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Enclosed are comments on the 2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on States, Local, and Tribal Entities. My comments fall into three categories of concerns: clarity; objections; and extensions.

Clarity

The Report itself represents an achievement in clarity and accessibility in government. The Report arms legislators, agency officials, and citizens with at least one important measure of the efficacy of the regulatory state—the cost-benefit analysis (“CBA”). The Report facilitates comparisons and assessment on a common metric across different domains. The Report is careful to state that regulations serve goals other than economic efficiency (although this list is not complete). It is also careful to address some of the concerns about CBA. Notably, the Report discusses the contested role of discount rates in these analyses, assesses effects on future generations, and openly discusses differential effects on disadvantaged groups. Although one can imagine that the Report could go further in addressing these concerns, further discussion would undermine its clarity. Debate on the meaning and shortcomings CBA cannot be settled in such a document. The chief virtue of the Report lies with its use of a single metric, which in fact will facilitate sensible discourse on the virtues of the role that CBA can and should play in guiding the regulatory state.

That said, a few aspects of the Report could benefit from further refinement, so as to facilitate its clarity:

1. The Report indicates that dollar amounts are in 2001 dollars. The Report would be more accessible if the Report used 2010 dollars, unless the use of 2001 dollars in previous reports would facilitate comparisons. This is a small point, as the comparisons across domains are among the more interesting aspects of the Report; so long as the units are constant. Relatedly, the section on the social costs of carbon are listed as being in 2007 dollars, rather than 2001 dollars (as the rest of the Report).
2. The discussion of the social costs of carbon is somewhat hard to interpret. Table 2-1 does not indicate whether the costs it identifies are cumulative or annual. It also does not specify what the source of the costs are. That is common throughout the Report, but unlike the other areas, the nature of the existing regulation and its attendant benefits are more widely understood. Also, this section seems intended to imply that the CBA for carbon regulation (like that of other air quality regulation) would be positive. Hence some indication of the source of the social costs Table 2 identifies would facilitate an understanding of what this section means to suggest for the federal agencies.
3. The Report notes that it relied on the CBA’s conducted by the agencies of the regulations. Variations in methodology undermine the comparability across agencies, even though they are

apt to be inevitable. The Report notes, however, that some of the agencies used different valuations for lives saved by regulation (and possibly different discount rates). It seems that these could be standardized and the CBAs readjusted so that the results are more comparable. This may be some work, and possibly it is not realistic. But reconstructing these analyses with standardized measures would make the results across agencies truly comparable.

4. *“Behavioral Economics” and “Behavioral”*. The Report discusses “behavioral” regulatory interventions at several points. This jargon is used in law reviews and legal scholarship, but only a small group of law professors would have an accurate conception of the term “behavioral” in this context. The broader audience for which this Report is intended would more easily recognize the suggestions if they were labeled with the area of research to which they really belong—which is psychology. The citation and reliance on work by Leventhal and Wansink are in no sense behavioral economics, they are part of research in psychology. The reliance on the term “behavioral” for this work unnecessarily obscures the source of the research on which the Report relies (unless the word “science” appears after it, and even then “social science” would be more accurate). This makes it harder for a reader to evaluate the Report. The consistent use of “economics” in the term also obscures some important aspects of how the phenomena being discussed actually works (I address this further in a discussion of “disclosure” below). If the intended suggestion is that agencies could use benefit from an understanding of a broad array of tools from the social sciences, including standard economics, behavioral economics, and psychology, then it should say so.

Objections

The Report overall seems like a sound work of social science. The objections I list below are small:

1. *Disclosure*. The Report flags disclosure as a potential avenue for low- cost risk regulation. Disclosure might be a valuable way to guide conduct without overbearing regulation in some contexts. But the report does not identify the kinds of contexts in which disclosure would be a valuable substitute for regulation and does not flag the critical importance that the form of the disclosure takes. One could read the Report as suggesting that any form of disclosure in any context would guide behavior in useful ways, but the research on disclosure supports nothing of the sort. Context matters for disclosure. Disclosure is valuable when it provides a focal point or plan to facilitate individually beneficial conduct. For example, prominent nutritional information (such as calorie listings on menus) can facilitate healthier dietary choices. Other factors, such as the frame of a disclosure (as suggesting a gain or a loss) and its salience also have been shown to matter enormously. Furthermore, evidence that disclosure provides as consistently useful mean of constraining businesses from imposing negative externalities on society (such as pollution) is lacking. Disclosure regimes like California’s proposition 65 and the Federal Emergency

Planning Community Right to Know Act rely on a kind of shaming regime, in which they hope that companies would rather reduce their harmful activities than report them. This regime arguably works only on the lowest level polluters who are responsive to concerns about reputation. I the point of flagging disclosure as a regulatory mechanism is to guide agencies, the Report should do more to indicate the kinds of disclosures and kinds of circumstances that facilitate desirable behavior.

It would be unfortunate if the Report's praise of disclosure regimes produces an overuse of disclosure. Its overgeneralization of the venerable Leventhal study on information disclosure provides a case in point for the difficulties of the Report in this regard. On the one hand, as the Report correctly notes that the Leventhal study shows that merely providing information might have little effect on behavior. This conclusion comprises the Report's only indication that the form of discloser is critical. But the Report misinterprets the conclusion of the study, somewhat. In the study, providing a map to the campus health care center (which the Report flags as significant) and requesting that students review their weekly schedule so as to identify when they would be near the center increased vaccination rates. The Report flags this study as an example of how providing clear guidance facilitates beneficial behaviors, but contemporary research on procrastination by Ted O'Donohue suggests that the review of the schedule and suggest of forming a concrete plan, more so than the explicit guidance of a map, increased vaccination rates. My concern is that the Report is making disclosure seem like an easy mechanism for channeling behavior—but it is not. The efficacy of disclosure is highly contextual, and hard to predict. Agencies should not take this Report as a green light for substituting disclosure for regulation absent clear empirical evidence on the efficacy of the disclosure regime that they are contemplating.

