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BEFORE THE COMMITTEE ON THE BUDGET
UNITED STATES SENATE

HEARING ON “MOVING TOWARD A STRONGER ECONOMY WITH A REGULATORY BUDGET”

DECEMBER 9, 2015

Chairman Enzi, Ranking Member Sanders, and Members of the Committee, thank you for inviting me here today to share with you my concerns about regulatory budgeting and to explain why I think this strategy could hurt everyday Americans while producing no benefit to the overall economy. As a former official at the U.S. Environmental Protection Agency (EPA), I'm very proud of the professionalism and resourcefulness of America's regulatory agencies. And, as a law professor, I know that our regulatory system can be much improved. But rather than focusing on artificially imposed caps, I think we would do better by instead providing executive agencies with the tools and resources they need to write the smartest, most effective rules possible. Agencies should, of course, have the incentives and the resources to identify deficient rules already on the books and to fix or remove them. (And, in fact, periodic retrospective review, is already required of most agencies.)[1] But a regulatory budget—whose fixation is on *quantity*, not *quality*—will not lead to smarter regulations, a stronger economy, or a healthier and more secure citizenry. It will stand against those those things, making the concept, however well-intended, ultimately counter-productive.

My name is Robert R.M. Verchick. I hold the Gauthier-St. Martin Chair in Environmental Law at Loyola University New Orleans and serve as a Senior Fellow in Disaster Resilience Leadership at Tulane University. I am the President of the Center for Progressive Reform (CPR) (http://www.progressivereform.org/), where I also serve as a Member Scholar.

I have been a law professor for more than 20 years. My research focuses on environmental law, disaster risk management, and administrative law. I am author of three books, including the award-winning *Facing Catastrophe: Environmental Action for a Post-Katrina World* (Harvard University Press 2010). My work has appeared in many venues, including the *California Law Review,* the *Southern California Law Review,* and the environmental law reviews at Harvard, Stanford, and Duke.

In 2009 and 2010, I served as Deputy Associate Administrator of Policy for the EPA. The office I helped direct, EPA's Office of Policy, coordinates all of EPA's rulemaking processes, oversees the economic analysis of its proposed actions, and works closely with the White House's Office of Information and Regulatory Affairs (OIRA).

I hold an A.B. degree, with distinction and honors, from Stanford University and a J.D. degree *cum laude* from Harvard University.

Today I make five points:

1. In contrast to what some budgeting advocates suggest, there is no question that our regulatory system, over all, benefits Americans immensely. Federal regulations keep our air clean, our water drinkable, our workplaces safe, and our access to energy reliable. Government estimates have routinely shown (in the administrations of both parties) that the combined benefits of major regulations far outstrip the costs. An arbitrary cap on future rulemaking would deprive us of many necessary protections and of even more net benefits.

[1] *See, e.g.*, Exec. Order No. 13563, Sec. 6, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf; Regulatory Flexibility Act §610, 5 U.S.C. §610 (2005).

2. It is a mistake to focus on the quantity of regulations rather than the quality. By itself, quantity (as expressed in terms of compliance costs) says nothing useful about a rule at all. As my first point shows, regulation is not a zero-sum game. More regulations can bring more benefits to the public and the economy if managed properly. This pivot from quality to quantity marks a dramatic shift in reform strategies, and I'm concerned it will lead to worse decision-making within agencies.
3. A regulatory budget program could create a series of novel governance problems, including threats of government shut-down over a failure to raise the "reg ceiling," legal questions about proper delegations of power to the executive branch, and the challenge of accompanying many new rulemaking actions with equal and opposite "unrulemaking" actions. These problems would hobble, not improve the regulatory system.
4. Regulatory budgeting risks leaving people and the environment unprotected, particularly against new and emerging risks like those posed by nanotechnology, driverless cars, and many other important but untested technologies.
5. For rulemaking agencies, improving regulatory outcomes is Job Number 1. Sound proposals for making the system smarter include (a) eliminating unnecessary *ex ante* analytical and procedural requirements, (b) empowering agencies to emphasize back-end adjustments in the implementation of completed rules, and (3) empowering agencies to emphasize more flexible, agency-driven reviews of their existing regulations and regulatory programs.

