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Executive Summary

No. 1336 November 1, 1999

THE LEVIN-THOMPSON PROPOSAL: HOW REGULATORY IMPROVEMENT VEERS OFF TRACK

ANGELA ANTONELLI

On March 25, 1999, Senators Carl Levin (D–MI) and Fred Thompson (R–TN) introduced S. 746, the Regulatory Improvement Act of 1999. The impetus behind this initiative is a concern about the increasing number of expensive, one-size-fits-all rules with diminishing returns—regulators chasing smaller and smaller risks at greater and greater costs—and the lack of accountability of regulators to the public for decisions they make.

As currently drafted, the Regulatory Improvement Act would affirm broad agency discretion, fail to improve public health, safety, and environmental outcomes significantly, and would make it more difficult for Congress, the courts, and the public to hold agencies accountable for their decisions. Not surprisingly, the White House has stated its willingness to sign the bill while opposing other regulatory accountability bills in Congress.

The Regulatory Improvement Act of 1999 would help regulators avoid accountability and issue the regulations they want because it:

1. **Applies to a small set of all rules.** The bill's requirements apply only to major rules, less than 2 percent of all final rules. According to the U.S. General Accounting Office (GAO), between April 1, 1996, and September 30, 1999, the federal government issued 15,280 final rules. Of these, 222 were major final rules with an annual economic impact of more than $100 million.

2. **Exempts too many rules.** The bill exempts a broad range of rules that can include pesticide and food rules. As a result, as little as 1 percent of final rules may actually be subject to the bill's requirements.

3. **Affirms broad agency rulemaking discretion.** In May 1999, the D.C. circuit court concluded in *American Trucking Association* v. *EPA* that under the non-delegation doctrine, the Environmental Protection Agency cannot interpret a statute so loosely that it becomes an unconstitutional delegation of legislative power. S. 746 would affirm an agency's discretion to interpret a statute and justify its

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consideration of a limited set of regulatory options.

4. **Lacks effective decision criteria.** There is nothing to prevent an agency from issuing a final rule that is "not likely to provide benefits that justify the costs" or fails to select the option that would "substantially achieve the rulemaking objective in a more cost-effective manner, or with greater net benefits" than other alternatives considered.

5. **Creates loopholes to avoid analysis requirements.** The bill allows an agency to adopt a major rule without doing the required cost-benefit analysis if the agency finds "good cause" that "conducting the regulatory analysis…before the rule becomes effective is impracticable or contrary to an important public interest." A 1999 GAO report suggests that up to one-fifth of the final major rules—approximately 10 each year—may never be subject to the initial or final analytical requirements based on past agency actions.

6. **Falls short on risk assessment transparency.** Even though the risk analysis requirements are the strongest part of this bill, weaknesses include: agency discretion about when to inform the public of a risk assessment and to perform comparative risk analysis; the exclusion of risks associated with declines in income; and the failure to require agencies to fully disclose to the public all of the data they intend to rely on in making risk assessments.

7. **Leaves "peer review" discretion with agencies.** Only rules that cost more than $500 million annually would be covered. Agencies will determine what kind of peer review—formal or informal—is warranted. Peer review is not necessary if the agency and the Office of Management and Budget (OMB) already determined that the rule has been subjected to "adequate" peer review.

8. **Allows each agency to adopt its own analytical guidelines.** A 1998 GAO report concludes that agencies lack consistency and clarity in their regulatory economic analysis methods and reporting. Nevertheless, S. 746 would allow each agency to develop it own guidelines and assumptions for regulatory analyses, rather than follow one set of guidelines, which would make comparisons between agencies difficult.

9. **Includes weak language on judicial review** that represents the lowest level of preemptive effect. A rule could not be remanded or invalidated by the court because underlying analyses were weak or important scientific information was excluded. The court would need to determine that the entire rulemaking was arbitrary and capricious based on the statute and not anything that is required in the bill.

10. **Establishes a transparency double standard.** OMB must disclose to the public information regarding the status of rules under review, changes made to rules, and communications related to the substance of a rule or contact with anyone not employed within the executive branch of the federal government. But neither the agencies nor Congress are subject to similar requirements.

11. **Fails to expand the public's right to know about regulations.** The bill fails to acknowledge the Internet and ways to expand public access to information about rulemaking. It continues to rely on the poorly subscribed *Federal Register* and agency dockets based in Washington, which are accessed by those who can afford to pay lawyers to go through them.

The Regulatory Improvement Act of 1999 is fundamentally flawed and will not lead to real regulatory improvement. The exemptions, loopholes, and lack of real judicial review will leave the vast majority of federal rules untouched by its analytical and reporting requirements. For the less than 1 percent of rules it will cover, S. 746 gives an agency greater opportunity to justify any regulation but fails to give the public greater access to information or the legal tools needed to hold an agency accountable.

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ANGELA ANTONELLI

On March 25, 1999, Senators Carl Levin (D–MI) and Fred Thompson (R–TN) introduced S. 746, the Regulatory Improvement Act of 1999. In the Senate Governmental Affairs Committee report accompanying the bill (S. Report 106–110), the committee states that this legislation would "promote more open, better informed, and more accountable regulatory decisions."[1] Since 1994, each Congress has considered major reform proposals to improve the regulatory decisionmaking process and its outcomes.[2] The impetus behind these initiatives are concerns about: 1) the annual increases in the volume and costs of rules; 2) the one-size-fits-all approach of rules to address problems; and 3) the diminishing returns of regulations—regulators chasing smaller and smaller risks at greater and greater costs.

