

ESSAY

THE REGULATORY BUDGET REVISITED

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INTRODUCTION

National debt and the expanse of the administrative state have increased significantly in recent decades.¹ Nonetheless, regulation and fiscal policy have long been understood to be partially substitutable tools of government action.² Congress could, for example, appropriate public dollars to pay for health insurance for the sick and uninsured, or it could require private firms to offer coverage without regard to pre-existing conditions.³ Congress could tax the carbon content of fuels, or it could ban greenhouse gas emissions above limits specified by agency rules.⁴ But a less obvious connection between regulation and fiscal policy runs deeper still: government borrowing and regulation often serve as substitutes for taxation that operate outside the normal disciplines of public finance and political accountability.⁵ Regulation directs private resources less visibly than direct taxation, and public borrowing directs private resources

1. See CONG. BUDGET OFFICE, HISTORICAL BUDGET DATA—AUGUST 2013 tab 1 (2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/HistoricalBudgetData_Aug13.xls (noting that public debt rose from 25.5% of GDP in 1980 to 70.1% in 2012); OFFICE OF THE FED. REGISTER, FEDERAL REGISTER & CFR PUBLICATION STATISTICS—AGGREGATED CHARTS 6–7 (2013), <https://www.federalregister.gov/uploads/2014/04/OFR-STATISTICS-CHARTS-ALL1-1-1-2013.pdf> (noting an increase in the Code of Federal Regulations from 102,195 pages in 1980 to 174,545 pages at year-end 2012).

2. See Mila Sohoni, *The Idea of “Too Much Law,”* 80 *FORDHAM L. REV.* 1585, 1613 (2012) (“The power to tax and spend is fungible with the power to specify standards of regulatory conduct; either tax-and-spend programs or regulatory mandates can be used to achieve the same practical results.”); MARK KELMAN, *STRATEGY OR PRINCIPLE?: THE CHOICE BETWEEN REGULATION AND TAXATION* 44 (1999) (noting that “regulation and taxation are substitutes one for the other” and that states may thus achieve their policy goals “either through the public-spending programs that tax revenues finance or through regulatory mandates requiring that actors take certain steps and forbear from others”); Richard A. Posner, *Taxation by Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 22, 23 (1971) (“[O]ne of the functions of regulation is to perform distributive and allocative chores usually associated with the taxing or financial branch of government.”).

3. See, e.g., Patient Protection and Affordable Care Act §§ 2702, 2704, 42 U.S.C. §§ 300gg–1, 300gg–3 (2012) (guaranteed issue provisions).

4. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 *Fed. Reg.* 66,496, 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

5. See Christopher DeMuth, *The Bucks Start Here*, *CLAREMONT REV. BOOKS*, Summer 2013, at 10, 11 [hereinafter DeMuth, *The Bucks Start Here*] (describing this link between excessive regulation and deficit spending).

intergenerationally.⁶ In that sense, both can obscure or defer the true costs of government action.

This kinship between regulation and deficit spending has potentially significant implications as public debt has reached peacetime highs in many Western democracies, including the United States.⁷ Given the growing consensus that such borrowing levels are unsustainable,⁸ there is good reason to expect political actors to rely increasingly on regulation to “fund” major new government initiatives. It is especially timely, then, to consider whether and how the disciplines of public finance might be applied to regulation. For more than three decades, policymakers and scholars have debated a proposal to do precisely that by creating a regulatory budget. This reform is based on the idea that an agency’s authority to require private expenditures to comply with new regulations should be limited and allocated much like the authority to spend public tax dollars. Despite its simplicity in theory, however, even reform proponents have recognized the technical and administrative difficulties involved in measuring regulatory costs reliably and budgeting them with sufficient foresight. Yet serious proposals to create a regulatory budget continue to resurface, most recently in the form of a draft executive order adopted as part of Governor Mitt Romney’s presidential readiness team plan in 2012.⁹

This Article presents a review and reappraisal of the concept of regulatory budgeting in light of recent trends in regulation—both in the United States and abroad. Part I outlines the academic literature and other commentary on the purpose and design of a regulatory budget. Part II describes Legislative and Executive Branch activity on this issue over the past thirty-five years. Part III describes the United Kingdom’s recent experience with a new regulatory constraint—the “One-in, Two-out” policy—that operates much like an incremental regulatory budget.

The increasing acceptance and sophistication of cost-benefit analysis in the regulatory process, the increasing pressure on non-fiscal means of

6. *See id.*

7. *See* CONG. BUDGET OFFICE, THE 2014 LONG-TERM BUDGET OUTLOOK 9 (2014), http://www.cbo.gov/sites/default/files/cbofiles/attachments/45471-Long-TermBudgetOutlook_7-29.pdf (noting that national debt held by the public will reach “74 percent of GDP by the end of 2014,” more than any period in United States history other than World War II).

8. *See, e.g.*, ORG. FOR ECON. CO-OPERATION & DEV., OECD ECONOMIC SURVEYS: UNITED STATES 11 (2012), [http://www.oecd.org/eo/surveys/Overview%20Eng%20US%20\(2\).pdf](http://www.oecd.org/eo/surveys/Overview%20Eng%20US%20(2).pdf) (“[D]eficits of the present size are causing debt accumulations at a pace that cannot be sustained over time”).

9. *See* CHRISTOPHER LIDDELL ET AL., ROMNEY READINESS PROJECT: RETROSPECTIVE & LESSONS LEARNED 33 (2013); *see also* Tevi Troy, *Measuring the Drapes*, NAT’L AFF., Spring 2013, at 86, 99; ROMNEY FOR PRESIDENT, INC., BELIEVE IN AMERICA: MITT ROMNEY’S PLAN FOR JOBS AND ECONOMIC GROWTH 61 (2011).

government intervention, the growing body of scholarship on the methodology for regulatory cost-benefit analysis, and the recent implementation of a regulatory budgeting scheme in the United Kingdom make the concept of a regulatory budget ripe for reconsideration.¹⁰ With available analytical tools and decades of policy experience, the foundation for a regulatory budget is stronger today than when it was first proposed in 1978.

I. THE RATIONALE AND STRUCTURE OF REGULATORY BUDGETING

The principal insight behind a regulatory budget—the notion that private-sector costs arising from taxation and regulation are largely fungible—emerged in the 1970s.¹¹ As a new wave of federal rulemaking unfolded in that decade, those involved in the regulatory process began to reflect on the increasing costs of regulation. The idea of a regulatory budget was a natural outgrowth of that increased focus.¹² Scholars and policymakers alike noted that better data on private-sector costs of regulation could, in theory, form the basis for a “shadow budget to cover the resources that the agency requires private agents to consume in the pursuit of [a] regulatory goal.”¹³ Just as the fiscal budget limits and allocates the use of government revenues, a regulatory budget would limit and allocate government authority over private revenues.¹⁴

A. *The Purpose of a Regulatory Budget*

Regulation is often characterized as a “hidden tax.”¹⁵ The regulatory

10. See Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 883 (2010) (book review); see also Cass R. Sunstein, *The Stunning Triumph of Cost-Benefit Analysis*, BLOOMBERGVIEW (Sept. 12, 2012, 6:30 PM), <http://www.bloombergvview.com/articles/2012-09-12/the-stunning-triumph-of-cost-benefit-analysis>; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489 (2002).

¹¹ See JULIUS W. ALLEN, CONG. RESEARCH SERV., REP. NO. 79-197E, THE PROPOSAL FOR A FEDERAL REGULATORY BUDGET—AN OVERVIEW 5–7 (1979).

