

United States Senate Subcommittee on Regulatory Affairs and Federal Management

Roundtable Discussion:

## **Examining Practical Solutions to Improve the Federal Regulatory Process**

Prepared statement of Susan E. Dudley

Chairman Lankford and Ranking Member Heitkamp, thank you for inviting me to participate in today's roundtable discussion to examine practical solutions to improve the federal regulatory process. 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.<sup>1</sup> From April 2007 to January 2009, I oversaw executive branch regulations of the federal government 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, the non-profit world, and consulting.

I founded the George Washington University Regulatory Studies Center in 2009 to improve regulatory policy through research, education, and outreach. An academic center of GW's Trachtenberg School of Public Policy and Public Administration, we are a network of scholars from around the globe with experience and credibility on regulatory matters who conduct objective, empirically-based analysis of regulatory policies and practices.

I appreciate this Committee's interest in exploring common sense, bipartisan ideas to provide immediate improvements to the federal regulatory process. Though regulation affects every aspect of our lives, as a policy tool it rarely reaches the attention of voters (and consequently of elected officials) because, unlike the federal budget, its effects are often not visible. Like the direct government spending that is supported by taxes, regulations are designed to achieve social

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<sup>1</sup> 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.

goals, but the costs of regulations are hidden in higher prices paid for goods and services and in opportunities foregone.

This committee's constructive bipartisan discussions have the potential to bring about needed improvements. The 1970s and '80s are a testament to the reform that can be accomplished with bipartisan efforts in Congress, the Executive and the Judiciary. Those efforts, informed by scholarship and experience, brought about dramatic improvements in innovation and consumer welfare by removing unnecessary regulation that had kept prices high, to the benefit of regulated industries, and at the expense of consumers.<sup>2</sup>

This testimony offers recommendations in four areas that may meet the Subcommittee's request for "common sense ideas that could garner bipartisan support and provide immediate improvement to the federal regulatory process." These are 1) codifying regulatory impact analysis requirements, 2) providing for earlier analysis and public input on new regulations, 3) increasing resources for regulatory oversight, and 4) being mindful of regulatory consequences when passing new legislation. The sections that follow summarize insights in each of these areas, and provide citations to relevant GW Regulatory Studies Center research that provide further detail.

## **1. Codify regulatory impact analysis requirements.**

Presidents of both parties for over 30 years have supported ex ante impact analysis of regulations. Despite enjoying bipartisan support, however, these requirements are not codified in statute. Codifying these requirements could have several advantages.<sup>3</sup> ([Dudley 2013, p. 8](#))

First, such legislation would lend Congressional support to the nonpartisan principles of Executive Orders 12866 and 13563.

Second, legislation could apply these requirements to independent agencies (which Administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President).

Third, Congress could consider subjecting regulatory impact analysis to judicial review.<sup>4</sup> ([Dudley 2015](#)) Judicial review could be valuable because agencies tend to take more seriously

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<sup>2</sup> Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future." *Case Western Reserve Law Review*, Vol. 65, Issue 4. (2015) (Attached) The working paper on which this article is based is available here: [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_Exec-Discretion-Reg-Accountability\\_20150121.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_Exec-Discretion-Reg-Accountability_20150121.pdf).

<sup>3</sup> Susan E. Dudley, "Reducing Unnecessary and Costly Red Tape through Smarter Regulations," Testimony before the United States Congress Joint Economic Committee (June 26, 2013): 8, [http://www.jec.senate.gov/public//index.cfm?a=Files.Serve&File\\_id=f61eebb7-333c-40e6-a110-44c20d97eaal](http://www.jec.senate.gov/public//index.cfm?a=Files.Serve&File_id=f61eebb7-333c-40e6-a110-44c20d97eaal).

aspects 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. ([Dudley 2013](#)) On the other hand, requiring judicial review may make RIAs more detailed but less accurate or useful, so Congress should consider tradeoffs, especially with respect to review of analyses conducted early in the decision process. ([Carrigan & Shapiro 2014](#))

In codifying executive requirements, Congress should ask agencies to present evidence that the identified problem requires a federal regulatory solution, as well as an objective evaluation of alternative solutions. In other words, it will be important that analytical requirements not be limited to conducting benefit-cost analysis, but rather should include the broader philosophy and principles articulated in E.O. 12866. Legislation could require that regulatory decisions be based on the identification of a compelling public need (a material failure of private markets), an objective review of alternatives (including the alternative of not regulating), and an understanding of the distributional impacts of different approaches.<sup>5</sup> ([Executive Order 12866](#))

