

**Hearing before the Homeland Security and Government Affairs
Subcommittee on Regulatory Affairs and Federal Management**

September 27, 2018

**“Examination of the Effects of Regulatory Policy on the Economy and
Business Growth”**

Testimony of Howard Shelanski

Chairman Lankford, Ranking Member Heitkamp, and members of the subcommittee:

Thank you for inviting me to testify before you today. My background as a government official, scholar, and practicing lawyer informs my perspective on the importance of a sound regulatory system for the U.S. economy and for the health and welfare of all Americans. I am currently a Professor of Law at Georgetown University and a partner in the law firm of Davis Polk & Wardwell LLP. From July 2013 through January of 2017, I served as Administrator of the Office of Information and Regulatory Affairs at the White House. In that capacity, I dealt first hand with the review of new regulations and the retrospective assessment of rules already on the books. My previous government positions include serving as Director of the Federal Trade Commission’s Bureau of Economics, Chief Economist of the Federal Communications Commission, and a Senior Economist for the President’s Council of Economic Advisors. From 1997 to 2009 I was on the faculty of the University of California at Berkeley, and before that I practiced law in Washington D.C. and served as a law clerk to Justice Antonin Scalia, to Judge Stephen F. Williams of the U.S. Court of Appeals, and to Judge Louis H. Pollak of the United States District Court in Philadelphia. I am the author or co-author of numerous articles and books related to antitrust and regulation.

I wish to make three points in my testimony today: (1) regulation must be done carefully, with rigorous attention to costs and benefits; (2) regulation should take account of how its costs might differ for entities of varying sizes; and (3) the same careful assessment of costs and benefits that applies to rulemaking should apply to deregulation. The criteria for any regulatory reform should be whether it advances the above three principles and whether it is neutral in its impact on the weighing of regulatory costs and benefits.

Sound regulation requires rigorous assessment of both benefits and costs

One of the signature achievements of the U.S. regulatory system over the past 40 years has been the increasingly central role of cost-benefit analysis. When President Reagan signed Executive Order 12291 in 1981, he established the process of centralized review of Executive Branch Regulations based on cost-benefit principles. EO 12291 met with a cold reception in many quarters on grounds that it would be barrier to sound policy and a one-way ratchet toward deregulation. Cost-benefit analysis of federal rules, and the

Office of Information and Regulatory Affairs (OIRA) tasked with implementing that analysis, nonetheless became firmly established. When President Clinton took Office in 1993, instead of repealing EO 12291 he revised and updated the order into EO 12866 and signed amendments to the Paperwork Reduction Act strengthening OIRA. EO 12866 remains in force to this day, affirmed and expanded by Executive Orders from Republican and Democratic administrations alike.

For purposes of this hearing, I wish to focus on two core principles of EO 12866: (1) that the benefits of any regulation must justify the costs the rule imposes on society; and (2) that agencies should regularly review the continuing effectiveness of the rules they already have on the books. For purposes of this hearing, I put aside the important questions of how well agencies have implemented these two principles and of what analytical methods agencies should use. I focus instead on why it is important that regulatory reform neither get in the way of sound assessment of costs and benefits nor put an undue thumb on the scales toward one side of that balance.

For cost-benefit analysis to be meaningful, agencies need to take both costs *and* benefits seriously. Unfortunately, polarized arguments that emphasize one of those values while ignoring the other too often characterize debates over regulation. For example, regulatory advocates have often opposed weighing quantified, economic costs against health and safety benefits. Despite occasional statements from advocates that we should never trade lives for lower social costs, however, we do it every day. A speed limit of 15 miles per hour would save thousands of lives and prevent countless injuries every year, yet society would not tolerate the costs of such a rule and no one has seriously proposed such a policy. Regulatory costs are therefore an inherent factor in societal decisions about what kinds of rules it wants. Even if there is no requirement (and there should not be) that a rule's quantifiable benefits always exceed its quantifiable costs, rigorous analysis of regulatory costs allows society to know how much it is paying for the policies and protections it chooses.

On the other side of the debate, advocates of non-regulation or deregulation sometimes focus too exclusively on the costs of a given rule, without acknowledging or accurately accounting for the very real benefits to society that would be lost. In one recent, high-profile example, then-EPA Administrator Scott Pruitt went on television to promote the EPA's planned repeal of the Obama Administration's Clean Power Plan regulations, without mentioning the predicted benefits of those rules. Fox News interviewer Chris Wallace pointed out to Mr. Pruitt that the EPA had predicted that those rules would eventually eliminate 90,000 asthma attacks, 300,000 missed school and work days, and 3,600 premature deaths each year. Mr. Pruitt offered no new analysis to refute those benefit figures and had little answer when Mr. Wallace asked him: "without the Clean Power Plan, how are you going to prevent such things?" Ignoring regulatory benefits cheats society out of sound and desirable rules.

