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Stronger Regulation from the Get-Go

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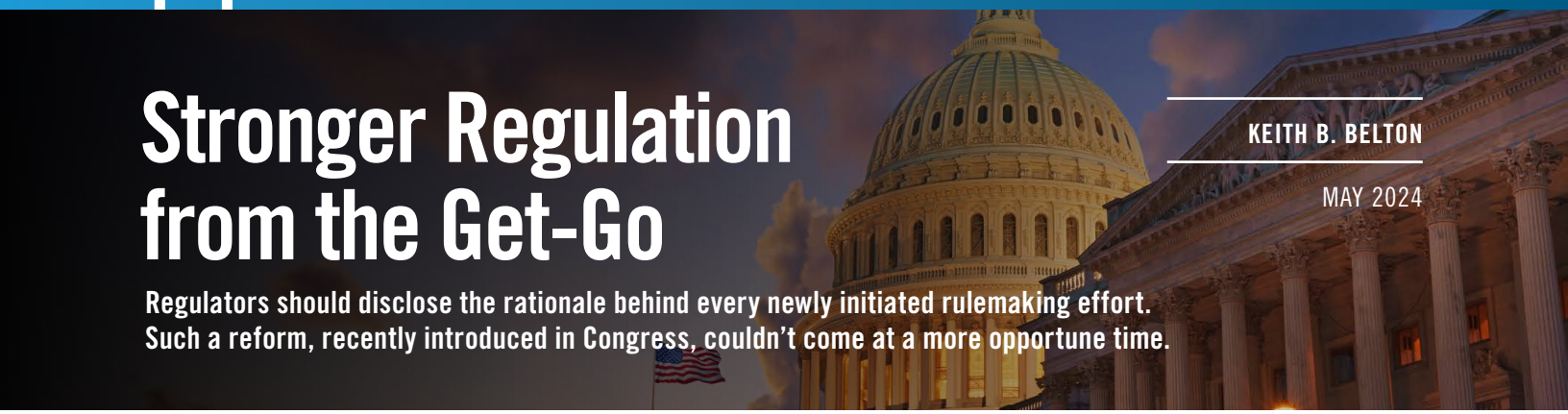

Stronger Regulation from the Get-Go

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Regulators should disclose the rationale behind every newly initiated rulemaking effort. Such a reform, recently introduced in Congress, couldn't come at a more opportune time.

INTRODUCTION

For federal regulators, the stakes have never been higher. On the one hand, the Biden Administration sees regulation as an important mechanism to advance its ambitious policy priorities — and is employing a whole-of-government approach unprecedented in terms of both its breadth and depth — for example, to address climate change, to advance its pro-labor agenda, and to regulate artificial intelligence.

On the other hand, the Supreme Court, with its 6-3 conservative majority, is taking aim at regulatory overreach. In its last two terms, SCOTUS has shown a growing interest in curtailing the so-called administrative state, narrowing the ability of regulators to interpret broadly their statutory authority — for example, by vacating Biden regulations to forgive student loan debt and narrowing the scope of federal jurisdiction over waters subject to pollution control. The current SCOTUS term — which began in October — offers more of the same.[1] Among the cases to be decided are those challenging long-standing tenets of administrative law, such as the major questions doctrine, the non-delegation doctrine, and *Chevron* deference.