Regulatory budgeting rations regulatory costs to industry the way a fiscal budget rations taxpayer dollars. Before an agency could issue a new standard relevant to, say, blowout preventers on deep-water oil platforms, or the venting of radiation from a nuclear reactor, an agency might first have to locate an existing regulation with comparable compliance costs and strike it from the books. To make way for protections demanded by new circumstances and new technologies, many long-established safeguards would be put on the chopping block.

As applied, budgeting appears to be more about fewer protections, not better ones.

But as we face a future in which deep-water drilling, nanomaterials, and even driverless cars will be more commonplace, *better* protections—not fewer ones—are what we actually need. Rationing public goods like health, safety, and security for the benefit of a narrow class of commercial interests is the very opposite of what a virtuous and effective government should be doing.

I. Don't Put a Lid on Regulatory Success

In the last fifty years, federal regulatory agencies have done a remarkable job protecting people and the environment from unreasonable risks. During the 1960s and '70s, rivers caught fire, cars exploded on rear impact, steel workers inhaled benzene as a condition of employment, while smog sent legions of urban and suburban children to the emergency room. But today, the most visible manifestations of these threats are under control. Millions of people have avoided early deaths and terrible injury as a result. Rates of environmental degradation has been slowed in

many cases, and even reversed. In short, the United States is much better off because of the regulations adopted over the past half century.

Consider the following:

- The White House Office of Management and Budget (OMB) estimates that regulatory benefits exceed regulatory costs by about 7 to 1 for significant regulations.[2] The EPA estimates that the regulatory benefits of the Clean Air Act exceed costs by a 25-to-1 ratio.[3]
- The failure to regulate some hazards related to the workplace, the environment, product safety, food safety, and more, and the failure to enforce existing regulations on such hazards results in thousands of deaths, tens of thousands of injuries, and billions of dollars in economic damages every year. Sometimes, the damages reach a catastrophic scale. The BP Oil Spill caused tens of billions of dollars in damages.[4] The Wall Street collapse may have caused trillions. Regulation to prevent catastrophe can be far cheaper, and less painful, than cleaning up damage to lives, property, and the environment later.[5]
- Dozens of retrospective evaluations of regulations by the EPA and the Occupational Safety and Health Administration (OSHA) have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.[6]

Individual examples of regulatory successes paint an even more compelling portrait. The EPA estimates Clean Air Act rules saved 164,300 adult lives in 2010 and will save 237,000 lives annually by 2020. The National Highway Traffic Safety Administration's vehicle safety

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[2] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, DRAFT 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 11, *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf.

[3] ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-9 (Mar. 2011), *available at* http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.

[4] *See* Aaron Smith, *BP: We've Spent $2 Billion on Clean-Up*, CNNMONEY, June 21, 2010, *available at* http://money.cnn.com/2010/06/21/news/companies/bp_oil_spill/index.htm. In June of 2010, Credit Suisse predicted that the total costs would be around $37 billion, with $23 billion in clean-up costs and $14 billion in settlement claims. Linda Stern, *Gulf Oil Spill Could Cost BP as Much as $37 Billion*, MONEYWATCH.COM, June 8, 2010, *available at* http://moneywatch.bnet.com/economic-news/blog/daily-money/gulfoil-spill-could-cost-bp-as-much-as-37-billion/728/.

[5] OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FISCAL YEAR 2012: ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT 47 (2011), *available at* www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/spec.pdf. The Congressional Budget Office (CBO), which employs a different methodology for calculating costs than does the OMB, estimates the costs of TARP to be $19 billion. CONG. BUDGET OFFICE, REPORT ON THE TROUBLED ASSET RELIEF PROGRAM—MARCH 2011, 1 (2011), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12118/03-29-TARP.pdf. *See also* BARBARA BUTRICA, KAREN E. SMITH, & ERIC TODER, HOW WILL THE STOCK MARKET COLLAPSE AFFECT RETIREMENT INCOMES? 1 (The Urban Institute, Older Americans' Economic Security Report No. 20, 2009), *available at* http://www.urban.org/uploadedpdf/411914_retirement_incomes.pdf.