Beyond serving as illustrative anecdotes, the above examples also hint at an important challenge for cost benefit analysis, and one to which regulatory reform should be attuned: regulatory costs are often more salient and easier to quantify than regulatory benefits. Regulatory benefits often accrue far in the future and are spread broadly across

millions of individuals. Moreover, the benefits of regulation, especially to any given individual, might be uncertain. For example, the 3600 premature deaths that the EPA predicted the Clean Power Plan rules would eliminate were an estimate from a range of possible outcomes. Any individual might reasonably be skeptical that she herself would be one of the people to live longer were emissions to be reduced—a benefit that in any case would likely seem quite remote in time. Regulatory benefits can therefore be less salient for people, and their precise level less certain, even when they are large and reasonably likely in the aggregate. Regulatory costs, in contrast, are more likely to be more salient and quantifiable. The costs of regulatory compliance are usually more measurable, more concentrated in where they fall, and more proximate in time than the benefits are. Businesses and other stakeholders are therefore more likely to have hard information about costs and strong motivation to oppose them.

The fact that businesses might have access to more quantifiable cost information and be highly motivated to push for lower costs is not a criticism—we want reliable cost information, and we want the parties with the best access to that information to have incentive to engage in the regulatory process. But the fact that costs can be more readily quantifiable and more likely to motivate stakeholder advocacy than benefits is important because it suggests that the legislative creation of new requirements for the regulatory process might not fall symmetrically on the cost and benefit sides of the ledger. Therefore, while the most important thing for regulatory reform is to ensure that it advances analysis of both costs and benefits in rulemaking, it is also important to ensure that legislation that is neutral on its face does not, in actual practice, improperly tilt the analysis of costs and benefits in a way that harms society over time.

Regulation should not disadvantage small businesses

Regulations should not presumptively exempt small businesses from compliance. When there is a strong case that an activity causes harm, that a regulation can effectively reduce that harm, and that the costs of reducing the harm are justified by the benefits, then there could be a sound basis for applying the rule to all entities that engage in the harm-causing activity. That said, the fact that aggregate benefits justify aggregate costs does not mean that the costs fall proportionately on firms regardless of size. Larger firms might well be in a better position to absorb the fixed costs of regulatory compliance than small firms, and those fixed costs might not always vary terribly much for big and small firms. A large firm might be able to absorb regulatory costs that might put a small firm out of business or at a competitive disadvantage. For small firms that might later want to enter the industry at issue, the regulatory compliance costs might be a high barrier that prevents them from coming into the marketplace.

Because small businesses are an important engine of both economic growth and economic opportunity, agencies should, to the extent possible, calibrate regulation so that it does not impede the creation and viability of small enterprises. Processes put in place to assess small business impacts should not become a rate-determining step in promulgation of a new rule, however. When a rule is well justified under the principles of the relevant statutes and executive orders, the public should get the regulatory benefits even if the

rule's applicability to properly defined small businesses might be staged, deferred, modified, or subject to additional analysis.

The same principles that apply to making new rules should apply to retrospective review or repeal of existing rules

Retrospective review of regulation is an important, but often neglected, element of a healthy regulatory system. The assessment of rules already on the books to ensure that they are still achieving their objectives, and doing so at acceptable cost, ensures accountability and prevents the accumulation of unwarranted regulatory costs. Retrospective review has been a bipartisan aspiration, and was the subject of President Obama's EOs 13563 and President Trump's EO 13777. The latter executive order puts in place a process that, if faithfully executed according to the principles expressly set forth in the text of the order, would launch a more focused and accountable process for retrospective reviews. Notably, EO 13777 specifically invokes EO 12866 and EO 13563 as documents whose principles the regulatory reform process should follow. To the extent that this means regulatory review should incorporate sound cost-benefit principles, and make use of the best-available science and economics—as those previous executive orders require—then I think EO 13777 puts retrospective review on solid ground. If benefits that justify costs are a sufficient basis for a new rule, then benefits that continue to justify costs would be equal reason to keep an existing rule on the books. The cost-benefit principles for regulation and deregulation should be generally the same.

For that reason, regulatory reforms that take the form of “one in, one out” or, as in the case of EO 13771, “one in, two out” may be in tension with sound cost-benefit analysis. If one generally believes that there are many rules whose costs exceed their benefits, then a “pay go” mandate that new rules must be accompanied by repeal of old rules makes sense. The pay-go principle then functions as a regulatory budgeting mechanism that forces agencies to do the hard work of retrospective review. If, on the other hand, rules have been well developed according to the principles of EO 12866 in the first place, a forced repeal mechanism makes little sense, and will have the effect of preventing agencies from issuing beneficial new rules and/or forcing agencies to repeal rules that are still doing good for society. There is little evidence, and indeed evidence to the contrary from previous retrospective review efforts, that there is an existing stock of costly, ineffective regulations to be readily and efficiently repealed. Moreover, to date there is to date little, generally accepted economic evidence that regulation imposes so high an aggregate economic burden on the U.S. economy that it would be better for society to forego the benefits of that regulation, and indeed a number of facts to suggest the contrary. For that reason, retrospective review should be an important, embedded feature of our regulatory system, but without mandatory outcomes that are contrary to sound cost benefit analysis.

Conclusion

Regulatory reform that reinforces the principles of the executive orders that have guided regulatory review by all administrations since President Reagan could benefit American citizens and businesses alike. There is room for regulatory reform to improve

and reinforce the principles of cost-benefit analysis and the use of the best economic and scientific information; to improve the flexibility of regulation in its application to small businesses; and to further institutionalize and advance the process of retrospective review of regulation. The challenge lies in the details, for any such reform must achieve its objectives without systematically shifting the balance against regulatory benefits, and without so burdening the rulemaking process that even clearly beneficial rules become difficult for agencies to propose and publish in an effective manner.