Statement of Robert L. Glicksman
to the House Judiciary Committee's
Subcommittee on Courts, Commercial and Administrative Law

Raising the Agency's Grades — Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need

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My name is Robert L. Glicksman. I am the J.B. & Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School. I am also a member scholar at the Center for Progressive Reform. I graduated from the Cornell Law School and have practiced and taught environmental and administrative law for nearly 35 years.

I. IMPROVING COST-BENEFIT ANALYSIS WILL NOT IMPROVE REGULATORY DECISION-MAKING

The essential premise of the Mercatus Center's Regulatory Report Card project is that the output of federal regulatory agencies is flawed and that the best way to address that problem is for agencies to engage in more rigorous regulatory analysis to provide better justifications of the need for and content of regulation. Implicitly, the premise seems to be that agencies are engaged in excessive regulation and that regulatory analysis, particularly at the initial stages of regulation, would cure that problem by demonstrating that regulation is unnecessary. The Report Card project also reflects the conviction that cost-benefit analysis is an essential analytical tool capable of identifying regulations whose costs to society exceed their benefits and that are therefore counterproductive. My first response to that framing of the problem is that cost-benefit analysis is itself a flawed technique for distinguishing between useful and counterproductive regulations. More fundamentally, while the current regulatory process is indeed flawed, the problems for the most part are not the result of agencies adopting regulations without justification or regulations whose social costs exceed their benefits. Instead, the primary

problem is regulatory dysfunction resulting from providing agencies with inadequate resources to fulfill their statutory responsibilities, not giving agencies sufficient tools to address significant health , safety, and environmental risks, and burdening agencies with what are already excessive and unhelpful analytical obligations. Finally, the existing regulatory process already allows those affected by regulation to identify flaws in agency regulatory proposals and affords both regulated entities and agencies opportunities to fix problems such as overly costly or unfair regulation.

Let me say at the outset that I'm delighted to see that the Report Card project that is the focus of this hearing acknowledges that there are in fact benefits to regulation. We've heard a full-throated assault on regulation over the last couple of months, in which a grossly inflated dollar figure for the supposed cost of regulation has been bandied about frequently. Those who have assailed supposedly excessive regulatory costs almost never mention the benefits of regulation, however, even though ample data indicate that these benefits vastly exceed the costs. Even using the deeply flawed methodology of cost-benefit analysis, which is slanted heavily against protective regulations, the benefits of regulation vastly exceed the costs.

Putting aside the critics' tendency to ignore or give short shrift to the benefit side of the equation, I think the presumption that we can get better regulation if we make cost-benefit analysis more rigorous is just wrong. It sounds reasonable, but in the real world it will lead to longer delays in much-needed regulations, all in pursuit of some sort of mathematical ideal that is, in the end, illusory.

As a decision-making methodology, cost-benefit analysis is inescapably limited by what the academic literature refers to as indeterminacy. By that, I mean that it produces cost and

benefit estimates that are so ambiguous and uncertain that they can tell us very little about the economic efficiency, "smartness," or quality of a regulation.

One of the biggest sources of indeterminacy in cost-benefit analysis comes from its reliance on monetization, the process by which the cost-benefit analyst attempts to reduce any value—no matter how complex or how important—to a crude dollar figure, so that the monetized benefits of regulation can be measured against its monetized costs. On their face, some agency estimates of monetized regulatory benefits are absurdly low. For the Environmental Protection Agency's (EPA) air pollution regulations, for example, the prevention of a non-fatal heart attack in a person 0-24 years old is worth only $84,000 and the prevention of an emergency room visit to treat an asthma attack is worth only $363.[1] Protecting children's developing brains against mercury pollution is worth only $8,800 per IQ point saved.[2] Until recently, agencies assigned a value of $0 to preventing catastrophic climate change, because this benefit was too hard to monetize.[3] Beyond that, inconsistencies in how agencies monetize benefits cast serious doubt on the usefulness of the effort. EPA values each life saved through its regulations at $9.1 million,[4] but lives saved by Department of Transportation regulations are worth closer to $6 million.[5] Cost-benefit figures therefore provide the aura of precision and rationality. It may be possible to asses the impacts of regulation in monetary terms, although pre-regulation estimates of costs often turn out to be inflated in retrospect. Efforts to monetize