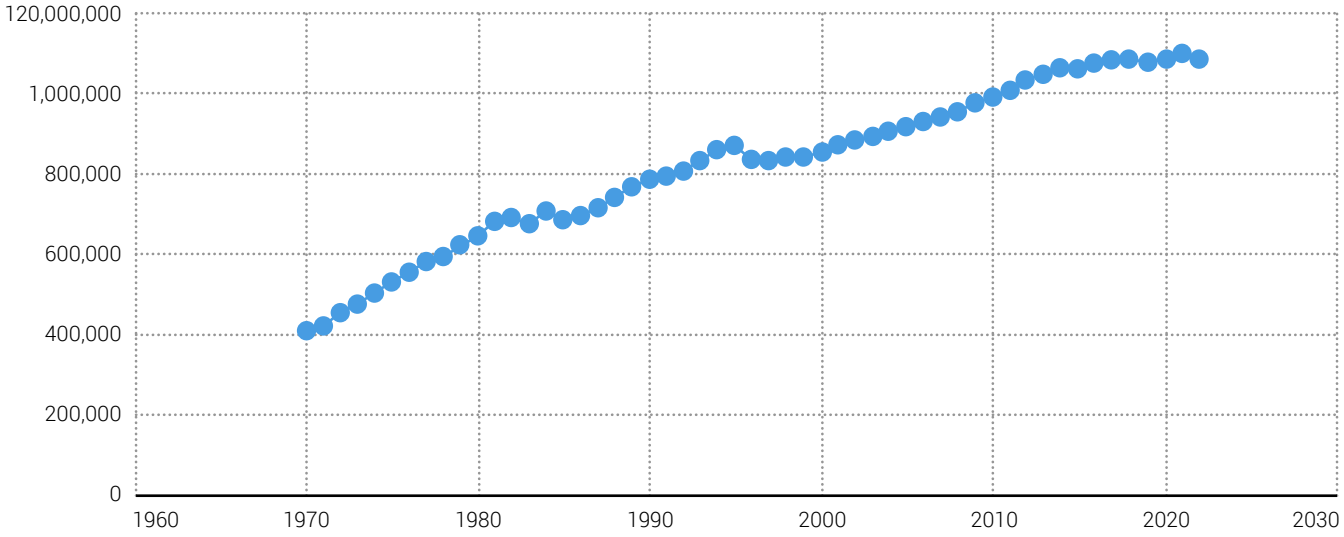
The stakes are high because, once in place, regulation has staying power.*The Code of Federal Regulation* (CFR), a compendium of all federal rules — has grown from just two volumes in 1938 to approaching 250 volumes and more than 185,000 pages — four times larger than the U.S. Code of Laws, a compendium of statutes enacted by Congress.[2] Containing more than one million restrictions (and counting) and touching every aspect of American life, the CFR has expanded by 3% year after year (see Figure 1), reflecting the

roughly 3,500 new rules issued annually by more than 70 regulatory agencies employing hundreds of thousands of regulators.[3]

When crafted well, regulation saves lives and improves the quality of life. Our food is safer, air is cleaner, consumers are better informed, and household savings are better protected — in no small part because of regulation that sets a high bar on performance that Americans have come to expect. But when crafted poorly, regulation can extinguish opportunity: builders who must wait more than a decade for a federal permit, food processing facilities that must adhere to thousand-page rulebooks from two different federal agencies, innovators who must navigate an increasingly lengthy and costly government approval process that, in some cases, was never applied to competing products that had been in commerce for decades.

FIGURE 1: RESTRICTIONS IN THE CODE OF FEDERAL REGULATIONS

Federal regulatory restrictions have grown at an average annual rate of 3.2% since 1970, defining the modern administrative state.



Source: Patrick McLaughlin, Jonathan Nelson, Thurston Powers, Micheal Gilbert, and Stephen Strosko, RegData US 4.0 Annual (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, 2021

Whether a regulation provides a net plus or minus depends critically on the process used to create it. A flawed process leads to flawed outcomes, and vice versa.

With so much riding on regulation, now is an opportune time to identify and fix flaws in the process. The purpose of this report is to propose a new reform, developed by the author in collaboration with the Progressive Policy Institute, that would promote transparency and rigor in federal rulemaking. It has recently been introduced in Congress as H.R.8204, the "Regulatory Early Notice and Engagement Act (RENEA) by Representatives Don Davis (D-N.C.), Tim Burchett (R-Tenn.), and Guy Reschenthaler (R-Pa.).

