparable measures under special circumstances. WTP and WTA measures may be comparable in the following situations: if a regulation affects a price change rather than a quantity change; the change being evaluated is small; there are reasonably close substitutes available; and the income effect is small.¹¹ However, empirical evidence from experimental economics and psychology shows that even when income/wealth effects are “small”, the measured differences between WTP and WTA can be large.¹² WTP is generally

¹¹ See Hanemann WM (1991), *American Economic Review*, 81(3), 635-647.

¹² See Kahneman D, Knetsch JL, and Thaler RH (1991), “Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias,” *Journal of Economic Perspectives* 3(1), 192-206.

considered to be more readily measurable. Adoption of WTP as the measure of value implies that individual preferences of the affected population should be a guiding factor in the regulatory analysis.

Market prices provide rich data for estimating benefits and costs based on willingness-to-pay if the goods and services affected by the regulation are traded in well-functioning competitive markets. The opportunity cost of an alternative includes the value of the benefits forgone as a result of choosing that alternative. The opportunity cost of banning a product -- a drug, food additive, or hazardous chemical -- is the forgone net benefit (i.e., lost consumer and producer surplus¹³) of that product, taking into account the mitigating effects of potential substitutes.

The use of any resource has an opportunity cost regardless of whether the resource is already owned or has to be purchased. That opportunity cost is equal to the net benefit the resource would have provided in the absence of the requirement. For example, if regulation of an industrial plant affects the use of additional land or buildings within the existing plant boundary, the cost analysis should include the opportunity cost of using the additional land or facilities.

To the extent possible, you should monetize any such forgone benefits and add them to the other costs of that alternative. You should also try to monetize any cost savings as a result of an alternative and either add it to the benefits or subtract it from the costs of that alternative. However, you should not assume that the “avoided” costs of not doing another regulatory alternative represent the benefits of a regulatory action where there is no direct, necessary relationship between the two. You should also be careful when the costs avoided are attributable to an existing regulation. Even when there is a direct relationship between the two regulatory actions, the use of avoided costs is problematic because the existing regulation may not maximize net benefits and thus may itself be questionable policy. (See the section, “Direct Use of Market Data,” for more detail.)

Estimating benefits and costs when market prices are hard to measure or markets do not exist is more difficult. In these cases, you need to develop appropriate proxies that simulate market exchange. Estimates of willingness-to-pay based on revealed preference methods can be quite useful. As one example, analysts sometimes use “hedonic price equations” based on multiple regression analysis of market behavior to simulate market prices for the commodity of interest. The hedonic technique allows analysts to develop an estimate of the price for specific attributes associated with a product. For instance, a house is a product characterized by a variety of attributes including the number of rooms, total floor area, and type of heating and cooling. If there are enough data on transactions in the housing market, it is possible to develop an estimate of the implicit price for specific attributes, such as the implicit price of an additional bathroom or for central air conditioning. This technique can be extended, as well, to develop an estimate for

¹³ Consumer surplus is the difference between what a consumer pays for a unit of a good and the maximum amount the consumer would be willing to pay for that unit. It is measured by the area between the price and the demand curve for that unit. Producer surplus is the difference between the amount a producer is paid for a unit of a good and the minimum amount the producer would accept to supply that unit. It is measured by the area between the price and the supply curve for that unit.

the implicit price of public goods that are not directly traded in markets. An analyst can develop implicit price estimates for public goods like air quality and access to public parks by assessing the effects of these goods on the housing market. Going through the analytical process of deriving benefit estimates by simulating markets may also suggest alternative regulatory strategies that create such markets.

You need to guard against double-counting, since some attributes are embedded in other broader measures. To illustrate, when a regulation improves the quality of the environment in a community, the value of real estate in the community generally rises to reflect the greater attractiveness of living in a better environment. Simply adding the increase in property values to the estimated value of improved public health would be double counting if the increase in property values reflects the improvement in public health. To avoid this problem you should separate the embedded effects on the value of property arising from improved public health. At the same time, an analysis that fails to incorporate the consequence of land use changes when accounting for costs will not capture the full effects of regulation.

3. Revealed Preference Methods

Revealed preference methods develop estimates of the value of goods and services -- or attributes of those goods and services -- based on actual market decisions by consumers, workers and other market participants. If the market participant is well informed and confronted with a real choice, it may be feasible to determine accurately and precisely the monetary value needed for a rulemaking. There is a large and well-developed literature on revealed preference in the peer-reviewed, applied economics literature.

Although these methods are well grounded in economic theory, they are sometimes difficult to implement given the complexity of market transactions and the paucity of relevant data. When designing or evaluating a revealed preference study, the following principles should be considered:

- the market should be competitive. If the market isn't competitive (e.g., monopoly, oligopoly), then you should consider making adjustments such that the price reflects the true value to society (often called the "shadow price");
- the market should not exhibit a significant information gap or asymmetric information problem. If the market suffers from information problems, then you should discuss the divergence of the price from the underlying shadow price and consider possible adjustments to reflect the underlying shadow price;
- the market should not exhibit an externality. In this case, you should discuss the divergence of the price from the underlying shadow price and consider possible adjustments to reflect the underlying shadow price;
- the specific market participants being studied should be representative of the target populations to be affected by the rulemaking under consideration;
- a valid research design and framework for analysis should be adopted. Examples include using data and/or model specifications that include the markets for substitute and complementary goods and services and using reasonably unrestricted functional forms. When specifying substitute and complementary goods, the analysis should preferably be

based on data about the range of alternatives perceived by market participants. If such data are not available, you should adopt plausible assumptions and describe the limitations of the analysis.

- the statistical and econometric models employed should be appropriate for the application and the resulting estimates should be robust in response to plausible changes in model specification and estimation technique; and
- the results should be consistent with economic theory.

You should also determine whether there are multiple revealed-preference studies of the same good or service and whether anything can be learned by comparing the methods, data and findings from different studies. Professional judgment is required to determine whether a particular study is of sufficient quality to justify use in regulatory analysis. When studies are used in regulatory analysis despite their technical weaknesses (e.g., due to the absence of other evidence), the regulatory analysis should discuss any biases or uncertainties that are likely to arise due to those weaknesses. If a study has major weaknesses, the study should not be used in regulatory analysis.

a. Direct Uses of Market Data

Economists ordinarily consider market prices as the most accurate measure of the marginal value of goods and services to society. In some instances, however, market prices may not reflect the true value of goods and services due to market imperfections or government intervention. If a regulation involves changes to goods or services where the market price is not a good measure of the value to society, you should use an estimate that reflects the shadow price. Suppose a particular air pollutant damages crops. One of the benefits of controlling that pollutant is the value of the crop yield increase as a result of the controls. That value is typically measured by the price of the crop. However, if the price is held above the market price by a government program that affects supply, a value estimate based on this price may not reflect the true benefits of controlling the pollutant. In this case, you should calculate the value to society of the increase in crop yields by estimating the shadow price, which reflects the value to society of the marginal use of the crop. If the marginal use is for exports, you should use the world price. If the marginal use is to add to very large surplus stockpiles, you should use the value of the last units released from storage minus storage cost. If stockpiles are large and growing, the shadow price may be low or even negative.

Other goods whose market prices may not reflect their true value include those whose production or consumption results in substantial (1) positive or negative external effects or (2) transfer payments. For example, the observed market price of gasoline may not reflect marginal social value due to the inclusion of taxes, other government interventions, and negative externalities (e.g., pollution). This shadow price may also be needed for goods whose market price is substantially affected by existing regulations that do not maximize net benefits.

b. Indirect Uses of Market Data

Many goods or attributes of goods that are affected by regulation--such as preserving environmental or cultural amenities--are not traded directly in markets. The value for these

goods or attributes arise both from use and non-use. Estimation of these values is difficult because of the absence of an organized market. However, overlooking or ignoring these values in your regulatory analysis may significantly understate the benefits and/or costs of regulatory action.

“Use values” arise where an individual derives satisfaction from using the resource, either now or in the future. Use values are associated with activities such as swimming, hunting, and hiking where the individual makes use of the natural environment.

“Non-use values” arise where an individual places value on a resource, good or service even though the individual will not use the resource, now or in the future. Non-use value includes bequest and existence values.

General altruism for the health and welfare of others is a closely related concept but may not be strictly considered a “non-use” value.¹⁴ A general concern for the welfare of others should supplement benefits and costs equally; hence, it is not necessary to measure the size of general altruism in regulatory analysis. If there is evidence of selective altruism, it needs to be considered specifically in both benefits and costs.

Some goods and services are indirectly traded in markets, which means that their value is reflected in the prices of related goods and services that are directly traded in markets. Their use values are typically estimated through revealed preference methods. Examples include estimates of the values of environmental amenities derived from travel-cost studies, and hedonic price models that measure differences or changes in the value of real estate. It is important that you utilize revealed preference models that adhere to economic criteria that are consistent with utility maximizing behavior. Also, you should take particular care in designing protocols for reliably estimating the values of these attributes.

4. Stated Preference Methods

Stated Preference Methods (SPM) have been developed and used in the peer-reviewed literature to estimate both “use” and “non-use” values of goods and services. They have also been widely used in regulatory analyses by Federal agencies, in part, because these methods can be creatively employed to address a wide variety of goods and services that are not easy to study through revealed preference methods.

The distinguishing feature of these methods is that hypothetical questions about use or non-use values are posed to survey respondents in order to obtain willingness-to-pay estimates relevant to benefit or cost estimation. Some examples of SPM include contingent valuation, conjoint analysis and risk-tradeoff analysis. The surveys used to obtain the health-utility values used in CEA are similar to stated-preference surveys but do not entail monetary measurement of value. Nevertheless, the principles governing quality stated-preference research, with some obvious exceptions involving monetization, are also relevant in designing quality health-utility research.

¹⁴ See McConnell KE (1997), *Journal of Environmental Economics and Management*, 32, 22-37.

When you are designing or evaluating a stated-preference study, the following principles should be considered:

- the good or service being evaluated should be explained to the respondent in a clear, complete and objective fashion, and the survey instrument should be pre-tested;
- willingness-to-pay questions should be designed to focus the respondent on the reality of budgetary limitations and alerted to the availability of substitute goods and alternative expenditure options;
- the survey instrument should be designed to probe beyond general attitudes (e.g., a "warm glow" effect for a particular use or non-use value) and focus on the magnitude of the respondent's economic valuation;
- the analytic results should be consistent with economic theory using both "internal" (within respondent) and "external" (between respondent) scope tests such as the willingness to pay is larger (smaller) when more (less) of a good is provided;
- the subjects being interviewed should be selected/sampled in a statistically appropriate manner. The sample frame should adequately cover the target population. The sample should be drawn using probability methods in order to generalize the results to the target population;
- response rates should be as high as reasonably possible. Best survey practices should be followed to achieve high response rates. Low response rates increase the potential for bias and raise concerns about the generalizability of the results. If response rates are not adequate, you should conduct an analysis of non-response bias or further study. Caution should be used in assessing the representativeness of the sample based solely on demographic profiles. Statistical adjustments to reduce non-response bias should be undertaken whenever feasible and appropriate;
- the mode of administration of surveys (in-person, phone, mail, computer, internet or multiple modes) should be appropriate in light of the nature of the questions being posed to respondents and the length and complexity of the instrument;
- documentation should be provided about the target population, the sampling frame used and its coverage of the target population, the design of the sample including any stratification or clustering, the cumulative response rate (including response rate at each stage of selection if applicable); the item non-response rate for critical questions; the exact wording and sequence of questions and other information provided to respondents; and the training of interviewers and techniques they employed (as appropriate);
- the statistical and econometric methods used to analyze the collected data should be transparent, well suited for the analysis, and applied with rigor and care.

Professional judgment is necessary to apply these criteria to one or more studies, and thus there is no mechanical formula that can be used to determine whether a particular study is of sufficient quality to justify use in regulatory analysis. When studies are used despite having weaknesses on one or more of these criteria, those weaknesses should be acknowledged in the regulatory analysis, including any resulting biases or uncertainties that are likely to result. If a study has too many weaknesses with unknown consequences for the quality of the data, the study should not be used.

The challenge in designing quality stated-preference studies is arguably greater for non-use values and unfamiliar use values than for familiar goods or services that are traded (directly or indirectly) in market transactions. The good being valued may have little meaning to respondents, and respondents may be forming their valuations for the first time in response to the questions posed. Since these values are effectively constructed by the respondent during the elicitation, the instrument and mode of administration should be rigorously pre-tested to make sure that responses are not simply an artifact of specific features of instrument design and/or mode of administration.

Since SPM generate data from respondents in a hypothetical setting, often on complex and unfamiliar goods, special care is demanded in the design and execution of surveys, analysis of the results, and characterization of the uncertainties. A stated-preference study may be the only way to obtain quantitative information about non-use values, though a number based on a poor quality study is not necessarily superior to no number at all. Non-use values that are not quantified should be presented as an “intangible” benefit or cost.

If both revealed-preference and stated-preference studies that are directly applicable to regulatory analysis are available, you should consider both kinds of evidence and compare the findings. If the results diverge significantly, you should compare the overall size and quality of the two bodies of evidence. Other things equal, you should prefer revealed preference data over stated preference data because revealed preference data are based on actual decisions, where market participants enjoy or suffer the consequences of their decisions. This is not generally the case for respondents in stated preference surveys, where respondents may not have sufficient incentives to offer thoughtful responses that are more consistent with their preferences or may be inclined to bias their responses for one reason or another.

5. Benefit-Transfer Methods

It is often preferable to collect original data on revealed preference or stated preference to support regulatory analysis. Yet conducting an original study may not be feasible due to the time and expense involved. One alternative to conducting an original study is the use of “benefit transfer” methods. (The transfer may involve cost determination as well). The practice of “benefit transfer” began with transferring existing estimates obtained from indirect market and stated preference studies to new contexts (i.e., the context posed by the rulemaking). The principles that guide transferring estimates from indirect market and stated preference studies should apply to direct market studies as well.

Although benefit-transfer can provide a quick, low-cost approach for obtaining desired monetary values, the methods are often associated with uncertainties and potential biases of unknown magnitude. It should therefore be treated as a last-resort option and not used without explicit justification.

In conducting benefit transfer, the first step is to specify the value to be estimated for the rulemaking. You should identify the relevant measure of the policy change at this initial stage. For instance, you can derive the relevant willingness-to-pay measure by specifying an indirect utility function. This identification allows you to “zero in” on key aspects of the benefit transfer.

The next step is to identify appropriate studies to conduct benefit transfer. In selecting transfer studies for either point transfers or function transfers, you should base your choices on the following criteria:

- The selected studies should be based on adequate data, sound and defensible empirical methods and techniques.
- The selected studies should document parameter estimates of the valuation function.
- The study context and policy context should have similar populations (e.g., demographic characteristics). The market size (e.g., target population) between the study site and the policy site should be similar. For example, a study valuing water quality improvement in Rhode Island should not be used to value policy that will affect water quality throughout the United States.
- The good, and the magnitude of change in that good, should be similar in the study and policy contexts.
- The relevant characteristics of the study and the policy contexts should be similar. For example, the effects examined in the original study should be “reversible” or “irreversible” to a degree that is similar to the regulatory actions under consideration.
- The distribution of property rights should be similar so that the analysis uses the same welfare measure. If the property rights in the study context support the use of WTA measures while the rights in the rulemaking context support the use of WTP measures, benefit transfer is not appropriate.
- The availability of substitutes across study and policy contexts should be similar.

If you can choose between transferring a function or a point estimate, you should transfer the entire demand function (referred to as benefit function transfer) rather than adopting a single point estimate (referred to as benefit point transfer).¹⁵

Finally, you should not use benefit transfer in estimating benefits if:

- resources are unique or have unique attributes. For example, if a policy change affects snowmobile use in Yellowstone National Park, then a study valuing snowmobile use in the state of Michigan should not be used to value changes in snowmobile use in the Yellowstone National Park.
- If the study examines a resource that is unique or has unique attributes, you should not transfer benefit estimates or benefit functions to value a different resource and vice versa. For example, if a study values visibility improvements at the Grand Canyon, these results should not be used to value visibility improvements in urban areas.
- There are significant problems with applying an “*ex ante*” valuation estimate to an “*ex post*” policy context. If a policy yields a significant change in the attributes of the good, you should not use the study estimates to value the change using a benefit transfer approach.
- You also should not use a value developed from a study involving, small marginal

¹⁵ See Loomis JB (1992), *Water Resources Research*, 28(3), 701-705 and Kirchoff, S, Colby, BG, and LaFrance, JT (1997), *Journal of Environmental Economics and Management*, 33, 75-93.

changes in a policy context involving large changes in the quantity of the good.

Clearly, all of these criteria are difficult to meet. However, you should attempt to satisfy as many as possible when choosing studies from the existing economic literature. Professional judgment is required in determining whether a particular transfer is too speculative to use in regulatory analysis.

6. Ancillary Benefits and Countervailing Risks

Your analysis should look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks. An ancillary benefit is a favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking (e.g., reduced refinery emissions due to more stringent fuel economy standards for light trucks) while a countervailing risk is an adverse economic, health, safety, or environmental consequence that occurs due to a rule and is not already accounted for in the direct cost of the rule (e.g., adverse safety impacts from more stringent fuel-economy standards for light trucks).

You should begin by considering and perhaps listing the possible ancillary benefits and countervailing risks. However, highly speculative or minor consequences may not be worth further formal analysis. Analytic priority should be given to those ancillary benefits and countervailing risks that are important enough to potentially change the rank ordering of the main alternatives in the analysis. In some cases the mere consideration of these secondary effects may help in the generation of a superior regulatory alternative with strong ancillary benefits and fewer countervailing risks. For instance, a recent study suggested that weight-based, fuel-economy standards could achieve energy savings with fewer safety risks and employment losses than would occur under the current regulatory structure.

Like other benefits and costs, an effort should be made to quantify and monetize ancillary benefits and countervailing risks. If monetization is not feasible, quantification should be attempted through use of informative physical units. If both monetization and quantification are not feasible, then these issues should be presented as non-quantified benefits and costs. The same standards of information and analysis quality that apply to direct benefits and costs should be applied to ancillary benefits and countervailing risks.

One way to combine ancillary benefits and countervailing risks is to evaluate these effects separately and then put both of these effects on the benefits side, not on the cost side. Although it is theoretically appropriate to include disbenefits on the cost side, legal and programmatic considerations generally support subtracting the disbenefits from direct benefits.

7. Methods for Treating Non-Monetized Benefits and Costs

Sound quantitative estimates of benefits and costs, where feasible, are preferable to qualitative descriptions of benefits and costs because they help decision makers understand the magnitudes of the effects of alternative actions. However, some important benefits and costs (e.g., privacy protection) may be inherently too difficult to quantify or monetize given current

data and methods. You should carry out a careful evaluation of non-quantified benefits and costs. Some authorities¹⁶ refer to these non-monetized and non-quantified effects as “intangible”.

a. Benefits and Costs that are Difficult to Monetize

You should monetize quantitative estimates whenever possible. Use sound and defensible values or procedures to monetize benefits and costs, and ensure that key analytical assumptions are defensible. If monetization is impossible, explain why and present all available quantitative information. For example, if you can quantify but cannot monetize increases in water quality and fish populations resulting from water quality regulation, you can describe benefits in terms of stream miles of improved water quality for boaters and increases in game fish populations for anglers. You should describe the timing and likelihood of such effects and avoid double-counting of benefits when estimates of monetized and physical effects are mixed in the same analysis.

b. Benefits and Costs that are Difficult to Quantify

If you are not able to quantify the effects, you should present any relevant quantitative information along with a description of the unquantified effects, such as ecological gains, improvements in quality of life, and aesthetic beauty. You should provide a discussion of the strengths and limitations of the qualitative information. This should include information on the key reason(s) why they cannot be quantified. In one instance, you may know with certainty the magnitude of a risk to which a substantial, but unknown, number of individuals are exposed. In another instance, the existence of a risk may be based on highly speculative assumptions, and the magnitude of the risk may be unknown.

For cases in which the unquantified benefits or costs affect a policy choice, you should provide a clear explanation of the rationale behind the choice. Such an explanation could include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs. Also, please include a summary table that lists all the unquantified benefits and costs, and use your professional judgment to highlight (e.g., with categories or rank ordering) those that you believe are most important (e.g., by considering factors such as the degree of certainty, expected magnitude, and reversibility of effects).

While the focus is often placed on difficult to quantify benefits of regulatory action, some costs are difficult to quantify as well. Certain permitting requirements (e.g., EPA’s New Source Review program) restrict the decisions of production facilities to shift to new products and adopt innovative methods of production. While these programs may impose substantial costs on the economy, it is very difficult to quantify and monetize these effects. Similarly, regulations that establish emission standards for recreational vehicles, like motor bikes, may adversely affect the performance of the vehicles in terms of driveability and 0 to 60 miles per hour acceleration. Again, the cost associated with the loss of these attributes may be difficult to quantify and monetize. They need to be analyzed qualitatively.

¹⁶ Mishan EJ (1994), *Cost-Benefit Analysis*, fourth edition, Routledge, New York.

8. Monetizing Health and Safety Benefits and Costs

We expect you to provide a benefit-cost analysis of major health and safety rulemakings in addition to a CEA. The BCA provides additional insight because (a) it provides some indication of what the public is willing to pay for improvements in health and safety and (b) it offers additional information on preferences for health using a different research design than is used in CEA. Since the health-preference methods used to support CEA and BCA have some different strengths and drawbacks, it is important that you provide decision makers with both perspectives.

