

Response to Written Question Submitted by Hon. John Thune to Adam White

Question. Even when agencies do perform full cost-benefit analyses of their proposed rules, they may still not capture the full regulatory burden on businesses when the full history of cumulative rules are taken into account. How effective have agencies been in assessing the cumulative burdens of, in some cases, decades of rules?

Answer. Agencies have not been successful in assessing the cumulative burdens of regulations—let alone reducing those burdens. The Administrative Conference of the United States diagnosed this problem well in 2014:

Traditionally, federal regulatory policymaking has been a forward-looking enterprise: Congress delegates power to administrative agencies to respond to new challenges, and agencies devise rules designed to address those challenges. Over time, however, regulations may become outdated, and the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies' enforcement efforts and impose a substantial burden on regulated entities.

To identify the agencies' failure on this point is not to "blame" them. As former OIRA Administrator Cass Sunstein observed, "[i]n principle, a competent analysis of costs might be able to capture those [cumulative] costs, but it is exceedingly hard to do so in the context of particular rules." While it was good for the White House and Sunstein's OIRA to order agencies to look back at old regulations and attempt to quantify cumulative burdens, one must concede the challenges inherent in that task.

The task of quantifying cumulative burdens is all the more difficult when one looks beyond the cumulative burdens imposed by a single agency, and considers the needless costs of redundant regulatory burdens across multiple agencies, or between federal and state government, or even at the international level. Still, experts have offered hope that such analysis can be done, even if there is no single "silver bullet" for easily accomplishing the task.

Given the challenges inherent in precisely calculating cumulative burdens, perhaps the solution lies in creating an incentive for agencies themselves to identify cumulative burdens as eagerly as possible. And that is a virtue of "regulatory budgets": by putting a cap on an agency's cumulative burdens, the agency itself has an incentive to identify excessively burdensome rules among its stock of existing regulations, and to reform or repeal them before imposing new regulatory burdens. President Trump already has begun to impose regulatory budgets on agencies through an executive order, but if Congress wants to reduce cumulative regulatory burdens then it should consider imposing regulatory budgets through legislation.

Congress should also look for opportunities to reduce cumulative regulatory burdens at the international level through trade agreements, as well as cumulative regulatory burdens between the federal and state governments.

Response to Written Question Submitted by Hon. Deb Fischer to Adam White

Question. As it relates to regulatory reform, I've been a strong proponent of transparency, better cost-benefit analysis, and more stakeholder participation in the process. As chair of the Surface Transportation Subcommittee, I've convened hearings on performance-based regulations, whereby agencies set goals or benchmarks and allow flexibility in achieving those goals. From your perspectives, what are the benefits of moving away from prescriptive regulations towards more goal-oriented regulations?

Answer. In my prior legal practice, I worked on energy infrastructure issues, and so I am familiar with the benefits and limits of performance-based regulation (PBR).

In general, I think that PBR offers great promise, by creating an environment in which humankind's capacity for innovation and technological advancement is given space and incentive to find the best path toward achieving overarching goals. This strikes me as more promising than the agencies' traditional method of dictating specific standards for agencies to comply with. And we must always keep in mind that regulations are not an end in themselves—they are a means to the greater end of positive outcomes. If PBR is a better way of achieving those outcomes, then PBR should supplement the traditional regulatory approach of setting myriad minutely-detailed standards.

That said, specific regulatory standards have a virtue: namely, they are precise and transparent, and thus they can be administered more easily and predictably. If, as Justice Scalia once suggested, "the rule of law" is "a law of rules," then we should hesitate before discounting altogether the value of rules-based system. The rules that bind the regulated community also bind the regulators.

Because there are both benefits and drawbacks to PBR, I would urge Congress to promote greater use of PBR but with an experimental mindset. Instead of prescribing greater use of PBR across all agencies and programs, consider targeting specific agencies and programs where PBR seems especially promising. If those programs are successful, then Congress could consider expanding the experiment to all agencies and programs.

Thank you, again, for the opportunity to testify.