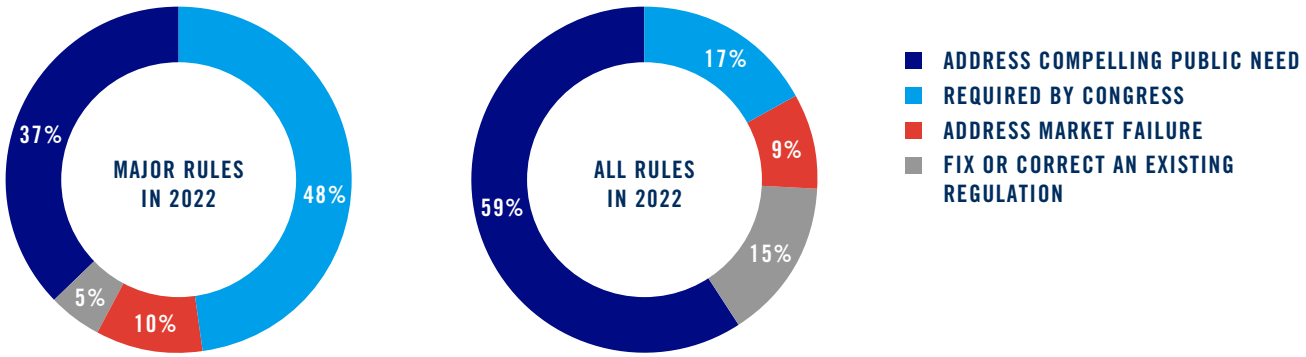
THE PROBLEM: UNACCOUNTABLE REGULATORS

Oversight of new regulations by elected officials should be the norm in a republic, where citizens elect representatives who exercise political power. Yet most new rules are initiated by regulators, not lawmakers. To illustrate this, we examined a random sample of 340 rules drawn from the 3,168 rules issued by federal regulatory agencies in 2022. We also examined all 80 "major" rules — the ones with the greatest impact.[4]

For each rule, we determined if it was required by Congress or developed at the discretion of regulators to address a compelling public need. The results of this exercise are shown in Figure 2. For major rules, nearly half were issued at the direction of Congress. For all rules, agencies were in the driver's seat 83% of the time. If 2022 is a representative year — and we have no reason to believe it is not — then the vast majority of federal regulations are initiated at the discretion of unelected regulators.

FIGURE 2: THE RATIONALE FOR FEDERAL LEGISLATION

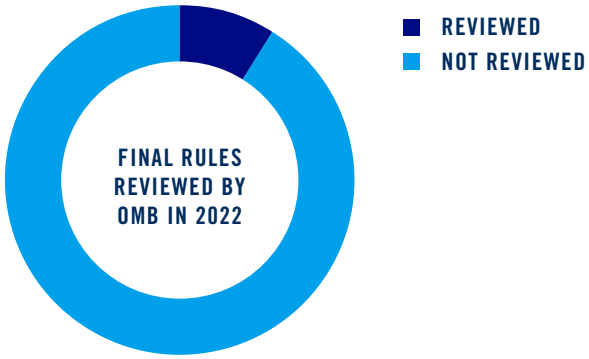
Of all final regulations issued in 2022, 17% were required by Congress. The rest were initiated by regulators, either to fix or improve an existing regulation (15%), address a market failure (9%), or address another compelling public need (59%). For major rules, Congress plays a more important role, requiring half of these most impactful regulations.



Perhaps this is not so bad? After all, the President is an elected official and every President since Ronald Reagan has required the Office of Management and Budget (OMB) to review regulations to ensure they meet certain principles of sound regulation. However, only a relatively small percentage of regulations—those designated "significant" by OMB—undergo this review.[5] In 2022, 8% of final rules were reviewed by OMB (Figure 3). And this small number of reviewed rules is shrinking. Consider this: the Biden Administration has issued the same number of major rules as the Obama Administration at the 36-month mark, but the number of draft rules reviewed by OMB is down 39% (Figure 4). We conclude that for the vast majority of regulations issued each year (at least 75%), no elected official has exercised direct oversight prior to issuance.