2. *Statistical Ranges.* The Report's reliance on ranges of estimates helpfully avoids the illusion of precision that point estimates can convey. The use of ranges has two problems, however. The first (which could have gone under clarity) is that it is not entirely clear to what the ranges correspond. They seem to be taken directly from the agencies that provided the estimates, but what are they? Are they 95% confidence intervals? Do they represent a "best and worst case" scenarios, and if so, how did the agencies decide what constituted a best or worst case? Do they reflect highly conservative assumptions in opposite directions? In general, it was hard to get a feel for the meaning of these ranges. How confident is OMB that these ranges are accurate? How comparable are the range estimates across agencies (are some agencies more or less conservative that the true costs and benefits lie within the ranges).

The Report uses overly simplified methods of combing the ranges into overall estimates of the costs and benefits of regulations. Whatever the source of the ranges for CBA estimates from the agencies, it is clear that some notion of probabilities underlie the end points. Implicit in the range (and explicit if the range reflects a 95% confidence interval) is that the true value is more likely to lie in the middle of the range than near the end points. This means that the combination of these ranges is much too broad.

For example, consider Table 1-1's report that the sum of 6 rules adopted by the Department of Agriculture has a low-end estimate of just under a billion dollars. The Report indicates that this range represents the sum of the low end estimates of the 6 rules. If each range reflects a 95% confidence interval, and each estimate is independent (an unlikely assumption), then the likelihood that the true sum of benefits is a billion dollars or less is less than 1 in 50 million (0.05 to the sixth power). In effect, although ranges are intended to convey a measure of uncertainty, when summed, they present too much uncertainty. Furthermore, the degree of uncertainty depends upon the number of aggregations, making it hard to compare across agencies. Even if the ranges are not calculated as statistical confidence intervals, they almost certainly carry the same essential property that creates this problem (that is, that the extremes are less likely to be true than the middle).

There is no easy cure for this difficulty because the estimates are almost certainly not independent and because not all of the ranges consist of confidence intervals. The same agencies likely use similar methods, and hence factors that suggest the true estimate of costs or benefits is on the high or low end of the range might be true for several of the estimates. Even if the estimates are correlated, the aggregation problem in the previous paragraph remains unless they are perfectly correlated (which is also not likely). Hence, identifying a reasonable aggregated range across several rules might not be possible. This problem admits of no easy answers, but the simple solution of simply adding is not apt to be sensible without further elaboration.

3. *Childhood Obesity*. The section on childhood obesity identifies an important social issue, but it is not clear why it is included in a Report on federal regulations. The section identifies no regulations that have either ameliorated or exacerbated the situation. The reader is left to wonder it is meant to trigger any particular regulatory undertaking. Regulations dealing with school lunches and nutrition or with agricultural subsidies come to mind, but are not identified. One can also imagine converting the work on portion size by Brian Wansink into regulations addressing portion size, but again, the Report fails to make a link between the research and specific regulatory suggestions. The reader should not be left in the dark as to why this section is here.

4. *Examples*. The Report indicates that agencies have increasingly relied on what it calls "behavioral" interventions that reduce regulatory costs. That is an exciting claim, but the Report does not provide any examples, making it hard to evaluate the claim. Are there any specific examples of regulations crafted since last year's report that fit this description?

5. *"Behavioral" Versus Empirical*. The Report lauds the potential for behaviorally informed regulation to facilitate regulatory efficacy. But given the highly contextual nature of some of what the Report calls behavioral interventions, it is difficult to have confidence that the phenomena that the Report relies upon translate neatly into efficacious interventions. The only way to be certain is to have data. The better message of the Report would be that the public would be better served if agencies adopt a broad-minded approach to the social sciences, rather than a narrow focus on economics, and rely on (or support) context empirical test of the efficacy

of the interventions that they propose. A behavioral approach, in short, should facilitate the reliance on empirical testing of the efficacy of agency programs, rather than simply substitute armchair psychological theories about efficacy for economic ones. It would be better for the Report to endorse reliance on hard data, and not simply endorse behavioral economics.

Extensions.

Two extensions of the reasoning in the Report would enhance the value of the document greatly.

1. *When Costs Outweigh Benefits.* The Report should offer an account of what explains the existence of those regulations that would seem to fail a CBA? Executive Order 12,866 would seem to prevent such rules from ever getting any traction in the regulatory process. While the Report notes that distributional issues can also support regulations, even when a CBA does not, at least two of the regulations that fare poorly in CBA also do not seem to arise from distributional concerns—that of roof crush resistance and (possibly) that of refuge alternatives for underground coal mines. Standard accounts of regulation offer several explanations for regulation other than efficiency and distribution as well. These should also be noted in the Report perhaps, and it would be useful to attend to the anomalies, such as the two flagged.
2. *Process.* Does the data in the Report allow for any systematic statement about the relationship between the means by which a rule gets crafted and its efficiency? Do Rules crafted by the independent agencies tend to fare worse on CBA than those crafted by the executive branch? How many of the rules were promulgated subject to an exception to the notice and comment process? While a reader could derive some of this from the data in the Report, the Report would be a more useful guide to regulation if it could address some of the issues of what might be learned from its assessments about the process of regulation.