Today's expansive federal regulatory bureaucracy, that includes at least 54 federal regulatory agencies spending more than $18 billion annually on regulatory programs,[3] is slow, sloppy, and secretive about how it makes decisions that affect the lives of all Americans—from the food they eat and the medications they take to how they use their private property and run their businesses. The goal of regulatory improvement efforts is to turn this around and hold unelected federal regulators accountable for what they are doing and to demand that they do a better job; including their efforts to protect public

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1. *Regulatory Improvement Act of 1999*, Report of the Committee on Governmental Affairs, United States Senate, Report 106–110, July 20, 1999, p. 1. (Hereafter, "Senate Report 106–110.")
2. During the 104th Congress, the major reform proposals introduced were: Title III of H.R. 9, the Job Creation and Wage Enhancement Act of 1995, S. 291, the Regulatory Reform Act of 1995, and S. 343, the Comprehensive Regulatory Reform Act of 1995. During the 105th Congress, S. 981, the Regulatory Improvement Act was the major reform proposal introduced (the House had no similar bill).
3. Melinda Warren and Murray Weidenbaum, "The Rise of Regulation Continues: An Analysis of the Budget for the Year 2000," Regulatory Budget Report 22, Center for the Study of American Business, August 1999, pp. 17–18.

health safety and the environment. There are two important reasons why this is critically important. First, more lives could be saved—as many as 60,000 annually—if resources are prioritized and targeted effectively.[4] Second, eliminating unnecessary regulatory costs will reduce the drag on productivity and economic growth.

As currently drafted, the Regulatory Improvement Act will affirm broad agency discretion, fail to improve public health, safety, and environmental outcomes significantly, and make it more difficult for Congress, the courts, and the public to hold agencies accountable for their decisions. It will have little impact on the vast majority of rules—including those that *are* subject to its analytical standards (less than 2 percent of final rules issued annually)—because of its serious loopholes, exemptions, and caveats.

Ironically, while this proposal would make the White House's regulatory watchdog, the Office of Management and Budget (OMB), more accountable, it will do little to make the regulatory agencies or Congress more responsible. Not surprisingly, the White House has stated its willingness to sign the bill, while opposing other regulatory accountability bills in Congress. S. 746 is a compromise between Senators Levin and Thompson and the White House that is fundamentally flawed and will not lead to real regulatory improvement.

A JUDICIAL LESSON ON REGULATORY IMPROVEMENT

Since 1994, Congress has passed and the President has signed regulatory accountability laws that have largely proven to be ineffective. These include the Unfunded Mandates Reform Act of 1995 (UMRA)[5] and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[6] which amends the Regulatory Flexibility Act of 1980. A recent court ruling illustrates the problem and teaches a very important lesson—a bill's arcane choice of language can so severely change its legislative effect that its intent will never be achieved.

On May 14, 1999, the U.S. Court of Appeals for the District of Columbia struck down one of the most controversial Environmental Protection Agency (EPA) regulations in many years. The court put a halt—at least for now—to stricter ambient air quality standards for ozone and particulate matter (PM).[7] Based on a lawsuit brought by a number of industry groups (led by the American Trucking Association), three states (Ohio, Michigan, and West Virginia), Representative Tom Bliley (R–VA), and Senator Orrin Hatch (R–UT), the court concluded that EPA reasoning in promulgating the standards represented "an unconstitutional delegation of legislative power."[8]

According to that decision, under the non-delegation doctrine, EPA cannot so loosely interpret a

4. See Tammy O. Tengs and John D. Graham, "The Opportunity Costs of Haphazard Social Investments in Life-Saving, in Robert W. Hahn, ed., *Risks, Costs and Lives Saved* (New York: Oxford University Press, 1996). See Chapter 8.
5. See U.S. General Accounting Office, *Unfunded Mandates Reform Act Has Little Effect on Agencies' Rulemaking Actions,* GAO/GGD–98–30, February 4, 1998.
6. See Dean Scott, "Small Business Regulatory Reform: Effectiveness of SBREFA Questioned," Bureau of National Affairs *Daily Report for Executives,* September 10, 1999, p. C-1.
7. The court remanded to the EPA, but did not vacate, the July 1997 eight-hour ground-level ozone standard with directions to establish a better scientific basis for the 0.08 parts per million standard. In addition, the court ruled that EPA must consider the benefit as well as the harm associated with ground-level ozone. The court did not "vacate the new ozone standards because the standard is unlikely to engender costly compliance activities," because "the 1990 amendments extended the time for non-attainment areas to comply with the [old] .12 ppm ozone NAAQS [National Ambient Air Quality Standards]," which "preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS." The court did vacate the older standard covering particulate matter of 10 micrometers or smaller because EPA will "have to change the standard when its corrects the arbitrarily chosen PM[10] indicator," and it requested briefing on the July 1997 standard for particulates that are 2.5 micrometers or smaller.

statute that it becomes an unconstitutional delegation of legislative power. The court concluded that EPA did not properly use the authority Congress delegated to it under Sections 108 and 109 of the Clean Air Act when it set the standards. Specifically, EPA had set numerical limits for both ozone and PM 2.5 without offering "intelligible principles"[9] that explain why these standards would protect human health better than any other standard.