FIGURE 3: FINAL RULES REVIEWED BY OMB IN 2022

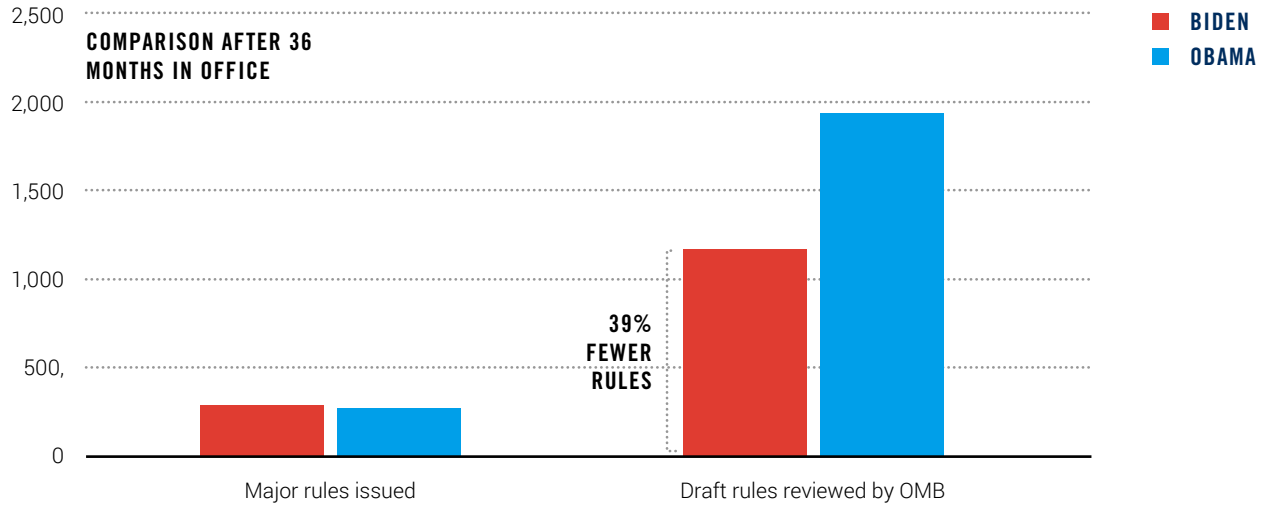
Only draft rules determined to be significant are reviewed by the White House prior to publication in the Federal Register. In 2022, just 8% of all final rules were deemed significant.



Source: Federal Register

FIGURE 4: BIDEN'S ORDER ON MODERNIZING REGULATORY REVIEW

In accordance with his Executive Order, Modernizing Regulatory Review, President Biden revised the criteria for OMB review of significant rules, lessening oversight of agency regulators. After 36 months in office, OMB has reviewed 39% fewer draft rules than under President Obama, even though both presidents issued the same number of major rules.



Source: GAO, OMB

OVERSIGHT OF FINAL RULES: TOO LITTLE, TOO LATE

With so little oversight by elected officials prior to the issuance of a final regulation and a year-after-year growing regulatory burden, it is no surprise that presidents increasingly have felt political pressure to eliminate unnecessary rules. Indeed, this is a recurring theme among Democrats elected to the White House in modern times:

Unneeded regulations, or necessary regulations that impose undue burdens, lower efficiency and raise costs. For the past 3 years I have vigorously promoted a basic approach to regulatory reform: unnecessary regulation, however rooted in tradition, should be dismantled and the role of competition expanded ***— Jimmy Carter, January 30, 1980***

We do need to reduce paperwork and unnecessary regulation. I think government can discard volume after volume of rules and, instead, set clear goals and challenge people to come up with their own ways to meet them. *— Bill Clinton, March 16, 1995*

We're also getting rid of absurd and unnecessary paperwork requirements . . . We're looking at the system as a whole to make sure we avoid excessive, inconsistent and redundant regulation. Regulations do have costs; often, as a country, we have to make tough decisions about whether those costs are necessary. *— Barack Obama, January 18, 2011*

Each of these Democratic presidents initiated a program to weed out unnecessary regulation, with some success.[6] But as every gardener knows, without consistent attention, weeds grow back. We shouldn't have to wait for a president to feel enough political pressure to eliminate unnecessary regulation.