¹² See *id.*; CHRISTOPHER DEMUTH ET AL., JOINT ECON. COMM., U.S. CONG., THE REGULATORY BUDGET AS A MANAGEMENT TOOL FOR REFORMING REGULATION ch. 1 (1979), available at <http://www.ccdemuth.com/regulatory-budget-book-ch-1.html>; OFFICE OF MGMT. & BUDGET, TOWARDS A REGULATORY BUDGET: A WORKING PAPER ON THE COST OF FEDERAL REGULATION pt. 2A tbls. 1–11 (1979) [hereinafter TOWARDS A REGULATORY BUDGET], <http://www.thecre.com/ombpapers/part2.html>.

¹³ Robert W. Crandall, *Federal Government Initiatives to Reduce the Price Level*, in CURING CHRONIC INFLATION 193 (Arthur M. Okun & George L. Perry eds., 1978).

¹⁴ See generally Christopher C. DeMuth, *The Regulatory Budget*, REG., Mar.–Apr. 1980, at 29 [hereinafter DeMuth, *The Regulatory Budget*].

¹⁵ See Wendy L. Gramm, *Regulatory Review Issues, October 1985–February 1988*, 63 ADMIN. L. REV. (SPECIAL EDITION) 27, 35 (2011).

budget is premised on the view that the transfer of private resources by regulation is no less a cost imposed by government than the collection and expenditure of private resources through the tax and spending powers. But while government expenditures are constrained by the ability to tax and borrow, regulatory costs are subject to no built-in limitations. By creating a systematic limitation on regulatory costs, a regulatory budget would counteract the tendency by agencies to treat private resources as a “free good.”¹⁶

Building on that insight, proponents have advanced a number of arguments for regulatory budgeting since the idea first attracted bipartisan interest.

First, a regulatory budget would better inform priority setting and enhance economic efficiency of regulation across agencies and programs. In 1980, the Economic Report of the President noted that “the regulatory process as yet lacks any mechanism analogous to the expenditure budget for comparing and integrating priorities among different program areas.”¹⁷ Cass Sunstein and others have argued that a regulatory budget would correct this deficiency by “permit[ting] informed comparisons across [regulatory] programs” and “coordination of the costs and benefits of various initiatives.”¹⁸ In so doing, it would allow policymakers to consider regulatory costs in the more realistic context of a *hierarchy* of competing public interests, rather than a series of isolated regulatory initiatives.¹⁹ Christopher DeMuth, an early proponent of regulatory budgeting, noted

16. See Nick Malyshev, *A Primer on Regulatory Budgets*, OECD J. ON BUDGETING, 2010/3, at 69, 71 (“Allowing agencies to treat regulatory resources as a ‘free good’ offers little hope that those resources will be allocated in a cost-effective manner.”).

17. COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT 125 (1980) [hereinafter 1980 ECONOMIC REPORT OF THE PRESIDENT].

18. Cass R. Sunstein, *Public Choice, Endogenous Preferences*, 12 INT’L REV. L. & ECON. 289, 290–91 (1992); see also Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1534 (1996) (arguing that “an immense wealth of new learning about the nature and performance of the regulatory state . . . has emphasized the need for better priority setting”). An Organisation for Economic Co-operation and Development (OECD) researcher also notes that a regulatory budget would crystallize “trade-offs between competing priorities among various health, safety, environmental and economic policies.” Malyshev, *supra* note 16, at 72.

19. See ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 134 (1983) (“Individual regulatory programs would no longer be viewed in isolation, but rather would be compared—in terms of costs and benefits—against each other and against similar direct-expenditure programs.”); see also JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96–44, at 52 (1979) (“Even if all regulations were cost effective, the problem of balancing resources for regulatory purposes with resources for other purposes would still exist. This balance could best be accomplished through a regulatory budget.”).

that comparisons across what “government is spending (or causing to be spent) on medical care, work-place safety, [or] housing” will better inform political judgments about how much a new regulatory endeavor is “worth.”²⁰ A regulatory budget would also allow regulators to consider “similar costs imposed on the same groups of regulated industries by other federal agencies.”²¹ This broader view would improve economic efficiency of regulation by “encouraging regulators to transfer regulatory costs from low-yield to high-yield programs.”²² By making the political branches responsible for judgments about an integrated regulatory strategy, a budget would force trade-offs among competing priorities and broaden the “tunnel vision” that plagues some agencies.²³

Second, a regulatory budget would for the first time give agencies an *internal* institutional incentive “to limit the compliance costs of their regulations.”²⁴ Under the regulatory analysis and review regime overseen by the Office of Information and Regulatory Affairs (OIRA) since 1981, pressure on agencies to minimize costs or maximize net benefits is largely external—from stakeholders, from OIRA, or in some cases from the courts.²⁵ By allocating a fixed sum of regulatory costs that an agency can “spend” each year, a regulatory budget would align the agency’s interests with the goal of limiting regulatory burdens.²⁶ An excessively costly regulation would come at an opportunity cost *to the agency* because it would (in theory) require the agency to forgo other regulatory initiatives.²⁷ It is less clear whether this incentive would encourage more *cost-effective* regulation; a budget constraint would put pressure only on the cost side of the equation, rather than require agencies to maximize net benefits. But, benefit maximization can be encouraged by other means, including analytical criteria to guide rulemaking.²⁸

20. See DeMuth, *The Regulatory Budget*, *supra* note 14, at 37.

21. Lance D. Wood et al., *Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies*, 18 HARV. J. ON LEGIS. 1, 3 (1981).

22. See LITAN & NORDHAUS, *supra* note 19, at 140.

23. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993) (describing “[t]unnel vision, a classic administrative disease” that leads agencies to “carr[y] [a] single-minded pursuit of a single goal too far, to the point where it brings about more harm than good”).

24. See JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96-44, at 54 (1979).

25. See *generally* Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (creating a regulatory impact analysis and review regime).

26. See DeMuth, *The Regulatory Budget*, *supra* note 14, at 36.

27. See THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT 211-12 (George C. Eads & Michael Fix eds., 1984).

28. See, e.g., Exec. Order No. 12,866 § (1)(a), 3 C.F.R. 638, 638-39 (1993) (setting forth various analytical criteria applicable to rulemaking by executive agencies).

Third, a regulatory budget would strengthen political accountability for rulemaking activity.²⁹ Rather than a series of discrete regulatory actions under broad authority delegated by past Congresses, regulations governed by a budget constraint would be the product of a yearly, comprehensive consideration and consent by the President and Congress.³⁰ The political branches would “make explicit decisions regarding the allocation of social resources both to regulatory goals generally and among specific regulatory programs in particular.”³¹ Building on centralized OIRA review of significant rules, this reform would strengthen what then-Professor Elena Kagan termed “presidential administration” and, with it, political accountability for regulatory decisions.³² Indeed, as DeMuth argues, the “logic of the regulatory budget is ultimately political rather than economic.”³³ Cost-benefit analysis is a useful tool, but major policy choices cannot be explained solely by mechanical reliance on numerical formulas. A regulatory budget “would acknowledge explicitly the political nature of regulatory benefits and permit the President and Congress to make political judgments in light of more thorough information about economic costs.”³⁴

Fourth, some commentators contend that a regulatory budget would counteract the “increasing tendency of government to pursue its objectives through regulation rather than taxing and spending—even when regulation is otherwise less desirable—because regulation is less constrained.”³⁵ Fiscal measures and regulation are often interchangeable tools of policy.³⁶ But unlike regulation, the costs of spending programs, taxes, and more than 200 “tax expenditures” are reported in detail every year.³⁷ As Julia Roin contends, the greater visibility of government costs and subsidies in the

29. See LITAN & NORDHAUS, *supra* note 19, at 139 (arguing that a regulatory budget would restore political control over the regulatory process).

30. *Id.*; see also Colin S. Diver, *Regulating the Regulators*, 132 U. PA. L. REV. 1243, 1245–46 (1984) (reviewing ROBERT E. LITAN & WILLIAM D. NORDHAUS, *REFORMING FEDERAL REGULATION* (1983)).

