HASTE MADE WASTE:
THE HEALTH CARE LAW'S RUSHED REGULATIONS

The Patient Protection and Affordable Care Act (ACA) is generating numerous new regulations that will have a significant impact on the way Americans access health care. But a new Mercatus Center study finds that in 2010, in the rush to implement key provisions of the ACA, the federal government used a fast-track process of regulatory analysis that failed to comply with its own standards, and produced poorly substantiated claims about the ACA's benefits and costs.

In the study, entitled "Beware the Rush to Presumption," a team of regulation and health care scholars examined the quality and use of the regulatory analysis published with eight interim final rules issued under the ACA in 2010.[1] In reviewing the regulatory analyses, Jerry Ellig and Chris Conover utilize the regulatory analysis criteria of the Mercatus Center's Regulatory Report Card and commonly understood benefit and cost information used by health care economists and policy experts. The rules examined include nearly all of the law's major components scheduled to go into effect prior to 2014.

This study includes three papers; below is a brief overview of the key findings. To read the study in its entirety and learn more about the authors, please click here.

WHY REGULATORY ANALYSES MATTER

The regulatory analyses for the eight rules fail to provide a reliable measure of benefits, costs, or even "fairness." Based on the analyses, it appears the federal government does not know the rules' likely effects on the economy, or even whether the rules will improve Americans' health care.

Material Omissions. This paper compares the regulatory impact analyses of the ACA interim final rules with categories of benefits and costs commonly considered by health care economists and policy experts.

- The analyses usually underestimated costs, in some cases by billions of dollars; overestimated the number of people who would benefit; and presented no monetary estimates of benefits.
- When the Mercatus scholars combined more realistic estimates of the number of beneficiaries with monetary benefit figures from the health economics literature, they found the analyses implicitly misestimated benefits by amounts ranging from tens of millions of dollars to more than one billion dollars.
    - For the "Dependent Coverage for Children up to Age 26" rule, benefits appear understated by $218 million overall, while costs were understated by at least $875 million annually.

[1] The ACA interim final rules reviewed are: *Early Retiree Reinsurance Program*; *Dependent Coverage for Children up to Age 26*; *Grandfathered Health Plans*; *Preexisting-condition Exclusions, Limits, and So Forth*; *Coverage of Preventive Services*; *Claims Appeal and External Review Processes*; *Preexisting-condition Insurance Plan*; *and Medical Loss Ratio Requirements*.

    - For the "Early Retiree Reinsurance Program" rule, costs were underestimated by $9-$10 billion over four years. More accurately calculated benefits might have been about one-third as high as estimated.
- The analyses often ignored obvious alternatives.
    - For the regulation on "Claims Appeals and External Review Processes," no alternatives were considered, even though at least three options are already in use: state laws that are more restrictive, state laws that are less restrictive, and review processes mandated for self-insured plans under the Employee Retirement and Income Security Act.
- The rules offer only superficial assessments of "fairness" when they mention it at all. None offers an explicit definition of fairness grounded in an articulated theory of justice or equity.

Substandard Regulatory Analyses. This paper finds that the quality and use of analysis for the ACA interim final regulations falls well below that of conventional notice-and-comment rulemaking by other agencies, including the Department of Health and Human Services (HHS).

- The Problem is Institutional. The poor quality of analysis in the examined ACA rules is comparable to the quality of analysis that accompanied a series of interim final homeland security regulations issued by the Bush administration following 9/11. This suggests that institutional, rather than partisan, factors explain why the quality of regulatory analysis declines when agencies implement significant presidential priorities on short deadlines.

Public Choice Analysis. Supreme Court Justice and former Clinton policy advisor Elena Kagan documented how President Clinton initiated the practice of directing high-priority rulemakings from the White House.[2] Subsequent presidents have followed suit. This practice, plus tight legislative deadlines, tends to create a perfect storm for flawed analysis.

- The regulatory analysis behind the ACA rules is worse than the analysis that goes into most economically significant federal regulations, is worse than most analysis done by HHS for other rules, and fails to meet standards established in executive orders and OMB guidance for regulatory analysis.
    - Congress placed tight deadlines (3, 6, 9 months) on the agencies to guarantee that the rules would be enacted quickly. Tight deadlines meant that major rules with significant economic repercussions were reviewed by the Office of Information and Regulatory Affairs (OIRA) for an average of five days (some less), when the typical average for economically significant rules was 27 days in 2009 and 56 days in 2008.
- When the White House writes rules, it is extremely unlikely that OIRA could return them on the grounds of poor analysis.

CONCLUSION

The significant flaws identified in the regulatory analyses published with the eight ACA interim final rules demonstrate the need for regulatory reform to ensure that agencies can and do produce quality analysis, and that the analysis is then used for making decisions about regulatory policy. For more on the need for regulatory reform, please see "Regulatory Overload" and "Ready, Fire, Aim! A Foundational Problem With Regulations."

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[2] Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2,246–385.