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The Regulatory Accountability Act, Or: How Progressives Learned to Stop Worrying and Love Cost-Benefit Analysis, by Jonathan Masur

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In a recent paper, Eric Posner and I argue that cost-benefit analysis (CBA) should become a judicially-enforced legal requirement for regulatory agencies. That is, agencies that promulgate major rules should be required to perform CBA and regulate only if the benefits of the regulation would exceed the costs. Judges should enforce this requirement by scrutinizing agency CBAs and rejecting regulations that do not pass a cost-benefit test. We based our argument in part on the inherent merits of cost-benefit analysis: it is a rational, politically neutral, scientifically-based decision procedure that provides a great deal of information as to whether a project will increase or decrease social welfare. CBA is not perfect, but it is superior to nearly every alternative, and certainly superior to not performing *any* type of welfare analysis.

We then advanced to what is perhaps an even more provocative claim: as a descriptive matter, the courts have *already* moved in the direction of requiring that agencies regulate on the basis of cost-benefit analysis. In the course of three cases spanning fifteen years – *Whitman v. American Trucking*, *Entergy v. Riverkeeper*, and *Michigan v. EPA* – the Supreme Court progressed from holding that

an ambiguous statute prohibited CBA (*Whitman*), to holding that CBA was *permitted* despite a statute that seemed to indicate to the contrary (*Entergy*), to holding that CBA (or a close facsimile) was *required* by an ambiguous statute (*Michigan*). What is more, even though *Michigan v. EPA* was decided on a 5-4 vote, even the four dissenting judges agreed that agencies were not permitted to regulate when costs substantially exceeded benefits. (The dissent was based upon whether or not the EPA had complied with that requirement, and here we agreed with the dissent.) We predicted that this trend would continue, and that courts would continue to make even greater demands of agencies that they regulate on the basis of sound science and rational consideration of costs and benefits.

Of course, there is an even more direct route to that outcome: Congress could simply pass a law requiring that agencies conduct CBA and directing courts to review those CBAs. That is precisely what the Senate version of the Regulatory Accountability Act, S. 951, would do. The bill would require all agencies, including independent agencies, to consider a "reasonable number of [regulatory] alternatives" and select the "most cost-effective" rule, unless "the additional benefits of the more costly rule justify the additional costs of that rule." The language is somewhat ambiguous, but a reasonable interpretation is that agencies must conduct CBA and select the regulatory alternative that generates the greatest net benefits. Courts would then be charged with reviewing whether agencies had complied with this cost-benefit standard, at least with respect to major and high-impact rules.

The bill thus represents a significant and positive step in the direction of rational and cost-justified regulation. It succinctly and explicitly achieves the goal toward which the Supreme Court has been inching for years: requiring that agencies act only when their regulations will do more harm than good. No piece of legislation is perfect, and several scholars, including Professor Chris Walker, have done an excellent job of describing some of the other strengths and weaknesses of the bill. Nevertheless, the cost-benefit mandates in the Senate bill are likely to improve regulatory outcomes across a wide variety of agencies and regulations. The bill also requires that agencies regulate only on the basis of sound science, but it does so without placing excessive or unwarranted demands on regulatory agencies. The bill only requires that agencies regulate "on the basis of the best reasonably available scientific, technical, or economic information." It is hard to imagine the argument for allowing agencies to regulate on any other basis.

The Senate bill is impressively bipartisan—it was introduced by two Republican and two Democratic sponsors. Nevertheless, some commentators have suggested that other Democrats should not support the bill. CBA is conventionally viewed as a politically conservative tool meant to restrain agencies from regulating. This perception likely derives from the fact that President Reagan was the first president to require that agencies engage in CBA on a widespread basis, and did so as part of a more general deregulatory effort.

But the perception of CBA as necessarily conservative or anti-regulatory is as unfortunate as it is misguided. CBA has been adopted and affirmed by every president since Reagan, including Presidents Clinton and Obama. There is nothing especially "conservative" about requiring that regulation (or any other government action) be based on sound science and create greater benefits than costs. Progressives have championed such ideas for years. Evaluating agencies on the basis of their CBAs would of course make it somewhat more difficult for agencies to promulgate new regulations, particularly regulations that are not cost-benefit justified. *Any* new requirement on agencies will make it more difficult for agencies to act. This, by itself, has never been enough reason for progressives to oppose procedural requirements that lead to better regulation. For that matter, agencies are already required by executive order to perform CBA. The additional workload imposed by this portion of the bill would be minimal.

Most importantly, progressives must realize that these new requirements *would apply to deregulation just as much as they do to new*

regulation. If an agency were to deregulate—if, for instance, the EPA were to reverse President Obama's Clean Power Plan—that deregulatory act would require a new major rulemaking. Without a cost-benefit mandate, there is nothing to stop the Trump administration from this sort of massive deregulatory action. If S. 951 passes, however, Trump's EPA would not be legally permitted to repeal the Clean Power Plan or any of the hundreds of other important regulations promulgated under Obama and other presidents. Any move to reverse such a cost-justified regulation would itself run afoul of CBA. The vast majority of regulatory activity under President Obama was cost-justified, in that it produced benefits that exceeded costs—in some cases by large margins. The Senate's Regulatory Accountability Act would thus protect vast swaths of worthwhile regulation against a rapacious Trumpian administrative state. It's time progressives learned to stop worrying and love CBA.

Jonathan Masur is the John P. Wilson Professor of Law, David and Celia Hilliard Research Scholar, and Director of the Wachtell, Lipton, Rosen & Katz Program in Behavioral Law, Finance and Economics at the University of Chicago Law School.

This post is part of the Regulatory Reform in Congress Series, which highlights and analyzes legislative proposals to reform the federal regulatory state. All posts in this RegReform Series can be found here.

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