31. LITAN & NORDHAUS, *supra* note 19, at 134.

32. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (arguing that “[p]residential administration promotes accountability” by “enabling the public to comprehend more accurately the sources and nature of bureaucratic power”).

33. DeMuth, *The Regulatory Budget*, *supra* note 14, at 37.

34. *Id.*

35. *Id.* at 37–38; see also D. Roderick Kiewiet, *A Regulatory Budget?* 7 (May 27–28, 2010) (unpublished manuscript), available at http://www.researchgate.net/publication/239572330_The_Regulatory_Budget (arguing that a regulatory budget would “discourage Congress from turning to new regulations as a mechanism for ‘off-budget’ financing”).

36. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012) (“Every tax is in some measure regulatory.”) (citation omitted); see also *supra* note 2 and accompanying text.

37. See S. COMM. ON THE BUDGET, 111TH CONG., *TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS III* (Comm. Print 2010).

fiscal budget “may redirect much of the political pressure to other, less visible—and possibly less efficient—arenas such as government regulation.”³⁸ Restoring “information parity” between fiscal measures and regulation “may well limit some of this redirection.”³⁹

Fifth, proponents note that the additional transparency of a regulatory budget would be valuable for its own sake, as it would afford policymakers and the public a more complete picture of the economic footprint of regulation.⁴⁰ A 1979 report by the Joint Economic Committee argued that “with the rapid growth of the new regulatory agencies . . . the Federal budget no longer conveys a complete picture of the Government’s economic impact.”⁴¹ In the same year, the Carter Administration’s Economic Report of the President similarly observed that “as more goals are pursued through rules and regulations mandating private outlays rather than through direct government expenditures, the Federal budget is an increasingly inadequate measure of the resources directed by government toward social ends.”⁴² A budget would provide the public and Congress with better information to evaluate regulation and “more information about the strength of interest groups.”⁴³ In doing so, it would combat some public choice pathologies that cause misallocation of regulatory resources.⁴⁴

Finally, former OIRA Administrator Susan Dudley has noted that, depending on its design, a regulatory budget could create an internal incentive for agencies to remove outdated or inefficient existing regulations in order to offset new regulatory costs.⁴⁵ This would accelerate and strengthen the retrospective regulatory review that agencies are already required to perform under the Regulatory Flexibility Act.⁴⁶

B. The Design of a Regulatory Budget

Over the past thirty years, academic commentators and policymakers have sketched out various approaches to a regulatory budget. Three design

38. Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget*, 54 HASTINGS L.J. 603, 633 (2003).

39. *See id.*

40. *See* JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96-44, at 54 (1979).

41. *Id.* at 53.

42. 1980 ECONOMIC REPORT OF THE PRESIDENT, *supra* note 17, at 125.

43. Roin, *supra* note 38, at 634.

44. *See* Sunstein, *supra* note 10.

45. Susan Dudley, *Why I Support Regulatory Pay-Go*, DAILY CALLER (Feb. 7, 2011, 2:25 PM), <http://dailycaller.com/2011/02/07/why-i-support-regulatory-pay-go/>; *see also* Malyshev, *supra* note 16, at 71-73 (noting that a regulatory budget constraint encourages regulators to reduce unnecessary or inefficient existing rules).

46. *See* Regulatory Flexibility Act § 3(a), 5 U.S.C. § 610(c) (2012) (requiring periodic review of existing significant regulations).

choices are most significant. First, a regulatory budget could be created by statute and subject to annual congressional “appropriations” of regulatory costs across agencies,⁴⁷ or it could be implemented by a presidential executive order that constrains agency discretion.⁴⁸ Second, the budget could be comprehensive such that the aggregate costs of an agency’s entire inventory of regulations are tallied and limited each year, or it could be incremental such that only the costs of *new* regulations are limited. Third, the budget could be measured in terms of costs only, as most proponents suggest,⁴⁹ or it could be based on some alternative measure that explicitly accounts for benefits.⁵⁰ This section discusses only these three design features. Many other features would need to be addressed in connection with the actual implementation of a regulatory budget.⁵¹

1. *Legislative or Executive Action?*

A regulatory budget in its purest form would be structured by analogy to the fiscal budget. The Office of Management and Budget (OMB) would collect and review each agency’s regulatory agenda for the year ahead, much as it evaluates agency fiscal budget requests. OMB would then develop the President’s regulatory budget proposal, allocating regulatory costs across each agency, program, or specific initiatives. The budget would be submitted to Congress for revision and approval. The legislative process could be designed to track the Congressional Budget Act of 1974, resulting in a non-binding concurrent resolution.⁵² Alternatively, it could be designed to produce a joint resolution, signed by the President, with binding limitations on each agency’s regulatory costs.

Commentators, including Robert Hahn, point to several advantages of

47. See Crandall, *supra* note 13, at 193.

48. See, e.g., ROMNEY FOR PRESIDENT, INC., BELIEVE IN AMERICA: MITT ROMNEY’S PLAN FOR JOBS AND ECONOMIC GROWTH 61–63 (2011) (proposing to establish a regulatory budgeting process through executive action).

49. See DeMuth, *The Bucks Start Here*, *supra* note 5, at 14; see also Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 U. CHI. LEGAL F. 143, 153 (1997) (“Congress should introduce a binding regulatory budget on an experimental basis.”).

50. Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1474 (2002).

51. Other significant design choices include the definition of covered costs, the sanction for exceeding budget allocations, selection of an entity (the Office of Management and Budget (OMB), the Congressional Budget Office (CBO), and/or a new agency) to act as scorekeeper, the use of regulatory “offsets,” waivers, and reprogramming of regulatory cost authority across agencies or programs—to name a few.

52. See Congressional Budget Act of 1974 tit. III, 2 U.S.C. § 632 (2012) (providing for adoption of annual adoption of concurrent resolution on the budget that sets revenue and appropriation targets).

legislative involvement.⁵³ Most significantly, it would hold members of Congress accountable for regulations they have authorized. By requiring Congress to approve the consequences of its open-ended delegations of rulemaking power, a regulatory budget might counteract the congressional practice of passing broad regulatory statutes with popular but ill-defined goals and blaming regulators for implementation problems.⁵⁴ This process might help to revive, at least in political practice, the constitutional nondelegation doctrine.⁵⁵ Other commentators note that involving Congress through House and Senate regulatory committees would, for the first time, create a body within Congress that takes a broader view of the overall consequences of government regulation.⁵⁶

Unlike unilateral executive action, a budget approved by Congress could also be drafted to supersede individual regulatory statutes—if that were desirable. Annual limits on compliance costs would not directly conflict with most regulatory statutes, as agencies today have discretion to consider costs unless Congress has directed otherwise.⁵⁷ But even under a regulatory regime that permits cost consideration, an agency could find itself up against a cost limitation that conflicts with a required rulemaking. A regulatory budget created by statute could resolve this conflict by making clear that the specific rulemaking statutes are subordinate to cost limitations enacted by Congress. Just as an agency's lack of appropriated funds can excuse its failure to fully carry out a statutory mandate,⁵⁸ lack of regulatory cost authority would excuse agency inaction.

Against these potential advantages, however, there are significant practical and political obstacles to a joint legislative-executive regulatory budget. Given the breadth and potential complexity of this reform, the flexibility afforded by executive action may be advantageous, at least at the pilot stage. Congress may also have strong institutional reasons to oppose the greater accountability and increased workload of a regulatory budget. Even reform-minded legislators might consider a full regulatory budget

53. See Hahn, *supra* note 49, at 153.

54. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

55. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

56. See LITAN & NORDHAUS, *supra* note 19, at 135.

57. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222–23 (2009) (holding that the Environmental Protection Agency permissibly considered costs and benefits in setting performance standards under a Clean Water Act provision that was silent concerning cost-benefit analysis); see also *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (“It is only where there is ‘clear congressional intent to preclude consideration of cost’ that we find agencies barred from considering costs.”) (citation omitted).

58. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 230–31 (1974); *Cobell v. Salazar*, 573 F.3d 808, 812–13 (D.C. Cir. 2009) (recognizing limited congressional appropriations may confine an agency's implementation of a statutory mandate).

process procedurally challenging, given that the U.S. Senate has lately proven incapable of complying with its basic responsibilities under the Congressional Budget Act.⁵⁹ In practice, a joint legislative-executive regulatory budget could well turn into a series of continuing resolutions that provide a routine increase in regulatory cost levels, rather than a budget based on a genuine appraisal of the value of regulatory programs.

In view of those obstacles, implementation by executive order is likely the more practical option, at least initially. Such an order would build on OIRA's supervision of the regulatory agenda—an annual compilation of ongoing and planned regulatory actions required by Executive Order 12,866—and the broader framework of centralized regulatory review created and refined by a series of executive orders since 1981.⁶⁰ This approach would allow the Executive Branch the leeway to develop a workable regulatory budgeting process that could, if successful, be expanded into a joint legislative-executive process.

2. *Aggregate or Incremental?*

Beyond the means of implementation, there is the question of scope. As a recent paper by the Organisation for Economic Co-operation and Development (OECD) explains, “[t]he [regulatory] budget, at [its] most ambitious level, would cover the total costs of all regulations past and present, not just new ones.”⁶¹ This would have the advantage of requiring a periodic accounting to reconcile actual with expected regulatory costs, which would address the common criticism that agencies report costs when they know least about them—before a rule takes effect.⁶²

As DeMuth and others have noted, however, the practical and resource challenges of an all-in approach are daunting.⁶³ The start-up costs alone would be very high. To establish a baseline before budgeting could even begin, agencies would first have to monetize their existing inventory of

⁵⁹ Lori Montgomery, *Senate Passes First Budget in Four Years*, WASH. POST (Mar. 23, 2013), http://www.washingtonpost.com/business/economy/senate-passes-first-budget-in-four-years/2013/03/23/cd582dc8-9399-11e2-a31e-14700e2724e4_story.html.

⁶⁰ See generally Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,866, 3 C.F.R. 638 (1993); Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

⁶¹ Malyshev, *supra* note 16, at 70.

⁶² *Improving Regulatory Performance: Lessons from the United Kingdom: Hearing Before the Task Force on Government Performance of the S. Budget Comm.*, 112th Cong. 4–6 (2011) (statement of Michael Greenstone, Professor, Massachusetts Institute of Technology), available at http://www.budget.senate.gov/democratic/public/_cache/files/b1b6d27f-8f1c-4370-a42e-432ebf4d8885/greenstone-statement-performancetaskforce.pdf.

⁶³ See generally DEMUTH ET AL., *supra* note 12; CLYDE WAYNE CREWS JR., *COMPETITIVE ENTER. INST., PROMISE AND PERIL: IMPLEMENTING A REGULATORY BUDGET* (1996), <http://cei.org/PDFs/promise.pdf>.

rules, currently spanning more than 160,000 pages in the Code of Federal Regulations.⁶⁴ In addition, the baseline problem would be complicated by the natural change in regulatory costs over time, as large transition costs give way to smaller recurring costs.⁶⁵ Those declining costs of old regulations might be used by agencies to justify new regulatory costs, even where the agency has taken no deregulatory action.

A more practical approach would be an incremental budget that covers only the costs of *new* or *modified* regulations that reach a minimum economic impact threshold. Such an approach would be less challenging as a technical matter, while still providing “some level of control over total regulatory costs.”⁶⁶ Agencies are already required to forecast the costs of new proposed and final rules with an annual economic impact of \$100 million or more, so a budgeting mechanism would not require vast new agency resources.⁶⁷ Dudley, among others, has endorsed incremental regulatory budgeting on the ground that it would minimize the technical challenges of a full-blown budget.⁶⁸ Incremental new costs might be set at zero for any given period of time, or adjusted annually to account for new risks or public interests that warrant a net increase in regulatory costs. Agencies would also be permitted to “offset” the cost of new regulations by modifying or eliminating existing rules.

An incremental budget might lay the foundation for a comprehensive budget, but concerns about administrability clearly counsel in favor of a more modest initial approach.

3. *Costs or Net Benefits?*

Commentators on the whole have suggested that a regulatory budget should allocate only costs. One major practical concern is that benefits are

64. See Office of the Fed. Register, *supra* note 1, at 7.

65. DeMuth, *The Regulatory Budget*, *supra* note 14, at 39, 42 (noting the risk of “overstating ongoing compliance costs relative to initial costs”).

66. See Malyshev, *supra* note 16, at 71.

67. See Exec. Order No. 12,866 §§ 3(f)(1), 4(c)(1)(B), 3 C.F.R. 638, 641–42 (1993) (requiring a “summary of each planned significant regulatory action” that the agency “reasonably expects to issue in proposed or final form in that fiscal year or thereafter . . . including, to the extent possible, . . . preliminary estimates of the anticipated costs and benefits”).

68. See Dudley, *supra* note 45. At least four former Office of Information and Regulatory Affairs (OIRA) Administrators—Dudley, DeMuth, Wendy L. Gramm, and John Graham—have endorsed regulatory budgeting in some form. See John D. Graham, *Savings Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 536 n.608 (2008) (endorsing “a pilot project to determine the workability of the regulatory budget concept, which I have always regarded as a promising reform”); Gramm, *supra* note 15, at 35 (proposing adding regulatory cost limitations to any new or reauthorized statutory grant of rulemaking authority).

generally more difficult to measure and more manipulable.⁶⁹ But more importantly, benefit considerations would be central to even a cost-only regulatory budget because cost-benefit analysis would continue to be required and relied upon in setting priorities.⁷⁰ DeMuth explains that “benefits would indeed be taken into account—but early in the process, when the President and Congress determined the *size* of each agency’s budget.”⁷¹ Former OIRA Administrator John D. Graham similarly notes that “programs with a strong benefit justification should receive more generous treatment under a regulatory budget” than less compelling initiatives, just as spending programs that produce large public benefits should (in theory) receive better treatment in the fiscal budget than those with marginal benefits.⁷²

A minority of commentators have argued that a regulatory budget should explicitly account for benefits. An OECD researcher argues that cost-only budgeting “creates a bias towards low-cost regulatory options at the expense of solutions that may be more costly but that deliver greater economic benefits.”⁷³ Robert Hahn has suggested that a regulatory budget should apply “only to those rules for which the expected costs exceed the expected benefits,”⁷⁴ but that proposal is of limited relevance given that executive agencies are already generally barred from issuing any rule with greater costs than benefits.⁷⁵

Similarly, Eric Posner has proposed regulatory budgeting using “Net Benefit Accounts.”⁷⁶ Each agency would start the year with a Net Benefit

69. See Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB’s Reported Benefits of Regulation*, 47 BUS. ECON. 165, 168–70, 175 (2012) (identifying several categories of regulatory benefits of “questionable legitimacy”).

70. See DeMuth, *The Regulatory Budget*, *supra* note 14, at 35–36; CREWS, *supra* note 63 (“Agencies inevitably believe that all of their regulations confer net benefits. To remedy this, agencies subject to a budget would not be allowed to offset regulatory costs with benefits . . .”). *But see* Posner, *supra* note 50, at 1484 (“Research suggests that there is a general bias against regulation resulting from the fact that agencies often overestimate the costs of a regulation . . .”).

71. DeMuth, *The Regulatory Budget*, *supra* note 14, at 32.

72. John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 985 (2006).

73. Malyshev, *supra* note 16, at 73.

74. Hahn, *supra* note 49, at 153.

75. See Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. 638, 638–39 (1993) (“Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”).