[6] Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10, 20-30 (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicle miles traveled in 1980 to 1.41 fatalities per 100 million vehicle miles traveled in 2006. An Endangered Species Act recovery program developed by the U.S. Fish and Wildlife Service helped increase the Bald Eagle population from just 400 nesting pairs in 1963 to 10,000 nesting pairs in 2007, enabling the Service to remove Bald Eagles from the Endangered Species List.[7]

Still, big challenges remain. As scientific study expands, so does our knowledge of important risks. We discover new viruses, new cancer-causing agents, new kinds of workplace injuries, new flood risks, and new seismic fault lines. Developing technologies, while exciting in terms of promised benefits, can also present profound risks if not carefully managed. Think of deep-water drilling, edible nano-particles, or privately owned drones. Just as there is no end to what we can learn, imagine, or invent, there is similarly no end to the amount of good sense that we should be expected to employ along the way. Good sense—in the form of reasonable regulation—is what allows society to innovate and experiment *while at the same time remaining profitable and safe*.

Saying you want to provide for the general welfare with only a fixed quantity of regulation is a little like saying you are going to paint a picture with only ten colors or write a novel using only twenty verbs. Unless there is some inherent objection to colors or verbs, why would you do it?

Supporters of a regulatory budget cap usually say that the cost to industry is, itself, an inherent objection to government rulemaking. But that dismisses the moral obligation that industry already has to avoid harming other parties. When an agency regulates activities at a steel mill or a coal mine, it surely shifts costs to the operator.[8] But it is also requiring that an operator act responsibly toward its workers and the public. Requiring businesses to act responsibly even when it costs money is not a *bad* thing. We can argue about whether an obligation is too strict or too lax. But it is hard to argue that one's duty to avoid harming others is a thing to be rationed or put on the chopping block. That's particularly true when the rules cementing such duties each year contribute tens of millions of dollars to the economy (after deducting the costs) and save hundreds of thousands of lives.

To those who ask if we can afford to have more regulations like these, the simple answer is that we cannot afford not to.

II. Focus on Quality, not Quantity

A. How Regulatory Budget Differs from Traditional Regulatory Policy Debate

Most debates on regulatory policy focus on quality and effectiveness. The question is whether a rule or set of rules is furthering the objectives that Congress set in its enabling legislation and doing so in a fair and effective way. Answering the question depends on the statutes involved,

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[7] *Id*. at 5-6.

[8] Budget advocates sometimes say the cost is "imposed," but that's not quite right. Even before a regulation is enacted, the cost exists—manifested as a risk of injury borne by members of the public. By reducing the risk, a safety regulation lowers the cost borne by the public and transfers that cost to a regulated entity, which experiences that cost as a duty to exercise care.

taking into account factors that Congress and the President (to the extent permitted by statute) deem relevant.[9] Considerations almost always include the rule's general effectiveness and the costs imposed on government actors and regulated entities. When a regulation meets the standard, agencies implement the rule. To do otherwise, would likely defy the will of Congress.

Regulatory budgeting presents a sharp departure from the traditional approach. Instead of quality, it's interested in quantity. Under the budgeting approach, designing a rule that implements Congress's will while reflecting (to the extent permitted by statute) the President's values is only the first step. The second step is finding an existing rule of similar cost—which once also expressed Congress's will and the President's values—and deleting it.

The underlying premise appears to be that there is a maximum amount of regulation that is socially desirable. And it is the primary goal of a regulatory system to make sure that that maximum is never exceeded. Many of the regulatory budgeting proposals that have been introduced in Congress add an important corollary: It is the job of the executive branch, *not the Congress*, to decide which previous regulations (all authorized or required by Congress) can be snuffed out in order to meet that limit.

This approach must be puzzling to those who believe cost-benefit analysis is a measure of regulatory success. According to its supporters, cost-benefit analysis seeks to ensure that all rules increase social welfare by producing net monetized benefits. In fact, according to the strict version of cost-benefit analysis, a regulation should be designed to achieve maximized net benefits. But under regulatory budgeting, even rules that make society better off may not be permitted if there is no room beneath the budgetary cap. Plus, to make room a policy maker has to delete an existing rule that in another way *also* makes society better off.