## **2. Provide for earlier analysis and public input on new regulations.**

Regulatory impact analyses are often developed after decisions are made and used to justify, rather than inform, regulations. Congress might consider requiring agencies to conduct earlier “back of the envelope” analyses that consider a wide range of alternatives.<sup>6</sup> ([Carrigan & Shapiro 2014](#))

For regulations with particularly significant effects, advanced notices of proposed rulemaking could be valuable for soliciting input from knowledgeable parties on a range of possible policy options.<sup>7</sup> ([Dudley & Wegrich 2015](#))

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<sup>4</sup> Susan E. Dudley, “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future,” forthcoming in *65 Case Western Reserve Law Review* (2015).

<sup>5</sup> E.O. 12866, Section 1.a states: “(a) *The 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. 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.”

<sup>6</sup> 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>.

<sup>7</sup> 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)

### 3. Increase resources for regulatory oversight.

The [Office of Information & Regulatory Affairs](#) (OIRA) is responsible for reviewing draft regulatory proposals and their supporting analysis. Yet, its staffing has been declining while regulatory agency staffing has increased.<sup>8</sup> ([Vesey 2011](#); [Drat 2011](#)) Providing OIRA with more resources could improve regulatory review and, ultimately, regulatory outcomes.<sup>9</sup> ([Shapiro & Morrall 2013](#))

Congress may also want to consider legislation that would strengthen its own ability to oversee regulation. Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient. 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 independent analysis regarding the likely off-budget effects of legislation and regulation. Importantly, such an office would serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.<sup>10</sup> ([Dudley 2015](#)) Regulatory expertise in Congress may be particularly important during presidential transitions, when regulatory activity tends to increase.<sup>11</sup> ([Dudley, ALR 2011](#))

More resources and regulatory expertise in OIRA and in Congress would not only provide more accountability for new regulations, but could improve retrospective evaluation of regulations in effect.<sup>12</sup> ([Dudley HSGAC 2011](#)) Reallocating resources to provide more checks and balances and to review actual regulatory impacts could improve regulatory outcomes.<sup>13</sup> ([Dudley 2013](#))

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<http://regulatorystudies.columbian.gwu.edu/achieving-regulatory-policy-objectives-overview-and-comparison-us-and-eu-procedures>.

<sup>8</sup> Kathryn Vesey, "OIRA Celebrates 30<sup>th</sup> Anniversary," George Washington University Regulatory Studies Center (2011),

[https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628\\_oira\\_staffing.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628_oira_staffing.pdf). Collin Drat, "Who's Regulating the Regulators?," George Washington University Regulatory Studies Center (2011)

[https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110630\\_drat\\_reg\\_staffing1.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110630_drat_reg_staffing1.pdf).

<sup>9</sup> Stuart Shapiro and John Morrall, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?," *Administration & Society* (2013): 0095399713498745.

<sup>10</sup> Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," forthcoming in *65 Case Western Reserve Law Review* (2015)

<sup>11</sup> Susan E. Dudley, "Observations on OIRA's Thirteenth Anniversary," *63 Administrative Law Review* 113 (2011) <http://heinonline.org/HOL/Page?handle=hein.journals/admin63&id=1093>.

<sup>12</sup> Susan E. 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\\_HS\\_GAC\\_20110718.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HS_GAC_20110718.pdf).

<sup>13</sup> Susan E. Dudley, "A Retrospective Review of Retrospective Review," The George Washington University Regulatory Studies Center Regulatory Policy Commentary. (May 07, 2013)

<https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf>.

#### **4. Be mindful of regulatory consequences when issuing new legislation.**

When faced with a crisis or unexpected event, legislators and policy officials face strong incentives to “do something,” and passing legislation demonstrates action. Whether the legislation leads to regulation that ultimately produces the desired outcomes may get less attention, partly because those outcomes are not immediately apparent, but also because action simply appears more constructive than inaction. It is tempting, in the moment of crisis, to demand that regulations be issued under very tight timeframes, or to limit the factors that agencies can consider when regulating. Nevertheless, regulations are likely to have better outcomes when their enabling legislation is drafted to encourage consideration of consequences and tradeoffs, allow for experimentation, and enable robust public consultation.

##### **A. Enabling legislation should direct regulatory agencies to consider alternatives, tradeoffs and consequences.**

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. New legislation should avoid this. Congress might also want to consider how to address language in existing legislation that precludes reliance on sound decision criteria or hinders Administrative Procedure Act (APA) procedures.