In monetizing health benefits, a WTP measure is the conceptually appropriate measure as compared to other alternatives (e.g., cost of illness or lifetime earnings), in part because it attempts to capture pain and suffering and other quality-of-life effects. Using the WTP measure for health and safety allows you to directly compare your results to the other benefits and costs in your analysis, which will typically be based on WTP.

If well-conducted revealed-preference studies of relevant health and safety risks are available, you should consider using them in developing your monetary estimates. If appropriate revealed-preference data are not available, you should use valid and relevant data from stated-preference studies. You will need to use your professional judgment when you are faced with limited information on revealed preference studies and substantial information based on stated preference studies.

A key advantage of stated-preference and health-utility methods compared to revealed preference methods is that they can be tailored to address the ranges of probabilities, types of health risks and specific populations affected by your rule. In many rulemakings there will be no relevant information from revealed-preference studies. In this situation you should consider commissioning a stated-preference study or using values from published stated-preference studies. For the reasons discussed previously, you should be cautious about using values from stated-preference studies and describe in the analysis the drawbacks of this approach.

a. Nonfatal Health and Safety Risks

With regard to nonfatal health and safety risks, there is enormous diversity in the nature and severity of impaired health states. A traumatic injury that can be treated effectively in the emergency room without hospitalization or long-term care is different from a traumatic injury resulting in paraplegia. Severity differences are also important in evaluation of chronic diseases. A severe bout of bronchitis, though perhaps less frequent, is far more painful and debilitating than the more frequent bouts of mild bronchitis. The duration of an impaired health state, which can range from a day or two to several years or even a lifetime (e.g., birth defects inducing mental retardation), need to be considered carefully. Information on both the severity and duration of an impaired health state is necessary before the task of monetization can be performed.

When monetizing nonfatal health effects, it is important to consider two components: (1) the private demand for prevention of the nonfatal health effect, to be represented by the

preferences of the target population at risk, and (2) the net financial externalities associated with poor health such as net changes in public medical costs and any net changes in economic production that are not experienced by the target population. Revealed-preference or stated-preference studies are necessary to estimate the private demand; health economics data from published sources can typically be used to estimate the financial externalities caused by changes in health status. If you use literature values to monetize nonfatal health and safety risks, it is important to make sure that the values you have selected are appropriate for the severity and duration of health effects to be addressed by your rule.

If data are not available to support monetization, you might consider an alternative approach that makes use of health-utility studies. Although the economics literature on the monetary valuation of impaired health states is growing, there is a much larger clinical literature on how patients, providers and community residents value diverse health states. This literature typically measures health utilities based on the standard gamble, the time tradeoff or the rating scale methods. This health utility information may be combined with known monetary values for well-defined health states to estimate monetary values for a wide range of health states of different severity and duration. If you use this approach, you should be careful to acknowledge your assumptions and the limitations of your estimates.

b. Fatality Risks

Since agencies often design health and safety regulation to reduce risks to life, evaluation of these benefits can be the key part of the analysis. A good analysis must present these benefits clearly and show their importance. Agencies may choose to monetize these benefits. The willingness-to-pay approach is the best methodology to use if reductions in fatality risk are monetized.

Some describe the monetized value of small changes in fatality risk as the "value of statistical life" (VSL) or, less precisely, the "value of a life." The latter phrase can be misleading because it suggests erroneously that the monetization exercise tries to place a "value" on individual lives. You should make clear that these terms refer to the measurement of willingness to pay for reductions in only small risks of premature death. They have no application to an identifiable individual or to very large reductions in individual risks. They do not suggest that any individual's life can be expressed in monetary terms. Their sole purpose is to help describe better the likely benefits of a regulatory action.

Confusion about the term "statistical life" is also widespread. This term refers to the sum of risk reductions expected in a population. For example, if the annual risk of death is reduced by one in a million for each of two million people, that is said to represent two "statistical lives" extended per year ($2 \text{ million people} \times 1/1,000,000 = 2$). If the annual risk of death is reduced by one in 10 million for each of 20 million people, that also represents two statistical lives extended.

The adoption of a value for the projected reduction in the risk of premature mortality is the subject of continuing discussion within the economic and public policy analysis community. A considerable body of academic literature is available on this subject. This literature involves either explicit or implicit valuation of fatality risks, and generally involves the use of estimates of

VSL from studies on wage compensation for occupational hazards (which generally are in the range of 10^{-4} annually), on consumer product purchase and use decisions, or from an emerging literature using stated preference approaches. A substantial majority of the resulting estimates of VSL vary from roughly \$1 million to \$10 million per statistical life.¹⁷

There is a continuing debate within the economic and public policy analysis community on the merits of using a single VSL for all situations versus adjusting the VSL estimates to reflect the specific rule context. A variety of factors have been identified, including whether the mortality risk involves sudden death, the fear of cancer, and the extent to which the risk is voluntarily incurred.¹⁸ The consensus of EPA's recent Science Advisory Board (SAB) review of this issue was that the available literature does not support adjustments of VSL for most of these factors. The panel did conclude that it was appropriate to adjust VSL to reflect changes in income and any time lag in the occurrence of adverse health effects.

The age of the affected population has also been identified as an important factor in the theoretical literature. However, the empirical evidence on age and VSL is mixed. In light of the continuing questions over the effect of age on VSL estimates, you should not use an age-adjustment factor in an analysis using VSL estimates.¹⁹

Another way that has been used to express reductions in fatality risks is to use the life expectancy method, the "value of statistical life-years (VSLY) extended." If a regulation protects individuals whose average remaining life expectancy is 40 years, a risk reduction of one fatality is expressed as "40 life-years extended." Those who favor this alternative approach emphasize that the value of a statistical life is not a single number relevant for all situations. In particular, when there are significant differences between the effect on life expectancy for the population affected by a particular health risk and the populations studied in the labor market studies, they prefer to adopt a VSLY approach to reflect those differences. You should consider providing estimates of both VSL and VSLY, while recognizing the developing state of knowledge in this area.

Longevity may be only one of a number of relevant considerations pertaining to the rule. You should keep in mind that regulations with greater numbers of life-years extended are not necessarily better than regulations with fewer numbers of life-years extended. In any event, when you present estimates based on the VSLY method, you should adopt a larger VSLY estimate for senior citizens because senior citizens face larger overall health risks from all causes and they may have accumulated savings to spend on their health and safety.²⁰

The valuation of fatality risk reduction is an evolving area in both results and methodology. Hence, you should utilize valuation methods that you consider appropriate for the

¹⁷ See Viscusi WK and Aldy JE, *Journal of Risk and Uncertainty* (forthcoming) and Mrozek JR and Taylor LO (2002), *Journal of Policy Analysis and Management*, 21(2), 253-270.

¹⁸ Distinctions between "voluntary" and "involuntary" should be treated with care. Risks are best considered to fall within a continuum from "voluntary" to "involuntary" with very few risks at either end of this range. These terms are also related to differences in the cost of avoiding risks.

¹⁹ Graham JD (2003), Memorandum to the President's Management Council, Benefit-Cost Methods and Lifesaving Rules. This memorandum can be found at http://www.whitehouse.gov/omb/inforeg/pmc_benefit_cost_memo.pdf

²⁰ Office of Information and Regulatory Affairs, OMB, Memorandum to the President's Management Council, *ibid*.

regulatory circumstances. Since the literature-based VSL estimates may not be entirely appropriate for the risk being evaluated (e.g., the use of occupational risk premia to value reductions in risks from environmental hazards), you should explain your selection of estimates and any adjustments of the estimates to reflect the nature of the risk being evaluated. You should present estimates based on alternative approaches, and if you monetize mortality risk reduction, you should do so on a consistent basis to the extent feasible. You should clearly indicate the methodology used and document your choice of a particular methodology. You should explain any significant deviations from the prevailing state of knowledge. If you use different methodologies in different rules, you should clearly disclose the fact and explain your choices.

c. Valuation of Reductions in Health and Safety Risks to Children

The valuation of health outcomes for children and infants poses special challenges. It is rarely feasible to measure a child's willingness to pay for health improvement and an adult's concern for his or her own health is not necessarily relevant to valuation of child health. For example, the wage premiums demanded by workers to accept hazardous jobs are not readily transferred to rules that accomplish health gains for children.

There are a few studies that examine parental willingness to pay to invest in health and safety for their children. Some of these studies suggest that parents may value children's health more strongly than their own health. Although this parental perspective is a promising research strategy, it may need to be expanded to include a societal interest in child health and safety.

Where the primary objective of a rule is to reduce the risk of injury, disease or mortality among children, you should conduct a cost-effectiveness analysis of the rule. You may also develop a benefit-cost analysis to the extent that valid monetary values can be assigned to the primary expected health outcomes. For rules where health gains are expected among both children and adults and you decide to perform a benefit-cost analysis, the monetary values for children should be at least as large as the values for adults (for the same probabilities and outcomes) unless there is specific and compelling evidence to suggest otherwise.²¹

Discount Rates

Benefits and costs do not always take place in the same time period. When they do not, it is incorrect simply to add all of the expected net benefits or costs without taking account of when they actually occur. If benefits or costs are delayed or otherwise separated in time from each other, the difference in timing should be reflected in your analysis.

As a first step, you should present the annual time stream of benefits and costs expected to result from the rule, clearly identifying when the benefits and costs are expected to occur. The beginning point for your stream of estimates should be the year in which the final rule will begin to have effects, even if that is expected to be some time in the future. The ending point should be far enough in the future to encompass all the significant benefits and costs likely to result from the rule.

²¹ For more information, see Dockins C., Jenkins RR, Owens N, Simon NB, and Wiggins LB (2002), *Risk Analysis*, 22(2), 335-346.

In presenting the stream of benefits and costs, it is important to measure them in constant dollars to avoid the misleading effects of inflation in your estimates. If the benefits and costs are initially measured in prices reflecting expected future inflation, you can convert them to constant dollars by dividing through by an appropriate inflation index, one that corresponds to the inflation rate underlying the initial estimates of benefits or costs.

1. The Rationale for Discounting

Once these preliminaries are out of the way, you can begin to adjust your estimates for differences in timing. (This is a separate calculation from the adjustment needed to remove the effects of future inflation.) Benefits or costs that occur sooner are generally more valuable. The main rationales for the discounting of future impacts are:

- (a) Resources that are invested will normally earn a positive return, so current consumption is more expensive than future consumption, since you are giving up that expected return on investment when you consume today.
- (b) Postponed benefits also have a cost because people generally prefer present to future consumption. They are said to have positive time preference.
- (c) Also, if consumption continues to increase over time, as it has for most of U.S. history, an increment of consumption will be less valuable in the future than it would be today, because the principle of diminishing marginal utility implies that as total consumption increases, the value of a marginal unit of consumption tends to decline.

There is wide agreement with point (a). Capital investment is productive, but that point is not sufficient by itself to explain positive interest rates and observed saving behavior. To understand these phenomena, points (b) and (c) are also necessary. If people are really indifferent between consumption now and later, then they should be willing to forgo current consumption in order to consume an equal or slightly greater amount in the future. That would cause saving rates and investment to rise until interest rates were driven to zero and capital was no longer productive. As long as we observe positive interest rates and saving rates below 100 percent, people must be placing a higher value on current consumption than on future consumption.

To reflect this preference, a discount factor should be used to adjust the estimated benefits and costs for differences in timing. The further in the future the benefits and costs are expected to occur, the more they should be discounted. The discount factor can be calculated given a discount rate. The formula is $1 / (1 + \text{the discount rate})^t$ where “t” measures the number of years in the future that the benefits or costs are expected to occur. Benefits or costs that have been adjusted in this way are called “discounted present values” or simply “present values”. When, and only when, the estimated benefits and costs have been discounted, they can be added to determine the overall value of net benefits.

2. Real Discount Rates of 3 Percent and 7 Percent

OMB's basic guidance on the discount rate is provided in OMB Circular A-94 (<http://www.whitehouse.gov/omb/circulars/index.html>). This Circular points out that the analytically preferred method of handling temporal differences between benefits and costs is to adjust all the benefits and costs to reflect their value in equivalent units of consumption and to discount them at the rate consumers and savers would normally use in discounting future consumption benefits. This is sometimes called the "shadow price" approach to discounting because doing such calculations requires you to value benefits and costs using shadow prices, especially for capital goods, to correct for market distortions. These shadow prices are not well established for the United States. Furthermore, the distribution of impacts from regulations on capital and consumption are not always well known. Consequently, any agency that wishes to tackle this challenging analytical task should check with OMB before proceeding.

As a default position, OMB Circular A-94 states that a real discount rate of 7 percent should be used as a base-case for regulatory analysis. The 7 percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy. It is a broad measure that reflects the returns to real estate and small business capital as well as corporate capital. It approximates the opportunity cost of capital, and it is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector. OMB revised Circular A-94 in 1992 after extensive internal review and public comment. In a recent analysis, OMB found that the average rate of return to capital remains near the 7 percent rate estimated in 1992. Circular A-94 also recommends using other discount rates to show the sensitivity of the estimates to the discount rate assumption.

Economic distortions, including taxes on capital, create a divergence between the rate of return that savers earn and the private rate of return to capital. This divergence persists despite the tendency for capital to flow to where it can earn the highest rate of return. Although market forces will push after-tax rates of return in different sectors of the economy toward equality, that process will not equate pre-tax rates of return when there are differences in the tax treatment of investment. Corporate capital, in particular, pays an additional layer of taxation, the corporate income tax, which requires it to earn a higher pre-tax rate of return in order to provide investors with similar after-tax rates of return compared with non-corporate investments. The pre-tax rates of return better measure society's gains from investment. Since the rates of return on capital are higher in some sectors of the economy than others, the government needs to be sensitive to possible impacts of regulatory policy on capital allocation.

The effects of regulation do not always fall exclusively or primarily on the allocation of capital. When regulation primarily and directly affects private consumption (e.g., through higher consumer prices for goods and services), a lower discount rate is appropriate. The alternative most often used is sometimes called the "social rate of time preference." This simply means the rate at which "society" discounts future consumption flows to their present value. If we take the rate that the average saver uses to discount future consumption as our measure of the social rate of time preference, then the real rate of return on long-term government debt may provide a fair approximation. Over the last thirty years, this rate has averaged around 3 percent in real terms on a pre-tax basis. For example, the yield on 10-year Treasury notes has averaged 8.1 percent since

1973 while the average annual rate of change in the CPI over this period has been 5.0 percent, implying a real 10-year rate of 3.1 percent.

For regulatory analysis, you should provide estimates of net benefits using both 3 percent and 7 percent. An example of this approach is EPA's analysis of its 1998 rule setting both effluent limits for wastewater discharges and air toxic emission limits for pulp and paper mills. In this analysis, EPA developed its present-value estimates using real discount rates of 3 and 7 percent applied to benefit and cost streams that extended forward for 30 years. You should present a similar analysis in your own work.

In some instances, if there is reason to expect that the regulation will cause resources to be reallocated away from private investment in the corporate sector, then the opportunity cost may lie outside the range of 3 to 7 percent. For example, the average real rate of return on corporate capital in the United States was approximately 10 percent in the 1990s, returning to the same level observed in the 1950s and 1960s. If you are uncertain about the nature of the opportunity cost, then you should present benefit and cost estimates using a higher discount rate as a further sensitivity analysis as well as using the 3 and 7 percent rates.

3. Time Preference for Health-Related Benefits and Costs

When future benefits or costs are health-related, some have questioned whether discounting is appropriate, since the rationale for discounting money may not appear to apply to health. It is true that lives saved today cannot be invested in a bank to save more lives in the future. But the resources that would have been used to save those lives can be invested to earn a higher payoff in future lives saved. People have been observed to prefer health gains that occur immediately to identical health gains that occur in the future. Also, if future health gains are not discounted while future costs are, then the following perverse result occurs: an attractive investment today in future health improvement can always be made more attractive by delaying the investment. For such reasons, there is a professional consensus that future health effects, including both benefits and costs, should be discounted at the same rate. This consensus applies to both BCA and CEA.

A common challenge in health-related analysis is to quantify the time lag between when a rule takes effect and when the resulting physical improvements in health status will be observed in the target population. In such situations, you must carefully consider the timing of health benefits before performing present-value calculations. It is not reasonable to assume that all of the benefits of reducing chronic diseases such as cancer and cardiovascular disease will occur immediately when the rule takes effect. For rules addressing traumatic injury, this lag period may be short. For chronic diseases it may take years or even decades for a rule to induce its full beneficial effects in the target population.

When a delay period between exposure to a toxin and increased probability of disease is likely (a so-called latency period), a lag between exposure reduction and reduced probability of disease is also likely. This latter period has sometimes been referred to as a "cessation lag," and it may or may not be of the same duration as the latency period. As a general matter, cessation lags will only apply to populations with at least some high-level exposure (e.g., before the rule

takes effect). For populations with no such prior exposure, such as those born after the rule takes effect, only the latency period will be relevant.

Ideally, your exposure-risk model would allow calculation of reduced risk for each year following exposure cessation, accounting for total cumulative exposure and age at the time of exposure reduction. The present-value benefits estimate could then reflect an appropriate discount factor for each year's risk reduction. Recent analyses of the cancer benefits stemming from reduction in public exposure to radon in drinking water have adopted this approach. They were supported by formal risk-assessment models that allowed estimates of the timing of lung cancer incidence and mortality to vary in response to different radon exposure levels.²²

In many cases, you will not have the benefit of such detailed risk assessment modeling. You will need to use your professional judgment as to the average cessation lag for the chronic diseases affected by your rule. In situations where information exists on latency but not on cessation lags, it may be reasonable to use latency as a proxy for the cessation lag, unless there is reason to believe that the two are different. When the average lag time between exposures and disease is unknown, a range of plausible alternative values for the time lag should be used in your analysis.

4. Intergenerational Discounting

Special ethical considerations arise when comparing benefits and costs across generations. Although most people demonstrate time preference in their own consumption behavior, it may not be appropriate for society to demonstrate a similar preference when deciding between the well-being of current and future generations. Future citizens who are affected by such choices cannot take part in making them, and today's society must act with some consideration of their interest.

One way to do this would be to follow the same discounting techniques described above and supplement the analysis with an explicit discussion of the intergenerational concerns (how future generations will be affected by the regulatory decision). Policymakers would be provided with this additional information without changing the general approach to discounting.

Using the same discount rate across generations has the advantage of preventing time-inconsistency problems. For example, if one uses a lower discount rate for future generations, then the evaluation of a rule that has short-term costs and long-term benefits would become more favorable merely by waiting a year to do the analysis. Further, using the same discount rate across generations is attractive from an ethical standpoint. If one expects future generations to be better off, then giving them the advantage of a lower discount rate would in effect transfer resources from poorer people today to richer people tomorrow.

Some believe, however, that it is ethically impermissible to discount the utility of future generations. That is, government should treat all generations equally. Even under this approach,

²² Committee on Risk Assessment of Exposure to Radon in Drinking Water, Board on Radiation Effects Research, Commission on Life Sciences (1996), *Risk Assessment of Radon in Drinking Water*, National Research Council, National Academy Press, Washington, DC.

it would still be correct to discount future costs and consumption benefits generally (perhaps at a lower rate than for intragenerational analysis), due to the expectation that future generations will be wealthier and thus will value a marginal dollar of benefits or costs by less than those alive today. Therefore, it is appropriate to discount future benefits and costs relative to current benefits and costs, even if the welfare of future generations is not being discounted. Estimates of the appropriate discount rate appropriate in this case, from the 1990s, ranged from 1 to 3 percent per annum.²³

A second reason for discounting the benefits and costs accruing to future generations at a lower rate is increased uncertainty about the appropriate value of the discount rate, the longer the horizon for the analysis. Private market rates provide a reliable reference for determining how society values time within a generation, but for extremely long time periods no comparable private rates exist. As explained by Martin Weitzman²⁴, in the limit for the deep future, the properly averaged certainty-equivalent discount factor (i.e., $1/[1+r]^t$) corresponds to the minimum discount rate having any substantial positive probability. From today's perspective, the only relevant limiting scenario is the one with the lowest discount rate – all of the other states at the far-distant time are relatively much less important because their expected present value is so severely reduced by the power of compounding at a higher rate.

If your rule will have important intergenerational benefits or costs you might consider a further sensitivity analysis using a lower but positive discount rate in addition to calculating net benefits using discount rates of 3 and 7 percent.

5. Time Preference for Non-Monetized Benefits and Costs

Differences in timing should be considered even for benefits and costs that are not expressed in monetary units, including health benefits. The timing differences can be handled through discounting. EPA estimated cost-effectiveness in its 1998 rule, "Control of Emissions from Nonroad Diesel Engines," by discounting both the monetary costs and the non-monetized emission reduction benefits over the expected useful life of the engines at the 7 percent real rate recommended in OMB Circular A-94.

Alternatively, it may be possible in some cases to avoid discounting non-monetized benefits. If the expected flow of benefits begins as soon as the cost is incurred and is expected to be constant over time, then annualizing the cost stream is sufficient, and further discounting of benefits is unnecessary. Such an analysis might produce an estimate of the annualized cost per ton of reduced emissions of a pollutant.

6. The Internal Rate of Return

The internal rate of return is the discount rate that sets the net present value of the discounted benefits and costs equal to zero. The internal rate of return does not generally

²³ Portney PR and Weyant JP, eds. (1999), *Discounting and Intergenerational Equity*, Resources for the Future, Washington, DC.