Imagine that before you put a $20 bill into your wallet or purse, you had to first take out a $5 bill to make room for it. Regulatory budgeting is like that: it asks you to leave advances in public health, environmental protection—and money—on the table.

B. <u>The Reasons for Placing a Cap on the Total Number of Regulations are Unavailing</u>

Beyond a preference for smaller government, supporters of regulatory budgeting offer two justifications: (1) Budgeting promotes good government and (2) Budgeting encourages economic growth and creates jobs. Neither claim is supported by evidence.

1. Good Government

Advocates of budgeting believe a regulatory cap will help agencies set better priorities: faced with a scarcity of options to improve public welfare, they will choose the best and forget the rest. But there is little evidence that agencies have their priorities wrong. The relatively high job approval ratings of most agencies, to take one measure, suggest that the public largely supports

[9] *See* Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction under the Clean Water Act,* 55 ALA. L. REV. 845, 849-64 (2004).

agencies' current approaches to priority setting. If an agency does veer off course, there are many ways to set them back on track through Congressional oversight, Congressional control of agency (financial) budgets, White House control through executive orders, White House control through support of budget requests, and other softer forms of Congressional and White House cajoling.

Budgeting advocates also say that regulatory limits will encourage agencies to minimize compliance costs so as to squeeze in as many rules as possible. But agencies are already doing this. Indeed, regulators are under constant pressure to minimize costs, whether from the White House, Congressional committees, individual members of Congress, state governors, or industry lobby groups. The weakening of regulations to reduce compliance costs manifests itself through a well-known process known as "policy erosion." Legal scholar Thomas McGarity describes this process in the following terms:

> Students of the policymaking process have long understood that the protective purposes of regulatory programs established over the opposition of regulated industries during times of crisis are often undermined through a slow process of erosion, drift, or slippage, as the industries, agencies, and beneficiary groups engage in what Professor Eugene Bardach calls "the implementation game." As the crises that gave rise to public demand for a government program fade from memory and the beneficiary groups that fought for it move on to other pressing matters, the agency charged with implementing the new program struggles to promulgate and enforce the required regulations over the continued opposition of the regulated industry. The industry, meanwhile, carefully monitors and frequently interacts with the agency as the agency sets its regulatory agenda, collects and analyzes scientific and economic information, and prepares the various support documents that accompany modern rulemaking.[10]

At any rate, lower compliance costs do not necessarily translate into better regulatory decision making. Imagine, for example, an agency is trying to decide between Rule 1, which would generate $1 million in benefits at a cost of $100,000, and Rule 2, which would generate a $10 million in benefits at a cost of $150,000. A regulatory budgeteer might be tempted to choose Rule 1 because of the lower compliance costs. But the better deal for the national economy and the public at large is Rule 2.

Third, supporters say regulatory budgeting increases political accountability. Given the many ways Congress and the White House influence agency action, this need is probably not as strong as imagined. But if Congress believes agencies need greater accountability, it can make better use of its oversight powers. And if Congress believes that an agency has misused its discretion under a statute or taken the mission too far, lawmakers can and should amend the law to put a stop to that.

In any event, regulatory budgeting risks defeating political accountability, rather than enhancing it. Depending on how it is designed, a regulatory budgeting program typically involves complex

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[10] *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1674-75 (2012).

processes that few ordinary citizens would be able to follow or understand. In this regard, regulatory budgeting proposals modelled on the fiscal budgeting process raise special concern. Few Americans have the expertise, time, or inclination to follow the fiscal budgeting process, even though many have strong concerns over how their tax dollars are spent. It is unlikely that the general public would monitor a regulatory budgeting process effectively and then organize into action when they feel that this process does not serve their interests adequately. Regulatory budgeting could have the effect of surreptitiously rewriting popular laws, such as the Clean Water Act and Clean Air Act, that have been on the books for years. Many such laws direct agencies to prioritize protections over cost compliance concerns. As noted above, however, regulatory budgeting would likely induce these agencies to do the reverse and put costs before protections. Such changes to bedrock laws are not trivial, and should only be made after careful consideration in an open debate.