Well then, what about Congress? Because of the breadth of statutory delegations to regulatory agencies, Congress has taken steps consistent with the nondelegation doctrine. For example, the 1996 Congressional Review Act (CRA) allows Congress to invalidate a new federal rule by a simple majority if it acts within a short period of time. However, it has seldom been employed for the simple reason that a President is unlikely to sign legislation invalidating one of his or her own rules. Since the CRA was enacted in 1996, roughly 87,500 final rules have been issued. Of these, just 17 (0.02%) have been disapproved by Congress.

In 2013, PPI proposed a simple yet elegant solution — the Regulatory Improvement Commission (RIC). Under this concept, a politically appointed bipartisan commission would compile a list of existing regulations that have outlived their usefulness and present it to Congress for rescission. This proposal was modeled after the successful military base-closure commission, which allowed elected officials to reach an agreement about which military bases to close — a thorny issue given local political pressures.

The RIC concept originally was championed in Congress by Senator Angus King (I-Maine) and Roy Blunt (R-Mo.).[7] A companion House bill drew strong support from Democrats and Republicans.[8] With the election of Donald Trump in 2016, however, many Republicans reverted to more partisan approaches aimed at regulatory rollback rather than improvement. One criticism from the business community was RIC's focus on regulations that had been in effect for a long time; even if eliminated, such regulations wouldn't restore the sunk compliance costs borne by business. Nevertheless, the bill would have cut the cost of compliance to business from an ever-growing body of rules.

Challenging the legal basis of a new rule in court remains a workable, yet slow, solution for those few entities able to afford the significant costs associated with taking on the federal government. Even so, this option represents a second-best solution because the final rule often remains in effect until a court decides otherwise, which is not often.

We conclude that our regulatory oversight process (by the President, by Congress, by the courts) is flawed because it is too heavily tilted toward the end of the process, after a rule is issued, when it is difficult to make wholesale changes, and long after resources have been spent by regulators to write a rule and the

regulated to comply with it. In fact, for many rules, the biggest expense is the up-front capital expenditures prior to the effective date of compliance — after which any reform comes too little, too late.

A NEW SOLUTION FROM AN OLD EXECUTIVE ORDER

An improved oversight process would focus on the very beginning of the regulatory process. Executive Order 12866 — issued in 1993 by Bill Clinton and affirmed by every president since — points toward a solution. This executive order describes the philosophy of federal regulation and lists several principles that regulators are supposed to follow before crafting a new rule. (See Box.)

The philosophy of federal regulation is a two-step process: First, regulators must determine that a new rule is necessary. Second, they should write it such that net benefits to the public are maximized. Although there have been many reform proposals focused on step 2, which typically involve the application of cost-benefit analysis, few if any reforms have focused on step 1, which arguably is more important.

Let's take a closer look at step 1. EO 12866 raises some key questions about the need for a new regulation. First and foremost, is the rule required by statute or made necessary to interpret a statute? If yes, there is no room for argument; the agency must develop and issue a new rule. Assuming the rule is not required by Congress, does it meet a compelling public need, such as addressing a market failure? If so, regulation may be needed, according to OMB guidance.