[1] Envtl. Protection Agency, *The Benefits and Costs of the Clean Air Act from 1990 to 2020*, 5-18 to5-19 (Table 5-4) (Mar. 2011), *available at* http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.
[2] Envtl. Protection Agency, *Regulatory Impact Analysis of the Final Clean Air Mercury Rule* 10-5 (Mar. 2005), *available at* http://www.epa.gov/ttnecas1/regdata/RIAs/mercury_ria_final.pdf.
[3] *See, e.g.,* U.S. Dep't of Transportation, National Highway Traffic Safety Administration, *Final Regulatory Impact Analysis, Corporate Average Fuel Economy and CAFÉ Reform for MY 2008-2011 Light Trucks*, at VIII-64 to VIII-65 (March 2006), *available at* http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Rulemaking/Rules/Associated%20Files/2006_FRIAPublic.pdf.
[4] Envtl. Protection Agency, *Regulatory Impact Analysis (RIA) for Existing Stationary Compression Ignition Engines NESHAP, Final Draft* 7-6 n. 8 (Feb. 2010), *available at* http://www.epa.gov/ttn/atw/rice/rice_neshap_ria2-17-10.pdf.
[5] U.S. Dep't of Transportation, National Highway Traffic Safety Administration, *Final Regulatory Impact Analysis, FMVSS 216, Upgrade Roof Crush Resistance* 121 (Apr. 2009).

benefits often depend on arbitrary and unrevealed assumptions and serve to undervalue the social benefits of regulation as benefits that are difficult or impossible to quantify get ignored or downgraded in importance.

Indeterminacy is inherent to cost-benefit analysis. We've been using cost-benefit as a regulatory guide star for 30 years, and so we're in a position to draw that conclusion. The indeterminacy has been with us since day one, and it's not going away. Efforts to reform the methodology will at best yield only marginal improvements in its ability to improve regulatory decision-making. Cost-benefit analysis attempts to distill a large and complicated body of information into a few numbers. The information on which the analysis is based is always full of uncertainty and imperfections. Data are never complete. Scientific conclusions are never certain. And the process of converting intangible values into monetary terms is fraught with unsolvable theoretical conundrums. Over time, methodological improvements may chip away at some of the ambiguity and uncertainty underlying every cost-benefit analysis. However, cost-benefit analysis will never be able to adequately measure the net benefits of a particular regulatory option, much less to allow for a meaningful comparison of the net benefits of several regulatory options to determine which maximizes net benefits.

That doesn't mean that potential costs and benefits shouldn't be weighed by regulatory agencies. Agencies ought to assess costs and benefits. But such estimates ought to provide only one piece of the puzzle, and should be used with caution and with an acknowledgment of their limitations. Supporters of cost-benefit analysis sometimes seem to believe that these flawed estimates can be the sole basis for determining whether regulations are workable or worthwhile, as if a computer that has been fed all the details will just do the math and then crank out an

"optimal" decision for us. But if the data going into the computer are incomplete and flawed, as they inevitably are, the result of the process is bound to be flawed as well.

II. TO IMPROVE THE REGULATORY SYSTEM, THE PROTECTOR AGENCIES MUST BE RE-ENERGIZED

The real problem to which Congress should be directing its attention is not insufficient agency attention to cost-benefit methodologies. A recent series of catastrophic regulatory failures have brought to light the indisputably troubling condition of crucial regulatory agencies assigned to protect public health, worker and consumer safety, and the environment. The destructive convergence of funding shortfalls, demonizing political attacks, and outmoded legal authority has set the stage for ineffective enforcement and unsupervised industry self-regulation. From the Deepwater Horizon spill in the Gulf of Mexico that killed eleven and caused grave environmental and economic damage, to the worst mining disaster in 40 years at the Upper Big Branch mine in West Virginia with a death toll of 29, the signs of regulatory dysfunction abound. Peanut products tainted by salmonella, glasses contaminated by cadmium sold to children at fast food restaurants, Code Red smog days when parents are warned to keep their children indoors, the recall of widely used pharmaceutical drugs found to create risks of heart failure—all reflect agencies unable to do their jobs and companies that put economic self-interest above operating in ways consistent with the public interest.