For many, the court's application of the non-delegation doctrine signals the resurrection of a potential new tool for challenging non-elected, executive branch regulators.[10] Yet, if this were a game, the margin of victory would be much thinner than it appears. The federal regulators prevailed on many fronts, and a close reading of the decision brings home how close EPA came to locking these new standards into place. Without the application of the little known and infrequently used non-delegation doctrine by Judges Stephen Williams and Douglas Ginsburg, the outcome would likely have been quite different.

In the end, the court, through its reasoning in *American Trucking* v. *EPA*, makes it abundantly clear that legislative loopholes and exemptions do matter, particularly when laws designed to hold regulators accountable are full of them. For example:

- **The National Environmental Policy Act (NEPA) of 1970.** Congress exempted all actions under the Clean Air Act from NEPA, including the preparation of an Environmental Impact Statement. The court concluded that there was nothing in "NEPA that requires the EPA in setting National Ambient Air Quality Standards [NAAQS] to consider or discuss matters that the Clean Air Act does not already permit or require."[11]
- **The Unfunded Mandates Reform Act of 1995 (UMRA).** Petitioners in the appeal argued that EPA is required by the Clean Air Act to prepare a Regulatory Impact Statement (RIS) and to choose the least burdensome from a range of alternative and permissible NAAQS. However, a weakness in UMRA's judicial review language—"the inadequacy or failure to provide a[n] RIS…shall not be used as a basis for staying, enjoining, invalidating, or otherwise affecting an agency rule"—prevented the court from providing any relief.[12]
- **The Regulatory Flexibility Act (RFA) of 1980, as amended.** Petitioners argued that EPA improperly certified that the revised NAAQS would not have a significant impact on a substantial number of small entities. Because the RFA only requires that the impact analysis consider the impact on those small entities subject to the rulemaking, the fact that the rules will have a broader, indirect impact on small entities that it would not regulate, cannot be considered by the court. Nothing in the **Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA),** which amended RFA, did anything to close this loophole.[13]

What the court decision revealed is that, despite overwhelming public opposition to the EPA's Clean Air Act rulemaking,[14] EPA was largely following the laws Congress created. If Congress wants to

8. *American Trucking Association* v. *the Environmental Protection Agency,* D.C. Circuit Court of Appeals, No. 97-1440, 97-1441, May 14, 1999, p. 4. See *http://www.cadc.uscourts.gov/common/opinions/199905/97-1440a.txt* (as of May 17, 1999).
9. *Ibid.*, p. 7.
10. See C. Boyden Gray and Alan Charles Raul, "The Courts Thwart the EPA's Power Grab," *Wall Street Journal*, May 18, 1999; see also George F. Will, "See You in Congress…," *The Washington Post*, May 20, 1999, p. A29.
11. *American Trucking Association* v. *the Environmental Protection Agency,* p. 16.
12. *Ibid*.
13. *Ibid.*, pp. 16–19.
14. See Angela Antonelli, "Can No One Stop the EPA?" Heritage Foundation *Backgrounder* No. 1129, July 8, 1997.

stop giving regulators a blank check, the Regulatory Improvement Act will not get the job done. It is not likely to be different or more effective than other recently enacted regulatory statutes .

FLAWS IN THE LEVIN-THOMPSON PROPOSAL

The Regulatory Improvement Act of 1999 (S. 746) is a "comprehensive" regulatory reform bill that would: 1) require agencies to perform cost-benefit analyses for major rules;[15] 2) require agencies to follow risk assessment principles; 3) require agencies to subject to peer review any rules with an annual economic effect of $500 million or more; 4) provide for judicial review; 5) develop new guidelines for a cost-benefit analysis; 6) arrange for a study of comparative risk; and 6) require new executive branch oversight requirements.

S. 746 is very similar to another "comprehensive" reform bill, the Regulatory Improvement Act (S. 981) considered during the 105th Congress. After the White House demanded several changes to weaken S. 981, Senators Levin and Thompson agreed in hope of assuring Senate passage and avoiding a presidential veto. The 105th Congress ended without Senate action on S. 981.

This year, S. 981 was reintroduced as S. 746. In testimony before the Senate Governmental Affairs Committee on April 21, 1999, the White House indicated its willingness to sign S. 746 if it was passed in its current form. The bill was subsequently reported out of the committee on May 20, 1999 by a vote of 11 to 5, with only one minor amendment.[16] The bill has bipartisan support, including that of Senate Minority Leader Tom Daschle (D–SD). Nevertheless, many environmental and consumer groups continue to oppose the legislation this year because of a belief that it will endanger important regulatory protections.