Fourth, and related to increased accountability, supporters contend that regulatory budgeting will lead to greater transparency with regard to regulations and their impacts. But regulatory budgeting threatens to undermine transparency instead. Regulatory budgeting would make a rule's cost the determinative consideration in regulatory decision-making. The problem is that it is impossible to evaluate any decision on its costs alone without giving proper consideration to its benefits. By considering only costs, any decision—from buying a loaf of bread to reinforcing a bridge—would be counted as a negative. In this way, regulatory budgeting tends to obscure rather than clarify the impacts and purpose of regulations.

Finally, proponents of regulatory budgeting contend that it is necessary to encourage agencies to engage in meaningful reviews of their existing regulations. This argument overlooks the fact that agencies already operate under many legal mandates to conduct such reviews. The Regulatory Flexibility Act, for example, requires agencies to review every rule that has "a significant economic impact upon a substantial number of small entities" within 10 years after the final rule is published. Further, Executive Order 13563 requires agencies to conduct similar resource-intensive reviews on an ongoing basis for all significant rules. In addition, several procedures are already in place for third parties to independently evaluate agencies' existing regulatory programs. For instance, federal law establishes a network of independent Inspectors General for every major executive and independent agency, which, among other things, audits and evaluates the effectiveness of agencies' regulatory programs. In addition, Congress created the Government Accountability Office (GAO), an independent agency that works to aid Congress's oversight of the federal government. A key component of the GAO's work is to audit and evaluate specific regulatory programs in response to requests from members of Congress. As part of this effort, the GAO maintains a "High Risk List," which it updates at the start of each new Congress in order to bring "attention to agencies and program areas that are high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement, or are most in need of transformation."

Beyond these legally required retrospective reviews, agencies also frequently conduct discretionary reviews. Last year, Michelle Sager, the Director of Strategic Issues at the GAO, testified before the U.S. Senate Committee on Homeland Security and Governmental Affairs that agencies already conduct discretionary lookbacks of their existing regulatory programs, and that these discretionary reviews were more effective than the mandatory ones in terms of producing

meaningful policy changes. As she put it, "discretionary reviews generated additional action more often than mandatory reviews, which most often resulted in no changes."[11] Thus, contrary to the claims of many supporters of regulatory budgeting, a strong culture of regulatory review already exists.

2. *Economic Growth and Job Creation*

Supporters of regulatory budgeting say something is needed to eliminate regulations that are hindering economic growth and job creation. The position assumes there is an inherent trade-off between regulatory protections and a sound economy. For that, there is little support in economic theory or empirical evidence. After all, the steps a business undertakes to comply with or respond to a new regulation is simply a form of spending, and as such generates tangible economic activity. In turn, this spending generates job gains that can offset whatever job losses a firm might experience as a result of a regulation. The relevant question, then, is what net impact a given regulation has on employment overall.

While difficult to measure, most existing studies find that regulations result in either no overall impact or even an actual increase in employment in some cases.[12] For example, a study of Bureau of Labor Statistics (BLS) data by the Environmental Policy Institute (EPI) found little evidence that jobs are lost due to regulation.[13] Until recently, the BLS had developed an "extended mass layoff" data series, which examined the reasons why companies lay off 50 or more workers for more than 30 days. Significantly, the data series were based on employer-supplied information. EPI found that an average of only 0.3 percent of workers lost their jobs because of government regulations or interventions during the years 2007 through 2009. This result is similar to data concerning layoffs prior to 2007.[14] (By comparison, the same data find that extreme weather events have caused more extended mass layoffs.[15]) Similarly, regulatory scholars at the University of Pennsylvania conducted a comprehensive book-length study that looked at the economy-wide employment impacts of regulation and concluded that "to date the empirical work suggests that regulation plays relatively little role in affecting the aggregate number of jobs in the United States."[16]

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[11] *A More Efficient and Effective Government: Improving the Regulatory Framework, Hearing Before the Subcomm. on Efficiency and Effectiveness of Fed. Programs and Fed. Workforce of the S. Comm. on Homeland Security and Gov. Aff*, 113th Cong. 3 (2014) (statement of Michelle Sager, Director, Strategic Issues, U.S. Gov. Accountability Off.), available at http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/a-more-efficient-and-effective-government-improving-the-regulatory-framework [follow hyperlink text "Download Testimony (217.7 KB)"].