76. Posner, *supra* note 50, at 1474–75. Another scholar proposed a similar approach termed a “regulatory cost-effectiveness budget,” which would also take into account net benefits for regulations. See Kiewiet, *supra* note 35, at 14.

Account balance set by Congress.⁷⁷ That balance would be reduced by regulations with *negative* net benefits and replenished by regulations with *positive* net benefits.⁷⁸ For example, if an agency with a starting balance of \$10 million issues Regulation A with net benefits of \$5 million, its balance rises to \$15 million. If the agency then issues Regulation B with negative net benefits of \$15 million, the balance falls to zero. Posner proposes that agencies should be forbidden from issuing regulations that would reduce their Net Benefit Account below zero.⁷⁹ Agencies might also be required to periodically reappraise the costs of major regulations, with discrepancies between estimated and actual costs resulting in adjustments to net benefit accounts.⁸⁰ Acknowledging that benefits are “harder” to measure than costs, Posner nevertheless argues that Net Benefit Accounts are superior to the regulatory cost budget because the former approach better measures the social value of regulation, creates an incentive to maximize net benefits, and gives agencies flexibility to pursue some regulations that may not be strictly cost-justified but promise large non-monetizable benefits.⁸¹

To be sure, net benefits are often a useful consideration in evaluating the merits of individual rules and setting priorities among individual proposed rules, and benefit forecasts would surely be used by agencies to justify expanded regulatory budget requests. But the purpose of a regulatory budget, much like the fiscal budget, would be to limit the government’s cumulative use and allocation of finite resources. That discipline requires a focus on the cost side of the equation—the expenditure of private resources required to comply with regulations.

II. LEGISLATIVE AND EXECUTIVE BRANCH PROPOSALS REGARDING REGULATORY BUDGETING

The idea of a regulatory budget has not been limited to white papers and law review articles. Over the last three decades, there have been several concrete legislative proposals to subject regulatory costs to the disciplines of public finance, as well as some Executive Branch activities worth noting. None of these proposals have come to fruition.

A. Federal Regulatory Budget Act—Senator Lloyd Bentsen—1978

In 1978, Senator Lloyd Bentsen introduced the first legislation to create a regulatory budget.⁸² His stated aim was to “force agencies to choose the

77. Posner, *supra* note 50, at 1477.

78. *See id.* at 1478.

79. *Id.*

80. *See id.* at 1484.

81. *See id.* at 1486–87.

82. S. 3550, 95th Cong. (1978) (proposing to add §§ 1101–1109 to the Congressional

least costly way of achieving regulatory goals.”⁸³

The Federal Regulatory Budget Act would have amended the Congressional Budget Act to establish a joint legislative-executive budget process governing regulatory costs. First, in November of each year, each regulatory agency head would submit a report to Congress and the President detailing: (1) the actual costs of complying with all regulations under the agency’s purview in the preceding fiscal year; and (2) the expected costs of compliance with all regulations under the agency’s purview in the upcoming fiscal year, including new regulations expected to be issued in the upcoming fiscal year.⁸⁴ The Comptroller General would review these agency reports for “inadequacies” or “errors.”⁸⁵ Second, the President would include with his annual fiscal budget submission a “regulatory budget for each agency” containing “recommendations for the maximum costs of compliance.”⁸⁶ If the President’s budget called for a cut in regulatory costs projected by an agency’s November report, the President would recommend specific actions to achieve those cuts.⁸⁷ Third, based on the agency reports and the President’s budget, the congressional budget committees would develop and Congress would vote on a concurrent resolution “to establish a regulatory budget for each agency which sets the maximum costs of compliance” for all rules in effect for the upcoming fiscal year.⁸⁸

With no regulatory analogue to the Antideficiency Act, which precludes unauthorized fiscal expenditures,⁸⁹ the Bentsen bill imposed no sanction for exceeding authorized regulatory costs. Instead, an agency’s November report would simply compare the actual costs of compliance for the preceding year with the budgeted costs and provide a “full explanation for any costs of compliance which exceeded the regulatory budget for such fiscal year.”⁹⁰

The bill adopted a broad definition of costs, but it authorized the President, through OMB, to establish guidance governing significant details of the regulatory budget, including which regulations would be covered.⁹¹ With respect to new legislation, the bill created a point of order, waivable

Budget Act of 1974); *see also* S. 51, 96th Cong. (1979) (same). A companion bill was introduced in the House of Representatives. H.R. 76, 96th Cong. (1979).

83. 124 CONG. REC. 33,959 (1978).

84. S. 3550 (proposed § 1103(a)(1)–(2)).

85. *Id.* (proposed § 1103(b)).

86. *Id.* (proposed § 1104).

87. *See id.*

88. *See id.* (proposed § 1105(a)(1)).

89. Antideficiency Act, Pub. L. No. 97-258, 96 Stat. 923 (1982) (current version at 31 U.S.C. § 1341 (2012)).

90. S. 3550 (proposed § 1103(a)(2)(A)(ii)–(iii)).

91. *Id.* (proposed § 1102(a)(1)–(2), (e)).

by a majority vote of the Senate and House, against any legislation that “would result in additional costs of compliance” in the current fiscal year.⁹²

This bill appears to have been an outgrowth of a 1978 hearing before the Joint Economic Committee’s Subcommittee on Economic Growth and Stabilization, then chaired by Senator Bentsen, on the subject of regulatory costs.⁹³ The 1979 annual report of the Joint Economic Committee also unanimously recommended adoption of a regulatory budget along the lines proposed in the Bentsen bill.⁹⁴ However, this bill was not enacted.

B. Carter Administration Draft Legislation

Supporters of a regulatory budget in the Carter Administration, including former OMB official Jim Tozzi, managed to get the proposal for a regulatory budget into wider circulation.⁹⁵ The 1980 Economic Report of the President briefly discussed the regulatory budget, noting practical difficulties of measuring costs but concluding that “tools like the regulatory budget may have to be developed” to improve regulatory priority-setting and cost-effectiveness.⁹⁶

In 1980, OMB circulated among agencies a proposed “Regulatory Cost Accounting Act” that would have created a “regulatory cost accounting system” resembling a regulatory budget.⁹⁷ The proposal would have required each agency to submit to OMB an annual report on the costs of its regulation for the upcoming fiscal year.⁹⁸ The President would then submit to Congress a plan to adjust those costs by revising regulatory statutes.⁹⁹ In addition, the first “prototype regulatory budget” for an agency was formulated by the Environmental Protection Agency in the Carter Administration.¹⁰⁰ The budget provided estimates for the total private-sector costs of environmental regulation under the Clean Air Act and Clean

92. *Id.* (proposed § 1107(a), (c)(1)).

93. *The Cost of Government Regulation: Hearings Before the Subcomm. on Econ. Growth & Stabilization of the Joint Econ. Comm.*, 95th Cong. 1 (1978).

94. JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96-44, at 52-54 (1979); *id.* at 87 (describing the report as “the first such consensus [Joint Economic Committee] Report in 20 years”) (supplementary views of the minority members).

95. See generally Jim Tozzi, *OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37 (2011).

96. 1980 ECONOMIC REPORT OF THE PRESIDENT, *supra* note 17, at 125-26.

97. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REGULATORY COST ACCOUNTING ACT OF 1980 (1979) (unpublished draft legislation), available at <http://thehre.com/ombpapers/RegCostAccounting1980.htm>.

98. *Id.*

99. *Id.*

100. Tozzi, *supra* note 95, at 56.

Water Act.¹⁰¹ But the draft Carter legislation was never submitted and enacted, and despite the interest of Reagan Administration officials including DeMuth, the regulatory budget idea seemed to go into a legislative hiatus for almost the next decade, as other tools of regulatory reform gained precedence.