How S. 746 Veers Off Track

The Regulatory Improvement Act of 1999 focuses on establishing the analytical criteria, such as risk assessment and benefit-cost methods, that agencies should use as a guide for making decisions. The bill's sponsors claim the bill will "increase the accountability and quality of government,"[17] although it will do neither of these things. S. 746 simply puts into place a series of decisionmaking requirements that agencies will view as little more than hoops to jump through, because agencies are not held accountable in any real way for compliance with the standards. History has shown that agencies will devote considerable time and legal resources (paid for by taxpayers) to determine ways to get around statutory requirements that are imposed on them.

The Regulatory Improvement Act makes sure that the regulators will succeed in a number of different ways.

1. **It applies to a small set of rules.**

   The benefit-cost and risk assessment requirements apply only to major rules [Sections 621(7), 623, 624]. As shown in Table 1, between April 1, 1996, and September 30, 1999, the federal government issued 15,280 final rules. Of these, 222—less than 2 percent—were major final rules with an annual economic impact of more than $100 million.

15. A major rule is defined in Section 621(7) of S. 746 as a rule "that the agency proposing the rule or the Director [of OMB] determines is likely to have an annual effect on the economy of $100 million or more in reasonably quantifiable costs"; or "is otherwise designated a major rule by the Director [of OMB] on the ground that the rule is likely to adversely affect, in a material way, the economy, a sector of the economy, including small business, productivity, competition, jobs, the environment, public health or safe, or State, local or tribal governments, or communities."

16. The Committee approved by unanimous voice vote a modified amendment that requires OMB to report to Congress in 2002 an accounting statement and report containing an estimate of the total annual incremental benefits and costs of complying with the provisions of S. 746.

17. See *Regulatory Improvement Act of 1999*, Senate Report 106–110, cover text.

Although the vast majority of rules are not major, they still impose costs. For example, the bill would not cover a rule that the agency determines imposes $90 million in costs plus other costs that are not "reasonably quantifiable."[18] By focusing only on major rules, agencies will have strong incentives to break apart their rule-makings activities into smaller rule-makings to get around the statutory threshold. And the lack of oversight, both within the executive branch and Congress,[19] suggests agencies will get away with it. OMB has the discretion to designate a rule as major only if it adversely affects the economy, but OMB should also be able to designate rules (including deregulatory actions) as major if they have a *positive* impact on the economy.

Table 1 B1336

15,280 Major and Minor Rules in the Last Four Fiscal Years

	Major	Minor	Total
FY1996*	35	2,024	2,059
FY1997	59	3,873	3,932
FY1998	70	4,666	4,736
FY1999	58	4,495	4,553
Total	222	15,058	15,280

Note: * Figures are from April 1, 1996 to September 30, 1996. GAO did not keep records prior to April 1, 1996.
Source: GAO, *SBREFA Rules Report.*

2. **It exempts too many rules.**

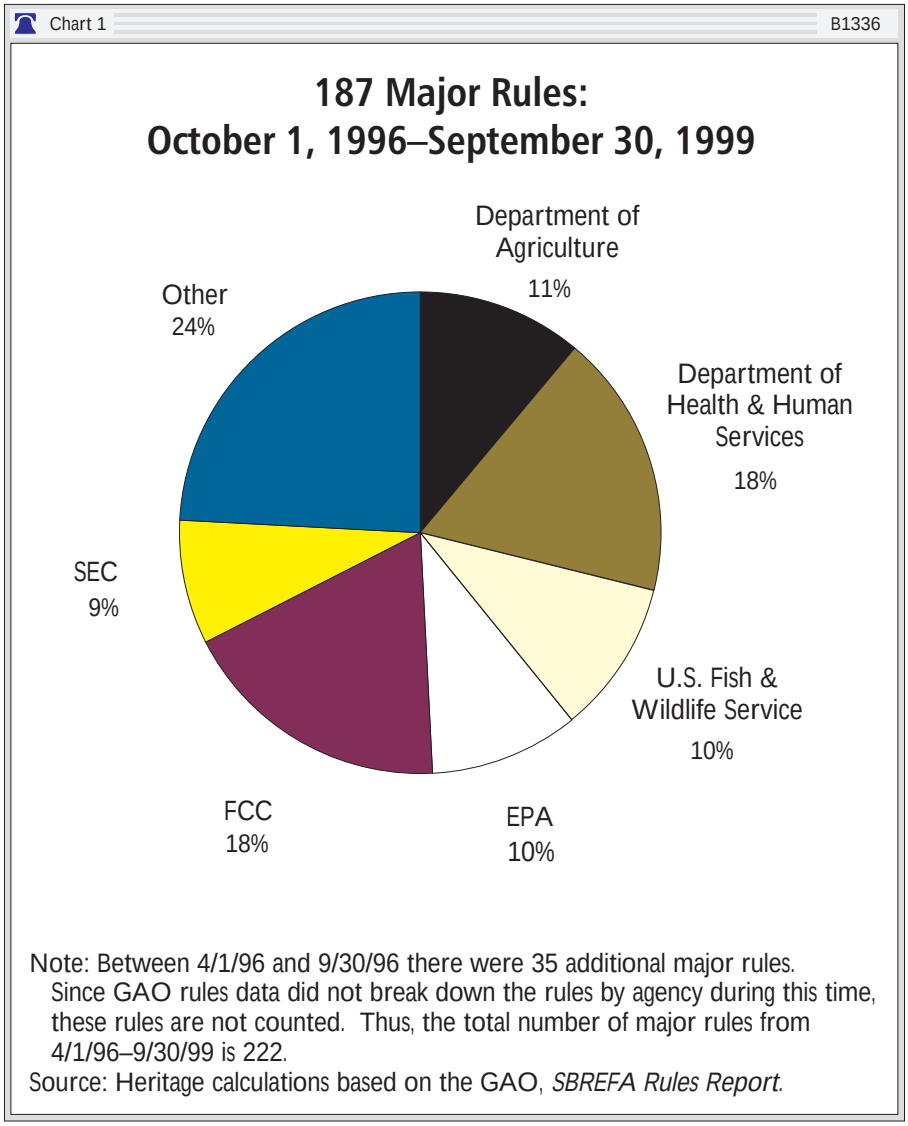
Section 621(10) of the bill would exempt a broad range of rules for which there is no clear justification for such exclusion. These include:

- Rules related to the securities or commodities futures markets (issued by the Securities and Exchange Commission (SEC) and Commodities Futures Trading Corporation, respectively) and the telecommunications rules issued by the Federal Communications Commission;
- Rules that must be promulgated at least annually regardless of their content or significance. There are many health care financing rules issued by the Health Care Financing Administration (HCFA) and agriculture marketing orders issued by the Department of Agriculture (USDA) that have significant budgetary and programmatic impacts which would not be covered;
- Tax rules or wage rules; and
- Rules or agency actions that authorize or bar the introduction into or removal from commerce; or recognize or cancel recognition of the marketable status of a product, which includes pesticide rules issued by EPA or food and drug rules issued by the Food and Drug Administration (FDA). Many of these presumably are based on some scientific justification that will not be subject to the risk assessment and disclosure requirements of S. 746.

During the first three years of final rules issued under the Congressional Review Act, the FCC, SEC, HCFA, and USDA issued a significant number of these types of major rules that would now be considered exempt.[20] Indeed, as Chart 1 suggests, a significant number of the major rules issued by agencies are

18. See U.S. General Accounting Office, *Comments on S. 746 –The Regulatory Improvement Act of 1999,* April 21, 1999, GAO/T–GGD/RCED-99-163, p. 2.
19. Susan E. Dudley and Angela Antonelli, "Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight," *Regulation*, Fall 1997.

likely to be exempt under S. 746 in the future. The consequences will be that very few rules will be subject to the reforms of S. 746[21] and there will be little change in the regulatory output of agencies over the long term.



3. **It affirms broad agency rulemaking discretion.**

Unfortunately, S. 746 affirms an agency's broad discretion to interpret a statute and justify its consideration of a limited set of regulatory options. Section 621(6) contains a very important qualification in the definition of "flexible regulatory options." Only options that "achieve the objectives of the statute" would qualify for consideration. The agency would not have to consider options that may not have been contemplated in the underlying organic statute but that could, in fact, be beneficial. This constraint also appears to be further narrowed by excluding any option that "achieves the objectives of the statute" but fails to do so in a manner "addressed by the rulemaking." Unfortunately, the Senate Governmental Affairs Committee report does not speak to these important words nor does it suggest any alternative interpretation or intent.[22] And ambiguous statutory language is a delegation of the power to interpret.

Section 623(b)(2)(A)(iv) leaves a significant amount of flexibility for agencies to determine what constitutes "a reasonable number of regulatory alternatives reflecting the range of regulatory options." The definition of "flexible

20. These rules include agriculture marketing orders, Medicare and other health care financing rules, telecommunications rules, and securities dealers and products. See also Angela Antonelli, "Two Years and 8,600 Rules: Why Congress Needs an Office of Regulatory Analysis," Heritage Foundation *Backgrounder* No. 1192, June 26, 1998.

21. Many rules in Chart 1 would potentially be excluded including SEC, FCC, HCFA, as well as the USDA's marketing orders and the U.S. Fish and Wildlife Service's migratory bird hunting rules.

22. *Regulatory Improvement Act of 1999*, Senate Report 106–110, pp. 24–25.

regulatory option" already gives an agency tremendous discretion, and the added vagueness reflected in "reasonable number" appears to give an agency considerable latitude to select whatever alternatives it wants and, with relative ease, dispense with the responsibility of being accountable to the public for addressing a wide range of other available options.

Regulators are often accused of interpreting laws passed by Congress in ways that Congress never intended. In the D.C. circuit court decision in *American Trucking Association* v. *EPA*, the court concluded that under the non-delegation doctrine, EPA cannot so loosely interpret a statute that it becomes an unconstitutional delegation of legislative power. Unfortunately, the vague qualifications in S. 746 more formally create the means by which an agency can justify its own interpretation of a statute and its choice of regulatory option. Indeed, if S. 746 had been in effect at the time EPA was developing its 1997 tighter air quality standards for particulate matter and ozone, the D.C. circuit court may not have struck them down. At best, the Regulatory Improvement Act would have joined the list of other regulatory accountability statutes like UMRA and SBREFA that were ineffective tools in stopping them.