[12] *See* Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011) (summarizing the evidence), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf; Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Global Dev. & Env't Inst., Working Paper, 2002) (same), *available at* http://www.healthytomorrow.org/attachments/prosper.pdf.

[13] Shapiro & Irons, *supra* note 12, at 20.

[14] *Id*.; *see also* Eban Goodstein, *The Trade-off Myth: Fact and Fiction About Jobs and the Environment*, 35-37 (1999). (summarizing data from 1970-90 and finding similarly small numbers of workers being laid off because of environmental regulations).

[15] *Regulations Do Not Hinder U.S. Job Market, Paper Finds*, CTR. FOR EFFECTIVE GOVT, Apr. 19, 2011, http://www.foreffectivegov.org/node/11615 (last visited Sept. 30, 2015).

[16] CARY COGLIANESE, ADAM M. FINKEL & CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS? (2013).

Most importantly, this line of argument ignores the fact that inadequate regulation of the financial services industry can result in catastrophic job losses, as the recent global economic crisis dramatically demonstrated. The 2008 financial collapse and resulting Great Recession in the United States was in large part precipitated by the steady deregulation of the financial services industry over the course of several decades. According to a 2013 Government Accountability Office analysis, the economic crisis could cost the United States more than $13 trillion in lost economic output over all. [17] Most estimates put the total job losses that resulted from the financial crisis at 8.7 million.[18]

The above evidence indicates that is not regulation *per se* that has negative impacts on the economy, but rather that it is poorly designed regulations that can have this effect. To avert this possibility, it makes more sense to focus on reforms that promote higher quality regulatory outcomes.

III. Regulatory Budgeting Sounds Simple, but It's Really Very Complicated

The threshold implementation challenge posed by regulatory budgeting is identifying the proper level at which to set the regulatory cap. Among the many concrete proposals for regulatory budgeting that have been offered over the years, none have offered a coherent explanation for why their cap on total regulatory costs reflects the socially desirable amount of such costs. Ultimately, it seems that a regulatory budget's cap ought to be set in reference to one or more of the justifications noted above. For example, the cap should be set at a level at which additional regulation will cause concrete economic harm or at which it will clearly correct some undesirable government pathology, such as inadequate transparency or political accountability.

Thus far, most regulatory budget proposals would deem the current level of regulation as at or in excess of what the proper cap on regulatory costs should be. But as I note above, none of the common justifications offered in support of regulatory budgeting would seem to support that conclusion. Rather, establishing the cap at the current level seems to be based on some arbitrary consideration, such as a desire to maintain the status quo.

Once the cap is set, other daunting implementation challenges begin to merge. One version of the regulatory budget concept would be modeled on the annual appropriations process, in which agencies are each allotted a certain amount of regulatory costs they can expend through the implementation of new regulations over the course of a defined period of time. Given the ongoing inability of Congress to carry out the annual appropriations process according to regular order in recent years, it is doubtful whether a similar process for allocating annual regulatory budgets could be carried out successfully either. In turn, the failure to carry out the regulatory budget process according to regular order raises additional concerns. For example, what would a regulatory budget "shut-down" look like? If Congress doesn't pass an annual regulatory budget—essentially lifting the "reg ceiling," would agencies not be able to issue new regulations? Would their budget authority carry over automatically similar to a continuing

[17] U.S. Gov't Accountability Off., Financial Regulatory Reform: Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act 17 (2013), *available at* http://www.gao.gov/assets/660/651322.pdf.
[18] Ctr. on Budget & Pol'y Priorities, *Chart Book: The Legacy of the Great Recession*, Sept. 9, 2015, http://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession (last visited Sept. 30, 2015).

resolution? If the latter, does this really contribute to greater political accountability and transparency in the regulatory process?