C. George H.W. Bush Administration Regulatory Budgeting Proposals

By the end of President George H.W. Bush's first term, the regulatory budget concept had regained adherents and focus. President Bush's 1993 budget submission to Congress endorsed the idea of a regulatory budget but advised gradual implementation.¹⁰² While noting the technical and administrative challenges, the report argued that a regulatory budget would likely "produce both a more efficient and a more equitable use of private resources."¹⁰³ The report explained that the Executive Branch could begin by giving agencies "allowances that would set ceilings on increased regulatory compliance costs they would be allowed to impose each year on the private sector" through discretionary regulatory actions.¹⁰⁴ Mandatory regulatory actions would not be covered initially.¹⁰⁵ The report noted that agencies "could also be given 'credits,' which they could add to their allowances, for cutting regulatory [costs] by relaxing existing regulations."¹⁰⁶ However, there was no further public action on these recommendations, and they were not adopted by President Clinton when he assumed office the next year.

D. Regulatory Budget Legislation in the 1990s

As regulatory reform became a major concern during the 1990s, several members of Congress again proposed various new iterations of potential regulatory budget concepts. Four examples were:

- *Regulatory Accountability Act of 1993, Senator Orrin Hatch.* Senator Hatch introduced legislation designed to freeze regulatory costs by requiring that the costs of any new regulation must be "fully offset" by repealing or modifying an existing regulation.¹⁰⁷ The bill made no legislative progress.

101. See TOWARDS A REGULATORY BUDGET, *supra* note 12, at pt. 2.A.

102. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1993 398–402 (1992).

103. *Id.* at 399–401.

104. *Id.* at 401.

105. *Id.*

106. *Id.*

107. See Regulatory Accountability Act of 1993, S. 13, 103d Cong. § 4(3)(A) (1993).

- *Federal Regulation Reduction, Reform, and Budget Act of 1993, Representative Lamar Smith.* This bill was designed to require an annual reduction in aggregate regulatory costs until the Congressional Budget Office (CBO) and OMB could jointly certify that annual “aggregate direct [regulatory] cost[s]” were not more than 5% of gross domestic product (GDP).¹⁰⁸ Specifically, the bill required OMB and CBO to determine the “aggregate regulatory baseline,” updated annually.¹⁰⁹ Against this baseline, the annual concurrent resolution under the Congressional Budget Act would specify “changes in laws and regulations” necessary to reduce aggregate regulatory costs by 6.5% until regulatory costs fell to 5% of GDP.¹¹⁰ The bill also provided that the House and Senate Budget Committees would “allocate” regulatory cost authority among committees with jurisdiction over regulatory agencies; a point of order would lie against any new legislation authorizing regulatory costs in excess of the regulatory budget.¹¹¹ But this bill, likewise, was never enacted.
- *Regulatory Accounting Act of 1995, Representative Thomas Bliley.* This bill would have created a purely informational budget of regulatory costs and benefits to be published every two years, but even this modest concept was unable to become law.¹¹²
- *Regulatory Accountability Act of 1998, Representative Lamar Smith.* This bill was designed to require regulatory cost caps for new regulatory statutes.¹¹³ The bill would have amended the Congressional Budget Act to create a point of order for any new or reauthorized measure likely to impose \$100 million or more in regulatory costs on the private sector, unless the bill specified a “regulatory cost authorization” limiting the costs of implementing regulations.¹¹⁴ Regulators would be prohibited

108. *See* Federal Regulation Reduction, Reform, and Budget Act of 1993, H.R. 3005, 103d Cong. § 2(a) (1993) (proposing to add § 321 to the Congressional Budget Act of 1974).

109. *See id.* (proposed § 321(c)).

110. *See id.* (proposed § 323(a)(1)).

111. *See id.* (proposed § 323(b)–(c)).

112. *See generally* Regulatory Accounting Act of 1995, H.R. 1636, 104th Cong. (1995).

113. Regulatory Accountability Act of 1996, H.R. 3277, 104th Cong. § 3(a) (1996).

114. *Id.* § 2(a)(2), (b) (proposing to add §§ 421(14)–(17) and 425(a)(3) to the Congressional Budget Act of 1974).

from exceeding these statutory cost caps,¹¹⁵ and OMB would be required to certify compliance for each major rule.¹¹⁶ Like the others, this bill was never enacted.

E. George W. Bush Administration Regulatory Budgeting Actions

President George W. Bush retained the basic regulatory review framework established by President Clinton in Executive Order 12,866. But in 2007, a new executive order by President Bush required each agency to include in its annual regulatory plan a “best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities.”¹¹⁷ Prior to this order, costs and benefits were listed only for individual rules. This was correctly observed by some as a possible first step toward regulatory budgeting.¹¹⁸ In January 2009, however, President Obama promptly revoked Executive Order 13,422 without comment or explanation.¹¹⁹

F. The 113th Congress

1. National Regulatory Budget of 2014—Senator Marco Rubio

Senator Marco Rubio’s proposed National Regulatory Budget Act of 2014 is the most recent and the most ambitious attempt to establish a regulatory budget.¹²⁰ The bill creates a process for setting annual, aggregate regulatory “cost cap[s]” for each federal agency by statute, backed by sanctions for noncompliance.¹²¹ Central to this process would be a new independent agency, the Office of Regulatory Analysis (ORA), which would wield considerably more expansive oversight power than OIRA.¹²² The budgeting process would begin with ORA’s calculation of a

115. *Id.* § 3(a).

116. *Id.* § 3(b)(2).

117. Exec. Order No. 13,422 § 4(c), 3 C.F.R. 191, 192 (2007).

118. See Roger G. Noll, *The Economic Significance of Executive Order 13,422*, 25 YALE J. ON REG. 113, 119 (2008) (“The new E.O. requires that agencies estimate the total benefits and costs of all regulations contained in their annual regulatory plans. A common criticism of this provision is that it represents a first step down the slippery slope to a regulatory budget . . .”).

119. Exec. Order No. 13,497, 3 C.F.R. 218 (2009).

120. S. 2153, 113th Cong. (2014).

121. See *id.* § 2(a) (proposing to add §§ 617(a)–(b) and 618(c)(1) to Title 5, Chapter 6 of the United States Code).

122. See *id.* (proposed § 614). The bill does address coordination between OIRA and the newly created Office of Regulatory Affairs (ORA), despite the fact that the two agencies’ roles would overlap significantly. The bill does nod in the direction of this difficulty, however, by instructing ORA to report to Congress on the functions of other government

baseline of “the aggregate costs” of all regulations “imposed by each Executive branch agency” (including independent agencies) for each upcoming fiscal year.¹²³ ORA would provide that baseline in a report to Congress on January 30 of each year.¹²⁴

Legislative responsibility for devising the yearly “National Regulatory Budget” would fall to the four congressional committees with principal jurisdiction over federal regulatory policy and laws affecting small business.¹²⁵ The bill provides that regulatory budget legislation would establish annual “cost cap[s]” for individual agencies and government-wide, thereby setting the “maximum amount of regulatory costs that [each agency] may impose in a fiscal year.”¹²⁶ The bill prescribes a timeline for congressional action, culminating in presentment of a regulatory budget bill to the President by September 15 of each year.¹²⁷ If Congress and the President fail to enact a regulatory budget for any year, the previous year’s cost caps remain in effect for the coming fiscal year.¹²⁸

Enforcement of the regulatory budget would rest with ORA and the courts. The bill directs ORA to review and publish a cost estimate of *all* proposed rules (including non-legislative rules) that would increase or decrease costs imposed on a regulatory entity.¹²⁹ If ORA concludes, as part

agencies that are “duplicative” of ORA’s work or “otherwise rendered cost ineffective by the work of [ORA].” *See id.* § 3(a)(1)–(2).