More analysis—including analysis aimed at increasing regulatory report card scores—will not fix these flaws in the current regulatory system. If anything, more analysis only makes things worse by needlessly slowing agencies down without demonstrably improving the quality of their regulatory decisions. The Occupational Safety and Health Administration's (OSHA) recently issued Cranes and Derricks Rule provides a concrete illustration of the pernicious effects of "paralysis by analysis." Beginning in the mid-1990s, industry itself began petitioning

OSHA for stronger and more comprehensive regulations and in July of 2004 a committee of industry, labor, and government representatives reached agreement on a draft proposed rule. Nevertheless, an understaffed, under-resourced, and over-stretched OSHA was not able to issue a final rule until August of 2010—more than 6 years later—because it was tied up by several burdensome analyses.[6] By OSHA's own estimates, every year the rule remained stuck, 53 people died and another 155 were injured unnecessarily.[7]

Yet, proponents of cost-benefit analysis remain focused on perfecting formulas, assumptions, models, and data sets. But elaborate efforts to monetize heart attacks do not prevent heart attacks; EPA's air pollution regulations do. A rigorous cost-benefit analysis does not prevent workplace deaths; an energized and unencumbered OSHA does.

If we want to fix the regulatory system, we should instead focus on finding ways to help agencies effectively achieve their statutory missions of protecting people and the environment. Here are some places to start:

- **Providing agencies with the resources they need.** One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, thus forcing these agencies to effectively do more with less. And the situation is getting worse, not better. Just last week in an editorial published in the Washington Post on March 24, 2011, William Ruckelshaus and Christine Todd

[6] Cranes and Derricks in Construction, 75 Fed. Reg. 47906 (Aug. 9, 2010) (to be codified at 29 C.F.R. pt. 1926), *available at* http://www.osha.gov/FedReg_osha_pdf/FED20100809.pdf. *See* Catherine O'Neill et al, *The Hidden Human and Environmental Costs of Regulatory Delay* 13-16 (Ctr. for Progressive Reform, White Paper 907, Oct. 2009), *available at* http://www.progressivereform.org/articles/CostofDelay_907.pdf.

[7] Cranes and Derricks in Construction, 73 Fed. Reg. 59714, 59884 (proposed Oct. 9, 2008) (to be codified at 29 C.F.R. pt. 1926); O'Neill et al., *supra* note 6, at 15.

Whitman, who served as EPA Administrators under Republican Presidents Nixon, Reagan, and George W. Bush, recognized the threat and decried House proposals to cut EPA's budget by nearly a third, which they said would "impede [EPA's] ability to protect our air and water."

- **Providing agencies with enhanced legal authority.** For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. Again, the warnings of Administrators Ruckelshaus and Whitman ring true. "Amid the virulent attacks on the EPA driven by concern about overregulation," they noted, "it is easy to forget how far we have come in the past 40 years. We should take heart from all this progress and not, as some in Congress have suggested, seek to tear down the agency that the president and Congress created to protect America's health and environment." The same holds true for the other health, safety, and environmental watchdog agencies.
- **Freeing agencies from unnecessary analytical requirements.** Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making.

