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Prepared Statement of Susan E. Dudley

Director, GW Regulatory Studies Center
Distinguished Professor of Practice,
Trachtenberg School of Public Policy and Public Administration

Hearing on

A Review of Regulatory Reform Proposals

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The George Washington University Regulatory Studies Center
805 21st St, NW, MPA 612
Washington, DC 20052
202-994-7543
RegulatoryStudies@gwu.edu
www.RegulatoryStudies.gwu.edu

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Thank you Chairman Johnson, Ranking Member Carper, and Members of the Committee for inviting me to share my thoughts as you review regulatory reform proposals. I am Director of the George Washington University Regulatory Studies Center, and Distinguished Professor of Practice in the Trachtenberg School of Public Policy and Public Administration.¹ From April 2007 to January 2009, I oversaw federal executive branch regulations as Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). I have studied regulations and their effects for over three decades, from perspectives in government (as both a career civil servant and political appointee), the academy, and consulting.

I appreciate the Committee's interest in improving how the U.S. government develops and evaluates regulatory policy and am pleased to respond to your invitation to comment on six reform proposals under consideration. Three of the bills focus on evaluating the effects of existing regulations and modifying them as appropriate, and three focus on enhancing analytical procedures conducted before new regulations are issued. These reforms continue a bipartisan tradition in the United States of efforts to make regulation well-informed, transparent, and accountable to the American people. Each of the bills is constructive and if passed, could bring about real improvements in regulatory procedures and outcomes.

Institutionalizing Retrospective Review

S. 708, S. 1683, and S. 1817 would institutionalize retrospective review of regulations. This is important. Agencies seldom look back to evaluate whether existing regulations are achieving their intended effects. While long-standing executive orders require agencies to conduct retrospective review of their rules, these initiatives have had limited success.²

¹ The George Washington University Regulatory Studies Center raises awareness of regulations' effects with the goal of improving regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.

² Dudley, Testimony before the Homeland Security and Governmental Affairs Committee, United States Senate, "Federal Regulation: A Review of Legislative Proposals, Part II," (July 20, 2011), http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf.

S. 708 and S. 1683 would establish an independent body, modeled after the Base Realignment and Closing (BRAC) Commission, to review existing regulations and present recommendations to Congress. S. 1817 would require agencies to plan for retrospective review when they develop new regulations and periodically evaluate them.

S. 708, the “Regulatory Improvement Act of 2015” would establish a Regulatory Improvement Commission responsible for evaluating regulations that have been in effect for at least 10 years and making recommendations for their “modification, consolidation, or repeal.” After opportunities for public input and consultation, the Commission would submit a report to Congress containing proposed legislation to implement recommended regulatory changes. Congress would vote on the full package of recommendations with no amendments. If the bill is enacted, federal agencies would have 180 days to implement the actions specified.

S. 1683, the SCRUB (Searching for and Cutting Regulations that are Unnecessarily Burdensome) Act of 2015 would establish a Retrospective Regulatory Review Commission to review and make recommendations to repeal rules or sets of rules that have been in effect more than 15 years. Congress would vote on a joint resolution approving the Commission’s recommendations in their entirety. The Commission’s report would include estimated costs of the rules targeted for repeal, and its recommendations would divide them into two categories. Agencies would be required to repeal rules in the first category within 60 days of passage of the joint approval resolution. As they issue new regulations, agencies would repeal rules in the second category to offset new regulatory costs.

As Michael Mandel & Diana Carew of the Progressive Policy Institute observe, “the natural accumulation of federal regulations over time imposes an unintended but significant cost to businesses and to economic growth.”³ The BRAC model has potential to address some of the accumulated regulatory burden. First, an independent third-party review of the accumulated stock of regulations would offer an objectivity that past efforts (which depend on regulatory agencies themselves to identify outmoded regulations) lacked. Executive orders requiring agencies to review their regulations “to determine whether [they] should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives,”⁴ have met with limited success in

³ Michael Mandel & Diana Carew, *Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform*, Policy Memo, May 2013 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

⁴ Executive Order 12866 (1993) and Executive Order 13563 (2011). https://www.whitehouse.gov/omb/inforeg_regmatters

part because regulatory agencies have little incentive to find fault with their regulations. Thus, third-party evaluation would likely identify reform opportunities agencies would miss.⁵

Second, requiring Congress to vote up or down on the complete set of recommendations has the potential to overcome the “rent-seeking” behaviors so common with regulation. While most people recognize that the cumulative burden of regulation is likely excessive, the costs of regulation are spread broadly while individual regulations confer advantages on identified parties who thus have incentives to resist reform.⁶

Since the executive branch can only issue regulations pursuant to authority delegated by Congress, the commission’s analysis might provide insights as to whether the underlying statutory authority contributed to any undesirable consequences of the regulations targeted for reform.⁷ As such, in addition to specific regulatory changes, the commission’s review might lead to improvements in underlying legislation.