²⁴ Weitzman ML In Portney PR and Weyant JP, eds. (1999), *Discounting and Intergenerational Equity*, Resources for the Future, Washington, DC.

provide an acceptable decision criterion, and regulations with the highest internal rate of return are not necessarily the most beneficial. Nevertheless, it does provide useful information and for many it will offer a meaningful indication of regulation's impact. You should consider including the internal rate of return implied by your regulatory analysis along with other information about discounted net present values.

Other Key Considerations

1. Other Benefit and Cost Considerations

You should include these effects in your analysis and provide estimates of their monetary values when they are significant:

- Private-sector compliance costs and savings;
- Government administrative costs and savings;
- Gains or losses in consumers' or producers' surpluses;
- Discomfort or inconvenience costs and benefits; and
- Gains or losses of time in work, leisure and/or commuting/travel settings.

Estimates of benefits and costs should be based on credible changes in technology over time. For example, retrospective studies may provide evidence that "learning" will likely reduce the cost of regulation in future years. The weight you give to a study of past rates of cost savings resulting from innovation (including "learning curve" effects) should depend on both its timeliness and direct relevance to the processes affected by the regulatory alternative under consideration. In addition, you should take into account cost-saving innovations that result from a shift to regulatory performance standards and incentive-based policies. On the other hand, significant costs may result from a slowing in the rate of innovation or of adoption of new technology due to delays in the regulatory approval process or the setting of more stringent standards for new facilities than existing ones. In some cases agencies are limited under statute to consider only technologies that have been demonstrated to be feasible. In these situations, it may be useful to estimate costs and cost savings assuming a wider range of technical possibilities.

When characterizing technology changes over time, you should assess the likely technology changes that would have occurred in the absence of the regulatory action (technology baseline). Technologies change over time in both reasonably functioning markets and imperfect markets. If you assume that technology will remain unchanged in the absence of regulation when technology changes are likely, then your analysis will over-state both the benefits and costs attributable to the regulation.

Occasionally, cost savings or other forms of benefits accrue to parties affected by a rule who also bear its costs. For example, a requirement that engine manufacturers reduce emissions from engines may lead to technologies that improve fuel economy. These fuel savings will normally accrue to the engine purchasers, who also bear the costs of the technologies. There is no apparent market failure with regard to the market value of fuel saved because one would expect that consumers would be willing to pay for increased fuel economy that exceeded the cost

of providing it. When these cost savings are substantial, and particularly when you estimate them to be greater than the cost associated with achieving them, you should examine and discuss why market forces would not accomplish these gains in the absence of regulation. As a general matter, any direct costs that are averted as a result of a regulatory action should be monetized wherever possible and either added to the benefits or subtracted from the costs of that alternative.

2. The Difference between Costs (or Benefits) and Transfer Payments

Distinguishing between real costs and transfer payments is an important, but sometimes difficult, problem in cost estimation. Benefit and cost estimates should reflect real resource use. Transfer payments are monetary payments from one group to another that do not affect total resources available to society. A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers. The net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers. However, transfers from the United States to other nations should be included as costs, and transfers from other nations to the United States as benefits, as long as the analysis is conducted from the United States perspective.

You should not include transfers in the estimates of the benefits and costs of a regulation. Instead, address them in a separate discussion of the regulation's distributional effects. Examples of transfer payments include the following:

- Scarcity rents and monopoly profits
- Insurance payments
- Indirect taxes and subsidies

Treatment of Uncertainty

The precise consequences (benefits and costs) of regulatory options are not always known for certain, but the probability of their occurrence can often be developed. The important uncertainties connected with your regulatory decisions need to be analyzed and presented as part of the overall regulatory analysis. You should begin your analysis of uncertainty at the earliest possible stage in developing your analysis. You should consider both the statistical variability of key elements underlying the estimates of benefits and costs (for example, the expected change in the distribution of automobile accidents that might result from a change in automobile safety standards) and the incomplete knowledge about the relevant relationships (for example, the uncertain knowledge of how some economic activities might affect future climate change).²⁵ By assessing the sources of uncertainty and the way in which benefit and cost estimates may be affected under plausible assumptions, you can shape your analysis to inform decision makers and the public about the effects and the uncertainties of alternative regulatory actions.

²⁵ In some contexts, the word "variability" is used as a synonym for statistical variation that can be described by a theoretically valid distribution function, whereas "uncertainty" refers to a more fundamental lack of knowledge. Throughout this discussion, we use the term "uncertainty" to refer to both concepts.

The treatment of uncertainty must be guided by the same principles of full disclosure and transparency that apply to other elements of your regulatory analysis. Your analysis should be credible, objective, realistic, and scientifically balanced.²⁶ Any data and models that you use to analyze uncertainty should be fully identified. You should also discuss the quality of the available data used. Inferences and assumptions used in your analysis should be identified, and your analytical choices should be explicitly evaluated and adequately justified. In your presentation, you should delineate the strengths of your analysis along with any uncertainties about its conclusions. Your presentation should also explain how your analytical choices have affected your results.

In some cases, the level of scientific uncertainty may be so large that you can only present discrete alternative scenarios without assessing the relative likelihood of each scenario quantitatively. For instance, in assessing the potential outcomes of an environmental effect, there may be a limited number of scientific studies with strongly divergent results. In such cases, you might present results from a range of plausible scenarios, together with any available information that might help in qualitatively determining which scenario is most likely to occur.

When uncertainty has significant effects on the final conclusion about net benefits, your agency should consider additional research prior to rulemaking. The costs of being wrong may outweigh the benefits of a faster decision. This is true especially for cases with irreversible or large upfront investments. If your agency decides to proceed with rulemaking, you should explain why the costs of developing additional information—including any harm from delay in public protection—exceed the value of that information.

For example, when the uncertainty is due to a lack of data, you might consider deferring the decision, as an explicit regulatory alternative, pending further study to obtain sufficient data.²⁷ Delaying a decision will also have costs, as will further efforts at data gathering and analysis. You will need to weigh the benefits of delay against these costs in making your decision. Formal tools for assessing the value of additional information are now well developed in the applied decision sciences and can be used to help resolve this type of complex regulatory question.

“Real options” methods have also formalized the valuation of the added flexibility inherent in delaying a decision. As long as taking time will lower uncertainty, either passively or actively through an investment in information gathering, and some costs are irreversible, such as the potential costs of a sunk investment, a benefit can be assigned to the option to delay a decision. That benefit should be considered a cost of taking immediate action versus the alternative of delaying that action pending more information. However, the burdens of delay—including any harm to public health, safety, and the environment—need to be analyzed carefully.

1. Quantitative Analysis of Uncertainty

²⁶ When disseminating information, agencies should follow their own information quality guidelines, issued in conformance with the OMB government-wide guidelines (67 FR 8452, February 22, 2002).

²⁷ Clemen RT (1996), *Making Hard Decisions: An Introduction to Decision Analysis*, second edition, Duxbury Press, Pacific Grove.

Examples of quantitative analysis, broadly defined, would include formal estimates of the probabilities of environmental damage to soil or water, the possible loss of habitat, or risks to endangered species as well as probabilities of harm to human health and safety. There are also uncertainties associated with estimates of economic benefits and costs, such as the cost savings associated with increased energy efficiency. Thus, your analysis should include two fundamental components: a quantitative analysis characterizing the probabilities of the relevant outcomes and an assignment of economic value to the projected outcomes. It is essential that both parts be conceptually consistent. In particular, the quantitative analysis should be conducted in a way that permits it to be applied within a more general analytical framework, such as benefit-cost analysis. Similarly, the general framework needs to be flexible enough to incorporate the quantitative analysis without oversimplifying the results. For example, you should address explicitly the implications for benefits and costs of any probability distributions developed in your analysis.

As with other elements of regulatory analysis, you will need to balance thoroughness with the practical limits on your analytical capabilities. Your analysis does not have to be exhaustive, nor is it necessary to evaluate each alternative at every step. Attention should be devoted to first resolving or studying the uncertainties that have the largest potential effect on decision making. Many times these will be the largest sources of uncertainties. In the absence of adequate data, you will need to make assumptions. These should be clearly identified and consistent with the relevant science. Your analysis should provide sufficient information for decision makers to grasp the degree of scientific uncertainty and the robustness of estimated probabilities, benefits, and costs to changes in key assumptions.

For major rules involving annual economic effects of \$1 billion or more, you should present a formal quantitative analysis of the relevant uncertainties about benefits and costs. In other words, you should try to provide some estimate of the probability distribution of regulatory benefits and costs. In summarizing the probability distributions, you should provide some estimates of the central tendency (e.g., mean and median) along with any other information you think will be useful such as ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution.

Your estimates cannot be more precise than their most uncertain component. Thus, your analysis should report estimates in a way that reflects the degree of uncertainty and not create a false sense of precision. Worst-case or conservative analyses are not usually adequate because they do not convey the complete probability distribution of outcomes, and they do not permit calculation of an expected value of net benefits. In many health and safety rules, economists conducting benefit-cost analyses must rely on formal risk assessments that address a variety of risk management questions such as the baseline risk for the affected population, the safe level of exposure or, the amount of risk to be reduced by various interventions. Because the answers to some of these questions are directly used in benefits analyses, the risk assessment methodology must allow for the determination of expected benefits in order to be comparable to expected costs. This means that conservative assumptions and defaults (whether motivated by science policy or by precautionary instincts), will be incompatible with benefit analyses as they will result in benefit estimates that exceed the expected value. Whenever it is possible to characterize quantitatively the probability distributions, some estimates of expected value (e.g., mean and

median) must be provided in addition to ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution.

Whenever possible, you should use appropriate statistical techniques to determine a probability distribution of the relevant outcomes. For rules that exceed the \$1 billion annual threshold, a formal quantitative analysis of uncertainty is required. For rules with annual benefits and/or costs in the range from 100 million to \$1 billion, you should seek to use more rigorous approaches with higher consequence rules. This is especially the case where net benefits are close to zero. More rigorous uncertainty analysis may not be necessary for rules in this category if simpler techniques are sufficient to show robustness. You may consider the following analytical approaches that entail increasing levels of complexity:

- Disclose qualitatively the main uncertainties in each important input to the calculation of benefits and costs. These disclosures should address the uncertainties in the data as well as in the analytical results. However, major rules above the \$1 billion annual threshold require a formal treatment.
- Use a numerical sensitivity analysis to examine how the results of your analysis vary with plausible changes in assumptions, choices of input data, and alternative analytical approaches. Sensitivity analysis is especially valuable when the information is lacking to carry out a formal probabilistic simulation. Sensitivity analysis can be used to find “switch points” -- critical parameter values at which estimated net benefits change sign or the low cost alternative switches. Sensitivity analysis usually proceeds by changing one variable or assumption at a time, but it can also be done by varying a combination of variables simultaneously to learn more about the robustness of your results to widespread changes. Again, however, major rules above the \$1 billion annual threshold require a formal treatment.
- Apply a formal probabilistic analysis of the relevant uncertainties – possibly using simulation models and/or expert judgment as revealed, for example, through Delphi methods.²⁸ Such a formal analytical approach is appropriate for complex rules where there are large, multiple uncertainties whose analysis raises technical challenges, or where the effects cascade; it is required for rules that exceed the \$1 billion annual threshold. For example, in the analysis of regulations addressing air pollution, there is uncertainty about the effects of the rule on future emissions, uncertainty about how the change in emissions will affect air quality, uncertainty about how changes in air quality will affect health, and finally uncertainty about the economic and social value of the change in health outcomes. In formal probabilistic assessments, expert solicitation is a useful way to fill key gaps in your ability to assess uncertainty.²⁹ In general, experts can be used to quantify the probability distributions of key parameters and relationships. These solicitations, combined with other sources of data, can be combined in Monte Carlo simulations to derive a probability distribution of benefits and costs. You should

²⁸ The purpose of Delphi methods is to generate suitable information for decision making by eliciting expert judgment. The elicitation is conducted through a survey process which eliminates the interactions between experts. See Morgan MG and Henrion M (1990), *Uncertainty: A Guide to Dealing with Uncertainty in Quantitative Risk and Policy Analysis*, Cambridge University Press.

²⁹ Cooke RM (1991), *Experts in Uncertainty: Opinion and Subjective Probability in Science*, Oxford University Press.

pay attention to correlated inputs. Often times, the standard defaults in Monte Carlo and other similar simulation packages assume independence across distributions. Failing to correctly account for correlated distributions of inputs can cause the resultant output uncertainty intervals to be too large, although in many cases the overall effect is ambiguous. You should make a special effort to portray the probabilistic results—in graphs and/or tables—clearly and meaningfully.

New methods may become available in the future. This document is not intended to discourage or inhibit their use, but rather to encourage and stimulate their development.

2. Economic Values of Uncertain Outcomes

In developing benefit and cost estimates, you may find that there are probability distributions of values as well for each of the outcomes. Where this is the case, you will need to combine these probability distributions to provide estimated benefits and costs.

Where there is a distribution of outcomes, you will often find it useful to emphasize summary statistics or figures that can be readily understood and compared to achieve the broadest public understanding of your findings. It is a common practice to compare the “best estimates” of both benefits and costs with those of competing alternatives. These “best estimates” are usually the average or the expected value of benefits and costs. Emphasis on these expected values is appropriate as long as society is “risk neutral” with respect to the regulatory alternatives. While this may not always be the case, you should in general assume “risk neutrality” in your analysis. If you adopt a different assumption on risk preference, you should explain your reasons for doing so.

3. Alternative Assumptions

If benefit or cost estimates depend heavily on certain assumptions, you should make those assumptions explicit and carry out sensitivity analyses using plausible alternative assumptions. If the value of net benefits changes from positive to negative (or vice versa) or if the relative ranking of regulatory options changes with alternative plausible assumptions, you should conduct further analysis to determine which of the alternative assumptions is more appropriate. Because different estimation methods may have hidden assumptions, you should analyze estimation methods carefully to make any hidden assumptions explicit.

F. Specialized Analytical Requirements

In preparing analytical support for your rulemaking, you should be aware that there are a number of analytic requirements imposed by law and Executive Order. In addition to the regulatory analysis requirements of Executive Order 12866, you should also consider whether your rule will need specialized analysis of any of the following issues.

Impact on Small Businesses and Other Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. chapter 6), agencies must prepare a proposed and final "regulatory flexibility analysis" (RFA) if the rulemaking could "have a significant impact on a substantial number of small entities." You should consider posting your RFA on the internet so the public can review your findings.

Your agency should have guidelines on how to prepare an RFA and you are encouraged to consult with the Chief Counsel for Advocacy of the Small Business Administration on expectations concerning what is an adequate RFA. Executive Order 13272 (67 FR 53461, August 16, 2002) requires you to notify the Chief Counsel for Advocacy of any draft rules that might have a significant economic impact on a substantial number of small entities. Executive Order 13272 also directs agencies to give every appropriate consideration to any comments provided by the Advocacy Office. Under SBREFA, EPA and OSHA are required to consult with small business prior to developing a proposed rule that would have a significant effect on small businesses. OMB encourages other agencies to do so as well.

Analysis of Unfunded Mandates

Under the Unfunded Mandates Act (2 U.S.C. 1532), you must prepare a written statement about benefits and costs prior to issuing a proposed or final rule (for which your agency published a proposed rule) that may result in aggregate expenditure by State, local, and tribal governments, or by the private sector, of \$100,000,000 or more in any one year (adjusted annually for inflation). Your analytical requirements under Executive Order 12866 are similar to the analytical requirements under this Act, and thus the same analysis may permit you to comply with both analytical requirements.

Information Collection, Paperwork, and Recordkeeping Burdens

Under the Paperwork Reduction Act (44 U.S.C. chapter 35), you will need to consider whether your rulemaking (or other actions) will create any additional information collection, paperwork or recordkeeping burdens. These burdens are permissible only if you can justify the practical utility of the information for the implementation of your rule. OMB approval will be required of any new requirements for a collection of information imposed on 10 or more persons and a valid OMB control number must be obtained for any covered paperwork. Your agency's CIO should be able to assist you in complying with the Paperwork Reduction Act.

Information Quality Guidelines

Under the Information Quality Law, agency guidelines, in conformance with the OMB government-wide guidelines (67 FR 8452, February 22, 2002), have established basic quality performance goals for all information disseminated by agencies, including information disseminated in support of proposed and final rules. The data and analysis that you use to support your rule must meet these agency and OMB quality standards. Your agency's CIO should be able to assist you in assessing information quality. The Statistical and Science Policy

Branch of OMB's Office of Information and Regulatory Affairs can provide you assistance. This circular defines OMB's minimum quality standards for regulatory analysis.

Environmental Impact Statements

The National Environmental Policy Act (42 U.S.C. 4321-4347) and related statutes and executive orders require agencies to consider the environmental impacts of agency decisions, including rulemakings. An environmental impact statement must be prepared for "major Federal actions significantly affecting the quality of the human environment." You must complete NEPA documentation before issuing a final rule. The White House Council on Environmental Quality has issued regulations (40 C.F.R. 1500-1508) and associated guidance for implementation of NEPA, available through CEQ's website (<http://www.whitehouse.gov/ceq/>).

Impacts on Children

Under Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," each agency must, with respect to its rules, "to the extent permitted by law and appropriate, and consistent with the agency's mission," "address disproportionate risks to children that result from environmental health risks or safety risks." For any substantive rulemaking action that "is likely to result in" an economically significant rule that concerns "an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children," the agency must provide OMB/OIRA "an evaluation of the environmental health or safety effects of the planned regulation on children," as well as "an explanation of why the planned regulation is preferable to other potentially and reasonably feasible alternatives considered by the agency."

Energy Impacts

Under Executive Order 13211 (66 FR 28355, May 22, 2001), agencies are required to prepare and submit to OMB a Statement of Energy Effects for significant energy actions, to the extent permitted by law. This Statement is to include a detailed statement of "any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies)" for the action and reasonable alternatives and their effects. You need to publish the Statement or a summary in the related NPRM and final rule. For further guidance, see OMB Memorandum 01-27 ("Guidance on Implementing Executive Order 13211", July 13, 2001), available on OMB's website.

G. Accounting Statement

You need to provide an accounting statement with tables reporting benefit and cost estimates for each major final rule for your agency. You should use the guidance outlined above to report these estimates. We have included a suggested format for your consideration.

Categories of Benefits and Costs

To the extent feasible, you should quantify all potential incremental benefits and costs. You should report benefit and cost estimates within the following three categories: monetized quantified, but not monetized; and qualitative, but not quantified or monetized.

These categories are mutually exclusive and exhaustive. Throughout the process of listing preliminary estimates of benefits and costs, agencies should avoid double-counting. This problem may arise if more than one way exists to express the same change in social welfare.

Quantifying and Monetizing Benefits and Costs

You should develop quantitative estimates and convert them to dollar amounts if possible. In many cases, quantified estimates are readily convertible, with a little effort, into dollar equivalents.

Qualitative Benefits and Costs

You should categorize or rank the qualitative effects in terms of their importance (e.g., certainty, likely magnitude, and reversibility). You should distinguish the effects that are likely to be significant enough to warrant serious consideration by decision makers from those that are likely to be minor.

Treatment of Benefits and Costs over Time

You should present undiscounted streams of benefit and cost estimates (monetized and net) for each year of the analytic time horizon. You should present annualized benefits and costs using real discount rates of 3 and 7 percent. The stream of annualized estimates should begin in the year in which the final rule will begin to have effects, even if the rule does not take effect immediately. Please report all monetized effects in 2001 dollars. You should convert dollars expressed in different years to 2001 dollars using the GDP deflator.

Treatment of Risk and Uncertainty

You should provide expected-value estimates as well as distributions about the estimates, where such information exists. When you provide only upper and lower bounds (in addition to best estimates), you should, if possible, use the 95 and 5 percent confidence bounds. Although we encourage you to develop estimates that capture the distribution of plausible outcomes for a particular alternative, detailed reporting of such distributions is not required, but should be available upon request.

The principles of full disclosure and transparency apply to the treatment of uncertainty. Where there is significant uncertainty and the resulting inferences and/or assumptions have a critical effect on the benefit and cost estimates, you should describe the benefits and costs under plausible alternative assumptions. You may add footnotes to the table as needed to provide documentation and references, or to express important warnings.

In a previous section, we identified some of the issues associated with developing estimates of the value of reductions in premature mortality risk. Based on this discussion, you should present alternative primary estimates where you use different estimates for valuing reductions in premature mortality risk.

Precision of Estimates

Reported estimates should reflect, to the extent feasible, the precision in the analysis. For example, an estimate of \$220 million implies rounding to the nearest \$10 million and thus a precision of +/- \$5 million; similarly, an estimate of \$222 million implies rounding to the nearest \$1 million and thus, a precision of +/- \$0.5 million.

Separate Reporting of Transfers

You should report transfers separately and avoid the misclassification of transfer payments as benefits or costs. Transfers occur when wealth or income is redistributed without any direct change in aggregate social welfare. To the extent that regulatory outputs reflect transfers rather than net welfare gains to society, you should identify them as transfers rather than benefits or costs. You should also distinguish transfers caused by Federal budget actions -- such as those stemming from a rule affecting Social Security payments -- from those that involve transfers between non-governmental parties -- such as monopoly rents a rule may confer on a private party. You should use as many categories as necessary to describe the major redistributive effects of a regulatory action. If transfers have significant efficiency effects in addition to distributional effects, you should report them.

Effects on State, Local, and Tribal Governments, Small Business, Wages and Economic Growth

You need to identify the portions of benefits, costs, and transfers received by State, local, and tribal governments. To the extent feasible, you also should identify the effects of the rule or program on small businesses, wages, and economic growth.³⁰ Note that rules with annual costs that are less than one billion dollars are likely to have a minimal effect on economic growth.

