

HOW TO ACHIEVE REGULATORY REFORM IN THE 115TH CONGRESS

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My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at George Washington University. I have spent over 40 years studying, teaching, and writing about the ways in which the government makes decisions and the effects of those decisions on the performance of markets. I have written over twenty books and one hundred twenty articles on those subjects. My books and articles have been cited in hundreds of judicial decisions, including over a dozen opinions of the U.S. Supreme Court.

I urge the 115th Congress to build on the outstanding regulatory reform mechanism that President Reagan created when he issued Executive Order 12,291. That Order instructed all executive branch agencies to subject every major rule to cost-benefit-analysis (cba), to choose the regulatory alternative that produces the highest net benefits, and to review major existing rules to determine whether their benefits exceed their costs. It also authorized the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to review agency cbas to insure that the benefits of each major rule exceed their costs.

The 115th Congress should strengthen the regulatory reforms initiated by President Reagan by working with the new OMB head, former Congressman Mulvaney, to take three steps. First, Congress should give OIRA jurisdiction to subject major rules issued by independent agencies, such as the Securities and Exchange Commission, to the same type of rigorous economic analysis that it applies to major rules issued by executive branch agencies to insure that independent agencies issue only rules that create benefits that exceed their costs. Several studies have found that subjecting an agency's rules to OIRA review improves the quality of the agency's decision making process.

Second, OIRA should create and implement a more aggressive program to identify and to rescind or amend existing rules that are obsolete or unduly burdensome. OIRA should encourage regulated firms to send to OIRA nominations of rules that the firm believes to be obsolete or unduly burdensome, along with reports that document the burdens imposed by each rule. OIRA should then review each rule that is nominated. If OIRA agrees with the regulated firm's characterization of the rule as obsolete or unduly burdensome, OIRA should direct the agency responsible for the rule to begin the process of rescinding or amending the rule.

Third, Congress should increase the personnel and other resources OIRA can use to perform these functions. OIRA has suffered from inadequate resources to perform its assigned duties effectively for several years. OIRA needs a major increase in its resources to perform those functions and the additional functions I recommend in an effective manner.

Some of the regulatory reform proposals under consideration by the 117th Congress, including some that have already been enacted by the House of Representatives, are ill-advised. They are based on serious misunderstandings of the ways in which government has been making regulatory decisions for the past seventy years.

To understand the flawed reasoning that underlies many of these reform proposals, it is useful to begin with a description of the process through which major rules are made. The rulemaking process begins and ends with Congress. An agency can issue a rule only if Congress has authorized it to do so, and virtually all major rules are subjected to pre-enforcement review in which a court decides whether to uphold or to

reject the rule. If the court concludes that the rule is not consistent with the statute that the agency relies on to authorize the agency to issue the rule or that the agency did not adequately explain why it issued the rule, the court rejects the rule.

Since the beginning of the Republic, Congress has delegated the power to issue rules to agencies when Congress identifies a problem and concludes that Congress lacks the specialized expertise and the time to address the problem effectively. Thus, for instance, the first Congress delegated to agencies the power to issue rules governing military pensions and collection of taxes and duties; the Congress of 1852 delegated the power to issue rules governing the operation of boilers on steamships to a Board of Inspectors, and; the Congress of 1970 unanimously delegated to an agency the power to issue rules to reduce air pollution. Each of these delegations has produced large benefits to society. Thus, for instance, the Board of Steamship Inspectors reduced the number of lives lost and the property damage caused by steamship explosions by eighty per cent within five years.

Most major rules issued today are the product of the notice and comment process that Congress required agencies to use in the Administrative Procedure Act of 1946. As interpreted by courts, that process has become extremely time-consuming. Thus, for instance, a team of researchers from the University of Texas found that the average EPA rulemaking takes more than six years, and a team of researchers from the University of Wisconsin found that the rulemaking process is so resource-intensive that agencies are able to issue only forty-one per cent of the rules that Congress requires agencies to issue.