The “cut-go” element of S. 1683 could impose additional discipline on regulatory agencies. While applying budgeting concepts such as this to regulation faces analytical difficulties, other countries (including Canada and the United Kingdom) have initiated successful programs that require new regulatory costs to be offset by removal of existing regulatory burdens.⁸

While a commission responsible for evaluating 10 to 15 year old regulations would be able to identify unnecessary, redundant, or overly burdensome regulations, it is less likely to provide incentives for ongoing evaluation of regulations or contribute to better designed regulations going forward. Thus, in addition to the one-time commission, a more integrated, continuous practice of retrospective review might serve not only to root out ineffective regulations, but make new regulations more effective.

S. 1817, the Smarter Regulations through Advance Planning and Review Act of 2015, would implement procedures that could serve that role, create an evaluation mindset and a

⁵ “The process of self-evaluation is challenging for all organizations, as it requires complete objectivity. Indeed, history is unkind to organizations that fail to get outside reviews of their work.” Statement of Michael Greenstone, Milton Friedman Professor of Economics, University of Chicago, Director, Energy Policy Institute at Chicago, before the United States Senate Subcommittee on Regulatory Affairs and Federal Management Roundtable on “Examining Practical Solutions to Improve the Federal Regulatory Process.” June 4, 2015

⁶ For a succinct definition of rent seeking, see David Henderson’s entry in the *Concise Encyclopedia of Economics*: <http://www.econlib.org/library/Enc/RentSeeking.html>

⁷ See recommendation 4 of Dudley statement prepared for the United States Senate Subcommittee on Regulatory Affairs and Federal Management Roundtable Discussion “Examining Practical Solutions to Improve the Federal Regulatory Process.” <http://regulatorystudies.columbian.gwu.edu/examining-practical-solutions-improve-federal-regulatory-process> June 4, 2015.

⁸ Dudley, *Can Fiscal Budget concepts Improve Regulation?* July 16, 2015. The George Washington University Regulatory Studies Center Working Paper. <http://regulatorystudies.columbian.gwu.edu/node/350>

feedback mechanism where agencies learn from evaluating regulatory outcomes and improve future rules accordingly. The “Smarter Regs Act” would require agencies to include in proposed major regulations a framework for measuring effectiveness, benefits and costs, as well as plans for gathering the information necessary to do so. Within 10 years of a rule’s promulgation, agencies would assess its benefits and costs, evaluate how well it accomplishes its objective, and determine whether it could be modified to achieve better outcomes.

This would fill an important gap in current regulatory practice. The GW Regulatory Studies Center reviewed all major rules proposed in 2014 and found that, despite requirements to do so, none of them included a plan for retrospective review, and not one was written and designed to facilitate review of its impacts.⁹

S. 1817’s forward-looking approach would complement the commission review envisioned by S. 708 and S. 1683, and ensure that not only are existing regulations being evaluated, but that new regulations are designed to facilitate such evaluation in the future. An advantage of this approach is that it focuses not just on reducing regulatory burdens, but improving regulatory outcomes by subjecting regulatory programs to rigorous evaluation and feedback. Most regulatory analyses rely on models and assumptions to make predictions about the risk reduction benefits that will accrue from a specific intervention. Institutionalizing a requirement to evaluate whether the predicted effects of the regulation were realized would provide a powerful incentive to improve regulatory impact analysis tools used to predict the impacts of regulatory alternatives.¹⁰

Accomplishing the important goals of this bill would require resources. Congress and OMB could reallocate resources from ex ante analysis to allow agencies to gather the information and evaluation tools necessary to validate ex ante predications. Shifting resources from ex ante analysis to ex post review would not only help with evaluation, but would improve our ex ante hypotheses of regulatory effects.

S. 1817 would make OIRA responsible for overseeing compliance with the Act and providing guidance for regulatory assessments. Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient. Congress may also want to assign a congressional body responsibility for reviewing these assessments. Just as the CBO provides independent estimates

⁹ Sofie E. Miller, “Evaluating Retrospective Review of Regulations in 2014” forthcoming from the George Washington University Regulatory Studies Center (2015)

<http://regulatorystudies.columbian.gwu.edu/retrospective-review-comment-project>.

¹⁰ Dudley, “Regulatory Science and Policy: A Case Study of the National Ambient Air Quality Standards,” the George Washington University Regulatory Studies Center Working Paper. September 9, 2015.

<http://regulatorystudies.columbian.gwu.edu/regulatory-science-and-policy-case-study-national-ambient-air-quality-standards>

of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis and serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.¹¹

Improved Analysis for Decision-Making

S. 1818, S. 1820, and S. 1607 aim to improve understanding of possible impacts *before* a regulation is issued. Presidents of both parties for over 30 years have supported ex ante impact analysis of regulations. Despite enjoying bipartisan support, however, these requirements are generally not codified in statute.

S. 1818, the “Principled Rulemaking Act” would codify the language of President Clinton’s Executive Order 12866 and President Obama’s Executive Order 13563.¹² Presidents of both parties have endorsed these requirements and codifying could have several advantages.¹³ First, the legislation would lend congressional support to the Orders’ nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit to Americans.¹⁴ Many existing authorizing statutes ignore or explicitly prohibit analysis of tradeoffs, leading to regulations with questionable benefits that divert scarce resources from more pressing issues.