³⁰ The Regulatory Flexibility Act (5 U.S.C. 603(c), 604).

OMB #:

Agency/Program Office:

Rule Title:

RIN#:

Date:

<i>Category</i>	<i>Primary Estimate</i>	<i>Minimum Estimate</i>	<i>Maximum Estimate</i>	<i>Source Citation (RIA, preamble, etc.)</i>
<i>BENEFITS</i>				
monetized benefits				
Annualized quantified, but unmonetized, benefits				
(unquantified) benefits				
<i>COSTS</i>				
Annualized monetized costs				
Annualized quantified, but unmonetized, costs				
Qualitative (unquantified) costs				
<i>TRANSFERS</i>				
Annualized monetized transfers: "on budget"				
from whom to whom?				
Annualized monetized transfers: "off-budget"				
From whom to whom?				
<i>Category</i>	<i>Effects</i>			<i>Source Citation (RIA, preamble, etc.)</i>
Effects on State, local, and/or tribal governments				
Effects on small businesses				
Effects on wages				
Effects on growth				

H. Effective Date

The effective date of this Circular is January 1, 2004 for regulatory analyses received by OMB in support of proposed rules, and January 1, 2005 for regulatory analyses received by OMB in support of final rules. In other words, this Circular applies to the regulatory analyses for draft proposed rules that are formally submitted to OIRA after December 31, 2003, and for draft final rules that are formally submitted to OIRA after December 31, 2004. (However, if the draft proposed rule is subject to the Circular, then the draft final rule will also be subject to the Circular, even if it is submitted prior to January 1, 2005.) To the extent practicable, agencies should comply earlier than these effective dates. Agencies may, on a case-by-case basis, seek a waiver from OMB if these effective dates are impractical.

Presidential Documents

Title 3—

Executive Order 12866 of September 30, 1993

The President

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.*

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

- (1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
- (2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is

intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the 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.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. Organization. An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. Definitions. For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

- (1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;
- (2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;
- (3) Regulations or rules that are limited to agency organization, management, or personnel matters; or
- (4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices

of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. Planning Mechanism. In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

- (A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;
- (B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- (C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- (D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;
- (E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. Existing Regulations. In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not

duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. *Centralized Review of Regulations.* The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

- (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and
- (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rule-making proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rule-making, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

- (i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;
- (ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and
- (iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. Resolution of Conflicts. To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. Publication. Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a

regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. Agency Authority. Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. Revocations. Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.

A handwritten signature in black ink, reading "William Clinton". The signature is written in a cursive, flowing style.

THE WHITE HOUSE,
September 30, 1993.

ABA ADMINISTRATIVE LAW CONFERENCE

Panel On

Improving Regulation for Businesses: The Need, the Means, and the Challenges

November 1, 2018

Backgrounder: The Problem of Regulation on Small Business

Overzealous regulation is a continuous concern for small business. The uncertainty caused by future regulation effectively acts as a “boot on the neck” of small business – negatively impacting a small business owner’s ability to plan for future growth. Since January 2009, “government regulations and red tape” have been listed as among the top-three problems for small business owners, according to the NFIB Research Center’s monthly Small Business Economic Trends survey.¹ Within the small business problem clusters identified by the NFIB’s Small Business Problems and Priorities report, “regulations” rank second only behind taxes.²

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.³ This is not surprising since it’s the small business owner, not one of a team of “compliance officers” who is charged with understanding new regulations, filling out required paperwork, and ensuring the business complies with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with federal regulation is one less hour she has available to service customers and plan for future growth.

In a Small Business Poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a “very serious” (25 percent) or “somewhat serious” (24 percent) problem.⁴ NFIB’s survey was taken at the end of 2016, and, at that time, 51 percent of small business owners reported an increase in the number of regulations impacting their business over the last three years.⁵

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.⁶ Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees, since 72 percent of small business owners in that cohort try to

¹ *Small Business Economic Trends*, NFIB Research Center (Jan., 2018), 18, available online at <https://www.nfib.com/assets/SBET-January-2018-1.pdf> (last visited March 1, 2018).

² Holly Wade, *Small Business Problems and Priorities*, NFIB Research Foundation, 17, (August, 2016), available online at <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf> (last visited March 1, 2018).

³ Babson, *The State of Small Business in America 2016*; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, (September 10, 2014), available online at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf> (last visited March 1, 2018).

⁴ Holly Wade, *Regulations*, Vol. 13, Issue 3, 2017, 6, available online at <http://411sbfacts.com/files/Regulations%202017.pdf> (last visited March 1, 2018).

⁵ *Id.*

⁶ *Id.*

figure out how to comply themselves, as opposed to assigning that responsibility to someone else.⁷

Finally, NFIB's research shows that it's the volume of regulations that poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.⁸

⁷ *Id.* at 10.

⁸ *Id.* at 9.



National Small Business Poll

NFIB National

Volume 13, Issue 3
2017

Small Business Poll

Regulations

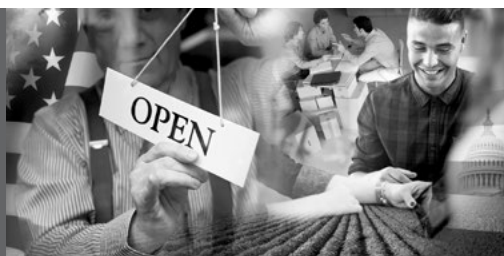
NFIB National Small Business Poll

The **National Small Poll** is a series of regularly published survey reports based on data collected from national samples of small business employers. The initial volume was published in 2001. The **Poll** is designed to address small business oriented topics about which little is known but interest is high. Each survey report looks into a different subject matter.

The survey reports in this series generally contain three sections. The first section is a brief Executive Summary outlining a small number of themes or salient points from the survey. The second is a longer, generally descriptive, exposition of the results. This section is not intended to be a thorough analysis of the data collected nor to explore a group of formal hypotheses. Rather, it is intended to textually describe that which appears subsequently in tabular form. The third section consists of a single series of tables. The tables display each question posed in the survey broken out by employee size of firm.

Individual reports are publicly accessible on the NFIB web site www.411sbfacts.com. The 411 site also allows the user to search the entire data base. It searches all the questions in all of the individual **Polls** with a user-friendly key word, topic, or **Poll** sort facility.

NFIB National
Small Business
Poll



Regulations

Volume 13, Issue 3
2017
ISSN - 1534-8326

Holly S. Wade
NFIB Research Foundation
Series Editor



1201 "F" Street, NW
Suite 200
Washington, DC 20004
nfib.com

National Small Business Poll



Regulations

Table of Contents

Executive Summary	1
Regulations	3
Tables	6
Data Collection Methods	17

Executive Summary

- One-quarter of small employers find government regulations a “very serious” problem in operating their business (Q#1), regulations are a “somewhat serious” problem for another 24 percent of small employers.
- Roughly half of small employers have experienced an increase in the number of regulations they must comply with in the last three years compared to only 2 percent who experienced a decline (Q#2).
- The single greatest regulatory problem for small employers is the *cost* of compliance (Q#3). About 28 percent of small employers cite compliance costs as their largest regulatory issue followed by 18 percent citing the difficulty of understanding what they must do to comply. Seventeen percent are most burdened by the extra paperwork required.
- The volume of regulations is the largest problem for 55 percent of small employers compared to 37 percent who are most troubled by a few specific regulations coming from one or two sources (Q#11).
- One-third of small employers have had a government official enter their place of business to inspect or examine their records and/or licenses or otherwise check on their compliance with some government requirement in the last 12 months (Q#18). For larger small business, 57 percent were visited in the last 12 months compared to 28 percent for the smallest ones.
- Over the last three years, 41 percent of small employers have reached out to talk with someone at a government agency for help complying with a regulation (Q#19). About 19 percent of small employers who contacted a government agency were very satisfied with their experience (Q#20).
- Almost one-in-ten small employers have been fined, sued or penalized for a regulatory related violation in the last 3 years (Q#21). Larger businesses are twice as likely to have this occur compared to smaller ones.
- Twenty percent find regulations affecting their business of limited value and 31 percent find them of little or no value for customers or consumers and not worth the cost of compliance (Q#22).

Regulations

Small-business owners frequently cite regulations as one of the largest obstacles in operating their businesses. The regulatory obstacles faced by owners vary in specificity. Some owners are overwhelmed by the general volume of regulatory compliances, some are burdened by one or two. The *NFIB Small Business Problems and Priorities* survey found “unreasonable government regulations” is a critical issue for one-third of small-business owners. Unlike tax policy, which broadly impacts all firms in much the same way, regulations are administered by a myriad of government agencies, at different levels of government impacting sometimes very narrowly defined types of businesses. Thus, it is difficult to construct a comprehensive approach to easing the burden. However, the better policy makers understand the impact of regulations on small-business owners, the more able they will be to lessen the burden. This edition of the *National Small Business Poll* series examines Regulations. The NFIB Research Foundation published similar surveys on regulations in 2001 and 2012. This edition offers an update to those publications to highlight differences over time and new regulatory challenges.

Problem Severity

One-quarter of small employers find government regulations a “very serious” problem in operating their business (Q#1). This is down 20 percentage points from the 2012 survey but similar to 2001 results. In 2012, small-business owners were struggling though the regulatory upheaval caused by the sweeping healthcare law, Dodd-Frank, labor related regulations and others reform efforts. Over the last four years, owners have adjusted to their new regulatory reality, absorbing new paperwork burdens and costs into business operations. While 25 percent find regulatory compliance a “very serious” problem, it is a “somewhat serious” problem for another 24 percent of small employers, about the same population size as in 2012. About one-in-five small employers find regulations “not too serious” a problem and 28 percent do not find regulations to be a serious problem at all.

Roughly half of small employers have experienced an increase in the number of regulations they must comply with compared

to only 2 percent who experienced a decline (Q#2). Another 45 percent of owners did not experience a change one way or another. The increase in regulatory compliance costs over the last three years has affected a greater number of large small businesses than small ones. Sixty-five percent of larger small employers (20 to 249 employees) experienced an increase in the number of regulations they must comply with over the last three years compared to 49 percent of smaller small employers, those with 1 to 9 employees.

Problem Source

The single greatest regulatory problem for small-business owners is the cost of compliance (Q#3). About 28 percent of small employers cite compliance costs as their largest regulatory issue followed by 18 percent citing the difficulty of understanding what they must do to comply. Seventeen percent find the extra paperwork required as their biggest issue. Time delays caused by regulations are the biggest problem for one-

in-ten owners and 6 percent cite the difficulty discovering new regulations.

All levels of government contribute to the regulatory compliance burden. Each level of government imposes its own regulatory burden on small businesses. But the main culprit for half of small employers is the federal government (Q#4). Thirty percent find regulations promulgated at the state level most burdensome while 15 percent are most impacted on the local level. These are roughly unchanged from the 2012 and 2001 surveys.

The economic burden varies substantially across regulators and the type of regulation. About 28 percent of owners are most burdened by tax-related regulations (Q#5). Seventeen percent each are most impacted by employee-related, environmental, land and zoning, and operational regulations. Fifteen percent are most bothered by regulations related to health and safety.

The type of health and safety regulations most burdensome for 19 percent of small employers are OSHA related followed by 16 percent who are most affected by drug and medical treatment regulations (Q#6). Fifteen percent are most impacted by health and safety regulations related to the health care law. Forty percent of respondents did not select a specific category.

Wage and hour rules are the most significant problem for those who are most impacted by employment related regulations (Q#7). Nearly half of those most affected by employee related issues cite wage and hour rules as the problem. Hiring and firing regulations cause the greatest problem for 17 percent in this category and 14 percent are most troubled by issues related to workers' compensation.

Of those most affected by tax-related regulations, 29 percent are most troubled by withholding or employment rules, and 25 percent are most affected by sales and use tax rules (Q#8). The biggest tax-related problem for 13 percent are the reporting requirements.

Zoning, land use or run-off is the greatest problem for over half (52 percent) of those owners most impacted by environmental regulations (Q#9). Fifteen percent of owners in this category are most impacted by hazardous or toxic substance related regulations. And, of those most burdened by operational type regulations, understanding and complying with the rules are most are the biggest problem for 43 percent of small employers (Q#10).

The volume of regulations is the largest problem for 55 percent of small employers compared to 37 percent who are most troubled by a few specific regulations coming from one or two sources (Q#11).

Regulatory Information

Often small employers face a variety of regulations coming from more than one level of government.

Small-business owners discover new regulations from a variety of sources. Outside advisors and direct contact from regulatory agencies are the two most frequently cited sources (Q#13, Q#15). A less frequently cited source of information, although still at 43 percent, is general web site searches (Q#12). About 47 percent of small employer receive information from a trade or business association (Q#14). And about half of small business owner learn about new regulations from other business owners (Q#16).

Once owners are aware of a new regulation, the vast majority of them learn about the specifics of the regulation on their own. About 69 percent of small employers check out the compliance requirements themselves (Q#17). Roughly 15 percent of owners rely on an expert to find out more information. Only 7 percent assign the task to an employee. Larger, small businesses though are more reliant on employees and experts for information gathering than smaller businesses.

Interactions with the Regulators

One-third of small employers have had a government official enter their place of business to inspect or examine their records and/or licenses or otherwise check on their compliance with some government requirement in the last 12 months (Q#18). For larger small business, 57 percent were visited in the last 12 months compared to 28 percent for the smallest ones.

Over the last three years, 41 percent of small employers have reached out to talk with someone at a government agency for help complying with a regulation (Q#19). About 19 percent of small employers who contacted a government agency were very satisfied with their experience (Q#20). Another 50 percent were generally satisfied. Thirty percent evaluated their experience as generally unsatisfactory or very unsatisfactory.

Almost one-in-ten small employers have been fined, sued or penalized for a regulatory

related violation in the last 3 years (Q#21). Larger businesses are twice as likely to have this occur compared to smaller ones.

About 16 percent of small employers characterize the regulations for which they comply as very valuable for customers or consumers and worth the cost of compliance (Q#22). One-quarter of small employers believe the regulations that they must comply with are of moderate value for customers or consumers and are worth the cost of compliance. Twenty percent find them of limited value, and 31 percent find them of little or no value for customers or consumers and not worth the cost of compliance.

Final Comments

Small businesses have two major assets: the capital they can accumulate through earnings to grow the business and the time and energy of the business owner. Both of these are managed to provide goods and services to consumers, earn a profit and grow the business and the firm’s employment to get the job done. Regulations force owners to do things that they would not ordinarily choose to do in the course of business. In some cases, regulations deal with “externalities” which compel owners to deal with costs they impose on others in operating their firms. But imposing regulations uses up valuable financial capital and owner time, and this slows the growth of the firm. For this reason, “cost/benefit” criteria are imposed on many regulatory agencies (with some exceptions including the EPA), requiring them to assess the benefits of a proposed regulation and compare these to the resource cost of implementing it. The fact that this is difficult sometimes is no excuse for not doing it. Over the past eight years, record volumes of regulations have been imposed by the federal government as well as state and local authorities with little or no concern given to the net value of the regulations to society in comparison to the costs of compliance. Few if any regulatory agencies consider the overall costs of all regulations on firms when considering their own. Each agency acts as if there is no limit to the amount of money that firms can collectively spend on compliance; there is no coordination, no priorities set.

Half of the small business owners in this study consider the regulatory morass as a “serious” problem, threatening their growth or existence. Less than 1 in 5 business owners

think that the regulations they deal with are of value to customers and consumers and their surrounding community. In simple terms, regulatory compliance uses up valuable human and financial capital which is not limitless. The more spent on compliance, the less that is available to finance growth and development. It is important that collectively we become much more concerned about “getting our money’s worth” from the trillions of dollars the private sector is forced to spend on regulatory compliance.

Regulations

(Please review notes at the table's end.)

		Employee Size of Firm			
		1-9 emp	10-19 emp	20-249 emp	All Firms
1.	Is government regulation in the United States a very serious, somewhat serious, not too serious, or not at all serious problem for your business?				
	1. Very serious	23.7%	21.8%	37.5%	24.8%
	2. Somewhat serious	23.4	29.5	26.4	24.3
	3. Not too serious	21.2	25.6	16.7	21.1
	4. Not at all serious	30.2	21.8	18.1	28.2
	5. (DK/Refuse)	1.5	1.3	1.4	1.5
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
2.	In the last 3 years have the number of regulations affecting your business increased, decreased or basically remained the same?				
	1. Increased	49.0%	51.6%	65.0%	51.1%
	2. Decreased	2.9	1.6	—	2.4
	3. Remained the same	46.9	45.2	33.3	45.2
	4. (DK/Refuse)	1.2	1.6	1.7	1.3
	Total	100.0%	100.0%	100.0%	100.0%
	N	243	157	164	564
3.	What is the single greatest problem created for your business by government regulation? Is it the:?				
	1. Limits placed on actions you want to take	8.0%	6.5%	5.0%	7.4%
	2. The extra paperwork required	16.4	17.7	21.7	17.1
	3. Time delays that it causes	10.6	9.7	8.3	10.2
	4. Difficulty discovering new regulations	6.5	4.8	5.0	6.1
	5. Difficulty understanding what you have to do to comply	18.6	17.7	13.3	17.9
	6. Dollars spent to comply	27.2	27.4	30.0	27.6
	7. (All of the above)	2.4	1.6	5.0	2.6
	8. (Something else)	7.0	4.8	5.0	6.5
	9. None	3.4	8.1	5.0	4.1
	10. (DK/Refuse)	—	1.6	1.7	0.4
	Total	100.0%	100.0%	100.0%	100.0%
	N	243	157	164	564

4. Which level of American government creates the most serious regulatory problems for you? Is it the?:

1. Federal government	49.3%	46.8%	57.6%	49.9%
2. State government	28.8	38.7	32.2	30.4
3. Local government	16.8	11.3	8.5	15.3
4. (DK/Refuse)	5.0	3.2	1.7	4.5
Total	100.0%	100.0%	100.0%	100.0%
N	243	157	164	564

5. What type of regulations, federal, state or local, cause the greatest difficulties for you? Is it?:

1. Health and safety	14.4%	16.4%	16.7%	14.9%
2. Employee-related, except health and safety	15.6	21.7	21.7	16.9
3. Tax-related	30.5	21.3	20.0	28.3
4. Environmental, land use, and zoning	18.0	14.8	11.7	16.9
5. Operational	15.6	21.3	20.0	16.8
6. All of the above	2.2	—	3.3	2.0
7. Other	2.9	3.3	5.0	3.2
8. (DK/Refuse)	0.7	1.6	1.7	0.9
Total	100.0%	100.0%	100.0%	100.0%
N	243	157	164	564

6. What type of health and safety regulations cause the greatest problems for you?

1. Food related	8.3%	10.0%	10.0%	8.8%
2. OSHA	15.0	40.0	20.0	18.8
3. Construction design or quality	—	10.0	—	1.3
4. Drug or medical treatment	16.7	10.0	20.0	16.3
5. Health insurance/ACA	16.7	10.0	10.0	15.0
6. (Other)	—	—	—	—
7. (DK/Refuse)	43.3	20.0	40.0	40.0
Total	100.0%	100.0%	100.0%	100.0%
N	35	25	27	87

7. What type of employment-related regulations cause the greatest problems for you?

1. Wages and hour rules	42.2%	50.0%	58.3%	45.5%
2. Immigration	7.8	8.3	—	6.8
3. Disabilities or civil rights	4.7	—	—	3.4
4. Union organizing activity	—	—	—	0.0
5. Hiring and Firing	18.8	8.3	16.7	17.0
6. Workers compensation	14.1	16.7	8.3	13.6
7. Unemployment	4.7	16.7	—	5.7
8. (Other)	7.8	—	16.7	8.0
Total	100.0%	100.0%	100.0%	100.0%
N	38	32	35	105

8. What type of tax-related regulations cause the greatest problems for you?

1. Depreciation	3.9%	—%	—%	3.3%
2. Capital gains rules	3.9	—	—	3.3
3. Sales and use tax rules	24.4	25.0	27.3	24.7
4. Withholding or employment	30.7	25.0	18.2	29.3
5. Reporting requirements	13.4	16.7	9.1	13.3
6. (Other)	16.5	16.7	27.3	17.3
7. (DK/Refuse)	7.1	16.7	18.2	8.7
Total	100.0%	100.0%	100.0%	100.0%
N	74	33	33	140

9. What type of environmental regulations cause the greatest problems for you?

1. Zoning, land use, or run-off	54.7%	22.2%	57.1%	51.6%
2. Hazardous or toxic substances	13.3	44.4	—	15.4
3. Clean water	6.7	11.1	14.3	7.7
4. Clean air	4.0	—	14.3	4.4
5. Solid waste disposal	2.7	—	—	2.2
6. (Other)	16.0	22.2	—	15.4
7. (DK/Refuse)	2.7	—	14.3	3.3
Total	100.0%	100.0%	100.0%	100.0%
N	44	23	19	86

10. What type of operational regulations cause the greatest problems for you?

1. Occupational licenses	10.8%	15.4%	8.3%	11.1%
2. Limits on production or work	4.6	7.7	—	4.4
3. Government reimbursement for services or procurement	3.1	—	8.3	3.3
4. Operations rules	44.6	46.2	33.3	43.3
5. Finance, insurance or securities requirements	29.2	7.7	16.7	24.4
6. (Other)	7.7	15.4	16.7	10.0
7. (DK/Refuse)	—	7.7	16.7	3.3
Total	100.0%	100.0%	100.0%	100.0%
N	38	34	34	106

11. Which BEST describes the source of your regulatory problems?

1. A few specific regulations coming from one or two sources	38.2%	32.8%	28.8%	36.6%
2. The volume coming from many sources	52.6	60.7	64.4	54.9
3. (DK/Refuse)	9.1	6.6	6.8	8.6
Total	100.0%	100.0%	100.0%	100.0%
N	243	157	164	564

How do you normally learn about new regulations?