123. *Id.* § 2(a) (proposed §§ 613(5)(B), 615(a)(2)). The term “aggregate costs” is defined broadly to include both “direct costs” of implementation incurred by the responsible agency as well as “all costs incurred by a regulated entity because of covered Federal rules.” *See id.* (proposed § 613(1)(A)–(B), (7)).

124. *Id.* (proposed § 615(a)(1)).

125. *See id.* (proposed § 617(a)–(b)). The responsible committees are the Senate Committee on Homeland Security and Governmental Affairs; the Senate Committee on Small Business and Entrepreneurship; the House Committee on Oversight and Government Reform; and the House Committee on Small Business. *Id.* (proposed § 617(b)(1)(A)–(B)).

126. *Id.* (proposed § 617(a)(1), (3)).

127. *Id.* (proposed § 617(b)–(d)).

128. *Id.* (proposed § 617(e)).

129. *See id.* (proposed § 615(b)(1)(A)–(B)). Although the implications of this new regulatory review process are beyond the scope of this article, it is clear that the Rubio bill would greatly expand the existing regime overseen by OIRA—both in terms of the number of regulations covered and the degree of supervision of agency rulemaking. ORA would provide a cost estimate for virtually all regulations, unlike OIRA’s more limited review of “[s]ignificant regulatory actions.” *Compare id.*, with Exec. Order No. 12,866 § 3(f), 3 C.F.R. 638, 641–42 (1993). And ORA would be expected to undertake and publish its own economic analysis of each regulation, unlike OIRA’s more limited function of reviewing and refining the responsible agency’s economic analysis. *Compare* S. 2153 § 2(a) (proposed § 615(a)(2)), with Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. 638, 644–46 (1993). Agencies that fail to cooperate with ORA’s request for information about a proposed rule would be subject to sanctions, including sequestration of 0.5% of fiscal appropriations. S. 2153 § 2(a) (proposed § 618(c)(1)(A)).

of that required analysis, that a new rule will exceed the agency's regulatory budget allocation, the agency is barred from promulgating the rule until the agency offsets its cost by repealing or amending existing regulations to ORA's satisfaction.¹³⁰ That prohibition is backed by judicial review, as the bill authorizes affected parties to bring suit in any federal district court seeking a declaratory judgment that the offending rule "has no force or effect."¹³¹

2. "Regulatory PAYGO"—Senator Mark Warner

Since 2010, Senator Mark Warner has been working on a proposal he calls "Regulatory PAYGO."¹³² As Warner has described it, this proposal would require agencies to fully "offset" the costs of any new economically significant regulation by eliminating or modifying existing regulations of equal or greater cost.¹³³ As part of the annual regulatory agenda process supervised by OIRA, agencies would be required to provide cost estimates for economically significant regulations under development, along with proposed offsets.¹³⁴ OIRA would create a scorecard to track agency compliance and government-wide savings.¹³⁵ Warner's stated aim is to encourage agencies to eliminate "outdated or duplicative regulation[s]" and create an internal incentive to minimize the costs of new regulations.¹³⁶

Although it has not yet been introduced in legislative form, this proposal was examined at hearings before the Senate Committee on Homeland Security and Governmental Affairs¹³⁷ and a special panel of the Senate Budget Committee in 2011.¹³⁸ The Warner bill was not introduced in the 112th or 113th Congresses, and Senator Warner's future plans with respect to this proposal are unclear.

130. See S. 2153 § 2(a) (proposed § 619(b)(1)).

131. *Id.* (proposed § 619(c)(2)).

132. See *A Review of Legislative Proposals: Hearings Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 48–49 (2011) [hereinafter *Legislative Proposals: Hearings*] (statement of Sen. Mark R. Warner); Mark R. Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST (Dec. 13, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639_pf.html.

133. See *Legislative Proposals: Hearings*, *supra* note 132, at 172.

134. See *id.*

135. *Id.*

136. See Warner, *supra* note 132.

137. *Legislative Proposals: Hearings*, *supra* note 132, at 48–49.

138. See generally *Improving Regulatory Performance: Lessons from the United Kingdom: Hearing Before the Gov't Performance Task Force of the S. Comm. On the Budget*, 112th Cong. (2011).

III. “ONE-IN, ONE-OUT” AND “ONE-IN, TWO-OUT”: INCREMENTAL REGULATORY BUDGETING IN THE UNITED KINGDOM

Europe is not known as a paragon of efficiency in government regulation. But the government of the United Kingdom has recently taken significant steps on regulatory reform. British Prime Minister David Cameron pledged that his Government will be “the first . . . in modern history to leave office having reduced the overall burden of regulation.”¹³⁹ To that end, in January 2011, the Cameron Government instituted a new “One-in, One-out” policy that operates much like an incremental regulatory budget. Cameron described this new initiative in simple terms:

[I]f you’re a Minister who wants to bring in a new piece of regulation, first you’ve got to find an existing one to get rid of. No-one should underestimate how revolutionary this is. For a long time, the whole business of Whitehall has been about creating new regulations. This new rule completely blows that culture apart.¹⁴⁰

More recently, “[t]o increase the pressure on Departments to deregulate,” the U.K. government strengthened the program by adopting a “One-in, Two-out” rule, which requires regulators to adopt “£2 worth of deregulatory [savings] . . . for every £1 of [new] regulatory [costs].”¹⁴¹

The mechanics of the policy are, of course, more complicated. Under the One-in, Two-out rule, no agency can issue a new regulation that would impose a *direct net cost* on the private sector without reducing existing regulatory burdens to offset *twice* the new cost.¹⁴² Although the U.K. regulatory system requires analysis of all costs and benefits, *direct net cost* is narrowly defined as the direct costs that the regulation will impose on private-sector entities, less the direct benefits that regulation will confer on private-sector entities.¹⁴³ Calculations under One-in, Two-out do *not*

139. Richard Tyler & Andrew Porter, *David Cameron Pledges Red Tape Burden Will Fall*, TELEGRAPH (Apr. 7, 2011), <http://www.telegraph.co.uk/finance/yourbusiness/8433317/David-Cameron-pledges-red-tape-burden-will-fall.html>.

140. David Cameron, Prime Minister, Speech at Shipley, West Yorkshire: Transforming the British Economy: Coalition Strategy for Economic Growth (May 28, 2010) (transcript available at <http://www.britishpoliticalspeech.org/speech-archive.htm?speech=351>).

141. U.K. DEP’T FOR BUS., INNOVATION & SKILLS, SEVENTH STATEMENT OF NEW REGULATION 7 (2013) [hereinafter U.K. BIS ONE-IN, TWO-OUT], https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271446/bis-13-p96b-seventh-statement-of-new-regulation.pdf.

142. *See id.* at 54.

143. *See id.* Private-sector entities include “business[es]” and “civil society organisations,” but not individuals. *See* U.K. DEP’T FOR BUS., INNOVATION & SKILLS: ONE-IN, ONE-OUT (OIOO) METHODOLOGY 5 (2011) [hereinafter U.K. BIS ONE-IN, ONE-OUT METHODOLOGY], <http://webarchive.nationalarchives.gov.uk/20111108235519/http://www.bis.gov.uk/asset/s/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology.pdf>.

account for (1) benefits to the public at large (such as improved health or safety); (2) “indirect” economic effects, i.e., any second-order costs or benefits not “resulting directly from the implementation or removal/simplification of the regulation”; and (3) non-monetizable costs and benefits.¹⁴⁴ Given these exclusions, the United Kingdom’s *direct net cost* concept should not be confused with *negative net benefits* in the U.S. regulatory context.