Some statutes directed at environmental risks have facilitated more rational regulatory policy than others by recognizing that risk management requires normative judgments that consider tradeoffs.<sup>14</sup> ([Dudley & Gray 2012](#)) For example, debates over drinking water standards are generally less acrimonious than debates over ambient air quality standards (which the Clean Air Act states should “protect public health” with an “adequate margin of safety.”) This is, in part, because the Safe Drinking Water Act allows explicit consideration of costs and benefits when setting standards, so the full burden of decision-making is not vested in the risk assessment. As a result, policy makers and interested parties may have less incentive to embed policy preferences in the risk assessment portion of the analysis, because they can debate them openly and transparently in the risk management discussion. (Dudley, forthcoming)

The engagement of scientific advisory panels can provide a valuable source of information and peer review for agency science, but legislation could be clearer when establishing such panels to restrict their advice to matters of science, and not ask them to recommend specific regulatory policies.<sup>15</sup> ([Bipartisan Policy Center 2009](#))

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<sup>14</sup> Dudley, Susan E., and George Gray. “Improving the Use of Science to Inform Environmental Regulation.” In *Institutions and Incentives in Regulatory Science*, edited by Jason Scott Johnston. Lanham, MD: Lexington Books, 2012.

<sup>15</sup> Bipartisan Policy Center, “Improving the Use of Science in Regulatory Policy” (2009) <http://bipartisanpolicy.org/library/science-policy-project-final-report/>.

When providing statutory authority for regulation and evaluating proposed and final rules, Congress should be aware that a greater emphasis on understanding cause and effect would improve regulatory outcomes.<sup>16</sup> ([Lutter et al 2015](#)) Rather than estimating risk-reduction impacts based on models that assume causation, agencies should apply well-accepted statistical models to evaluate causal risk relationships.<sup>17</sup> ([Cox 2015](#))

## **B. Legislation should provide opportunities for learning and experimentation.**

Congress should consider drafting laws that allow implementing rules to be designed in ways that encourage competition and allow for [experimentation](#). These need not be randomized controlled trials in the scientific sense, but rather natural experiments where the outcomes of different policies can be observed.<sup>18</sup> ([Dudley 2014](#))

Whenever possible, legislative and regulatory approaches should be designed to encourage innovation and learning. Regulation that forces substitution away from products that consumers' actions reveal they value hinders innovation, experimentation, and knowledge discovery. Innovation and learning depend on variation, cross-pollination of ideas, and are stifled by unilateral mandates.<sup>19</sup> ([Dudley, JRR 2014](#))

## **C. Legislation should encourage, and allow ample time for, public engagement.**

Congress has authorized federal regulatory agencies to issue certain rules in final form without first undergoing public comment. These “direct final” rules have the force of law without the benefit of input received from the public. Congress should avoid legislation that enables agencies to pursue major rulemakings without first seeking public comment.<sup>20</sup> ([Miller 2012](#))

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<sup>16</sup> Lutter, Randall, Linda Abbott, Rick Becker, Chris Borgert, Ann Bradley, Gail Charnley, Susan Dudley, Alan Felsot, Nancy Golden, George Gray, Daland Juberg, Mary Mitchell, Nancy Rachman, Lorenz Rhomberg, Keith Solomon, Stephen Sundlof and Kate Willett. “Improving the Use of Weight-of-Evidence Judgments in Risk Analysis,” *Risk Analysis* [Volume 35, Issue 2](#), pages 179–182, February 2015.

<sup>17</sup> Cox, Louis Anthony Jr. “Public Comment on EPA’s National Ambient Air Quality Standards for Ozone.” The George Washington University Regulatory Studies Center (2015).

<sup>18</sup> Susan E. Dudley, “The Utility of Humility,” The George Washington University Regulatory Studies Center Regulatory Policy Commentary. December 9, 2014, <http://regulatorystudies.columbian.gwu.edu/utility-humility>.

<sup>20</sup> For example, the Energy Policy and Conservation Act authorizes the Department of Energy to issue direct final rules setting energy efficiency standards for everyday household appliances, such as air conditioners and dishwashers. Read Sofie E. Miller’s comment on DOE’s direct final rule for dishwasher efficiency here: [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/DOE\\_EE\\_RE\\_2011\\_BT\\_STD\\_0060.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/DOE_EE_RE_2011_BT_STD_0060.pdf).