Even under regular order, implementation of a regulatory budgeting would face a host of other challenges. Some mechanism would need to be established to accommodate the creation, elimination, or consolidation of new agencies. For example, how would Congress have adjusted the regulatory budgets to match the reorganization of Homeland Security-related agencies in the early 2000s? Similarly, there have been several proposals to consolidate the food safety-related agencies into a single agency. What process would Congress follow to adjust the applicable agency regulatory budgets? Similarly, to function properly, a regulatory budget would have to accommodate the creation of brand new regulatory programs. For example, Congress recently established a new regulatory program to address the emerging hazards posed by the pharmaceutical compounding industry. Under regulatory budgeting, would Congress have been able to increase the Food and Drug Administration's (FDA) budgetary allocation to accommodate this new program? Or would the agency have been forced to stretch its finite regulatory budget to implement this new program? If the latter, would this outcome be desirable, given it would force the FDA to potentially forgo new protections for food and traditional pharmaceuticals?

Another version of regulatory budgeting would employ a "pay-go" system under which agencies would be prohibited from instituting a new regulation until they have first eliminated an existing regulation (or a set of existing regulations) that impose a cost that is equal to or greater than that of the new regulation. This version of regulatory budgeting introduces unique implementation challenges of its own. First, it would compound the "ossification" problem that affects the rulemaking process. In developing regulatory proposals, agencies must negotiate a thick web of analytical and procedural requirements, a process that is time-consuming and resource-intensive.[19] Agencies would also have to negotiate much of these same analytical and procedural requirements when it undertakes the "unrulemaking process"—that is, when it works to repeal an existing rule. To make matter worse, it is unlikely that agencies will receive additional budgetary resources to undertake the un-rulemaking process. As such, each new rulemaking would become an even more mammoth task for agencies, as they must complete the time- and resource-intensive parallel procedures of the rulemaking process and the unrulemaking process simultaneously.

Second, the APA would likely need to be revised to accommodate the process for repealing rule under a regulatory pay-go system. The APA requires agencies to articulate a rational basis supported by the record when undertaking a rulemaking to repeal a rule. It is unlikely that agencies would be able to articulate a rational basis to support a rule repeal in most cases. In particular, the need to clear space under a regulatory budget cap is unlikely to satisfy most reviewing judges as a rational basis.

[19] *See* PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.

IV. KEEP AMERICANS SAFE AND PROSPEROUS

As noted above, the defining characteristic of regulatory budgeting is that it might prohibit agencies from instituting new regulations due to the cap that it places on new regulatory costs. In some cases, if an agency sought to regulate a harmful activity, it would first have to drop an existing protection against some other risk. Alternatively, the agency could choose not to act, and leave the existing safeguard in place, at the price of leaving some other hazard unaddressed. In either case, people and the environment would be left unprotected against an identifiable and preventable risk.

In contrast, regulatory budgeting would not impose a similar cap on the sources of potential harms to people and the environment. For example, if a farm wanted to start using a new toxic pesticide that is uniquely harmful to the environment, it would not be required to first to take off-setting steps to improve the safety of working conditions for its laborers.

As noted above, the U.S. regulatory system has succeeded in addressing many environmental, health, and safety risks. Nevertheless, new risks continue to emerge as the U.S. economy evolves and technologies advance. Nanotechnology provides a good example of this potential challenge. Nanotechnology involves the use and manipulation of nature's basic building blocks— atoms and molecules—to manufacture new products or materials. Over the next decade, the nanotechnology industry is projected to employ millions of people and generate products worth trillions of dollars.[20] Because of its revolutionary nature, this new form technology carries substantial risks, and its health and environmental impacts remain poorly understood, even as the development and use of nanotechnologies continues to barrel ahead. For example, early research indicates that some nanotechnologies exhibit human health and environmental hazards that are similar to those of asbestos or toxic metals.[21] Oversight of nanotechnology remains limited, though several federal agencies, including the Consumer Product Safety Commission (CPSC), the FDA, and the EPA, could eventually play a role in regulating its use.