12. General Web site search

1. Yes	42.2%	44.3%	43.7%	42.6%
2. No	56.6	53.2	54.9	56.1
3. (DK/Refuse)	1.2	2.5	1.4	1.3
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

13. Direct contact from a regulatory agency, such as inspectors, advisory letters or flyers

1. Yes	54.3%	68.4%	62.5%	56.6%
2. No	45.2	31.6	36.1	42.9
3. (DK/Refuse)	0.5	—	1.4	0.5
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

		Employee Size of Firm			
		1-9 emp	10-19 emp	20-249 emp	All Firms
14.	A trade or business association				
	1. Yes	45.7%	46.8%	55.6%	46.8%
	2. No	53.4	51.9	41.7	52.1
	3. (DK/Refuse)	0.8	1.3	2.8	1.1
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
15.	Outside advisors such as an accountant or lawyer				
	1. Yes	55.9%	54.4%	64.4%	56.6%
	2. No	42.9	44.3	34.2	42.2
	3. (DK/Refuse)	1.2	1.3	1.4	1.2
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
16.	Other business owners				
	1. Yes	50.8%	49.4%	48.6%	50.5%
	2. No	47.3	48.1	50.0	47.7
	3. (DK/Refuse)	1.8	2.5	1.4	1.9
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750
17.	Once you learn that a new government requirement affects you, how do you learn about the specific requirements?				
	1. Assign an employee to check out compliance requirements	5.5%	11.4%	11.0%	6.7%
	2. Check out compliance requirements yourself	72.0	59.5	56.2	69.1
	3. Find an expert to check out the compliance requirements for you	14.5	15.2	19.2	15.0
	4. All of the above	2.8	2.5	2.7	2.8
	5. (Other)	3.2	8.9	11.0	4.5
	6. (DK/Refuse)	2.0	2.5	—	1.6
	Total	100.0%	100.0%	100.0%	100.0%
	N	350	200	200	750

18. Within the last 12 months, has one or more government officials entered your place of business to inspect it, examine your records and/or licenses, or otherwise check on your compliance with some government requirement?

1. Yes	28.1%	51.9%	56.9%	33.4%
2. No	70.9	46.8	43.1	65.7
3. (DK/Refuse)	1.0	1.3	—	0.9
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

19. In the last 3 years have you reached out to talk with someone at a government agency for help complying with a regulation?

1. Yes	39.4%	50.0%	45.8%	41.1%
2. No	57.9	47.4	48.6	55.9
3. (DK/Refuse)	2.6	2.6	5.6	3.0
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

20. Was your experience contacting the agency very satisfactory, generally satisfactory, generally unsatisfactory, or very unsatisfactory?

1. Very satisfactory	19.4%	21.1%	14.7%	19.1%
2. Generally satisfactory	46.4	52.6	38.2	46.3
3. Neither satisfactory nor unsatisfactory	3.0	2.6	8.8	3.6
4. Generally unsatisfactory	16.5	13.2	14.7	15.9
5. Very unsatisfactory	13.9	10.5	20.6	14.2
6. (DK/Refuse)	0.8	—	2.9	1.0
Total	100.0%	100.0%	100.0%	100.0%
N	138	99	92	329

21. In the last 3 years have you been fined, sued or penalized for a regulatory related violation?

1. Yes	8.0%	13.9%	16.7%	9.5%
2. No	91.2	84.8	81.9	89.6
3. (DK/Refuse)	0.8	1.3	1.4	0.9
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

		Employee Size of Firm			
		1-9 emp	10-19 emp	20-249 emp	All Firms
22. Overall, would you characterize the regulations you must comply with:?					
1. Very valuable for customers or consumers and worth the cost of compliance	15.7%	16.7%	16.7%	15.9%	
2. Of moderate value for customers or consumers and worth the cost of compliance	23.4	29.5	29.2	24.6	
3. Of limited value for customers or consumers but not worth the cost of compliance	20.0	19.2	19.4	19.9	
4. Of little or no value for customers or consumers and not worth the cost of compliance	31.4	30.8	27.8	31.0	
5. (DK/Refuse)	9.5	3.8	7.0	8.7	
Total	100.0%	100.0%	100.0%	100.0%	
N	350	200	200	750	

Regulations Demographics

Employee Size of Firm
1-9 emp 10-19 emp 20-249 emp All Firms

D1. What title best describes your position in the business?

1. Owner and Manager	85.5%	62.0%	59.7%	80.5%
2. Owner, but not a Manager	2.5	5.1	5.6	3.1
3. Manager, but not an Owner	12.0	32.9	34.7	16.4
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D2. What is your age?

1. Less than 25 years old	1.5%	1.3%	4.2%	1.7%
2. 25 – 34 years old	5.7	10.1	6.9	6.3
3. 35 – 44 years old	11.4	19.0	15.3	12.6
4. 45 – 54 years old	19.4	22.8	23.6	20.2
5. 55 – 64 years old	31.8	27.8	26.4	30.8
6. 65 years or older	26.3	13.9	18.1	24.2
7. (DK/Refuse)	4.0	5.1	5.6	4.3
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D3. What is your highest level of formal education?

1. Did not complete high school	1.7%	1.3%	1.4%	1.6%
2. High school diploma/GED	14.4	13.9	11.1	14.0
3. Some college or an associate's degree	27.2	20.3	22.2	26.0
3. Vocational or technical school degree	2.5	3.8	1.4	2.5
4. College diploma	30.6	39.2	40.3	32.4
5. Advanced or professional degree	21.4	19.0	19.4	20.9
6. (DK/Refuse)	2.3	2.5	4.2	2.5
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D4. How long have you owned, operated or been employed by this business?

1. 1 – 2 years	7.2%	10.1%	8.5%	7.6%
2. 3 – 5 years	12.0	11.4	15.5	12.3
3. 6 – 10 years	15.4	13.9	12.7	15.0
4. 11 – 20 years	27.4	31.6	22.5	27.4
5. 21 – 30 years	16.4	16.5	18.3	16.6
6. 31 or more years	19.4	13.9	19.7	18.8
7. (DK/Refuse)	2.3	2.5	2.8	2.4
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D6. Is this business operated primarily from the home, including any associated structures such as a garage or a barn?

1. Yes	43.4%	11.4%	5.6%	36.4%
2. No	54.9	87.3	91.7	61.9
3. (DK/Refuse)	1.7	1.3	2.8	1.7
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D7. Would you describe the primary or majority of your business locations as in areas that are:?

1. Downtown/Major city	14.0%	16.7%	19.4%	14.8%
2. Urban	13.4	12.8	15.3	13.5
3. Inner suburban	14.9	14.1	13.9	14.7
4. Outer suburban	11.4	9.0	11.1	11.1
5. Small town	25.4	29.5	23.6	25.7
6. Rural	14.0	14.1	11.1	13.8
7. (DK/Refuse)	6.8	3.9	5.6	6.4
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D8. For the last calendar year, what were the gross sales for your business?

1. Less than \$250,000	31.6%	8.9%	4.2%	26.6%
2. \$250,000 - \$499,999	11.1	6.3	2.8	9.8
3. \$500,000 - \$999,999	9.2	13.9	5.6	9.3
4. \$1 million - \$4.9 million	14.3	29.1	36.1	18.0
5. \$5 million - \$9.9 million	2.0	5.1	8.3	2.9
6. \$10 million or higher	0.3	2.5	8.3	1.3
7. (DK/Refuse)	31.4	34.2	34.7	32.0
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D9. Over the last two years, how have your real volume sales changed?

1. Increased by 30 percent or more	5.5%	6.3%	5.6%	5.6%
2. Increased by 20-29 percent	7.2	10.0	7.0	7.5
3. Increased by 10-19 percent	15.4	21.3	19.7	16.4
4. Increased by less than 10 percent	7.7	8.8	14.1	8.4
5. Decreased by less than 10 percent	10.9	13.8	9.9	11.1
6. Decreased by 10 percent or more	15.7	10.0	7.0	14.3
7. Stayed about the same	24.0	21.3	16.9	23.1
8. (DK/Refuse)	13.7	8.8	19.8	13.7
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

D10. Gender

1. Male	63.9%	58.2%	62.5%	63.2%
2. Female	36.1	41.8	37.5	36.8
Total	100.0%	100.0%	100.0%	100.0%
N	350	200	200	750

Table Notes

1. All percentages appearing are based on **weighted** data.
2. All “Ns” appearing are based on **unweighted** data.
3. Data are not presented where there are fewer than 50 unweighted cases.
4. ()s around an answer indicate a volunteered response.

WARNING – When reviewing the table, care should be taken to distinguish between the percentage of the population and the percentage of those asked a particular question. Not every respondent was asked every question. All percentages appearing on the table use the number asked the question as the denominator.

Data Collection Methods

The data for this survey report were collected for the NFIB Research Foundation by Susquehana Polling and Research. The interviews for this edition of the *Poll* were conducted between August 29 - October 14, 2016 from a sample of small employers. “Small employer” was defined for purposes of this survey as a business owner employing no fewer than one individual in addition to the owner(s) and no more than 249.

The sampling frame used for the survey was drawn at the Foundation’s direction from the files of the Dun & Bradstreet Corporation, an imperfect file but the best currently available for public use. A random stratified sample design was employed to compensate for the

highly skewed distribution of small business owners by employee size of firm (Table A1). Almost 60 percent of employers in the United States employ just one to four people meaning that a random sample would yield comparatively few larger small employers to interview. Since size within the small business population is often an important differentiating variable, it is important that an adequate number of interviews be conducted among those employing more than 10 people. The interview quotas established to achieve these added interviews from larger, small-business owners were arbitrary but adequate to allow independent examination of the 10-19 and 20-249 employee size classes as well as the 1-9 employee size group.

TABLE A1
SAMPLE COMPOSITION UNDER VARYING SCENARIOS

Employee Size of Firm	Expected from Random Sample*		Obtained from Stratified Random Sample			
	Interviews Expected	Percent Distribution	Interview Quotas	Percent Distribution	Completed Interviews	Percent Distribution
1-9	599	80	350	47	350	46
10-19	79	11	200	27	200	27
20-249	72	10	200	27	200	27
All Firms	750	101	750	101	750	100

* Sample universe developed from the U.S. Small Business Administration’s Office of Advocacy data on Statistics of U.S. Businesses.

The Sponsors

The **NFIB Research Foundation** is a small business oriented research organization affiliated with the National Federation of Independent Business, the nation's largest small and independent business advocacy organization. Located in Washington, D.C., the Foundation was established in 1980 to explore the policy related problems small business owners encounter. It's periodic reports include ***Small Business Economic Trends, Small Business Problems and Priorities***, and the ***National Small Business Poll*** series. The Foundation also produced ad hoc reports on issues of concern to small-business owners including regulatory analyses of selected proposed regulations through its Business Size Insight Module (BSIM).



1201 "F" Street, NW
Suite 200
Washington, DC 20004
nfib.com



NFIB | Research
The Voice of Small Business. Foundation

1201 "F" Street, NW
Suite 200
Washington, DC 20004
nfib.com

Regulatory Impact Analysis: A Primer

With this document, the Office of Information and Regulatory Affairs is providing a primer to assist agencies in developing regulatory impact analyses (RIAs), as required for economically significant rules by Executive Order 13563, Executive Order 12866, and OMB Circular A-4.¹

In accordance with those requirements, agencies should include the information described below in their RIAs. This primer is limited to the requirements of Executive Order 13563,² Executive Order 12866,³ and Circular A-4⁴; it does not address requirements imposed by other authorities, such as the National Environmental Policy Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, the Paperwork Reduction Act, and various Executive Orders that require analysis. Executive Order 13563, Executive Order 12866, and Circular A-4, as well as those other authorities, should be consulted for further information.

The purpose of this primer is to offer a summary of the requirements of OMB Circular A-4. The primer is not meant to be a substitute for the more detailed description in that Circular. Nothing in this primer is intended to alter existing requirements or policy.

Contents

A. Introduction..... 2

B. Key Elements of a Regulatory Impact Analysis 2

C. Preparing a Regulatory Impact Analysis..... 3

 Step 1: Describe the need for the regulatory action..... 4

 Step 2: Define the Baseline..... 4

 Step 3: Set the Time Horizon of Analysis 5

 Step 4: Identify a Range of Regulatory Alternatives 5

 Step 5: Identify the Consequences of Regulatory Alternatives 7

 Step 6: Quantify and Monetize the Benefits and Costs 9

 Step 7: Discount Future Benefits and Costs 11

 Step 8: Evaluate Non-quantified and Non-monetized Benefits and Costs 12

 Step 9: Characterize uncertainty in benefits, costs, and net benefits 14

D. Summarizing the Regulatory Analysis 15

¹ Agencies may also find “Regulatory Impact Analysis: Frequently Asked Questions” (http://www.whitehouse.gov/sites/default/files/omb/circulars/a004/a-4_FAQ.pdf) and “Agency Checklist: Regulatory Impact Analysis” (http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf), helpful as well.

² Available at: http://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf

³ Available at: http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

⁴ Available at: <http://www.whitehouse.gov/sites/default/files/assets/omb/circulars/a004/a-4.pdf>

A. Introduction

Executive Orders 13563 and 12866 require agencies to provide to the public and to OMB a careful and transparent analysis of the anticipated consequences of economically significant regulatory actions. This analysis includes an assessment and (to the extent feasible) a quantification and monetization of benefits and costs anticipated to result from the proposed action and from alternative regulatory actions. Executive Order 13563 specifically requires agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”

The purpose of the RIA is to inform agency decisions in advance of regulatory actions and to ensure that regulatory choices are made after appropriate consideration of the likely consequences. To the extent permitted by law, agencies should proceed only on the basis of a reasoned determination that the benefits justify the costs (recognizing that some benefits and costs are difficult to quantify). Regulatory analysis also has an important democratic function; it promotes accountability and transparency and is a central part of open government.

Important goals of regulatory analysis are (1) to establish whether federal regulation is necessary and justified to achieve a social goal and (2) to clarify how to design regulations in the most efficient, least burdensome, and most cost-effective manner. To that end, Executive Orders 13563 and 12866 require agencies to consider a range of regulatory alternatives, including the option of not regulating, and to design their regulations in the most cost-effective manner to achieve the regulatory objective. Agencies should select the alternative that maximizes net benefits, while also taking into consideration distributive impacts and qualitative benefits and costs, unless a statute requires another approach.

B. Key Elements of a Regulatory Impact Analysis

An RIA should include the following three basic elements:

A statement of the need for the regulatory action: An analysis should begin with a clear explanation of the need for the regulatory action, including a description of the problem that the agency seeks to address. Agencies should explain whether the action is intended to address a market failure or to promote some other goal, such as improving governmental processes, protecting privacy, or combating discrimination. If the action is compelled by statute or judicial directive, agencies should describe the specific authority and the extent of discretion permitted.

A clear identification of a range of regulatory approaches: If an agency has decided that Federal regulation is appropriate, it should identify and include in its RIA a range of alternative regulatory approaches, including the option of not regulating. Alternatives to Federal regulation include State or local regulation, voluntary action on the part of the private sector, antitrust enforcement, consumer-initiated litigation in the product liability system, and administrative compensation systems. Where relevant, agencies should consider flexible approaches that reduce burdens and maintain freedom of choice, such as warnings, appropriate default rules, and

disclosure requirements. To the extent feasible, agencies should specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

An estimate of the benefits and costs—both quantitative and qualitative—of the proposed regulatory action and its alternatives: After identifying a set of potential regulatory approaches, the agency should conduct a benefit-cost analysis that estimates the benefits and costs associated with each alternative approach. The benefits and costs should be quantified and monetized to the extent possible, and presented in both physical units (e.g., number of illnesses avoided) and monetary terms. When quantification of a particular benefit or cost is not possible, it should be described qualitatively. The analysis of these alternatives may also consider, where relevant and appropriate, values such as equity, human dignity, fairness, potential distributive impacts, privacy, and personal freedom.

The agency's analysis should be based on the best available scientific, technical, and economic information. To achieve this goal, the agency should generally rely on peer-reviewed literature, where available, and provide the source for all original information. In cases of particular complexity or novelty, the agency should consider subjecting its analytic models to peer review.⁵ In cases in which there is no reliable data or research on relevant issues, the agency should consider developing the necessary data and research. In addition, the agency should comply with the Information Quality Guidelines for the agency and with OMB's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies."⁶ Executive Order 13563 also provides that "[c]onsistent with the President's Memorandum for the Heads of Executive Departments and Agencies, 'Scientific Integrity' (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."

The agency should clearly document all of the assumptions and methods used in the analysis, discuss the uncertainties associated with estimates, and publicly provide the supporting data and underlying analysis (if possible on the Internet; see Executive Order 13563, section 2 (b)), so that a qualified third party reading the analysis could understand and reproduce the analysis. Regulatory analysis should also include a clear, plain language executive summary, including a table, that summarizes the benefit and cost estimates for each regulatory action and alternative under consideration, including the qualitative and non-monetized benefits and costs.⁷

C. Preparing a Regulatory Impact Analysis

This section provides a step-by-step guide to preparing an RIA. The three key elements discussed in the previous section are important; this section focuses primarily on the benefit and

⁵ For additional discussion, see OMB's "Final Information Quality Bulletin for Peer Review", available at: http://www.whitehouse.gov/sites/default/files/omb/assets/omb/fedreg/2005/011405_peer.pdf

⁶ Available at http://www.whitehouse.gov/omb/fedreg_reproducible/

⁷ For additional discussion, see 2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, page 51. Available at: http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf

cost assessment of regulatory alternatives required by Executive Order 13563, Executive Order 12866, and Circular A-4.

Benefit-cost analysis (BCA) provides a systematic framework for evaluating the likely outcomes of alternative regulatory choices. It allows agencies to evaluate different regulatory options with a variety of attributes using a common measure – a monetary unit. When important benefits and costs cannot be expressed in monetary units or quantified in any manner, the BCA can provide useful information about the relative merits of regulatory alternatives, but the “net benefits” estimate, viewed in isolation, may be incomplete and misleading.

To provide a complete RIA, agencies should follow these steps:

- Describe the need for the regulatory action
- Define the baseline
- Set the timeframe of analysis
- Identify a range of regulatory alternatives
- Identify the consequences of regulatory alternatives
- Quantify and monetize the benefits and costs
- Discount future benefits and costs
- Evaluate non-quantified and non-monetized benefits and costs
- Characterize uncertainty in benefits, costs, and net benefits

Below we provide additional information for each of these steps.

Step 1: Describe the need for the regulatory action

As discussed in the previous section, an analysis should begin with a reasonably detailed description of the need for the regulatory action and should include an explanation of how the regulatory action will meet that need. The RIA should explain whether the action is intended to address a significant market failure (e.g., externality, market power, and inadequate or asymmetric information) or to meet some other compelling public need such as improving governmental processes or promoting values such as privacy or human dignity. If the regulation is designed to correct a significant market failure, the RIA should describe the failure both qualitatively and (where feasible) quantitatively. If a regulation is required by statute or judicial directive, the RIA should clearly explain the specific authority, extent of agency discretion, and permissible regulatory instruments.

Step 2: Define the Baseline

The baseline represents the agency’s best assessment of what the world would be like absent the action. To specify the baseline, the agency may need to consider a wide range of factors and should incorporate the agency’s best forecast of how the world will change in the future, with particular attention to factors that affect the expected benefits and costs of the rule. For example, population growth, economic growth, and the evolution of the relevant markets should all be taken into account. For regulations that largely restate statutory requirements, the analysis

should use a pre-statutory baseline. For analyses supporting modifications to an existing regulation, a baseline assuming no change in the regulatory program generally provides an appropriate basis for evaluating regulatory alternatives.

The analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where the agency chooses to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately.

Step 3: Set the Time Horizon of Analysis

When choosing the appropriate time horizon for estimating benefits and costs, agencies should consider how long the regulation being analyzed is likely to have economic effects. The time frame for the analysis should cover a period long enough to encompass all the important benefits and costs likely to result from the rule. However, the agency should also consider for how long it can reasonably predict the future and should limit its analysis to that time period. Thus, if a regulation has no predetermined sunset provision, the agency will need to choose the endpoint of its analysis based on the foreseeable future or the agency's ability to forecast reliably. For rules that require large up-front capital investments, the life of the capital is also an option.

Step 4: Identify a Range of Regulatory Alternatives

The agency should consider a range of potentially effective and reasonably feasible regulatory alternatives. The relevant alternatives might involve different approaches, with distinct advantages and disadvantages. In considering which alternatives to discuss, an agency should reasonably explore which approaches are feasible and plausible ways of meeting the regulatory objective. An agency should give particular attention to identifying and assessing flexible regulatory approaches, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

Consistent with Executive Order 13563, section 4, an agency might consider flexible approaches that maintain freedom of choice. If, for example, an agency is considering banning the sale of a potentially unsafe product, it might consider instead requiring disclosure of health risks to the public. Once an agency identifies the least burdensome tool for achieving its regulatory objective, measuring the incremental benefits and costs of successively more stringent regulatory alternatives will allow an agency to identify the alternative that maximizes net benefits.