All of this begs the question: do agencies follow these principles in practice? One might expect that conformance is non-uniform because so few rules go through OMB review, where the OMB guidance serves as the rubric. We wanted to take a closer look, so our examination of rules issued in 2022 also included the first three executive order principles relating to whether a new rule is "necessary." Table 1 presents the results.[9]

Three points are clear from the table. The first, mentioned previously, is that a small percentage of rules (17% of all rules) are directed by Congress; most are initiated at the instigation of regulators. For example, on July 18, 2022, the FCC issued a final rule prohibiting gateway telecom providers from facilitating robocalls from foreign countries. FCC was not required to do so by statute and instead did this using its authority delegated to it by Congress through its organic statute.

EXCERPT FROM EXECUTIVE ORDER 12866, REGULATORY PLANNING AND REVIEW

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…

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:

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.

The second point is that regulation is sometimes necessary to correct or fix errors in an existing regulation. This was the justification for 15% of the rules that were not required by Congress. For example, on December 29, 2022, USDA revised its regulations that govern domestic quarantines for various plant pests by removing lists of quarantined areas and regulated articles from the regulations in order to maintain these lists on the Agency's web pages. This will enable USDA regulators to act more quickly and provide information that can be accessed more easily by the public. In our opinion, such rules reflect good government and, therefore, are necessary.

The third point is that agencies seldom disclose their thinking about alternatives to regulation. For example, on November 25, 2022, the CSPC issued a rule establishing safety standards for clothing storage units. The preamble to the final rule describes many alternatives CPSC considered and rejected. But this example of good practice is a rare exception. In only 1% of rules did an agency identify — and explain why it rejected — alternatives to direct regulation. We conclude that regulators seldom disclose information critical to instilling public confidence in the decision to regulate.

TABLE 1: RATIONALE FOR FINAL RULES ISSUED IN 2022

TYPE OF RULE	REQUIRED BY STATUTE	MADE NECESSARY BY COMPELLING PUBLIC NEED			
		MARKET FAILURE	OTHER	UNDERLYING PROBLEM RELATES TO EXISTING LAW	AGENCY DISCLOSED ALTERNATIVES TO REGULATION
MAJOR RULES (N=80)	48%	10%	43%	5%	2%
ALL RULES* (N=3,168)	17%	9%	74%	15%	1%

** Estimated (+/- 5%) from a random sample of 340 final rules.*

The bottom line: although the philosophy underpinning regulatory review is sound, it is not always practiced by regulators. If it were, public confidence in regulation would improve, and elected officials could better exercise oversight, which would lead to stronger, more defensible regulation.

A BETTER WAY: EARLY NOTICE

Congress is considering a solution. H.R.8204, the Regulatory Early Notice and Engagement Act (RENEA), would require that, within one week after initiating a new rulemaking activity, an agency shall make public on its website and send to Congress a *regulatory early notice,* which must

1. Identify the problem the rule is intended to address and state whether the rule is required by law, necessary to interpret law, or made necessary to address a compelling public need, such as a material failure of private markets;

2. State whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct;

3. State whether the agency identified and assessed available alternatives to direct regulation, including the alternative of not regulating; and

4. Invite the public to provide the agency with recommendations on how to accomplish the objectives of the rule most effectively and at least cost.

The sponsors of this bipartisan bill — Representatives Don Davis (D-N.C.), Tim Burchett (R-Tenn.), and Guy Reschenthaler (R-Pa.) — borrowed the wording directly from EO 12866, which has been in place since 1993 and affirmed by presidents of both major political parties. Additionally, the bill would require the U.S. Government Accountability Office (GAO) to develop and maintain a database containing each regulatory early notice and report to Congress on agency compliance with the Act. This is not a tall order; GAO already maintains a searchable database of final rules sent to them by federal agencies to implement the CRA.

RENEA would be a logical companion to RIC. Whereas the goal of RIC is to eliminate rules that are no longer necessary, the goal of RENEA would be to eliminate unnecessary rules from being created in the first place.

Let's now turn to the pros and cons.