The advent of driverless car technology raises another example. The National Highway Traffic Safety Administration (NHTSA)—the agency responsible for automobile safety—is already struggling to keep up with the rapid growth of computer-based automobile technology. [22] Driverless car technology would add still another dimension to the challenge NHTSA already faces in ensuring automobile safety. It is likely that regulatory measures would also needed to be taken to address cybersecurity treats for driverless cars to prevent against hacking of the cars' driverless technology, which can be deployed to endanger the driver, others on the road, and pedestrians.[23]

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[20] The Project on Emerging Nanotechnologies, *Introduction to Nanotechnology*, http://www.nanotechproject.org/topics/nano101/introduction_to_nanotechnology/ (last visited Dec. 4, 2015).
[21] *See, e.g.*, ENVTL. PROTECTION AGENCY, NANOTECHNOLOGY WHITE PAPER 58 (2007), *available at* http://www2.epa.gov/sites/production/files/2015-01/documents/nanotechnology_whitepaper.pdf.
[22] David Gelles, Hiroko Tabuchi, & Matthew Dolan, *Complex Car Software Becomes the Weak Spot Under the Hood*, N.Y. TIMES, Sept. 27, 2015, at BU1, *available at* http://www.nytimes.com/2015/09/27/business/complex-car-software-becomes-the-weak-spot-under-the-hood.html?_r=0.
[23] Tom Risen, *How Safe is a Self-Driving Car?*, U.S. NEWS & WORLD REPORT, Oct. 8, 2015, http://www.usnews.com/news/articles/2015/10/08/nhtsa-volvo-seek-cybersecurity-privacy-for-driverless-cars (last visited Dec. 7, 2015).

Even 10 years ago, few could have predicted the nature and scope of regulatory challenges like nanotechnology, just as today we are unable to predict the greatest regulatory challenges we will face 10 years from now. If regulatory budgeting becomes the law of the land, regulatory agencies may be prevented from instituting new safeguards for addressing emerging risks like nanotechnology, unless they can first identify and eliminate existing and potentially unrelated regulations. For example, as it works to address the harms of nanotechnologies used in some pesticides, the EPA might have to relax or eliminate regulations aimed at reducing the threats of endocrine disrupting substances used in other industrial chemicals. Similarly, 10 years from now, the EPA's pesticide nanotechnology standard might have to give way for another rule to address the next toxic chemical threat.

V. IMPROVE THE SYSTEM, BUT IN SMARTER WAYS

Based on these observations, as well as my experience supervising regulatory processes at the EPA, I strongly believe efforts at regulatory must stay focused on quality, not quantity. Regulatory budgeting, despite its intuitive appeal to some, will not lead to more effective regulation and it will not keep Americans prosperous or safe. If anything, it will hamper our efforts.

That said, I also strongly believe the regulatory system can and should be improved. Thus I recommend the following reforms:

- **Eliminate unnecessary and burdensome *ex ante* analytical and procedural requirements**. Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical and procedural 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. Eliminating the unnecessary requirements would enable agencies to focus on those considerations that are most important, leading to a more responsive regulatory system that produces higher quality rules.
- **Empower agencies to focus greater attention on making back-end adjustments in the implementation of completed rules**. Back-end adjustments—which can include exceptions, time extensions, variances, and waivers—allow for greater implementation flexibility and can reduce unintended burdens on uniquely affected regulated entities.[24] These various forms of back-end adjustments have been successfully deployed for decades without controversy, and a review of the table of contents for each day's edition of the *Federal Register* provides several examples of how these adjustments are deployed. Congress can encourage their greater use by ensuring that agencies have adequate budgetary and legal resources to deploy them as much as possible. One potential criticism against these adjustments is that they have been disproportionately used by larger and more sophisticated businesses to the competitive disadvantage of the

[24] For about these back-end adjustments and the advantages they offer, see Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004).

smaller firms in their industry. Congress should explore opportunities to correct this discrepancy by establishing new programs or reform existing ones aimed at ensuring small businesses are able to take advantage of available back-end adjustment processes. For example, Congress could enact legislation that directs the Small Business Administration's Office of Advocacy to focus on this task.

- **Empower agencies to focus greater attention on more flexible, agency-driven reviews of their existing regulations and regulatory programs**. As noted above, the GAO has found that agencies conduct discretionary reviews and that these reviews are more effective than those mandated under various legal authorities. Consequently, Congress should consider eliminating many of the existing one-size-fits-all regulatory review programs that are on the books. In addition, Congress should consider providing agencies with greater budgetary resources for conducting their discretionary reviews.

Thank you. I'd be pleased to answer any questions you might have.