Agencies should consider any of the following, alone or in combination, to develop regulatory alternatives:

- *Deferral to state or local regulation.* Agencies should consider the option of deferring to regulation at the State or local level. To be sure, problems that affect interstate commerce or spill across State lines may best be addressed by Federal regulation. But more localized problems may be more efficiently addressed locally. In such situations,

deferring to state and local regulation can encourage regulatory experimentation and innovation while also fostering learning and competition to establish the best regulatory policies.

- *Market-oriented approaches rather than direct controls.* Agencies should consider market-oriented regulatory approaches that use economic incentives to achieve regulatory goals and that afford entities greater flexibility in compliance. Such approaches include fees, penalties, subsidies, marketable permits or offsets, changes in liability rules or property rights, and required bonds, insurance, or warranties. In the domain of environmental protection, for example, emissions trading may deserve careful consideration as an approach that might achieve the same gain at a significantly lower cost.
- *Performance standards rather than design standards.* Performance standards express requirements in terms of outcomes, for example requiring achievement of a particular emissions level. By contrast, design standards specify the means to achieve those outcomes, for example requiring installation of a particular emissions control technology. Because they allow firms to have the flexibility to choose the most cost-effective methods for achieving the regulatory goal, and create an incentive for innovative solutions, performance standards are generally preferred to design standards.
- *Informational Measures.* If intervention is contemplated to address a market failure that arises from inadequate or asymmetric information or poor information processing, informational remedies will often be preferred. To the extent feasible, specific informational measures should be evaluated with reference to their benefits and costs.
- *Default rules rather than mandates.* Agencies should consider whether default rules are a better instrument than mandates for achieving regulatory objectives. If, for example, there is significant heterogeneity in the relevant population, a default rule may be preferable to a mandate because it allows people to act in ways that are suited to their own situations.
- *Enforcement Methods.* Alternative monitoring (e.g., Federal, State, or local authorities) and reporting methods (e.g., on-site inspections, periodic reporting, and noncompliance penalties) may vary in their benefits and costs.
- *Stringency.* Typically both the benefits and costs associated with a regulation will increase with the level of stringency. Agencies should study alternative levels of stringency to determine the level that maximizes net benefits.
- *Compliance dates.* The timing of a regulation can have an important effect on its net benefits. Agencies should consider various possible compliance dates, because (for example) a later date might, in some circumstances, promote predictability and significantly reduce compliance costs without greatly reducing benefits.
- *Requirements based on firm size.* If the expected costs or the expected benefits of compliance vary based on firm size, different requirements for large and small firms, based on these estimated differences, may be appropriate. Greater flexibility for small business, in the form of delayed compliance dates or partial or total exemptions, is worth careful consideration. At the same time, agencies should consider whether such differences in regulatory treatment provide one group of firms with a competitive advantage over others, create artificial incentives to keep firm sizes small (and thus deter hiring), or lead to foregone benefits that exceed the cost savings to exempted firms.

- *Requirements based on geographic regions.* Where there are significant regional variations in benefits and/or costs, agencies should consider setting different requirements for different regions to maximize net benefits.

At a minimum, agencies should compare, with their preferred option, a more stringent and less stringent alternative, and assess the benefits and costs of the three possibilities, with careful consideration of which achieves the greatest net benefits. And when the preferred option includes a number of distinct provisions, the benefits and costs of different regulatory provisions should be analyzed separately in order to facilitate consideration of the full range of potential alternatives.

Step 5: Identify the Consequences of Regulatory Alternatives

Benefits and costs. Agencies should identify the potential benefits and costs for each alternative and its timing. It may be useful to identify the benefits and costs in the following manner:

- Benefits and costs that can be monetized, and their timing;
- Benefits and costs that can be quantified, but not monetized, and their timing;
- Benefits and costs that cannot be quantified.

In addition to the direct benefits and costs of each alternative, the list should include any important ancillary benefits and countervailing risks. An ancillary benefit is a favorable impact of the alternative under consideration that is typically unrelated or secondary to the purpose of the action (e.g., reduced refinery emissions due to more stringent fuel economy standards for light trucks). A countervailing risk is an adverse economic, health, safety, or environmental consequence that results from a regulatory action and is not already accounted for in the direct cost of the action (e.g., adverse safety impacts from more stringent fuel-economy standards for light trucks). As with other benefits and costs, an effort should be made to quantify and monetize both ancillary benefits and countervailing risks.

Distributional effects. Those who bear the costs of a regulation and those who enjoy its benefits often are not the same people. The term "distributional effect" refers to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography).

The regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency (i.e., net benefits). Executive Order 13563 and Executive 12866 authorize this approach. Where distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups.

Examples of distributional effects that could potentially be quantified include:

- Health benefits that accrue principally to low-income groups
- Regulatory costs that are imposed principally on low-income groups
- Reductions in sales by one business that are matched by increases in sales by another (transfer in economic activity from one business to another)
- Reductions in well-being for some consumers that are matched by increases for others (transfer of well-being among consumers)

Transfer payments. Distributional effects may arise through "transfer payments" that stem from a regulatory action as well. Transfer payments are monetary payments from one group to another that do not affect total resources available to society. For example, transfers payments include revenue collected through a fee, a surcharge in excess of the cost of services provided, and a tax.

Distinguishing between real costs and transfer payments is an important, but sometimes difficult, problem in cost estimation. A stylized example may help to clarify. Consider a regulation that taxes an air pollutant that is harmful to human health and is a by-product of some manufacturing process. In response to the tax, firms modify their manufacturing process to reduce (but not eliminate) the pollutant. The benefits of the regulation are reductions in premature death, illness, and disability resulting from the decreased emission of the regulated pollutant, as well as benefits to ecosystems, improvements in visibility, and so on. The cost of the regulation is equal to the cost to firms of modifying their production process (e.g., purchasing abatement technology). The taxes paid on the pollutant by the firm to the government are a transfer and have no effect on the net benefits of the regulation.

Examples of costs include:

- Goods and services required to comply with the regulation
- Reductions in consumer and producer well-being due to regulation-induced price or quantity changes
- Increases in premature death, illness, or disability (e.g., in the case where a regulatory proposal that would reduce certain safety and/or health risks would also have the consequence of increasing other safety and/or health risks).

Examples of transfer payments include:

- Changes in sales tax revenue due to changes in sales (monetary transfers from consumers to government)
- Payment by the Federal government for goods or services provided by the private sector (monetary transfers to the government to service providers, such as reimbursements by the Medicare program)
- Fees to government agencies for goods or services provided by the agency (monetary transfers from fee payers to the government—the goods and services are already counted as government costs and including them as private costs would entail double counting)

Step 6: Quantify and Monetize the Benefits and Costs

The agency should use the best reasonably obtainable scientific, technical, economic, and other information to quantify the likely benefits and costs of each regulatory alternative. Presenting benefits and costs in physical units in addition to monetary units will improve the transparency of the analysis. For example, the benefits of a regulation that reduces emissions of air pollution might be quantified in terms of the number of premature deaths avoided each year; the number of prevented nonfatal illnesses and hospitalizations; the number of prevented lost work or school days; improvements in visibility in specific regions; and improvements in ecosystem health as measured by specific indicators (e.g. lake acidification). Some costs – such as countervailing risks – may also be quantified in similar terms before they are turned into monetary equivalents.

As discussed in greater detail below, the agency should, to the extent feasible, estimate the monetary value of the benefits and costs of each regulatory alternative considered. Both benefits and costs are measured by the value that individuals place on the change resulting from a particular regulatory alternative. This value is typically and most easily measured in terms of the amount of money the individual would pay (“willingness to pay” (WTP)) or require as compensation (“willingness to accept” (WTA)), so that the individual is indifferent between the current state of the world (baseline), on the one hand, and the consequences of the regulatory alternative along with the monetary payment, on the other hand.

To the extent possible, agencies should estimate people’s valuations of benefits and costs using revealed preference studies based on actual behavior. Revealed preference methods develop estimates of the value of goods and services — or attributes of those goods and services — based on actual market decisions by consumers, workers, and other market participants. If the market participant is well-informed and confronted with a real choice, and properly processes information, it may be feasible to determine accurately and precisely the monetary value of the changes associated with an alternative.

If the goods or attributes of goods that are affected by regulation — such as preserving environmental or cultural amenities — are not traded in markets, it may be difficult to use revealed preference methods. In such cases, the value of the goods or attributes may arise both from use and non-use. “Use values” arise where an individual derives satisfaction from using the resource, either now or in the future, for example by living in or moving to a neighborhood with clean air or water. “Non-use values” arise where an individual places value on a resource, good, or service even though the individual will not use the resource, now or in the future, for example by valuing wildlife in remote areas.

In the absence of an organized market, it is difficult to estimate use and non-use values. When studies are designed to elicit such values either through indirect market studies or stated preference methods, agencies should pay careful attention to characterization of the uncertainties. However, overlooking or ignoring these values may significantly understate the benefits and/or costs of regulatory action.

Agencies should include the following effects, where relevant, in their analysis and provide estimates of their monetary values:

- Private-sector compliance costs and savings;
- Government administrative costs and savings;
- Gains or losses in consumers' or producers' surpluses;
- Discomfort or inconvenience benefits and costs; and
- Gains or losses of time in work, leisure, and/or commuting/travel settings.

To improve the transparency of the analysis, monetary values of distinct benefits and costs should be presented separately, in addition to being summed and presented as total benefits and total costs.

Considerations in monetizing health and safety effects

In monetizing health and safety benefits, the agency should use the WTP measure (or, if appropriate, the WTA measure), rather than other alternatives (e.g., avoided cost of illness or avoided lost earnings). This is because WTP/WTA attempts to capture pain and suffering and other quality-of-life effects.

When monetizing nonfatal health effects, the agency should consider two factors: (1) the private demand for prevention of the nonfatal health effect, to be represented by the preferences of the target population at risk and (2) the net financial externalities associated with poor health, such as net changes in public medical costs and any net changes in economic production that are not experienced by the target population. Revealed-preference or stated-preference studies are necessary to estimate the private demand; health economics data from published sources can typically be used to estimate the financial externalities caused by changes in health status. If an agency uses literature values to monetize nonfatal health and safety risks, it is important to make sure that the values selected are appropriate for the severity and duration of health effects to be addressed by the alternative under consideration.

Since agencies often design health and safety regulation to reduce risks to life, evaluation of the benefits of reducing fatality risks can be the key part of the analysis. The goal of this analysis is to monetize the value of small changes in fatality risk – a measurement of WTP for reductions in only small risks of premature death. This concept is commonly referred to as the "value of statistical life" (VSL).⁸ A considerable body of academic literature is available on this subject. Current agency practice provides a VSL ranging from roughly \$5 million to \$9 million per statistical life.

Another approach to express reductions in fatality risks is to use the life expectancy method, the "value of statistical life-years (VSLY) extended." If a regulation protects individuals whose average remaining life expectancy is 40 years, a risk reduction of one fatality is expressed as "40

⁸ The term "value of life" is sometimes used to describe this concept. However, this term can be misleading because it suggests, erroneously, that the monetization exercise tries to place a "value" on individual lives. Use of VSL should not suggest that the value of any individual's life can be expressed in monetary terms. The sole purpose is to help estimate the likely benefits of a regulatory action that reduces the risks that people face.

life-years extended." Those who favor this alternative approach emphasize that the value of a statistical life is not a single number relevant for all situations. In particular, when there are significant differences between the effect on life expectancy for the population affected by a particular health risk and the populations studied in the labor market studies, they prefer to adopt a VSLY approach to reflect those differences. It is appropriate to consider providing estimates of both VSL and VSLY, while recognizing the developing state of knowledge in this area.

Step 7: Discount Future Benefits and Costs

The benefits and costs of a regulatory action typically take place in the future. Moreover, benefits and costs may not be distributed across time in the same manner. For example, a common challenge in evaluating alternatives that have health-related consequences is to quantify the time lag between when an action would take effect and when the resulting change in health status will be observed.

To provide an accurate assessment of benefits and costs that occur at different points in time or over different time horizons, an agency should use discounting. Agencies should provide benefit and cost estimates using both 3 percent and 7 percent annual discount rates expressed as a present value as well as annualized. These are "real" interest rates that should be used to discount benefits and costs measured in constant dollars. Unlike typical market interest rates, real rates exclude the expected rate of future price inflation.

The 7 percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy, based on historical data. It is a broad measure that reflects the returns to real estate and small business capital as well as corporate capital. It approximates the opportunity cost of capital, and it is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector.

The 3 percent discount rate is based on a recognition that the effects of regulation do not always fall exclusively or primarily on the allocation of capital. When regulation primarily and directly affects private consumption, a lower discount rate is appropriate. The alternative most often used is sometimes called the "social rate of time preference." This term simply means the rate at which "society" discounts future consumption flows to their present value. If one assumes the rate that the average saver uses to discount future consumption is a measure of the social rate of time preference, the real rate of return on long-term government debt may provide a fair approximation. Over the last thirty years, this rate has averaged around 3 percent in real annual terms on a pre-tax basis.

Special considerations arise when comparing benefits and costs across generations. Although most people demonstrate time preference in their own consumption behavior, it may not be appropriate for society to demonstrate a similar preference when deciding between the well-being of current and future generations. Future citizens who are affected by such choices cannot take part in making them, and today's society must act with due consideration of their interests. Many people have argued for a principle of intergenerational neutrality, which would mean that those in the present generation would not treat those in later generations as worthy of less

concern. Discounting the welfare of future generations at 7 percent or even 3 percent could create serious ethical problems.

An additional reason for discounting the benefits and costs accruing to future generations at a lower rate is the longer the horizon for the analysis, the greater the uncertainty about the appropriate value of the discount rate. Private market rates provide a reliable reference for determining how society values time within a generation, but for extremely long time periods no comparable private rates exist. As several economists (including Martin Weitzman⁹) have explained, for the very distant future, the properly averaged discount factor corresponds to the minimum discount rate having any substantial positive probability.

At the same time, some economists have cautioned that using a zero discount rate could raise intractable analytical problems. They have argued that with zero discounting, even a small improvement in welfare, if permanent, would justify imposing any cost on current generations since the benefits would be infinite.

If the regulatory action will have important intergenerational benefits or costs, the agency might consider a sensitivity analysis using a lower but positive discount rate, ranging from 1 to 3 percent, in addition to calculating net benefits using discount rates of 3 percent and 7 percent.

Step 8: Evaluate Non-quantified and Non-monetized Benefits and Costs

Sound quantitative estimates of benefits and costs, where feasible, are preferable to qualitative descriptions of benefits and costs because they help decision-makers to understand the magnitudes of the effects of alternative actions and compare across different types of consequences. However, some important benefits and costs (e.g., protection of human dignity, equity, or privacy, see Executive Order 13563, section 1(c)) may be difficult or impossible to quantify or monetize given current data and methods. Agencies should carry out a careful evaluation of non-quantifiable and non-monetized benefits and costs.

Benefits and costs that are difficult to monetize. If monetization is not possible, the agency should explain why and present all available quantitative information. For example, an agency may not be able to monetize a benefit in terms of privacy or dignity, but it may be able to quantify the number of beneficiaries. Alternatively, an agency may be able to quantify, but not to monetize, increases in water quality and fish populations resulting from water quality regulation. If so, the agency should attempt to describe benefits in terms of (for example) stream miles of improved water quality for boaters and increases in game fish populations for anglers. When estimates of monetized effects and quantified physical effects are mixed in the same analysis, the agency should describe the timing and likelihood of such effects, and should avoid double-counting of effects.

⁹ Weitzman ML In Portney PR and Weyant JP, eds. (1999), *Discounting and Intergenerational Equity*, Resources for the Future, Washington, DC.

Benefits and costs that are difficult to quantify. If the agency cannot quantify a benefit or cost, the agency should explain why and present any available quantitative information. For example, the agency may not be able to quantify the number of individuals exposed to a risk but may be able to quantify the magnitude of the risk to those who are exposed. The agency should also provide a detailed qualitative description of any unquantified effects, such as ecological gains, improvements in quality of life, and aesthetic beauty. The agency should provide a discussion of the strengths and limitations of the qualitative information.

When the unquantified benefits or costs affect a policy choice, the agency should provide a clear explanation of the rationale behind the choice. Such an explanation could include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs. The agency should include a summary table that lists all significant unquantified benefits and costs, highlighting (e.g., with categories or rank ordering) those that the agency believes are most important (e.g., by considering factors such as the degree of certainty, expected magnitude, and reversibility of effects).

Breakeven analysis. When quantification and monetization are not possible, many agencies have found it both useful and informative to engage in threshold or “breakeven” analysis. This approach answers the question, “How large would the value of the non-quantified benefits have to be for the rule to yield positive net benefits?” Suppose, for example, that a regulation that protects water quality costs \$105 million annually, and that it also has significant effects in reducing pollution in rivers and streams. It is clear that the benefits of the regulation would exceed its costs if and only if those effects could reasonably be valued at \$105 million or more. Once the nature and extent of the water quality benefits are understood, it might well be easy to see whether or not the benefits plausibly exceed the costs – and if the question is difficult, at least it would be clear why it is difficult. Breakeven analysis is an important tool, and it can provide insights when quantification is speculative or impossible.¹⁰

Cost-effectiveness analysis. Cost-effectiveness analysis (CEA) can provide a helpful way to identify options that achieve the most effective use of the available resources (without requiring monetization of all of the relevant benefits and costs). Generally, cost-effectiveness analysis is designed to compare a set of regulatory actions with the same primary outcome (e.g., an increase in the acres of wetlands protected) or multiple outcomes that can be integrated into a single numerical index (e.g., units of health improvement). This approach provides useful information about relative performance of regulatory alternatives (i.e., best ‘bang for the buck’). At the same time, a comparison of monetized benefits and costs is necessary to determine which alternative maximizes net benefits.

When CEA is applied to public health and safety rulemakings, a measure of effectiveness must be selected that permits comparison of regulatory alternatives. Agencies currently use a variety of effectiveness measures. There are relatively simple measures such as the number of lives saved, cases of cancer reduced, or cases of paraplegia prevented. Sometimes these measures

¹⁰ For additional discussion, see *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, page 66-67. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf

account only for mortality information, such as the number of lives saved and the number of years of life saved. There are also more comprehensive, integrated measures of effectiveness such as the number of "equivalent lives" (ELs) saved and the number of "quality-adjusted life years" (QALYs) saved. While OMB does not require agencies to use any specific measure of effectiveness, an Institute of Medicine report recommends that agencies use QALYs for all health and safety issues.¹¹ In any event, the regulatory analysis should explain why a measure was selected and how it was implemented.

Step 9: Characterize uncertainty in benefits, costs, and net benefits

Regulatory analysis requires forecasts about the future. What the future holds, both in the baseline and under the regulatory alternative under consideration, is typically not known for certain. The important uncertainties connected with the regulatory decision should be analyzed and presented as part of the overall regulatory analysis. The goal of the agency's uncertainty analysis is to present both a central "best estimate," which reflects the expected value of the benefits and costs of the rule, as well as a description of the ranges of plausible values for benefits, costs, and net benefits, which informs decision-makers and the public of the degree of uncertainty associated with the regulatory decision.

In developing an uncertainty analysis, agencies should follow these steps:

Specify potential scenarios. As a first step, the agency should specify a set of plausible, mutually exclusive *scenarios* for both the baseline and for each regulatory alternative. Each scenario represents a complete description of a state of the world, including its evolution through time, that could arise. The goal is to specify scenarios that cover the full range of how the benefits and costs of the rule might vary. Typically this is done by specifying the set of factors that affect the benefits and costs of the regulatory alternatives.

Calculate the benefits and costs associated with each scenario. Once the set of plausible scenarios has been specified, the agency can calculate the benefits and costs associated with each scenario. At this stage, the agency has all of the information it needs to conduct a *sensitivity analysis*. A sensitivity analysis examines how the benefits and costs of the rule change with key uncertain variables.

Construct a range of values. When the agency cannot specify probabilities for the relevant scenarios, the agency should develop a central scenario for the baseline and for each regulatory alternative that reflects the agency's *best estimate* of the likely consequences of each regulatory alternative. The agency should use the benefits and costs of these best estimates to approximate the expected value of the benefits and costs of each regulatory alternative to use in its regulatory decision-making. The agency should also characterize ranges of *plausible* benefits, costs, and net benefits of each regulatory alternative. The goal is not to characterize the full range of *possible* outcomes, which

¹¹ IOM (2006). Valuing Health for Regulatory Cost-Effectiveness Analysis. The National Academies Press, Washington, DC.

may turn out to be extremely large, but rather the range of *plausible* outcomes as in a confidence interval. The agency must use its judgment on the range of scenarios that such ranges should reflect. At a minimum, the range should include a “high” and a “low” scenario that provide plausible upper and lower bounds.

The approach to constructing a range outlined above should be thought of as the minimal analysis that agencies should conduct. When feasible, agencies should also:

Assign probabilities and calculate expected values. Having specified the set of plausible scenarios, the benefits and costs associated with each scenario, and the probabilities of each scenario, the agency should calculate expected values of the benefits and costs for each regulatory alternative. In these cases, where probability distributions can be assigned to each scenario, the agency should conduct a formal uncertainty analysis in which it characterizes the distributions of benefits, costs, and net benefits.

Circular A-4 requires formal quantitative analysis of uncertainty for rules that exceed the \$1 billion annual threshold in benefits or costs.