Accountability

The bill would put Congress — not the president — in an oversight role, as it should be because Congress delegated to agencies the authority to regulate. Elected officials need to oversee what unelected regulators are doing. Unfortunately, as previously discussed, elected officials oversee only a tiny fraction of draft regulations before they are issued. By codifying requirements in an executive order, Congress would put teeth into a long-standing best practice that regulators don't always follow today.

Public Engagement

Because RENEA would require notification on the agency's web page, it allows the public to engage with regulators earlier in the rulemaking process, as much as six months earlier — assuming most rules in the queue are only first made public in

the semi-annual *Unified Agenda of Regulatory and De-Regulatory Actions*.[10]

Public engagement is widely seen as a good thing. Indeed, it is a long-standing requirement for proposed rules under the Administrative Procedure Act. But because agencies often spend years developing a proposed rule, the bill would allow public engagement much earlier in the process, and narrowly focused on the underlying problem and need for a regulatory solution.

The Administrative Conference of the United States (ACUS), an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure, has embraced early public engagement, and the draft bill aligns with ACUS recommendations:

> **Although the notice-and-comment process generates important information, agencies can sometimes benefit from engaging the public at other points in the process and through other methods, particularly as they identify regulatory issues and develop potential options before issuing NPRMs.**
>
> **Agencies should make information available to the public about individual rulemakings and opportunities to participate. The availability of this information will help ensure that members of the public are adequately informed and can participate meaningfully in response to RFIs, ANPRMs, meeting opportunities, and other forms of public engagement. For example, an agency may list such information on a dedicated webpage or a section of a page on an agency's website. Doing so could help that agency inform and engage affected interests and other interested persons throughout the rulemaking process.**
>
> **Public engagement should generally occur as early as feasible in the rulemaking process, including when identifying problems and setting regulatory priorities.**
> ***ACUS recommendation, December 20, 2018***
>
> **Agency development of and outreach concerning regulatory alternatives prior to issuing a notice of proposed rulemaking (NPRM) on important issues often results in a better-informed notice-and-comment process, facilitates decision making, and improves rules. In this context, the term "regulatory alternative" is used broadly and could mean, among other things, a different method of regulating, a different level of stringency in the rule, or not regulating at all.**
>
> **Agencies will need to consider whether the benefits of early outreach outweigh the costs, including the resources required to conduct the outreach and any delays entailed.**
> ***ACUS recommendation, July 9, 2021***

We should note that the Biden Administration has set a goal to enhance public engagement in the regulatory process for underserved populations, and RENEA would advance this goal.

Transparency

Disclosing the rationale for each new rulemaking activity represents what Cass Sunstein and Richard Thayer call a policy nudge—a mandate that preserves choice and advances the public interest.[11] It has its advantages: compared to policies that restrict choice, nudges are more

cost-effective and reduce the possibility of an adverse unintended consequence. Examples of nudges include automatic opt-in or opt-out enrollment policies, labeling to inform consumer choice, and public education campaigns. Some have been enormously effective: for example, reducing billions of dollars in credit card debt, expanding health care coverage to millions, and providing access to school lunch programs to millions of children.[12]

Nudges also include mandatory disclosure policies, like that of the bill, in which agencies must disclose their rationale for regulating but are not required to regulate in any particular way. This should lead to more defensible, and thus stronger, regulation as agencies are forced to give thought to the necessity of a new rule in its earliest stages. And stronger regulation benefits everyone.

To the extent agency regulators already consider the necessity of a new rulemaking effort before undertaking it, compliance with RENEA would be particularly easy, and would have the benefit of increasing public confidence in regulation.

Caveats

Despite its significant virtues, RENEA is no panacea. It doesn't guarantee that agencies pursue only needed regulations, although it pushes regulators in that direction. Agencies will not always be clear and convincing that a public need is compelling enough to warrant a mandate. Or whether an underlying market failure is really a market imperfection and therefore not warranting governmental intervention. Or how deep it will look for alternatives to direct regulation. In short, RENEA doesn't substitute for the professionalism of regulators, which cannot be — and shouldn't be — legislated. In his 1995 manifesto, *The Death of Common Sense,* Phillip K. Howard provided example after example of bureaucratic rules handcuffing regulators from doing the right thing.[13] RENEA takes Howard's message to heart — preferring sunshine over micromanagement — to ensure stronger regulation from the get-go.

