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From Beginning to End: An Examination of Agencies' Early Public Engagement and Retrospective Review

Homeland Security and Governmental Affairs Committee

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From Beginning to End: An Examination of Agencies' Early Public Engagement and Retrospective Review

Prepared Statement of Susan E. Dudley May 7, 2019

Thank you, Chairman Lankford, Ranking Member Sinema, and Members of the Subcommittee for inviting me to share my thoughts on early public engagement and retrospective review of regulations. 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 private consulting.

I appreciate the Subcommittee's interest in improving how the U.S. government develops and evaluates regulatory policy. Your efforts continue a long bipartisan tradition in the United States of efforts to make regulation well-informed, transparent, and accountable to the American people. By 1) engaging public input earlier in the regulatory development process and 2) providing for retrospective review of regulations to evaluate whether they are achieving their objectives, the bills you have proposed can help ensure that regulations are based on the best evidence available and that they are working as intended for the American people.

My testimony reviews the problems necessitating the practices required by your legislation and addresses and examines each bill's requirements and impacts. It concludes with some cross-cutting comments and observations.

Engaging Public Input Early in Rulemaking

The Problem

The Administrative Procedure Act of 1946 requires agencies to publish a "general notice of proposed rule making … in the Federal Register," and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or

[1] The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. This statement reflects my own views and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.

without opportunity for oral presentation."[2] In addition, every president since Jimmy Carter[3] has required agencies to examine expected regulatory impacts before issuing proposed and final regulations; Executive Order (E.O.) 12866 has guided this analysis for more than 25 years.[4]

Despite these longstanding requirements, agencies often develop regulatory impact analyses (RIAs) after they have made key policy decisions; many analyses appear to be designed to justify regulatory actions, rather than inform them.[5] Agencies view their RIAs and preambles to proposed rules as legal documents, prepared in anticipation of litigation.[6] The need to defend their selected regulatory approach motivates agencies to "circle the wagons," narrowing the menu of alternatives and the evidence they consider before the public has an opportunity to engage. As a result, changes in response to notice and comment "tend to be small and painful, and they are often subtractive rather than innovative or additive."[7]

The Early Participation in Regulations Act of 2019

The draft "Early Participation in Regulations Act of 2019" would require agencies to issue for public comment advance notices of proposed rulemaking (ANPRMs) for major rules. This requirement could free the agency to share its early thinking on whether a problem requires a regulatory solution and what different options are available. As such, ANPRMs could be valuable for soliciting input from knowledgeable parties on a range of possible approaches, data, models, etc., before policy decisions are framed, or positions established.[8] As the President's Jobs Council noted in 2011, resulting regulations would benefit from critiques, feedback, and other public input provided by ANPRMs.[9]

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2 5 U.S. Code § 553(b) and (c).

3 Jimmy Carter, Exec. Order No. 12044, 43 Fed. Reg. 12661 (Mar. 24, 1978).

4 See A Forum Celebrating 25 Years of Executive Order 12866**,** September 24, 2018. The George Washington University.

5 Christopher Carrigan and Stuart Shapiro. "What's Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis." *Regulation and Governance*. (2017) See also Susan Dudley, Richard Belzer, Glenn Blomquist, Timothy Brennan, Christopher Carrigan, Joseph Cordes, Louis A. Cox, Arthur Fraas, John Graham, George Gray, James Hammitt, Kerry Krutilla, Peter Linquiti, Randall Lutter, Brian Mannix, Stuart Shapiro, Anne Smith, W. Kip Viscusi and Richard Zerbe. "Consumer's Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker," *Journal of Benefit-Cost Analysis*. (July 27, 2017).

6 Wendy E. Wagner. "The CAIR RIA: Advocacy Dressed Up as Policy Analysis." In Winston Harrington et al. (Ed.), *Reforming Regulatory Impact Analysis*. Washington, DC: Resources for the Future. (2009).

7 William F. West. "Formal Procedures, Informal Process, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis." *Public Administration Review* 64(1): 66–80 (2004).

8 Steven J. Balla, and Susan E. Dudley. "Stakeholder Participation and Regulatory Policymaking in the United States." Report prepared for the Organisation for Economic Co-operation and Development. (2014). Susan E. Dudley and Kai Wegrich, "Regulatory Policy and Practice in the United States and European Union" (Mar. 10, 2015) (Geo. Wash. Univ. Regulatory Studies Ctr. working paper). Susan Dudley and Marcus Peacock "Improving Regulatory Science: A Case Study of the National Ambient Air Quality Standards," *Supreme Court Economic Review*. (August 2018).