Second, legislation could apply these requirements to independent agencies (more on this below). Third, unlike executive orders, compliance with legislative requirements is subject to judicial review,¹⁵ which could be valuable because agencies tend to take more seriously aspects

¹¹ Dudley, “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future.” *Case Western Reserve Law Review*, Vol. 65 Issue 4, 2015.

<http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

¹² E.O. 12866, issued in 1993, continued to guide regulatory review during the George W. Bush Administration. E.O. 13563 reaffirmed that Order.

¹³ Dudley, “Improving Regulatory Accountability” <http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

¹⁴ Section 1(a) of Executive Order 12866 states the regulatory philosophy as follows: “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.”

¹⁵ Dudley, “Improving Regulatory Accountability” <http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

of their mission that are subject to litigation. Like executive and congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis.¹⁶

S. 1820, the Early Participation in Regulation Act of 2015, would require agencies to publish an advance notice of proposed rulemaking (ANPR) at least 90 days before publishing a proposed major rule.

Regulatory impact analyses are often developed after decisions are made and used to justify, rather than inform, regulations. ANPRs could be valuable for soliciting input from knowledgeable parties on a range of possible approaches, data, models, etc., before particular policy options have been selected.¹⁷ These might include “back of the envelope” analyses that consider the effects of a wide range of alternatives.¹⁸

S. 1607, the Independent Agency Regulatory Analysis Act explicitly authorizes presidents to require independent regulatory agencies to comply with regulatory analysis requirements. Out of deference to Congress, presidents have exempted some agencies from executive order requirements for regulatory analysis and oversight because of their historical designation as “independent.” As a result, their regulations tend to be less accountable and well-reasoned than others.¹⁹ The Independent Agency Regulatory Analysis Act would require independent regulatory agencies (such as the Securities and Exchange Commission, the Federal Communications Commission, and the Consumer Product Safety Commission) to follow the same principles other agencies have long followed, with a goal of improving regulatory outcomes by understanding possible consequences of new regulations before they are issued.²⁰

¹⁶ Dudley, Testimony before the Joint Economic Committee: Reducing Unnecessary and Costly Red Tape through Smarter Regulations. http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_06_26_Dudley_JEC_statement.pdf (June 26, 2013)

¹⁷ Susan E. Dudley and Kai Wegrich. “Regulatory Policy and Practice in the United States and European Union.” The George Washington University Regulatory Studies Center Working Paper (2015) <http://regulatorystudies.columbian.gwu.edu/achieving-regulatory-policy-objectives-overview-and-comparison-us-and-eu-procedures>.

¹⁸ Christopher Carrigan and Stuart Shapiro, “What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis,” George Washington University Regulatory Studies Center Working Paper (2014), <http://regulatorystudies.columbian.gwu.edu/whats-wrong-back-envelope-call-simple-and-timely-benefit-cost-analysis>.

¹⁹ Resources for the Future, Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Agencies? <http://www.rff.org/events/pages/can-greater-use-of-economic-analysis-improve-regulatory-policy-at-independent-regulatory-agencies.aspx>

²⁰ Dudley, “Bill would close loophole on figuring regulations’ impacts.” The Conversation. June 19, 2015. <https://theconversation.com/bill-would-close-loophole-on-figuring-regulations-impacts-43504>.

Despite the fact that regulations issued by independent regulatory agencies have broad social impacts, the analysis supporting them tends to be less robust because they have not been covered by the regulatory executive orders. The Administrative Conference of the United States recommended in 2013 that independent regulatory agencies adopt more transparent and rigorous regulatory analyses practices for major rules.²¹ OIRA observed in its most recent regulatory report to Congress that “the independent agencies still continue to struggle in providing monetized estimates of benefits and costs of regulation.” According to available government data, more than 40 percent of the rules developed by independent agencies over the last 10 years provided no information on either the costs or the benefits expected from their implementation.²²

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In closing, let me reiterate my appreciation for the Committee’s interest in regulation, and its consideration of six bipartisan bills that offer constructive approaches to regulatory process reform. In addition to this statement, I respectfully offer for the record two recent writings that may be relevant as you consider these bills. In an article published in the *Case Western Reserve Law Review* on “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future,”²³ I review previous regulatory reform initiatives and offer recommendations going forward. In a new working paper on “Regulatory Science and Policy: A Case Study of the National Ambient Air Quality Standards,”²⁴ I offer recommendations for improving how science is used in regulatory policy.

²¹ <https://www.acus.gov/research-projects/benefit-cost-analysis-independent-regulatory-agencies>

²² https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/2014-cost-benefit-report.pdf

²³ Vol. 65 Issue 4, 2015. Available at: <http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

²⁴ The George Washington University Regulatory Studies Center working paper available at: <http://regulatorystudies.columbian.gwu.edu/regulatory-science-and-policy-case-study-national-ambient-air-quality-standards> (September 9, 2015.)