CONCLUSION

With the Supreme Court willing and eager to curtail federal regulatory activity, now is the perfect time for Congress to strengthen future rules by improving the regulatory process.

RENEA isn't a cure-all, but it is progress. The necessity of a rule would now be disclosed at the very beginning of the regulatory process, rather than at the end. It puts Congress in an oversight role without eroding the practicality of statutory delegation to federal agencies. At its core, the concept of early notice is about checks and balances on governmental power — a hallmark of the Republic — and is well worth the small investment in government resources it would require.

ABOUT THE AUTHOR

Keith Belton is Senior Director of Policy Analysis with the American Chemistry Council. His research and writings explore the intersection of public policy and private markets, with particular focus on economic development, regulation, and competitiveness.

References and Notes

1 For a preview of the 2023-2024 SCOTUS term, see Andrew Chung and John Kruzel, "Federal agency powers in the crosshairs of the Supreme Court," *Reuters,* July 5, 2023.

2 S.E. Dudley, "Milestones in the Evolution of the Administrative State," *Daedalus,* American Academy of Arts & Sciences, Summer 2021, 33-48.

3 In FY2020, federal regulatory agencies employed 286,647 staff and expended $77.8 billion in outlays. Marc Febrizio and Melinda Warren, *Regulators' Budget: Overall Spending and Staffing Remain Stable, An Analysis of the U.S. Budget for Fiscal Years 1960 through 2021,* George Washington University Regulatory Studies Center and Washington University in St. Louis, Weidenbaum Center on the Economy, Government, and Public Policy, July 2020.

4 A major rule is one that has an annual effect on the economy of one hundred million dollars or more, a major increase in cost of prices for consumers or industry, or significant adverse effects on competition, employment, investment, productivity, or competition of prices in foreign markets. See 5 USC §804.

5 A significant regulation is one that has an economic impact of $100 million or more in any one year, interferes with an action from another agency, has a material impact on the federal budget, or raises novel legal or policy issues.

6 Carter was particularly successful in his efforts at eliminating so-called economic regulation because he had a Democrat-controlled Congress. With White House support, Congress enacted statutes to de-regulate airlines, railroads, trucking, and the power sector. The efforts of Clinton (Reinventing Government) and Obama (retrospective review) were done without statutory change and therefore achieved temporary success.

7 Diana G. Carew, "Senators King and Blunt Introduce Regulatory Improvement Commission Modeled After PPI Proposal," Progressive Policy Institute, July 30, 2013. https://www.progressivepolicy.org/blogs/senators-king-and-blunt-introduce-regulatory-improvement-commission-modeled-after-ppi-proposal/.

8 "PPI President Joins Bipartisan Group of U.S. Representatives to Unveil Regulatory Improvement Commission Proposal," Progressive Policy Institute, May 20, 2014, https://www.progressivepolicy.org/pressrelease/ppi-president-joins-bipartisan-group-of-u-s-representatives-to-unveil-regulatory-improvement-commission-proposal-2/.

9 The table does not indicate the percentage of agencies identifying the problem to be addressed because every final rule – major or non-major — that we examined provided this information.

10 We should note that some regulations do not appear in the *Unified Agenda* prior to issuance and are only made public when they are proposed and published in the *Federal Register,* sometimes years after they are initiated.

11 R.H. Thaler and C.R. Sunstein, Nudge: Improving decisions about health, wealth, and happiness (Penguin, 2009).

12 Cass R. Sunstein, "Misconceptions about Nudges," *Journal of Behavioral Economics for Policy 2,* no. 1 (2018): 61-67.

13 P.K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (Random House, 2011).

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