9 President's Jobs Council. Road Map to Renewal: 2011 Year-End Report.

ANPRMs could encourage better, more informed regulatory analyses. Experts have suggested that "back of the envelope" analyses could encourage agencies to consider the effects of a wide range of alternatives before they narrow their focus to just a few options.[10] Empirical research found that "pre-proposal notice[s] requesting comment from the public… are associated with higher quality regulatory impact analyses" supporting final regulations.[11]

The bill would require an ANPRM for a major rule to identify the problem that may call for regulation, and data or information that supports that regulatory need. This is an essential first step for developing effective regulation. E.O. 12866 calls on each agency to "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."[12] Yet, in my experience, agencies too often proceed with developing a regulatory solution without first clearly articulating the nature and significance of the problem to be solved.[13] The bill's related requirement to identify "an achievable objective for the major rule" would also serve to focus public comment, subsequent analysis, and evaluation.[14]

ANPRMs subject to the bill would also present a general description of alternatives the agency has identified for consideration. Laying out a range of preliminary alternatives early in the regulatory development process could elicit invaluable input from the public, not only on the merits of those alternatives (including data, analysis, experience) but suggestions of other options for agency consideration.

Together, these ANPRM elements should not be unduly demanding or burdensome; they would merely make the factors influencing the agency's thinking more transparent to the public at a stage when public input could be very valuable.

Over the past few decades, agencies have issued an average of 13 significant ANPRMs per year, representing less than 5% of their significant regulatory actions.[15] As noted below, given the bill's definition of "major rule," as many as 70 regulatory actions a year[16] could begin with an

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10 Carrigan and Shapiro (2017).

11 Jerry Ellig and Rosemarie Fike. "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis." *J. Benefit Cost Anal*. 2016; 7(3):523–559.

12 E.O. 12866 Sec. 1(b)(1).

13 Dudley et al. (2017).

14 Marcus Peacock, Sofie E. Miller, and Daniel R. Pérez, "A Proposed Framework for Evidence-Based Regulation" (George Washington University Regulatory Studies Center working paper). p. 22. (Feb. 22, 2018).

15 Juliana Balla, "Early but Not Often: A Look into the Use of ANPRMs in Rulemaking," *Regulatory Policy Commentary*. GW Regulatory Studies Center. May 3, 2019

16 Major rules include regulations issued by independent regulatory agencies, which are not captured in the above counts. Executive branch agencies issue an average of 40 regulations per year that would likely meet the bill's definition of major. See the data maintained by OIRA and the General Services Administration at www.RegInfo.gov.

ANPRM. However, the number would likely be less than that since the bill provides for exceptions.

The bill appropriately gives OIRA authority for determining whether a rule is major under the section, and whether an exemption should apply. OIRA is well-positioned to make those determinations given its authorities under the Congressional Review Act (CRA) and presidential executive orders.

The bill also wisely precludes judicial review of any differences between an agency's ANPRM and subsequent NPRM. One virtue of the ANPRM is that it provides an opportunity for agencies to share their preliminary thinking about a problem and get input on potential solutions at a stage when they are truly open to feedback, analysis, and evidence. If agencies had reason to fear this early notice could later be used against them in court, that would discourage objective queries and undermine these benefits.

The requirement to issue and accept comment on an ANPRM before proceeding to a proposal should not unduly slow agencies' regulations for several reasons. First, 90 days is not a long time considering that agencies often take years studying a problem and evaluating regulatory options before they issue a proposed rule. One study found that "the average interval between the formal initiation of research on a policy issue…and the publication of a proposed rule…was 5.3 years."[17]

Perhaps more important, to the extent the ANPRM serves to open up for public engagement preliminary deliberations that would otherwise have taken place behind closed doors, it may make the overall rulemaking process more efficient. Rather than tacking 90 days onto the rulemaking schedule, it may provide valuable input that ends up streamlining the subsequent notice-and-comment process. In many cases, early engagement could lead to more efficient analysis at the NPRM stage and fewer surprises during public comment. While there will certainly be cases where an ANPRM would not serve the public interest, the bill provides for those exceptions.

Creating an Evaluation Mindset

The Problem

Ex post evaluation has a long tradition in other areas (particularly in programs financed through the fiscal budget),[18] but it has received little attention in the regulatory arena, despite government

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[17] West (2004).