D. Summarizing the Regulatory Analysis

Regulatory analysis should include a clear, plain language executive summary. The summary should include one or more tables that summarize the benefit and cost estimates for each regulatory action and alternative under consideration as well as the qualitative and non-monetized benefits and costs.¹² The summary should include:

- *Alternative regulatory approaches.* At a minimum, one or more tables should generally be used to report the benefits and costs of both the agency’s preferred option and at least one alternative that is less stringent (i.e., lower cost) and one alternative that is more stringent (i.e., higher cost). For each of the regulatory alternatives, the agency should calculate benefits and costs relative to a common baseline.
- *Categories of benefits and costs.* The agency should categorize the benefits and costs into three mutually exclusive and exhaustive categories: (1) quantified and monetized; (2) quantified but not monetized; and (3) neither quantified nor monetized. The agency should not include any benefit or cost in more than one of these categories. For example, if the agency has monetized fatalities averted by an alternative, it should report the dollar value as part of the quantified and monetized benefits, and should avoid double-counting the number of “lives saved” in the quantified but not monetized benefits category. (Of

¹² Circular A-4 states: “...you should present a summary of the benefit and cost estimates for each alternative, including the qualitative and non-monetized factors affected by the rule, so that readers can evaluate them.” (P.3) In addition, it states: “Your analysis should also have an executive summary, including a standardized accounting statement.” (P. 3). It further states, “You need to provide an accounting statement with tables reporting benefit and cost estimates for each major final rule for your agency.” (P. 44). Circular A-4 includes an example of a format for agency consideration.

course, the agency may also choose to report the monetized benefits in physical units, but should do so in a way that clearly avoids double-counting).

- *Separate reporting of distributional effects, including transfers.* The agency should report distributional effects, including transfers, separately and avoid the misclassification of transfer payments as benefits or costs.
- *Rank qualitative impacts.* The agency should categorize or rank the qualitative effects in terms of their importance (e.g., certainty, likely magnitude, and reversibility). The agency should distinguish the effects that are likely to be significant enough to warrant serious consideration by decision-makers from those that are likely to be minor.
- *Transparency.* The agency should add notes to the bottom of the tables that enable readers to interpret the information in the tables correctly. For example, when there is significant uncertainty to estimates, a caveat describing the nature of the uncertainty should be provided in the notes.



**Regulatory
Transparency
Project**
Unlocking Innovation & Opportunity

Government Regulation: The Good, The Bad, & The Ugly

Regulatory Process Working Group

Howard Beales
Jerry Brito
J. Kennerly Davis, Jr.
Christopher DeMuth
Donald Devine
Susan Dudley (Chair)
Brian Mannix
John O. McGinnis

This paper was the work of multiple authors. No assumption should be made that any or all of the views expressed are held by any individual author. In addition, the views expressed are those of the authors in their personal capacities and not in their official/professional capacities.

To cite this paper: H. Beales, et al., “Government Regulation: The Good, The Bad, & The Ugly”, released by the Regulatory Transparency Project of the Federalist Society, June 12, 2017 (<https://regproject.org/wp-content/uploads/RTP-Regulatory-Process-Working-Group-Paper.pdf>).

12 June 2017

Table of Contents

Introduction	3
Regulation can be an important government function.	3-6
Serious problems with how regulations are made and enforced in practice.	7-10
There is a better way.	10-15
Conclusion	16-17

Introduction

The American free enterprise system has been one of the greatest engines for prosperity and liberty in history, and has the potential to deliver a promising future for the United States and the world.¹ Through protecting property rights and fostering healthy competition, democratic capitalism rewards work and ingenuity which improves our lives and has liberated more people from poverty than any other system.²

Yet, the United States faces growing challenges in an increasingly competitive global economy. Recent decades have seen a decline in economic growth and innovation, and one important cause is poorly-designed government policies. Large swaths of the American economy are distorted by government mandates and incentives, and the vast majority of binding “laws” are not enacted by our elected representatives in Congress, but are promulgated by agencies as regulations.

Sensible, evidence-based regulations that respect the fundamental role of free-market competition can provide vital public benefits – such as protecting the environment, public health and safety, civil rights, consumers, and investors. Yet, despite the best intentions, government regulation too often disrupts the marketplace or picks winners and losers among companies or technologies. When regulators behave this way, they invariably cause unintended harms. Poorly designed regulations may cause more harm than good; stifle innovation, growth, and job creation; waste limited resources; undermine sustainable development; inadvertently harm the people they are supposed to protect; and erode the public’s confidence in our government.³

This paper examines the important role regulations play in a vibrant economy, how they differ from other government programs, why they can produce unintended consequences, and how reforms could help us achieve the benefits regulations can provide with fewer negative outcomes. With a better regulatory system, we can enjoy a healthy environment, safe workplaces, more innovative products, and greater opportunities and prosperity for all Americans.

I. Regulation can be an important government function.

The federal government has two main vehicles for diverting private resources to achieve policy goals. The first is through *spending programs*. The IRS collects compulsory taxes, and the revenues are spent on desired public functions such as parks, roads and other infrastructure, schools, law enforcement, homeland security, and scientific research, as well as welfare and social insurance programs such as Social Security, Medicare, Medicaid, food stamps, and unemployment assistance.

¹ Paul R. Noe, “Smarter Regulation for the American Manufacturing Economy,” Indiana University School of Policy and Environmental Affairs, U.S. Manufacturing Public Policy Conference, National Press Club (Sept. 14, 2016).

² See Fred L. Smith, Jr., “Countering the Assault on Capitalism,” Institute of Economic Affairs, Blackwell Publishing, Oxford (Feb. 2012).

³ Paul R. Noe, “Smarter Regulation for the American Manufacturing Economy,” supra note 1.

The second is through *regulation*. Federal agencies issue and enforce standards ranging from environmental quality, to consumer protection, business and banking practices, nondiscrimination in employment, Internet privacy, labels and “disclosure,” safe food, drugs, products, and workplaces.

The *goals* of spending programs and regulations are widely accepted. For example, a clean and healthy environment, safe food and drugs, and fair business and employment practices are among the most important things citizens expect of their government. The goals are largely nonpartisan—most conservatives, moderates, and liberals agree on them. However, the *implementation* of spending and regulatory programs often is controversial. Disagreement over government policy is inevitable in a society where people’s values, opinions, incomes, and interests vary widely, and when the breadth of government has grown substantially.

A. Regulation presents special issues, problems, and controversies.

While the goals of most regulatory programs enjoy broad public support, in practice regulation usually comes down to detailed rules and lots of paperwork that can be highly costly and burdensome to those who must comply with them. This includes not only large corporations but small businesses, nonprofit organizations, schools, state and local governments, farms, and consumers and citizens. Some sectors of the economy bear the heaviest burdens, such as manufacturing, automobiles and transportation, energy and power, banking and finance, and health care and pharmaceuticals. But all of us pay for federal regulations through higher prices, fewer available products, services, and opportunities, and stifled wages or job opportunities. The costs of regulation are never “absorbed” by businesses; they always fall on real people.

In our democracy, citizens express their views at election time by voting for candidates and parties that stand for broad menus of policy positions. Between elections, choices on controversial subjects are made through presidential leadership, voting in Congress, court rulings on specific disputes, and “checks and balances” among the three constitutional branches. For citizens to intelligently hold elected officials accountable, however, policies’ benefits and costs must be visible.

While policies effected through both spending and regulatory programs provide benefits to Americans, the costs associated with regulatory programs are much less transparent than their on-budget counterparts. To implement spending policies, presidents send proposed budgets each year to Congress, and Congress must both authorize activities and appropriate necessary funds to implement them. Spending agencies are generally enthusiastic about their programs and want more resources to pursue them, but the available funds are necessarily limited and must be allocated to the highest priorities by Congress and the President in a much-debated, highly-publicized, annual budget process. These checks and balances make elected officials accountable to citizens. Regulatory policies cannot be measured in the same way, however; and there is nothing equivalent to the fiscal budget to track regulatory costs. These costs are like stealth taxation, and because they are assumed to fall on businesses (even though individual consumers and workers ultimately bear them),

regulatory tools may seem preferable to direct spending programs for accomplishing an agency's policy objectives.

Further, regulations have the force of law, but Congress usually just sets broad regulatory goals by statute, and delegates the power to write and enforce detailed rules to specialized regulatory agencies. This means that Congress gets credit for popular regulatory goals while the often-unpopular rules are blamed on "unelected bureaucrats." This criticism often comes not only from citizens and businesses but also from the legislators who voted for the regulatory statutes in the first place.

B. Regulatory costs are large, but invisible.

As the size and reach of the government has grown dramatically over the last century, so too have concerns about the costs and unintended consequences of regulatory programs. At the end of the nineteenth century, government accounted for less than ten percent of the U.S. economy. Today, government consumes or directs nearly half of the economy, with direct government spending alone reaching on the order of one-third of U.S. gross domestic product.⁴ Regulatory costs, while off-budget and less visible, are no less real.⁵

At the federal level alone, there are over 70 federal regulatory agencies, employing hundreds of thousands of people to write and implement regulations.⁶ Every year, they issue about 3,500 new rules, and the regulatory code now is over 168,000 pages long.⁷ Because regulatory impacts are diffuse and hard to measure, no estimates of the actual costs of regulation are completely reliable, but some researchers peg the total annual cost at more than \$2 trillion.⁸ Other research suggests the drag on economic growth could be twice that much, about \$4 trillion per year, or \$13,000 for every man, woman, and child in the United States.⁹ And we will never know the other costs, such as the value of jobs never created, factories never built, medicines never discovered, or entrepreneurial ideas never realized.

Regulatory mandates often are very costly—for example, for expensive pollution control equipment, extensive testing of new drugs, and collection of detailed information from consumers. As noted, these costs are not controlled as they are for spending programs. Federal spending is limited by the available revenues, and by budgeting among many competing programs. But regulatory costs are born outside the government, by those who must comply with the rules, their customers, and their employees. Additionally, lacking the budget constraint of spending agencies, regulatory agencies are prone to excess. They often pursue their specific mission with zeal, but this results in too little

⁴ <https://tradingeconomics.com/united-states/government-spending-to-gdp>.

⁵ Fred L. Smith, "Countering the Assault on Capitalism," *supra* note 2.

⁶ Susan Dudley & Melinda Warren, <https://regulatorystudies.columbian.gwu.edu/regulators%E2%80%9999-budget-eisenhower-obama>.

⁷ [https://regulatorystudies.columbian.gwu.edu/reg-stats#Total%20Pages%20in%20the%20Code%20of%20Federal%20Regulations%20\(1936%20-%202013\)](https://regulatorystudies.columbian.gwu.edu/reg-stats#Total%20Pages%20in%20the%20Code%20of%20Federal%20Regulations%20(1936%20-%202013)).

⁸ Mark Crain & Nicole Crain, <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

⁹ <http://mercatus.org/sites/default/files/Coffey-Cumulative-Cost-Regs-v3.pdf>.

regard for other legitimate goals, such as a strong and growing economy. This “tunnel vision” can result in rules that impose costs greater than the benefits they provide.¹⁰

C. Regulation faces fewer checks and balances.

Spending programs, like regulatory programs, often are authorized with broad aspirational language that everyone can support, like the ‘War on Cancer’ or ‘No Child Left Behind.’ But funds for those programs must be appropriated as well as authorized, and it is there in the budget process that we confront the necessary tradeoffs among competing priorities. In contrast, regulatory programs never realistically adjust to the reality that our country’s resources are limited. Both types of programs may claim dramatic benefits from eliminating disease, or crime, or pollution, but such claims often lack credibility and accountability. We would never allow the spending agencies to collect their own taxes from the public, in whatever amounts they feel they need. Yet regulatory agencies effectively do just that.

While many regulatory costs initially fall on regulated businesses, those costs are necessarily passed on—to consumers in the form of higher prices, to employees in the form of lower wages, and to investors in the form of lower returns on investment. For this reason, regulation can produce not only large social benefits but also large negative effects on prices, wages, business investment, and job opportunities. As mentioned earlier, regulation functions essentially as stealth taxation. The balance is often ignored in political debate—when it is assumed, incorrectly, that regulation is a “free lunch.”

D. The regulatory challenge.

The regulatory dilemma is this: On the one hand, regulation can be critically important to our welfare. Federal and state regulatory agencies have contributed to great improvements in air and water quality, highway safety, public health, honest commerce, racial and gender equality, and many other central aspects of American life. On the other hand, regulatory actions often have come at a cost that exceeds their benefits and sometimes actually have been counterproductive. These failures are abetted by the structure of the regulatory process: regulation operates outside our usual system of checks and balances, where policies are enacted directly by our elected representatives and disciplined by taxing and budgeting. Regulatory agencies have too often fallen short of public expectations and disappointed public trust.

Precisely because of its importance, regulation deserves constructive criticism and earnest efforts at improvement. In the following pages, we attempt to show how regulation can be reformed to achieve its valuable goals more thoroughly, more effectively, and at lower cost.

¹⁰ Breyer, Stephen, *Breaking the Vicious Circle: Toward Effective Risk Regulation*. Harvard University Press (March 15, 1995).

II. Serious problems with how regulations are made and enforced in practice.

In thinking about the real effects of regulation, it is important to understand that the special resource of the government—which private entities do not possess—is the power to coerce. Interest groups that can convince the government to use its coercive power to their benefit can profit at the expense of others. As a result, regulation tends to get “captured” by well-organized interest groups acting to maximize their own well-being, often at the expense of broader society.

Note that efforts of businesses, activist groups, unions and other organized groups to gain wealth or power through favorable government treatment (called “rent-seeking” in economic jargon),¹¹ is very different from “profit-seeking,”¹² when people attempt to *create* wealth by discovering and acting on new opportunities. The motivation for each of these activities is to maximize economic returns, but the *unintended consequences* of profit-seeking and rent-seeking differ dramatically.¹³

A. Why is “regulatory capture” a problem?

As Adam Smith famously wrote, “it is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.”¹⁴ “Profit-seeking entrepreneurs continuously move resources to more valuable uses, and in the process create economic growth and development,” which *unintentionally* leads to “socially beneficial consequences.”¹⁵ More importantly, in a competitive market environment, those returns that initially accrue to a successful entrepreneur are quickly competed away by other profit-seeking entities. Ultimately, consumers receive the gains in the form of lower prices and better products.¹⁶

In contrast to profit seeking, rent seeking emerges when regulation or other political intervention in markets creates opportunities for some people to gain “rights” that only the government can confer. Such rent-seeking to achieve favorable regulatory treatment is a rational response to the opportunity presented by regulation, and generates concentrated gains for the successful rent seekers at the expense of everyone else. But rather than creating new opportunities and value for consumers, such behavior leads to socially wasteful uses of resources. When regulations can provide competitive advantage, it is often in the self-interest of regulated parties to support them,¹⁷ (often hiding behind public interest arguments)¹⁸ even while other interests oppose them. Thus, talent and energy get channeled into lobbying for favorable government treatment (a zero sum game at best), rather than

¹¹ <http://www.econlib.org/library/Enc/RentSeeking.html>.

¹² <https://fee.org/articles/rent-seeking-a-primer/>.

¹³ <http://www.econlib.org/library/Enc/UnintendedConsequences.html>.

¹⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ch. 2, 1776.

¹⁵ James Buchanan, “Rent Seeking and Profit Seeking,” in *The Collected Works of James M. Buchanan: Vol. 1*. Liberty Fund 1999.

¹⁶ Susan Dudley, Exploring Regulatory Capture’s Unanswered Questions, *The Regulatory Review*, 2016, <https://www.theregreview.org/2016/07/04/dudley-exploring-regulatory-captures-unanswered-questions/>.

¹⁷ George Stigler, 1971, <http://www.ipcreators.org/pdf-files/Stigler%20on%20regulation.pdf>.

¹⁸ Adam Smith and Bruce Yandle, 2015, <http://www.amazon.com/Bootleggers-Baptists-Economic-Persuasion-Regulatory/dp/1939709369>.

into entrepreneurial experimentation and innovation that leads to growth and prosperity. This leads to regulatory agencies advancing the commercial or political concerns of the most well-organized special interests (which may be, but are not necessarily, regulated parties).¹⁹

B. Insiders gain advantage.

Regulatory programs are sometimes captured by businesses and other “interest groups,” who use them to promote their own end—such as restricting competition and suppressing innovation from new firms and business methods, or advancing their market power or political agendas. And even where regulations are well intended, they can produce unintended negative consequences. For example, drug regulation may delay the introduction of new, life-saving pharmaceuticals.

The well-connected—those who can hire lobbyists and know the right people in Washington—can gain at the expense of ordinary citizens. For example, large, established interest groups, such as large companies and trade associations, environmental groups, trial lawyers, unions, and state, local, and tribal governments, generally have much better access to legislators and regulatory officials, and can influence how regulations are designed and enforced. They often have Washington offices dedicated to ensuring their interests are reflected in regulations. This can disadvantage everyone else—ordinary consumers, taxpayers, workers, small businesses, the middle class, and the poor.

Businesses who ignore Washington, and just concentrate on competing for customers in the marketplace, can quickly find themselves on the losing side of trade policy, or tax policy, or some other regulatory tilt of the playing field. Large businesses also have advantages over smaller entities in that they have systems in place to handle the burdens of regulatory compliance, and can spread those costs over more employees and products. In heavily regulated industries like medical care or consumer finance, it becomes difficult, if not impossible to be successful by attending only to the needs of consumers. Catering to the whims of the regulators can dominate other considerations.

C. The vulnerable shoulder many of the costs.

The real costs of regulation are passed on to all Americans, who are generally unaware of these costs because they are hidden in lower wages, higher prices for consumer goods and services, and fewer products and opportunities made available. Often, those least able to represent themselves shoulder the greatest burdens.

For example, many regulations lead to higher energy and transportation costs, raising product prices on almost everything we buy. These regulations may lead to some benefits, but is it really fair to ask low-income families to pay a larger share of their income for these benefits than wealthier families?

Products standards that may make sense for many may also price low income consumers out of the market entirely. Higher prices for new cars to incorporate backup cameras, for example, make them less affordable to lower income consumers who end up driving older, less safe cars longer.

¹⁹ Reeve Bull, <http://www.regblog.org/2016/06/20/bull-combatting-external-internal-regulatory-capture/>.

Some have suggested that wireless carriers offering certain programming for free or without counting against data limits would violate “net neutrality,” but this could potentially preclude an offering likely to be especially attractive to lower income consumers.

Regulations in the workplace may keep the workplace safer, but they limit worker flexibility, and can dampen wages, or discourage employers from hiring less-experienced or lower-skilled workers.

Lengthy drug approval processes not only increase the cost of new drugs but discourage investment in potentially life-improving products. Consumers may face absurdly high drug prices, not because the drug is new or expensive to produce, but because it enjoys a monopoly protected by regulatory barriers. Only those pharmaceuticals with the potential to earn the highest profits can afford to go through the expense of decades’ long scrutiny. And, patients are prevented from getting access to promising products during the bureaucratic delay, even those with terminal illnesses.²⁰

Small, pioneering companies can’t afford the costs and time required to get approval of innovative new products, and often sell out to larger companies with the expertise and resources to obtain government approvals. It is then up to the larger company whether to market the new product or crush it. This reduces competition and innovation, and ultimately increases prices.

D. The bureaucracy is slow to change and often out of touch with the realities of an increasingly competitive global economy.

There is a growing concern that the U.S. regulatory system has become unsustainable, exceeding the basic rules needed for an efficient, competitive market capable of evolving to meet changing consumer needs.²¹ Regulatory burdens accumulate, with new regulations piling on top of old. Like pebbles tossed in a stream, each individual regulation may not have a significant impact, but cumulatively, they can hinder the flow of innovation and economic growth.²² Feedback loops are lacking in government policy.²³ Regulators have incentives to appear responsive by continually issuing new regulations, but not to evaluate how well existing rules are working. Thus, regulators typically proceed from one regulation to the next without focusing on understanding the results of their work. Insofar as regulators are concerned about results, the yardstick tends to be whether they are criticized by elected officials, interest groups, or judges. This is a weak feedback loop since, when citizens experience good or bad outcomes in their daily lives (such as safer products or higher

²⁰ <http://righttotry.org/about-right-to-try/>.

²¹ <http://www.gallup.com/poll/176015/few-americans-gov-regulation-business.aspx>.

²² As Mandel & Carew of the Progressive Policy Institute observe, “For each new regulation added to the existing pile, there is a greater possibility for interaction, for inefficient company resource allocation, and for reduced ability to invest in innovation. The negative effect on U.S. industry of regulatory accumulation actually compounds on itself for every additional regulation added to the pile.” Mandel & Carew, 2013, at p. 4, http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf.

²³ Susan Dudley, “Retrospective Evaluation of Chemical Regulations. 2017. *OECD Environment Working Papers, No. 118*, <http://www.oecd-ilibrary.org/docserver/download/368e41d7-en.pdf?expires=1490018292&id=id&accname=guest&checksum=CBFEE20A5B824A19F6E01DB1B59ABE63>.

prices), they rarely know whether those outcomes relate to regulation or other causes.²⁴ Politicians' and bureaucrats' ability to learn from prior policy decisions is constrained not only by poor feedback, but also by a tendency to interpret subsequent events as vindicating the adopted policy or as justifying even *more* regulation.

III. There is a better way.

Regulation is an essential tool for achieving broad public goals, but as we have shown, poorly designed regulations can do more harm than good. Recognizing that regulations can impose costs on entrepreneurs, workers, and consumers, the U.S. government has adopted procedural and analytical requirements, such as “notice-and-comment” rulemaking and “benefit-cost analysis” for issuing new regulations. These tend to focus on one problem at a time, however, and too often are based on regulators’ over-confident analysis of what consumers should value. As a result, they have done little to constrain regulations or ensure they are serving broad public goals.²⁵

Thus, regulations accumulate and stifle innovation and economic growth that is beneficial for all Americans. It need not be this way, however. Americans can enjoy the benefits of regulation while reducing the costs.

