

Smart Regulation for the Innovation Economy

Introduction

President Biden has committed his Administration to mobilizing American talent, ingenuity, and manufacturing prowess to rejuvenate the U.S. economy, create jobs and opportunity for all Americans, speed the transition to a lower carbon energy future, and ensure the United States remains at the forefront of global innovation. Business Roundtable has long shared these goals, and their importance is now even more pronounced as America rebuilds its economy after the pandemic-induced recession. BRT stands ready to work with President Biden to increase opportunity and support investments in infrastructure, innovation, education, and public health.

To see these commitments through, the Biden Administration must prioritize efforts to modernize the permitting and regulatory system. To meet the President's targets of carbon pollution-free electricity by 2035 and an electrified vehicle fleet will require a massive amount of new public and private sector investment. America will need to electrify its transportation sector, substantially expand its use of renewable sources of energy, and connect these new resources to population centers. And as the pandemic has shown, broadband access must be extended to provide underserved communities with equitable educational and economic opportunities.

Achieving these goals requires a predictable and expeditious permitting system in which reviews take two years, not five. Recent bipartisan reforms to the permitting process — including the Federal Permitting Improvement Steering Council, established under the Obama-Biden Administration — can help realize these objectives faster. BRT urges the Biden Administration to preserve and extend these reforms.

Building a more equitable economic future for Americans also depends, in part, on a governing approach that is flexible enough to adapt to changing economic circumstances — changes that have been accelerated by the pandemic. The Biden Administration's success will depend on enacting policies that are designed to promote job creation and equitable growth without delay. Indeed, the regulatory landscape is just as important in shaping the future economy as are tax, fiscal, and monetary policy.

To be clear, Business Roundtable CEOs do not oppose regulation. On the contrary, BRT understands the importance of rules that ensure a clean environment; secure workplaces; and fair, competitive markets. Instead, BRT advocates for a smarter approach to regulation that delivers for our stakeholders while minimizing harmful effects on innovation, economic growth, and job creation. More rapid innovation across the economy — particularly in medicine, artificial intelligence, low carbon energy, autonomous vehicles, cybersecurity, data privacy, and robotics — is the key to 21st

century American prosperity. However, achieving the breakthroughs that are needed will require regulators to quickly recognize emerging issues, seek input from experts, act in a coordinated and judicious manner, and maintain flexibility and the willingness to change tack as markets mature.

The President has made clear his goal to modernize regulatory review, particularly to reflect new developments in scientific and economic understanding and to address distributional effects. Business Roundtable supports this effort and believes it also presents an ideal opportunity to address other recommendations presented here.

This document describes the progress made by past administrations to promote innovation via regulatory and permitting process improvements and explains how the Biden Administration can build on this progress in the years ahead.

Our recommendations focus on (1) adapting infrastructure permitting to 21st century timetables, (2) improving the regulatory process to foster innovation and economic opportunity, and (3) strengthening international regulatory cooperation.

I. Adapt Infrastructure Permitting to 21st Century Timetables

The Biden Administration has ambitious goals for modern, sustainable infrastructure investment in 2021, from traditional projects like improving roads and electricity grids to innovative investments in universal broadband and clean energy technologies. Business Roundtable wholeheartedly supports these priorities, which are essential to combatting climate change and increasing economic opportunity for all Americans, especially those hit hardest by the pandemic.

To meet these infrastructure goals, it is essential that the Biden Administration reaffirm and strengthen the federal government's commitment to reforming the permitting process, which began under the Obama Administration. Like any major infrastructure project, sustainable energy infrastructure projects require federal permits and reviews, and the permitting process often takes years. Recent permitting reforms have moved in the right direction and have shortened the review process for some projects from an average of 4.5 years to 2 years.¹ These reforms have enabled the expedited approval of several clean energy projects, but more improvement is necessary. It is vital to move quickly, so that these projects can provide a stimulative effect for the post-pandemic economy and facilitate the transition to cleaner energy to combat climate change on the timeline that this urgent issue demands.

Three recent actions — FAST-41, Executive Order 13807, and a 2020 rule from the Council on Environmental Quality (CEQ) implementing the National Environmental Policy Act (NEPA) — improve and accelerate the permitting process. These actions complement bipartisan legislation, enacted earlier, addressing surface transportation and water resources projects. While the Biden Administration has revoked E.O. 13807 and has indicated its intent to scrutinize the CEQ NEPA rule, Business Roundtable urges the Administration to preserve the most important parts of these actions. These include expeditious review, multi-agency coordination, dispute resolution processes, and the "One Federal Decision" framework, each of which is critical to achieving the Administration's sustainable infrastructure goals.

FAST-41

Title 41 of the bipartisan Fixing America's Surface Transportation (FAST) Act, which President Obama signed into law in 2015, significantly improved the efficiency of the review process for major infrastructure projects.² It established the Federal Permitting Improvement Steering Council, which includes representatives from different agencies responsible for environmental review, thereby improving interagency coordination. The Permitting Council is headed by an Executive Director appointed by the President. FAST-41 also codified the federal Permitting Dashboard, a centralized database of current infrastructure projects, the relevant agencies associated with a project's approval, and the status of the project.

In general, a project qualifies for FAST-41 if it involves infrastructure construction in energy production (including renewable energy production), electricity transmission, surface transportation, broadband, or manufacturing, among other sectors. The project must require federal environmental review, be subject to NEPA, and either (i) involve a large investment (more than \$200 million), or (ii) require approvals by more than one agency or preparation of an environmental impact statement.³ Participation in the program is voluntary, but it comes with substantial benefits, including faster approval times.