A typical rulemaking that yields a major rule elicits at least hundreds, and often millions, of comments from members of the public. The agency must read and consider all of the comments and then must write a statement of basis and purpose to accompany its final rule in which it explains why it has issued the rule in light of the comments it received. In the case of a major rule, that statement is at least hundreds of pages long and often thousands of pages long. Every major rule reflects many thousands of hours of work by hundreds of agency staff employees, many of whom have expertise in the field in which the rule is issued.

With this background understanding, it is easy to identify the flawed reasoning that underlies many of the regulatory reform statutes that the 115th Congress is considering.

The Midnight Rules Relief Act (MRRRA) would repeal every rule issued during the several month period that is within the scope of the Congressional Review Act (CRA) and would forbid the agency from ever issuing a similar rule. Congress should recognize that every such rule is the product of thousands of hours of effort by agency staff members, many of whom are experts in the field in which the rule was issued. Congress should not use CRA as a sledgehammer to repeal hundreds of rules without first considering each one in detail. Congress should use CRA as a scalpel to repeal only those rules that Congress has studied with care and that Congress has determined to be unduly burdensome. Even in those cases, Congress should take particular care in light of the reality that conditions might change in the future in ways that strongly support the need to issue a similar rule.

The Regulatory Accountability Act of 2017 (RAA) would add demanding new mandatory procedures to the rulemaking process. It is implicitly based on the belief that the present procedures are inadequate in some respect. There is no evidence to support that belief and a great deal of evidence to support the findings of many studies that the present procedures are unduly burdensome and time consuming. RAA also adds scores of burdens on agencies and reviewing courts in statutory language that is ambiguous and could be interpreted in many ways. It would require decades for courts to adopt definitive interpretations of all of those new statutory requirements. During that long period of time, agencies and parties that participate in agency rule makings would be frustrated by the many uncertainties in determining the meaning of each

of the many ambiguous and seemingly open-ended duties the RAA imposes on agencies and reviewing courts.

The RAA also seems to be intended to require courts to review all major agency actions de novo with no deference to the agency. That would be a dramatic and unfortunate departure from historical practice. Until 1875, courts did not engage in any review of agency actions. The Supreme Court held repeatedly that courts were forbidden by the Constitution from reviewing actions in which agencies had any degree of discretion. Courts have engaged in review of many thousands of agency actions since 1875, but they always confer some degree of deference on the agency decision in light of the combination of the extraordinary amount of time and resources the agency devoted to the decision and the superior subject matter expertise of the agency. Judicial review of agency actions is deferential, but courts are not rubber stamps. They reject about one-third of all agency actions—usually either because the agency acted in a manner inconsistent with the statute it was attempting to implement or because it did not provide an adequate explanation for the action it took.

The Regulations from the Executive in Need of Scrutiny Act (REINS Act) would deny effect to any major agency rule unless Congress affirmatively enacts the rule in the form of a statute. The REINS act implicitly assumes that Congress has the time and expertise required to review every major rule and to decide whether to enact it in the form of a statute. That assumption is demonstrably false. Consider, for instance, the history of congressional actions pursuant to the CRA. Congress has reviewed and repealed only one rule since 1981. If Congress lacks the time and expertise needed to review and repeal rules with which it disagrees it also lacks the time and expertise needed to review and enact rules with which it agrees.

The 114th Congress considered enacting some version of a Regulatory Budget Act (RBA). Congress should refrain from enacting any version of an RBA that considers only the costs of rules and not the benefits of rules. Any such RBA would cost the nation dearly in the form of foregone net benefits of rules. To illustrate this point, consider the findings of OIRA with respect to the effects of the major rules issued by executive branch agencies over a recent ten-year period. OIRA estimated the cost of the rules as 57 to 84 billion dollars. However, OIRA estimated the benefits of the rules as 217 to 863 billion dollars. If we had implemented a cost-only version of a regulatory budget during that period, we would have irrationally foregone 133 to 806 billion dollars in net benefits to society.