4. **It lacks effective decision criteria.**

The bill's standard for an agency's decision is: As long as the agency explains it, it can do it. As the U.S. General Accounting Office (GAO) notes, "the centerpiece of S. 746 is its emphasis on cost-benefit analysis for major rules."[23] S. 746 establishes detailed procedures for reporting the benefit-cost analysis and alternatives (keep in mind the potentially narrow set of alternatives or options the bill allows agencies the discretion to include) considered during a rulemaking process. However, agencies are not bound in any way to follow specific decision criteria; the bill only requires that an agency do a better job of explaining the reasoning for making a decision and the options considered, and to make the determination explicit. There is nothing to prevent an agency from issuing a final rule that is "not likely to provide benefits that justify the costs" or to select the option that would fail to "substantially achieve the rulemaking objective in a more cost-effective manner, or with greater net benefits" than other alternatives it considers. Section 623(d)(2) simply requires an agency to include for the record a review and explanation of the alternatives (and their benefit-costs estimates) not considered and why they were not adopted, e.g., for statutory or other constraints.

5. **It creates loopholes to avoid analysis requirements.**

Section 623(f)(1) allows an agency to adopt a major rule without doing the required cost-benefit analysis if the agency finds "good cause" that "conducting the regulatory analysis…before the rule becomes effective is impracticable or contrary to an important public interest," and publishes a notice in the *Federal Register.* If a major rule is adopted without the analysis completed in advance, Section 623(f)(2) states the "agency shall comply…as promptly as possible unless the Director [of OMB] determines that compliance would be clearly unreasonable." As GAO notes, 23 of 122 final rules that were considered "major" under the SBREFA (which includes the Congressional Review Act) and published between March 29, 1996, and March 29, 1998, were issued without previous Notices of Proposed Rulemaking (NPRMs).[24] Thus, it is possible that as much as one-fifth of the final major rules—approximately 10 major rules a year—will never be subject to the initial or final analytical requirements in S. 746.

As GAO concludes, "Congress may want to review the implementation of this part to

23. See U.S. General Accounting Office, *Comments on S. 746—The Regulatory Improvement Act of 1999*, p. 3.

24. *Ibid.*, p. 5.

ensure that the initial regulatory analysis requirements apply to all the rules that it anticipated."[25]

6. **It falls short on risk assessment transparency.**

Section 624, Principles for Risk Assessments, is perhaps the strongest and best part of S. 746, although it is important to keep in mind how few rules will be covered by its requirements. Section 624(a)(1)(B) states:

> Risk assessments conducted…shall be conducted in a manner that promotes rational and informed risk management decisions and informed public input into and understanding of the process of making agency decisions.

However, there are some important ways in which the risk analysis requirements can be improved consistent with this stated purpose. For example:

- **Public Transparency and Input.** Most notably, Section 624(d) states:

> The agency shall inform the public when the agency is conducting a risk assessment subject to this section and, to the extent practicable, shall solicit relevant and reliable data from the public. The agency shall consider such data in conducting the risk assessment.

This language does not suggest a particular point in the risk assessment development process for when the public will be informed, how it would be informed, and whether the agency will disclose to the public sufficient information so that the public can determine what data make most sense to bring to the agency's attention. Agencies should not only ask the public for data, but also provide the public with information about all the relevant data it possesses and intends to rely upon at the time it provides notice to the public. The earlier in the risk assessment process this occurs, the better. Although the Senate Governmental Affairs Committee report notes that this language is to "make the process more transparent and accountable" and reflects the belief that public involvement should occur at all stages of risk management,[26] it is not clear that this information stage must occur earlier than the proposed rule stage when the agency provides the risk assessment as required in initial regulatory analysis outlined in Section 623(b)(2).

- **Substitution Risks.** Unfortunately, Section 621(11) excludes from the definition of risk any "risks attributable to the effect of an option on the income of individuals." The effect of this exclusion is to prevent the use of "health-wealth" analysis. Such analysis seeks to estimate the extent to which a regulatory action may affect health due to income effects triggered by changes in the relative price of a good that is affected by the regulation.[27] For example, if EPA bans a pesticide for use on fruits and vegetables and consumers must then pay higher prices for these items because producers are forced to use higher priced substitutes, consumers may ultimately eat fewer fruits and vegetables, and that will have a negative health effect. S. 746 should allow for consideration of risks triggered by the reduction of income.

- **Comparative Risk Analysis.** Section 624(g) asks agencies to perform comparative risk analysis "when scientific information that permits relevant comparisons of

25. *Ibid.*

26. *Regulatory Improvement Act of 1999*, Senate Report 106-110, p. 43, and footnote 79.

27. Randall Lutter and John F. Morrall, "Health-Health Analysis: A New Way to Evaluate Health and Safety Regulation," *Journal of Risk and Uncertainty,* Vol. 8, No. 1 (1994), pp. 43–66.

risk is reasonably available." A comparative risk analysis is very valuable to help the public understand how its government allocates resources to address risks and whether an agency is "focusing its efforts on the right problems."[28] However, this section does not establish any trigger to ensure that these types of comparative risk analyses are indeed performed by agencies.