III. THE TRADITIONAL ADMINISTRATIVE RULEMAKING PROCESS IS ALREADY DESIGNED TO IDENTIFY THE NEED FOR REGULATION AND ACCOUNT FOR REGULATORY IMPACTS

Although there is no evidence to support the charge that agencies routinely churn out ill-advised and counterproductive proposals, current law provides ample opportunities to fix those problems without heaping on agencies already stretched to the limit more onerous analytical responsibilities. A regulatory proposal is just that—a proposal. It reflects the best efforts of an agency to devise a regulatory solution to some environmental, health, or safety threat that is supported by applicable law and available science. The solution is the result of a broad inquiry into the nature of the threat and the available remedial options that is conducted by an interdisciplinary group of agency experts and policymakers.

Despite these best efforts, sometimes an agency overlooks some crucial issue when developing a rule. This is why, under traditional Administrative Procedure Act (APA) rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, it is strictly enforced by federal courts whenever those affected by a final rule challenge it in court. If the reviewing court finds that an agency ignored some relevant public comment without adequate explanation, it can vacate the rule and send the agency back to the drawing board. This prospect creates strong incentives for agencies to diligently consider all relevant information during development of the rule.

In essence, efforts to reform regulatory analysis through enhanced cost-benefit analysis ignore this well-calibrated process. Instead, these efforts would require agencies to embark on a time-consuming, resource-intensive, and ultimately fruitless search to uncover every impact that

a rule might have at the very beginning of the rulemaking process. This will not improve regulatory decision-making. At best, it wastes agencies time and resources. At worst, it stops the whole rulemaking process dead in its tracks.

IV. REGULATIONS CAN BE REVISED THROUGH INCREMENTAL ADJUSTMENTS

Even if agencies get it wrong during initial rule promulgation, the regulatory process provides ample avenues for those affected by the regulation in unintended or counterproductive ways to seek relief from the agency. Agencies spend much time and effort attempting to rationalize significant draft regulations before they are proposed and adopted. These efforts are certain to fail at times because of methodological and informational problems. It therefore makes more sense for regulators to make incremental adjustments to regulations at the "back-end" of the administrative process, by relying on exceptions, time extensions, variances, and waivers, rather than continuing the effort to rationalize regulation at the "front-end" of the process.[8] By focusing on the back-end, administrators have the opportunity to adjust regulations in light of their actual impact, as compared to the unavoidable and significant guesswork used in front-end analysis such as cost-benefit analysis.

Congress has generally authorized most agencies to make these back-end adjustments. A back-end adjustment process has several advantages over efforts to craft a perfect and omniscient regulation at the outset. First, it permits agencies to preserve relatively stringent baseline risk-reduction standards while still accommodating concerns that the application of these stringent rules will cause irrational or unfair results in particular cases. Regulators can make case-by-case adjustments instead of initially watering down standards in anticipation that a general rule may be counterproductive or irrational in some circumstances. Second, a back-end

[8] *See* Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004).

process addresses the delays caused by analysis requirements and the difficulty of undertaking analysis in light of informational and methodological problems. The availability of these adjustments can avoid delay in the issuance of a rule of widespread applicability because an agency can promulgate a rule and rely on regulated entities to alert it to implementation problems by filing individual requests for relief. Further, a back-end process gives regulated entities a strong incentive to produce evidence that an adjustment in a rule is justified. A process that relies on back-end adjustments to fix regulatory flaws places on those most likely to possess information bearing on how regulation has produced unintended consequences or unfair treatment—the regulated community—the incentive to bring that information to the agency's attention. Unlike rulemaking, in which regulators must attempt to anticipate problems before they occur as they write general rules, incremental adjustments permit regulators to consider concrete problems, one at a time, in the context of specific circumstances. The back-end process allows agencies to make adjustments in response to circumstances that they did not anticipate when they wrote a rule.

Third, a back-end adjustment process can increase the legitimacy of the regulatory program that contains the back-end process by reducing the frustrations likely to result from the application of regulatory requirements in ways that produce harsh or anomalous results.

Finally, but hardly least of all, a back-end process is one of the ways that regulators can take costs into account. A back-end adjustment process that authorizes hardship-based adjustments makes cost a relevant consideration without relying on a cost-benefit test that yields a misleading impression of analytical precision.