## 5. Additional Materials for Consideration by the Subcommittee

While neither the Center nor the George Washington University takes institutional positions on issues, the work of our scholars is relevant for the Committee’s Regulatory Improvement Effort. The following documents may be relevant for the Subcommittee’s consideration.

Balla, Steven J. “Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States,” Draft Report to the Administrative Conference of the United States (2011), <https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf>.

Balla, Steven and Susan E. Dudley. “Stakeholder Participation and Regulatory Policymaking in the United States.” A report prepared for the *Organisation for Economic Co-operation and Development* (2014). <http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Balla-Dudley-US-Stakeholder-Reg-Process-11-2014.pdf>

Bipartisan Policy Center. *Improving the Use of Science in Regulatory Policy*. Washington (DC): Bipartisan Policy Center; 2009.

Carrigan, Christopher and Stuart Shapiro, “What's Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis,” The 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>.

Cox, Louis Anthony Jr. “Public Comment on EPA’s National Ambient Air Quality Standards for Ozone.” The George Washington University Regulatory Studies Center (2015). <http://regulatorystudies.columbian.gwu.edu/public-comment-national-ambient-air-quality-standards-ozone>.

Dudley, Susan E. “Comment on Löfstedt’s ‘The substitution principle in chemical regulation: a constructive critique’” *Journal of Risk Research* [Volume 17](#), [Issue 5](#) p. 587 - 591 (2014).

Dudley, Susan E. “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future.” Forthcoming in *65 Case Western Reserve Law Review* (2015) [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_Exec-Discretion-Reg-Accountability\\_20150121.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_Exec-Discretion-Reg-Accountability_20150121.pdf).

- Dudley, Susan E. "Observations on OIRA's Thirteenth Anniversary," 63 *Administrative Law Review* 113 (2011)  
<http://heinonline.org/HOL/Page?handle=hein.journals/admin63&id=1093>.
- Dudley, Susan E. "Prospects for Regulatory Reform in 2011." *Engage* Vol 12 Issue 1  
[http://regulatorystudies.columbian.gwu.edu/files/downloads/regreform\\_dudley\\_workingpaper\\_20110405.pdf](http://regulatorystudies.columbian.gwu.edu/files/downloads/regreform_dudley_workingpaper_20110405.pdf).
- Dudley, Susan E. Testimony before the Joint Economic Committee: Reducing Unnecessary and Costly Red Tape through Smarter Regulations (2013)  
[http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013\\_06\\_26\\_Dudley\\_JEC\\_statement.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_06_26_Dudley_JEC_statement.pdf).
- Dudley, Susan E. "A Retrospective Review of Retrospective Review," The George Washington University Regulatory Studies Center Regulatory Policy Commentary. (May 07, 2013)  
<https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf>.
- Dudley, Susan E. Testimony before the Homeland Security and Governmental Affairs Committee United States Senate: Federal Regulation: A Review of Legislative Proposals, Part II. 2011.  
[http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_HSGAC\\_20110718.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf).
- Dudley, Susan E. Testimony before the Subcommittee on Courts, Commercial and Administrative Law Committee on the Judiciary: The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?  
[http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_HouseJudiciary\\_APA\\_20110228.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HouseJudiciary_APA_20110228.pdf)
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<http://regulatorystudies.columbian.gwu.edu/utility-humility>.
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- Lutter, Randall, Linda Abbott, Rick Becker, Chris Borgert, Ann Bradley, Gail Charnley, Susan Dudley, Alan Felsot, Nancy Golden, George Gray, Daland Juberg, Mary Mitchell, Nancy Rachman, Lorenz Rhomberg, Keith Solomon, Stephen Sundlof and Kate Willett. "Improving the Use of Weight-of-Evidence Judgments in Risk Analysis," *Risk Analysis* [Volume 35, Issue 2](#), pages 179–182, February 2015.
- Miller, Sofie E. "Recommendations to DOE on Reducing Regulatory Burden." The George Washington University Regulatory Studies Center. 2014. [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/image/RSC\\_PIC-DOE-Regulatory-Burden-RFI-SMiller.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/image/RSC_PIC-DOE-Regulatory-Burden-RFI-SMiller.pdf).
- Vesey, Kathryn. "OIRA Celebrates 30<sup>th</sup> Anniversary," George Washington University Regulatory Studies Center (2011), [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628\\_oira\\_staffing.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628_oira_staffing.pdf).
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- Shapiro, Stuart and John Morrall, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?" *Administration & Society* (2013): 0095399713498745.