[18] Susan Dudley and Brian Mannix, "Improving Regulatory Benefit-Cost Analysis," *The Journal of Law and Politics*, Vol. XXXIV, No.1 (2018).

guidelines requiring retrospective review.[19] RIAs are an important part of the regulatory process, but as *ex ante* analyses, they are necessarily hypotheses of the effects regulatory actions will have if implemented. Better regulatory evaluation would allow agencies and others to test those hypotheses against actual outcomes.[20] Retrospective review would not only inform decisions related to the benefits and costs of existing policy but would provide feedback that would improve future RIAs and future policies.[21]

Setting Manageable Analysis Requirements in Text (SMART)

While no one questions the importance of evaluation, a lack of methods and data make retrospective review of regulations challenging.[22] The draft SMART bill addresses that problem at the outset of rulemaking by requiring agencies to include in major regulations a framework for how they will measure effectiveness, benefits, and costs, and to incorporate plans for gathering the information necessary for *ex post* evaluation. It would also require agencies, within 10 years of a rule's effective date, to assess its benefits and costs, evaluate how well it accomplishes its objectives, and determine whether it could be modified to achieve better outcomes.

This would fill an important gap in current regulatory practice.[23] The GW Regulatory Studies Center reviewed all major rules proposed in 2014 and found that, despite President Obama's 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.[24] While we have not conducted a similarly comprehensive review since that year, case-by-case analysis suggests that most regulations continue to be issued without any plan for review.

The bill would ensure not only that existing major regulations are being evaluated, but that new major rules are designed to facilitate such evaluation in the future. It focuses not just on reducing regulatory burdens, but on improving regulatory outcomes by subjecting regulatory programs to rigorous evaluation and feedback. Institutionalizing a requirement to evaluate whether the predicted effects of the regulation were realized would provide a powerful incentive to improve the *ex-ante* RIA tools used to predict the impacts of regulatory alternatives.[25] The bill would

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[19] Joseph Aldy, Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy, ADMIN. CONF. U.S. (Nov. 18, 2014). Aldy writes that federal regulatory agencies have a mixed record on ex post review, despite their "long track record of prospective analysis of proposed regulations that can address these questions."

[20] Susan E. Dudley. "Retrospective Evaluation of Chemical Regulations," Organisation for Economic Co-operation and Development Environment Working Papers, No. 118. (2017).

[21] Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in *New Perspectives on Regulation*. David Moss and John Cisternino ed. The Tobin Project. (2009).

[22] Dudley (2017).

[23] Peacock et al. (2018).

[24] Sofie E. Miller, "Evaluating Retrospective Review of Regulations in 2014," the George Washington University Regulatory Studies Center. (Nov. 4, 2015).

[25] Dudley and Peacock (2018).

create an evaluation mindset and a feedback mechanism where agencies learn from evaluating regulatory outcomes and apply those lessons to improve future rules.

Other Observations

These two draft bills offer relatively modest, yet potentially powerful, changes to current rulemaking practices. If enacted, they could make regulatory decisions more transparent and accountable, leading to improved regulatory outcomes for the American people. My testimony concludes with observations on features common to both bills.

The definition of "major rule" in both bills appropriately captures what are likely to be the most significant regulatory actions, while not unduly burdening agencies with additional procedures for all their rules. It maintains the annual $100 million annual impact trigger embodied in the CRA and E.O. 12866 (Sec. 4(f)(i)), but it is not purely a monetary test. It recognizes that rules that are likely to significantly affect consumer prices, competition, productivity, innovation, the environment, public health, or safety deserve greater public engagement and *ex post* evaluation.

According to records kept by the Government Accountability Office (GAO), agencies issue approximately 3,000 regulations each year. Of those, GAO classifies around 900 as "substantive or significant."[26] An average of 70 of those meet the CRA definition of major, which closely resembles the bills' definition of major rule. This likely overstates the number of regulations that would be subject to these bills' requirements since many of them are routine (such as annual hunting and fishing limits) or affect annually recurring monetary transfers from taxpayers to program recipients (for example, Medicaid and Medicare payment rules). For these, the requirement to issue ANPRMs and develop a retrospective review framework could either be streamlined or they might qualify for an exemption.

Accomplishing the important goals of these bills would require resources. As noted above with respect to timing, the ANPRM requirement need not impose additional resource costs to the extent it engages public participation in preliminary deliberations that have traditionally been closed. To support more rigorous retrospective review, 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. In the long run, shifting resources from *ex ante* analysis to *ex post* review would not only help with evaluation, but could improve agencies' *ex ante* hypotheses of regulatory effects.[27]

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[26] The OIRA/GSA RegInfo.gov database classifies less than 300 rules as significant on average each year. Fewer than 50 of those would meet the bills' definition of major. See GW Regulatory Studies Center "Reg Stats" for more detail.

[27] Dudley (2017).

Both bills would make OIRA responsible for overseeing compliance, which is appropriate. Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient. Congress may also want to assign a congressional body, perhaps a new regulatory office in the Congressional Budget Office (CBO), responsibility for reviewing these assessments. Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a congressional regulatory office could provide Congress and the public feedback on legislation that enables regulation, as well as serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.[28]

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[28] Susan Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future." *Case Western Reserve Law Review*, Vol. 65 Issue 4. (2015).