To clear review under One-in, Two-out, any regulation with a direct net cost (known as an “IN”) must be matched with a deregulatory measure (an “OUT”) that will reduce net direct costs by at least twice the amount of the IN.¹⁴⁵ At the proposed and final rule stage, the agency submits a cost-benefit analysis for both the IN and the OUT to an independent advisory body, the Regulatory Policy Committee (RPC), which either challenges or validates the agency’s analysis.¹⁴⁶ Regulatory and deregulatory actions must then be approved by the Reducing Regulation Committee (RRC), a sub-cabinet department that reviews each department’s analysis and the RPC’s comments.¹⁴⁷

U.K. regulators have some flexibility in pairing new regulations with deregulatory offsets. First, a corresponding OUT need only be identified (not finalized) at the time the IN takes effect.¹⁴⁸ Once an IN is final, however, “departments are expected to put in place plans” to finalize the required OUTs “as soon as possible.”¹⁴⁹ Second, savings from an OUT need only be “broadly equivalent” with the costs of the corresponding IN.¹⁵⁰ Economic comparisons between regulatory and deregulatory measures are based on the “Equivalent Annual Net Cost to Business,” the product of a formula that averages short-term and long-term costs and benefits.¹⁵¹ Third, departments may “bank” OUTs to be used against future INs.¹⁵² Finally, upon petition, Whitehall may reallocate OUTs from

144. See U.K. DEP’T FOR BUS., INNOVATION & SKILLS, BETTER REGULATION FRAMEWORK MANUAL 42–43, 45 (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf.

145. See U.K. BIS ONE-IN, TWO-OUT, *supra* note 141, at 54. The largest categorical exemptions are for regulations required by European Union obligations and regulations necessary to address “financial systemic risk.” See U.K. BIS ONE-IN, ONE-OUT METHODOLOGY, *supra* note 143, at 5–6.

146. See U.K. BIS ONE-IN, TWO-OUT, *supra* note 141, at 55.

147. See U.K. BIS ONE-IN, ONE-OUT METHODOLOGY, *supra* note 143, at 3–4.

148. See *id.* at 3.

149. *Id.*

150. See *id.* at 7 n.3.

151. See *id.* at 10–11.

152. See *id.* at 6.

one agency to another or issue a waiver in specific cases.¹⁵³ A waiver may be granted only after the affected agency monetizes its full stock of regulations and explains why sufficient OUTs cannot be found.¹⁵⁴

Accountability for compliance with One-in, Two-out rests entirely with the individual Ministers and RRC, which publishes semi-annual reports on regulatory and deregulatory actions. Private parties have no judicial or administrative remedies to challenge an agency's noncompliance with the policy. The One-in, Two-out initiative appears to be working reasonably well. Although the *Financial Times* reports that "the business community—which has seen a number of different assaults on red tape by previous [U.K.] governments—remains sceptical,"¹⁵⁵ the initiative has posted significant regulatory cost savings and "curbed Whitehall's penchant for new regulations."¹⁵⁶ Since its inception in 2011, the initiative has "reduce[d] the annual cost to business by an estimated £1.19 billion."¹⁵⁷ In 2013, the first year of One-in, Two-out, the government reported that U.K. regulators adopted INs carrying an annual net direct cost of £28 million compared to OUTs carrying an annual net direct cost of £255 million—far exceeding the 2:1 target.¹⁵⁸ Despite early concerns that some departments were evading the One-in, One-out policy,¹⁵⁹ RPC now reports that the compliance rate for newly submitted rules has increased from 56% in 2010 to 80% in 2013, even as the offset standard has increased in

153. *See id.*

154. *See id.*

155. Elizabeth Rigby & Jonathan Moules, *Ministers Clash over EU Regulatory Burden*, FIN. TIMES (Jan. 28, 2014), <http://www.ft.com/intl/cms/s/0/d2247bf8-8778-11e3-ba87-00144feab7de.html#axzz3B986je6N>.

156. Bagehot, *Blunt Scissors*, THE ECONOMIST (Sept. 22, 2012), <http://www.economist.com/node/21563294>. *The Economist* notes that in a recent survey of business perceptions in the United Kingdom, the number of firms that considered over-regulation an obstacle to success fell from 62% in 2009 to 55% in 2012. *Id.* Consider that this directional trend is almost the exact opposite of the United States, where polling suggests that businesses small and large perceive over-regulation as an increasingly dominant concern. *See* Dennis Jacobo, *Gov't Regulations at Top of Small-Business Owners' Problem List*, GALLUP (Oct. 24, 2011), <http://www.gallup.com/poll/150287/Gov-Regulations-Top-Small-Business-Owners-Problem-List.aspx> (reporting that "[c]omplying with government regulations" tops the list of "most important problem[s]" facing small business owners); *see also* *CEOs See Continued Uncertainty for U.S. Economy*, BUSINESS ROUNDTABLE (Dec. 12, 2012), <http://businessroundtable.org/news-center/ceos-see-continued-uncertainty-for-u.s.-economy/>.

157. *See* U.K. BIS ONE-IN, TWO-OUT, *supra* note 141, at 4.

158. *See id.* at 8 tbl. 2.

159. James Hurley, *Government Set for New Red Tape Overhaul*, TELEGRAPH, Nov. 13, 2012, <http://www.telegraph.co.uk/finance/yourbusiness/9684255/Government-set-for-new-red-tape-overhaul.html> ("The Regulatory Policy Committee, an independent red tape watchdog created by the Labour government, on Friday outlined its concerns that too many departments are ignoring one-in, one-out.").

rigor.¹⁶⁰ The U.K. experience to date suggests that some form of regulatory budgeting—long the subject of academic commentary—can work in practice. No two regulatory regimes are identical, but the U.K. approach may prove worthy of study or even emulation. Indeed, the Cameron Government has urged the European Commission to adopt a One-in, One-out mechanism for European Union regulations, and similar reforms to limit the net increase in regulatory costs have been developed or implemented by the governments of Portugal, Australia, and Canada.¹⁶¹ Given this experience abroad, it should not be surprising if a renewed focus on regulatory budgeting resurfaces in the United States. Indeed, in the face of continued national economic challenges, some of the considerations that led to the regulatory budgeting concept in the United Kingdom would seem to warrant further study in the United States.

CONCLUSION

In the United States, the debate over regulatory reform has too often broken down along familiar, oversimplified lines of deregulatory and pro-regulatory camps. A key virtue of the regulatory budget is that it would not control particular outcomes or create new analytical criteria. Instead, this reform proposal holds the promise of improving the quality of particular regulatory responses by simply broadening the lens of agency policymaking and priority setting. A disjointed series of proposed regulations would instead be evaluated as part of a broader regulatory strategy, with greater political accountability for the overall trends and results. The ability to compare the economic “bang” for the regulatory “buck” across initiatives would better reflect the tradeoffs and choices that must be made in allocating finite resources—both public and private. All stakeholders could stand to profit from better informed political judgments about the wisdom of regulatory responses.

The concept of a regulatory budget has undergone three decades of scholarly, legislative, and administrative consideration. After a long gestation period, the increasing adoption of complementary policy tools such as cost-benefit analysis, and recent experience with the “One-in, Two-Out” initiative in the United Kingdom, the time has come for further

160. See U.K. BIS ONE-IN, TWO-OUT, *supra* note 141, at 10.

161. See Malyshev, *supra* note 16, at 74; Treasury Board of Canada Secretariat, *Government of Canada Introduces Legislation to Make the One-for-One Rule Law*, CANADA NEWS CENTRE (Jan. 29, 2014), <http://news.gc.ca/web/article-en.do?nid=812559>. Since April 2012, the Canadian regulators have operated under a policy whereby any new “administrative burden”—primarily paperwork burdens—must be offset by an equivalent reduction in existing administrative burdens. See *id.* In January 2014, the government of Prime Minister Stephen Harper introduced legislation to make this policy permanent law. *Id.*

debate about regulatory budgeting as a reform option in the United States.