It is important that agencies be accountable for how they make back-end adjustments.[9] But this method of improving regulation makes far more sense than endless attempts to perfect the cost-benefit analysis that occurs at the front-end of the regulatory process.

V. REGULATIONS CAN BE REVISED THROUGH SUBSEQUENT RULEMAKINGS

At least one other aspect of current regulatory practice functions as a device for weeding out flawed regulations. On occasion, a rule imposes burdens without providing much benefit. Much more frequently, the agency discovers that the rule is not strong enough, as illustrated by EPA's 1973 Clean Air Act regulation that required refineries to reduce the amount of lead in gasoline by about 80 percent. Subsequent epidemiological studies confirmed that the rule significantly reduced blood lead levels in children, preventing countless cases of learning disabilities and impaired brain development, while imposing relatively little cost on refineries. These studies also confirmed that the 1973 lead rule did not go far enough in protecting the public health (specifically, in protecting children exposed to lead from cognitive impairment). In 1985, EPA tightened the standard even more, and Congress eventually banned the use of lead as a gasoline additive in the 1990 Clean Air Act Amendments. EPA was convinced in 1973 that lead was harmful to public health, but because of the state of the science at the time, it underestimated its adverse impacts. When EPA acquired that knowledge later, it amended its rules to better advance the fundamentally precautionary mission of the Clean Air Act.[10]

Problematic regulations of either variety (excessive or inadequate) can be fixed through subsequent rulemaking actions. Some statutes contemplate this eventuality, requiring periodic

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[9] *See* Sidney A. Shapiro & Robert L. Glicksman, *The APA and the Back-End of Regulation*, 56 ADMIN. L. REV. 1159 (2004).

[10] *See* Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc) ("A statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. Regulatory action may be taken before the threatened harm occurs; indeed, the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat. As should be apparent, the 'will endanger' language of [the Clean Air Act] makes it such a precautionary statute.").

review and revision of existing rules. For example, the Clean Air Act requires EPA to revisit its National Ambient Air Quality Standards (NAAQSs) for criteria pollutants at least once every five years and revise them as necessary. The same law requires EPA to assess whether technology-based controls on emissions of hazardous air pollutants provide sufficient health protection. If not, EPA must recommend supplemental regulation to Congress and adopt it if Congress does not.

Efforts to reform cost-benefit analysis ignore the regulatory system's capacity for self-correction. If anything, these efforts undermine this capacity by tying up the regulatory process in knots. Instead, the cost-benefit analysis reform movement aims at perfection at the front end of the regulatory process, with the inevitable result that agencies will not have time and resources to issue many regulations and those that are issued will tend to underprotect health and safety as regulatory benefits are undervalued. If cost-benefit analysis had been the order of the day in 1973, it is highly unlikely that EPA would have been able to issue its important lead rule due to the absence of an established connection between automotive lead emissions and health problems in children.[11] If the cost-benefit analysis reform movement succeeds, one can only imagine all the important future safeguards that will be unnecessarily delayed and diluted.

I will close by returning to the recent admonitions of Administrators Ruckelshaus and Whitman. They recognized what is obvious but that nevertheless bears repeating: "Our country needs today what it needed in 1970: a strong, confident, scientifically driven, transparent, fair and responsible" set of protective agencies such as EPA. "Congress should help America

[11] Frank Ackerman, Lisa Heinzerling, & Rachel Massey, *Applying Cost-Benefit to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 161 (2005) ("Thus, the cost-benefit analysis of the 1980s phase down of lead in gasoline would not have been possible in the absence of the more important 1970s-era regulation—which was not itself based on cost-benefit analysis. Had we waited in the 1970s, as some argue we should do in policy disputes today, for cost-benefit analysis to show us the way, we might still be waiting now.").

achieve that." They also fired a shot across the bow of those antagonistic to these goals: "The American public will not long stand for an end to regulations that have protected their health and quality of life."