7. **It leaves peer review discretion with the agency.**

Section 625 requires peer review for benefit-cost analysis for rules that cost more than $500 million annually, resulting in an even smaller portion of an already tiny set of rules to be subject to this requirement. Although S. 746 does include a requirement that agencies conduct "independent" peer review for required cost-benefit and risk assessments, the way the bill language is crafted allows agencies to determine what kind of review—whether formal or informal—is warranted. In addition, such peer review would not be necessary if the agency and OMB already determined that the rule has been subjected to "adequate" peer review. In the case of EPA's 1997 air standards, both EPA and the White House took the position that the standard had undergone more than adequate peer review; based on the scientific evidence, many in Congress and elsewhere strongly disagreed.

As written, S. 746 appears to do little to prevent such situations from happening in the future and might actually strengthen an agency's position by allowing it to designate a variety of procedures, for reviewing the science that serves as the basis of a rulemaking, as "peer review."

S. 746 also allows peer reviewers to include those individuals who are under contract or receive federal funds from the agency issuing the rule it is reviewing, raising conflict of interest concerns. There is also no requirement in S. 746 that the rule necessarily highlight or discuss the peer review process, or its conclusions, in a way that is easily accessible and understandable to the public. An agency is simply required to make it "available to the public."

8. **It allows each agency to adopt its own analytical guidelines.**

Section 628 requires agencies to develop their own guidelines, consistent with guidelines first issued by OMB, for risk assessment and benefit-cost analysis. Each agency can develop its own benefit-cost guidelines and White House offices, such as OMB, the Office of Science and Technology Policy, and the Council of Economic Advisers, must evaluate these guidelines and work with the agencies to improve them and make them consistent with, although not the same as, OMB's own guidelines. In January 1996, OMB issued a set of "Best Practices" guidelines for preparing an economic analysis—after a two-year review by an interagency group.

A 1998 GAO study examined 20 regulations issued by 5 agencies, between July 1996 and March 1997, to determine the extent to which those analyses contained best-practices elements recommended by OMB.[29] GAO found that agencies could improve the development, documentation, and clarity of their regulatory economic analyses. For example, 6 out of the 20 rules did not assign dollar values to benefits, 6 out of the 20 identified net benefits, and 5 out of 20 did not discuss alternatives to the proposed regulatory action.[30] In a 1997 GAO study, 8 of 23 EPA rulemakings examined did not discuss or explain key economic assumptions.[31]

28. *Regulatory Improvement Act of 1999*, Senate Report 106–110, pp. 44–45.

29. U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation and Clarity of Regulatory Economic Analyses*, GAO/RCED–98–142, May 1998.

30. See U.S. General Accounting Office, *Comments on S. 746—The Regulatory Improvement Act of 1999*, p. 3.

Instead of bringing consistency and clarity to regulatory economic analyses, methods, and reporting by agencies—which could be done by requiring agencies to follow OMB's existing "Best Practices" guidelines—S. 746 would only make the differences across agencies more likely as each agency developed its own guidelines "consistent" with another set of guidelines prepared by OMB. And, if agencies are not using consistent methodologies, their results will not be comparable. This principle is very important if any meaningful form of regulatory accounting is to be conducted or estimates of benefits applied across regulations and agencies for comparable risk.[32]

9. **It allows ineffective judicial review.**

The judicial review language in Section 627 is extremely weak and represents the lowest level of preemptive effect. S. 746 reinforces the fact that it would defer to any underlying organic statute. In addition, if any agency fails to perform the required analysis, a court may, "giving due regard to prejudicial error," remand or invalidate the rule. This language weakens the provision, because it now says that there has to be evidence that the error would have resulted in a different rule all together. Agencies, not surprisingly, would suggest that the error was harmless and a different rule would not have been issued absent the error. In addition, the bill's good cause exemption now allows the OMB Director to determine that it would simply be "unreasonable" to go back and do the required analysis after a rule has been issued. The court, for example, could point to this determination as the basis for concluding that the error would not have resulted in a different rule.

Finally, the provision as modified makes it clear that a rule could not be remanded or invalidated by the court because the underlying analyses were weak. The court would need to determine that the entire rulemaking was arbitrary and capricious. If the benefit-cost analysis was poorly done or some important scientific data were excluded in developing a rule, a court would not conclude that the agency violated S. 746 and, thus, the rule could still stand.[33]

10. **It establishes a transparency double standard.**

Section 633 imposes disclosure requirements on communications between the White House Office of Management and Budget and agencies. As the Senate Governmental Affairs Committee report notes, "this has been an area of particular concern to the Committee for almost 20 years…many in Congress were concerned about guaranteeing the openness of the regulatory review process to instill public confidence and equal access in such review."[34]

OMB must disclose to the public information regarding the status of rules under review, changes made to rules, and communications related to the substance of a rule or contact with anyone not employed within the executive branch of the federal government. The law also would generally require OMB to release rules within 90 days, although the Director of OMB can extend that review time. These requirements might be considered to be an impermissible intrusion by Congress into the prerogatives of the executive branch, notably the ability of the President to communicate with agencies. At a minimum, these transparency requirements reflect a double standard because neither the agencies nor Congress are

31. *Ibid.*

32. For a more detailed discussion, see Susan Dudley and Angela Antonelli, "Shining a Bright Light on Regulators: Tracking the Costs and Benefits of Federal Regulation," Heritage Foundation *Backgrounder* No. 1142, September 30, 1997.