A. Respect market forces and the beneficial effects of competition.

First, in deciding whether to regulate, agencies should determine whether there is a material failure of private markets.²⁶ This is because competitive markets are not only very efficient at allocating scarce resources to their best use, but in encouraging entrepreneurial activity and innovation. When important effects of a free market transaction (such as environmental pollution) are not captured in the decisions made by buyers and sellers, government should examine the underlying cause of that “market failure” and seek to address it by exploiting, rather than disrupting, the “marvel”²⁷ that is the market-based economic ecosystem.²⁸ For example, are property rights poorly defined, or could

²⁴ John D. Graham and Paul R. Noe, “Beyond Process Excellence: Enhancing Societal Well-Being,” in *Achieving Regulatory Excellence*, Cary Coglianese, ed., Brookings Institution Press, Washington, DC (2017), at p. 73.

²⁵ Susan Dudley, “Reforming Regulation,” *Reviving Economic Growth: Policy Proposals from 51 Leading Experts* Brink Lindsey, ed. 2015.

²⁶ See Executive Order 12866, 58 FR (Oct. 4, 1993), Sec. 1(a) (“Federal agencies should promulgate only such regulations as are required by law, made necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people”).

²⁷ Hayek, 1945, says “The marvel is that in a case like that of a scarcity of one raw material, without an order being issued, without more than perhaps a handful of people knowing the cause, tens of thousands of people whose identity could not be ascertained by months of investigation, are made to use the material or its products more sparingly; *i.e.*, they move in the right direction.... I have deliberately used the word “marvel” to shock the reader out of the complacency with which we often take the working of this mechanism for granted. I am convinced that if it were the result of deliberate human design, and if the people guided by the price changes understood that their decisions have significance far beyond their immediate aim, this mechanism would have been acclaimed as one of the greatest triumphs of the human mind.” Available at <http://www.econlib.org/library/Essays/hykKnw1.html>.

²⁸ To illustrate, guar gum, a food ingredient used, among other applications, to make ice cream smooth and creamy was also widely used in fracking fluids. The increased demand for guar gum generated price increases leading

economic incentives, such as an emissions tax, internalize those costs without inhibiting innovation.²⁹ Calibrating regulations to address market failures can ensure that government interventions achieve the intended goals while minimizing adverse consequences.

B. Do more good than harm.

Second, because the goal of regulation is to enhance, not undermine, societal well-being, regulatory agencies should consider important trade-offs and design regulations to do more good than harm. Benefit-cost analysis, despite its limitations, is the best tool for understanding regulatory consequences and ensuring that regulations provide social benefits greater than their social costs.²⁹ There is longstanding bipartisan consensus on this point: every President since Ronald Reagan has required regulatory agencies to use benefit-cost analysis by Executive order. As the Clinton Administration put it:

[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive, and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.

The only way we know how to distinguish between regulations that do good and those that do harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits.”³⁰

Although presidential directives have required agencies to balance benefits and costs in designing their regulations for over 36 years, agencies often have interpreted their regulatory statutes to preclude doing so. Fortunately, the courts—including the Supreme Court³¹—recently have clarified

fracking producers to seek substitutes and gum producers to expand output. Consumers probably never even noticed.

²⁹ See, e.g., John D. Graham and Paul R. Noe, “A Reply to Professor Sinden’s Critique of the ‘Cost-Benefit State,’” RegBlog, University of Pennsylvania Law School (Sept. 27, 2016); Jonathan S. Masur & Eric A. Posner, “Against Feasibility Analysis,” 77 U. Chicago L. Rev. 657 (2010); John D. Graham, “Saving Lives Through Administrative Law,” 157 U. Pa. L. Rev. 395 (2008); Economic Analyses at EPA, Richard D. Morganstern, ed., Resources For the Future Press (1997) (providing case studies on EPA’s use of benefit-cost analysis and finding that it resulted in reduced regulatory costs and often increased benefits as well); U.S. Environmental Protection Agency, “EPA’s Use of Cost-Benefit Analysis: 1981-1986,” EPA-230-05-87-028 (Aug. 1987), at p. 5-2 (“the return to society from improved environmental regulations is more than one thousand times EPA’s investment in cost-benefit analysis”).

³⁰ Office of Management and Budget, Office of Information and Regulatory Affairs, Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997), at p. 10.

³¹ See, e.g., Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009) (agencies have substantial discretion in interpreting a statute that is silent or ambiguous on benefit-cost balancing as authorizing it); Business Roundtable

that in the vast majority of cases, agencies may exercise their discretion to balance benefits and costs in implementing regulatory statutes. Accordingly, a president could direct all regulatory agencies to reexamine their statutory interpretations, and unless expressly prohibited by law, implement their regulatory statutes through benefit-cost balancing to do more good than harm.³²

Moreover, to date, a significant number of regulatory agencies—so-called “independent” agencies that do not report to the President (such as the Securities and Exchange Commission, the Federal Communications Commission, and the Consumer Products Safety Commission)—are not required to conduct benefit-cost analysis for their major rules at all, but there is a strong consensus that they should be required to do so.³³ Therefore, presidents could include the independent regulatory agencies within the requirements for benefit-cost balancing, including the directive to modernize their statutory interpretations to do more good than harm.³⁴

Unfortunately, the office that reviews important regulatory proposals under the presidential directives for benefit-cost balancing—the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget—is grossly underfunded for the task at hand. Since its creation over 36 years ago, OIRA has lost over half its staff (from 97 to about 47), while the staff of the regulatory agencies has almost doubled (from 146,000 to 278,000).³⁵ Increasing OIRA’s resources commensurately could improve agency analysis and regulatory outcomes.

Finally, it is important that the fundamental and eminently rational requirement for regulators to balance benefits and costs to ensure regulations do more good than harm be required by statute, not just through a presidential order. A judicially enforceable benefit-cost test is needed because the status quo is inadequate for many reasons, including the institutional limitations of the agencies and OIRA (such as bureaucratic turf battles, failure to utilize both internal and external expertise, bias, and the mismatch between the vast volume of regulation and OIRA’s shrinking resources), as well as political dysfunctions (including inconsistent support for OIRA by varying administrations, interest group rent-seeking, and presidential electoral politics).³⁶ Scholars have shown that the courts are quite capable of competently reviewing agency use of benefit-cost analysis.³⁷ Indeed, benefit-cost

v. SEC, 647 F.3d 1144, 1148-89 (D.C. Cir. 2011) (SEC’s failure to apprise itself of the economic consequences of a regulation was arbitrary and capricious); *Michigan v. EPA*, 576 U.S. __ (2015) (EPA’s failure to consider cost in determining whether a regulation was “appropriate and necessary” was arbitrary and capricious).

³² John D. Graham and Paul R. Noe, “A Paradigm Shift in the Cost-Benefit State,” RegBlog, University of Pennsylvania Law School (April 26, 2016).

³³ See, e.g., American Bar Association, Section of Administrative Law and Regulatory Practice, “Improving the Administrative Process: A Report to the President-Elect of the United States” (2016), at pp. 9-10 (urging the President to “bring the independent regulatory commissions within the requirements for cost-benefit analysis, OMB review and retrospective review of rules”). Susan Dudley, “Make Independent Regulatory Agencies More Accountable to the Public,” *Forbes*, 2017, <https://www.forbes.com/sites/susandudley/2017/05/09/make-independent-regulatory-agencies-more-accountable-to-the-public/>.

³⁴ John D. Graham and Paul R. Noe, “A Paradigm Shift in the Cost-Benefit State,” *supra* note 32.

³⁵ See Susan Dudley & Melinda Warren, G.W. Regulatory Studies Center and Washington University in St. Louis, “Regulators’ Budget from Eisenhower to Obama: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2017” (May 2016), at p. 20 (Table A-3).

³⁶ John D. Graham and Paul R. Noe, “Beyond Process Excellence: Enhancing Societal Well-Being,” *supra* note 24, at p. 72 - 87.

³⁷ See, e.g., Caroline Cecot and W. Kip Viscusi, “Judicial Review of Agency Benefit-Cost Analysis,” 22 *George Mason Law Review* 575 (2015); Jonathan S. Masur & Eric A. Posner, “Cost-Benefit Analysis and the Judicial

balancing is so fundamental to rational decision making that the courts already have shifted toward requiring agencies to do more good than harm, even in the absence of Congressional action.³⁸

C. Base decisions on the best available information and transparency.

Important regulatory decisions should be based on high quality information and should be transparent to the public. Specifically, regulators should base their regulatory decisions, priorities, and influential information disseminations on the best available scientific and technical information, including an objective and unbiased evaluation of the cost, benefits and risks, and a careful analysis of the weight of the scientific evidence. Influential scientific information and assessments should be peer-reviewed by independent experts before being disseminated.

Agencies also should disclose early to the public the important data, models, and other key information used in major rulemakings and provide a meaningful opportunity for public input. Court settlements between regulators and interest groups to require rulemakings should be published and made available to the public, and reviewed by OIRA, before they are final.³⁹

D. Gather better feedback.

The feedback loop between businesses and customers is an essential element of an economic ecosystem that regulations often disrupt.⁴⁰ When considering public policies to address perceived problems, regulators must appreciate the value of competition and choice at regulating undesirable behavior. We live in a diverse society made up of individuals in varied circumstances and with different preferences.⁴¹ One-size-fits-all regulatory approaches at the national level that reduce competition, choice, and feedback disrupt learning processes, protect favored interests from challenge, and make the economic ecosystem as a whole less able to adapt and innovate.

E. Encourage experimentation and learning.

Regulation should not short-circuit trial and error. No one, in the market or in the government, makes mistakes on purpose, but they are inevitable, particularly in complex, rapidly changing conditions. Mistakes are inevitable when regulators take precautionary approaches to regulation or when they attempt to substitute some products for others. Mistakes in the marketplace generate

Role,” University of Chicago Law School, Coase-Sandar Working Paper Series in Law and Economics (Feb. 7, 2017).

³⁸ See, e.g., Jonathan S. Masur & Eric A. Posner, “Cost-Benefit Analysis and the Judicial Role,” *supra*; John D. Graham and Paul R. Noe, “A Paradigm Shift in the Cost-Benefit State,” RegBlog, *supra*; Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection*, American Bar Association, Section of Administrative Law and Regulatory Practice, Chicago, IL (2002).

³⁹ Paul R. Noe, “Smarter Regulation for the American Manufacturing Economy,” *supra* note 1.

⁴⁰ <http://democracyjournal.org/magazine/31/capitalism-redefined/>.

⁴¹ Susan Dudley, “The Utility of Humility,” The George Washington University, 2014, <https://regulatorystudies.columbian.gwu.edu/utility-humility>.

immediate pressures to make corrections. Mistakes in regulation too often create pressures for even more regulation.

When regulation is necessary, the policies themselves should be designed in ways that encourage competition and allow for experimentation and testing of regulatory hypotheses. These need not be randomized controlled trials in the scientific sense, but rather natural experiments that allow for trial and error and real-world observation of how different policies affect behavior and outcomes.⁴² To generate natural experiments, whenever possible, policies should be developed at the state and local levels. Global governance structures that reduce competition among regulators will quash healthy differences that permit experimentation and learning.⁴³

F. Regulatory humility.

Regulators should be humble about what they know, and what they do not. Interventions in complex systems that are not completely understood are fraught with risk. Even with the best of intentions, sensible sounding “solutions” can make things worse, and sometimes much worse. For this reason, a foundation of medical ethics is the Hippocratic Oath: First do no harm.

Regulators should follow the same principle. When a problem is not well understood, or the effects of a regulation are uncertain, or rapid technological change means present circumstances are not likely to last, regulation that impedes market adaptation can do more harm than good.

The success of capitalist systems does not depend on markets being efficient, or on people always behaving rationally, but rather their complex, adaptive⁴⁴ features, like natural ecosystems.⁴⁵ Both market participants and markets learn from their mistakes and correct them. Static analyses by benevolent regulators willing to substitute their judgment for that of diverse individuals with different circumstances and preferences ignores this insight and unwittingly reduce opportunities, growth, and human flourishing.

Like everyone else, government actors are susceptible to giving more weight to information that supports their position, discounting data, research, values and perspectives that call regulatory action into question. Political demand for costly regulation of highly publicized risks, even when scientists believe that those risks are minimal and not worth addressing, may reinforce bad government policies.

⁴² <http://www.latimes.com/opinion/op-ed/la-oe-sunstein-mercury-regulation-pollution-epa-20140425-story.html>.

⁴³ Susan Dudley, “The Utility of Humility,” The George Washington University, 2014, <https://regulatorystudies.columbian.gwu.edu/utility-humility>, *supra* note 41.

⁴⁴ <http://democracyjournal.org/magazine/31/capitalism-redefined/>, *supra* note 40.

⁴⁵ Susan Dudley, “Evolution and Innovation,” 2016, <https://regulatorystudies.columbian.gwu.edu/evolution-and-innovation>.

G. Address regulatory accumulation.

Finally, incentives are needed to address the accumulation of regulations already on the books. As noted above, unlike ecosystems and interactions in non-government spheres, where individuals and organizations are constantly learning from past experience and updating their behavior accordingly, the regulatory sphere has no feedback loop. The regulatory framework tends to focus on solving the next big problem (on the assumption that markets fail but regulators are infallible), without ever looking back to see if the rules in place are actually working as anticipated.⁴⁶ The incentives of the regulatory agency can be perverse, causing it to actively avoid the efficient solution—to prefer a system of rules and enforcement actions, for example, to a self-enforcing system of emissions taxes.

All the incentives in the federal bureaucracy are to create more and more regulations under the vast authority of the administrative state. Thus, both administrative and statutory structures should be created to counterbalance these incentives.

There should be retrospective review to streamline and simplify existing rules and to remove outdated and duplicative rules. The retrospective review process should be the start of a bottom-up analysis of how agencies can best accomplish their statutory missions. This should include a careful analysis of regulatory requirements and their necessity, as well as an estimation of their value to achieve needed outcomes. No significant new rule should be issued without a plan for review.⁴⁷

A team within agencies (perhaps like the regulatory reform task forces established recently by Executive Order 13777) dedicated to identifying deregulatory opportunities could provide a counterweight to the natural focus of regulatory agencies on issuing new regulations. But even such structures may at times be defeated by a culture of regulatory zeal within an agency. Thus, as Professor Michael Rappaport of San Diego Law School has suggested, Congress could create an agency that would have express statutory authority to deregulate. The agency should have the authority that all existing agencies have, but *only to pass regulations that deregulate*. The deregulatory agency would employ the additional time, insulation, and expertise that administrative agencies possess in the service of deregulation.

The agency would also have the right incentives to deregulate: it would likely be filled with people who understand and support deregulation, and the agency's public reputation and internal incentive structure would be driven by the efficacy of its deregulatory actions.

By raising proposals in the form of proposed rules, the agency would both publicize the case for the deregulation and constrain any hubris from the regulatory agencies.

⁴⁶ Susan Dudley, "The Utility of Humility," The George Washington University, 2014, <https://regulatorystudies.columbian.gwu.edu/utility-humility>.

⁴⁷ Paul R. Noe, "Smarter Regulation for the American Manufacturing Economy," *supra* note 1.

IV. Conclusion

The appropriate goal of regulation is to enhance, not undermine, societal well-being. In other words, regulation should do more good than harm. Without a counterfactual, it is impossible to know what a more disciplined regulatory environment would have meant for economic growth and well-being. However, evidence suggests that a smarter regulatory approach targeted at problems that cannot be solved by other means could have enormous benefits for current and future generations.

Though difficult to measure, it is widely recognized that the quality and extent of government regulation is “a major determinant of prosperity.”⁴⁸ The World Bank conducts annual *Doing Business* surveys measuring government policies and the ease of doing business in different countries. Over the last decade, the U.S. has dropped from #4 to #8 on the World Bank’s list.⁴⁹

The World Bank finds that the highest ranked countries in its survey regulate, but “they do so in less costly and burdensome ways, and they focus their efforts more on protecting property rights than governments in other countries.”⁵⁰ It observes, “a thriving private sector—with new firms entering the market, creating jobs and developing innovative products—contributes to a more prosperous society,”⁵¹ “promotes growth and expands opportunities for poor people.”⁵²

Empirical studies of deregulated industries in the U.S. demonstrate the impact of regulation on innovation; they consistently find that deregulation enables greater innovation and larger price reductions than economists predicted based on pre-deregulation costs and market conditions.

A few studies have attempted to quantify the effect of regulation on economic growth, productivity, and innovation. For example, in a classic analysis from the 1980s, Jorgensen & Wilcoxon simulate the long-term growth of the U.S. economy with and without environmental regulation and conclude that “the cost of environmental regulation is a long run reduction of 2.59 percent in the level of the U.S. gross national product.”⁵³ More recently, McGrattan and Prescott find that higher regulatory costs contribute to lower total factor productivity (TFP) and GDP.⁵⁴ Dawson & Seater estimate that regulations reduced gross domestic product (GDP) growth by 2 percent per year between 1949 and 2005, leading to an accumulative reduction of \$38.8 trillion in GDP.⁵⁵

A better regulatory system is always in the national interest: With a better regulatory system, we can have more innovative products, higher wages, and upwardly mobile jobs. A smarter regulatory

⁴⁸ <http://elibrary.worldbank.org/doi/abs/10.1596/0-8213-5341-1>.

⁴⁹ <http://www.tradingeconomics.com/united-states/ease-of-doing-business>.

⁵⁰ <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB05-FullReport.pdf>.

⁵¹ <http://www.doingbusiness.org/reports/global-reports/doing-business-2014>.

⁵² <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB04-FullReport.pdf>.

⁵³ http://www.jstor.org/stable/2555426?seq=1#page_scan_tab_contents.

⁵⁴ <https://www.minneapolisfed.org/research/wp/wp694.pdf>.

⁵⁵ <http://www4.ncsu.edu/~jjseater/regulationandgrowth.pdf>.

process can ensure that regulations enhance societal well-being, rather than provide an advantage for powerful interest groups. Now more than ever, regulatory reform is essential for both the economic and the political well-being of the nation. The United States faces one of its highest levels of debt to GDP since World War II.⁵⁶ The retirement of the baby boomers will only exacerbate this problem. The only solution for reducing the ratio, other than painful tax increases or benefit decreases, is the faster economic growth that regulatory reform can bring.

The United States is more bitterly divided politically than it has been for decades. If regulations focus on promoting public goods and preventing public bads, rather than serving as a forum for special interests and partisanship, the regulatory system can address the needs we have in common rather than divide us. It also can address widespread social discontent at the ability of insiders to gain at the expense of outsiders. Regulatory reform can blunt the force for division by reducing rent-seeking and unlocking the healthy competition and creativity needed to revive opportunity, prosperity, and freedom in the United States and the world.

⁵⁶ <https://tradingeconomics.com/united-states/government-debt-to-gdp>.



EXECUTIVE ORDERS

Presidential Executive Order on Promoting Energy Independence and Economic Growth

— ENERGY & ENVIRONMENT

Issued on: **March 28, 2017**



By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic

energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

Sec. 2. Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources. (a) The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, “burden” means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for

Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions. (a) The following Presidential actions are hereby revoked:

(i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment);
and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," which is referred to in "Notice of Availability," 81 Fed. Reg. 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in

subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.

Sec. 4. Review of the Environmental Protection Agency's "Clean Power Plan" and Related Rules and Agency Actions. (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64509 (October 23, 2015); and

(iii) The proposed rule entitled "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule," 80 Fed. Reg. 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the “Legal Memorandum Accompanying Clean Power Plan for Certain Issues,” which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the administrative actions described in subsection (a) of this section.

Sec. 5. Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis. (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

(i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);

(ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);

(iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);

(iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);

(v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016); and

(vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.

Sec. 6. Federal Land Coal Leasing Moratorium. The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. Review of Regulations Related to United States Oil and Gas Development. (a) The Administrator shall review the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," 81 Fed. Reg. 35824 (June 3, 2016), and any rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable,

suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.

(b) The Secretary of the Interior shall review the following final rules, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules:

(i) The final rule entitled “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,” 80 Fed. Reg. 16128 (March 26, 2015);

(ii) The final rule entitled “General Provisions and Non-Federal Oil and Gas Rights,” 81 Fed. Reg. 77972 (November 4, 2016);

(iii) The final rule entitled “Management of Non Federal Oil and Gas Rights,” 81 Fed. Reg. 79948 (November 14, 2016); and

(iv) The final rule entitled “Waste Prevention, Production Subject to Royalties, and Resource Conservation,” 81 Fed. Reg. 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
March 28, 2017.



EXECUTIVE ORDERS

Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs

— **BUDGET & SPENDING**

Issued on: **January 30, 2017**



EXECUTIVE ORDER

REDUCING REGULATION AND CONTROLLING REGULATORY COSTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 et seq.), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Purpose. It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior

regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

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

(c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

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

Sec. 3. Annual Regulatory Cost Submissions to the Office of Management and Budget. (a) Beginning with the Regulatory Plans (required under Executive Order 12866 of September 30, 1993, as amended, or any successor order) for fiscal year 2018, and for each fiscal year thereafter, the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.

(b) Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.

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

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.

(e) The Director shall provide the heads of agencies with guidance on the implementation of the requirements in this section.

Sec. 4. Definition. For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:

(a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;

(b) regulations related to agency organization, management, or personnel; or

(c) any other category of regulations exempted by the Director.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
January 30, 2017.