33. For some examples of how the judicial review provision is intended to operate, see Senate Report 106–110, pp. 51–52.

34. *Regulatory Improvement Act of 1999*, Senate Report 106–110, p. 58.

subject to similar requirements. Why should agencies not have to disclose their communications with anyone not employed by the executive branch of the federal government? If OMB is subject to these rules, Congress and the agencies also should be subject to them.

11. **It fails to act affirmatively to expand the public's right to know about regulations.**

Too often, agencies maintain public dockets in Washington to which few people, other than those who can pay to have attorneys pour through the files, have access to see how major decisions are made—most notably, the benefit-cost and risk assessments that represent the major elements of S. 746. The bill would do little to change this process or force agencies to develop other ways to communicate information about rulemakings as early and as much as possible.

What S. 746 does do is require agencies to include executive summaries in their proposed and final rules that explain the analysis behind the decision. However, as history suggests and the GAO has noted, such summaries will probably meet the minimum requirements of the law, but lack clarity and thoroughness, and, ultimately, will not be much help when they appear only in the little known, and little read, *Federal Register*. S. 746 could do a lot more to enhance public accountability and transparency if it took steps to require agencies to take affirmative action to broaden the disseminating information, such as better use of the Internet and through improved and expanded use of the *Federal Register*, to the public and potentially regulated entities.

S. 746 is Fatally Flawed

Together, these flaws in the Regulatory Improvement Act simply put in place a series of requirements that agencies will view as easy hoops they must jump through. The ambiguous language, loopholes, and exemptions only affirm an agency's broad discretion to regulate as it deems necessary. Sadly, then, this bill would simply continue the legacy of "reform" from 1994 that, as the D.C. Circuit Court of Appeals noted in the *American Trucking Association* v. *EPA*, will do little to affect the regulatory decisionmaking process and its outcomes. Agencies will devote considerable time and legal resources (at taxpayer expense) to determine ways to get around the statutory requirements imposed on them. And Congress and the public remain ill-equipped to stop them.

Much more is still needed before this bill will work to improve regulatory decisionmaking and lead to better outcomes that save more lives. The lack of accountability of agencies today will not be effectively addressed by simply codifying more rules that they can easily avoid. The solution ultimately lies in correcting the inherent disadvantage of Congress and the public with respect to making regulatory decisions. Congress and the public have as much a right to debate regulatory priorities and spending as they do the annual federal budget. One way to ensure this happens is to put back effective checks and balances between Congress and the agencies. A good way to start to do this is to refuse to allow the regulators to be evasive, elusive, and secretive about how they make their decisions.

ALTERNATIVE APPROACHES

Congress is considering a number of proposals that would enhance the public's right to know about the decisions regulators make and that would hold them accountable. Ironically, the Administration usually opposes such regulatory right-to-know measures. Rather than debating the merits of S. 746 as currently drafted, Congress should take steps to put real regulatory improvement back on track by focusing on a number of regulatory accountability proposals already introduced in existing legislation. For example, the Senate should consider the Regulatory Right to Know Act of 1999 (S. 59/H.R. 1074) and the Mandates Information Act of 1999 (S. 427/H.R. 350), which have already passed the House of Representatives.

In addition, Congress should take steps to give itself resources dedicated solely to oversight of the regulators. The Truth in Regulating Act (S. 1244)

and the Congressional Accountability for Regulatory Information Act (S. 1198) would establish mechanisms for Congress to analyze and track rules. Congress also should move forward with the very good risk assessment principles in S. 746 as a separate proposal, as Senator Trent Lott (R–MS) proposed in the second session of the 105th Congress in the Risk Assessment Improvement Act of 1998 (S. 1728). These are just a few examples of the proposals being considered in Congress that seek to improve the regulatory system by making it more accountable.[35]

The tyranny of the federal regulatory system can only be ameliorated by injecting true democracy into the process. Federal regulators have little incentive to maximize the dissemination of information and public participation in the rulemaking process because this makes them vulnerable to challenge. For Congress, this ultimately means it must act to give the public a larger window into the world of rulemaking and a seat at the table. Congress must take steps to open up regulators' books to scrutiny, demand more information and analyses, and foster a healthy system of checks and balances where no one party holds all the resources and information.

Today, regulators are increasingly making value judgments about society's needs and priorities. Americans elect representatives who reflect their interests to make those judgments for them. Unlike the citizens of many European nations, Americans have no desire to turn major policy decisions affecting their lives to an elite core of professional bureaucrats who would determine their future, their health, and their prosperity.

CONCLUSION

The Regulatory Improvement Act of 1999 (S. 746) is a compromise between Senators Levin and Thompson and the White House that is fundamentally flawed and will not lead to real regulatory improvement. The exemptions, loopholes, and lack of real judicial review in the bill will leave the vast majority of federal rules untouched by its analytical and reporting requirements. For the less than 1 percent of rules it will cover, S. 746 provides agencies with the opportunity to justify any regulatory outcome while failing to give the public either greater access to information or the legal tools needed to hold agencies accountable. Congress should take a second look at a number of other proposals before Congress that would do much more to put real regulatory improvement back on track.

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35. For a more complete list of legislative proposals, please see the "Congress and Regulation" section of *http://www.regulation.org*.