The Permitting Council established under FAST-41 has produced measurable progress. According to the latest data from the Council, the average completion time for environmental impact statements for covered projects to date under the FAST-41 process is now 21.5 months (1.9 years) from Notice of Intent (NOI) to Record of Decision (ROD).⁴ This is a dramatic improvement over the normal process: between 2010 and 2018, the process averaged 4.5 years,⁵ and Federal Highway Administration projects took over 7 years.⁶ Moreover, major projects reviewed and approved include innovative solar energy (including the largest solar power facility in the U.S.),⁷ wind energy,⁸ and flood mitigation projects,⁹ among others. The achievements of the bipartisan FAST-41 process demonstrate that infrastructure project permitting can be done more efficiently and expeditiously without compromising environmental safeguards.

To ensure the continued success of FAST-41, the Biden Administration should first name a Permitting Council Executive Director and empower him or her to build on the Council's recent successes. The Administration also should work with Congress to lift the sunset on FAST-41, currently scheduled for the end of 2022, so that the legislation becomes a permanent part of streamlining the federal permitting process.¹⁰ Congress should act immediately to address FAST-41's sunset, as it is already deterring project sponsors from opting into the process. Finally, the Administration should raise the visibility of the Council within the government, for example by ensuring that agency deputy secretaries regularly participate in its deliberations. Firm commitments to FAST-41 reforms could ensure that infrastructure projects initiated this year are authorized during the Biden Administration's first two years.

Executive Order 13807

Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," expanded on the FAST Act reforms enacted during the Obama Administration.¹¹ It effectively extended the reforms codified in FAST-41 to multi-agency environmental reviews of all projects, without a dollar threshold.¹² E.O. 13807 set up a presumptive

two-year goal for environmental reviews, created a mechanism for coordinating multi-agency reviews, and established a dispute resolution process. It also introduced “One Federal Decision,” a concept through which all agency environmental impact reviews are consolidated into a single document.

This past year, environmental review was completed for a major solar energy project via the expedited process laid out in E.O. 13807, taking less than two years from NOI to ROD. The process could have lasted years longer without these reforms: the project was reviewed by the Bureau of Indian Affairs (BIA), whose projects typically take more than five years from NOI to ROD.¹³

The Biden Administration rescinded E.O. 13807, instructing the Office of Management and Budget and CEQ to “jointly consider whether to recommend that a replacement order be issued.”¹⁴ Business Roundtable strongly encourages the Administration to reinstate the two-year goal, multi-agency coordination requirements, dispute resolution processes, and “One Federal Decision” framework. These mechanisms greatly increase the chances of success of the Administration’s clean energy infrastructure projects and other priorities.

2020 CEQ NEPA Rule

In July 2020, CEQ significantly updated its NEPA implementation regulations for the first time in more than 40 years.¹⁵ The CEQ NEPA rule codifies many significant bipartisan legislative reforms that have been enacted over the past decade by incorporating into the NEPA regulations the presumptive timelines, coordination of reviews, and dispute resolution mechanisms included in these statutes as well as E.O. 13807. As with FAST-41 and E.O. 13807, these changes make the infrastructure permitting process more simple, predictable, efficient, and transparent. Business Roundtable supports most aspects of this rule, as BRT articulated in comments on the proposed rule.¹⁶

The CEQ NEPA rule will significantly improve the process of beginning new projects and make it easier for the Biden Administration to meet both its infrastructure and environmental goals. The rule did generate political controversy, primarily due to concerns that some of its provisions were intended to prevent or diminish consideration of climate change. (Business Roundtable did not endorse these provisions.) But the bulk of the rule simply updates the rules to implement mechanisms — like joint Environmental Impact Statements and RODs — that have been widely endorsed.¹⁷ The Biden Administration can easily address specific concerns about the rule through targeted updates and might even consider requesting Congress to clarify NEPA’s intent in certain regards. BRT is optimistic, however, that CEQ’s review will conclude that the 2020 rule, along with FAST-41 and the streamlined permitting process described in E.O. 13807, is a necessary prerequisite to improving infrastructure on a large scale and expediting the clean energy transition.

II. Improve the Regulatory Process to Foster Innovation and Economic Opportunity

Innovation has long been America’s “secret sauce” that drives growth, provides economic opportunity, and ensures global competitiveness. Unsurprisingly, innovation has been at the core of our collective efforts to carry on despite the pandemic, as evidenced by the exponential growth of food, grocery, and beverage delivery apps, as well as the rapid growth of digital healthcare offerings — to say nothing of the record-speed development of multiple highly effective COVID-19

treatments and vaccines aimed at overcoming it. Some of these innovations have been facilitated by increased regulatory flexibility, which has stimulated discussions regarding whether and how to maintain regulatory flexibility in a post-pandemic world.¹⁸ This sentiment is echoed in the Obama Administration's E.O. 13563,¹⁹ which states that agencies should "identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public."

President Biden's memorandum entitled "Modernizing Regulatory Review" reaffirms both E.O. 13563 and its Clinton Administration predecessor, E.O. 12866.²⁰ Business Roundtable was pleased to see this recognition of the importance of regulatory flexibility. The response to the pandemic demonstrates how smart regulation can reduce regulatory barriers to the kind of innovation needed to drive equitable growth while still achieving intended regulatory outcomes, such as mitigating climate change and addressing other major challenges.

Barriers to Innovation

Federal agencies play an important role in creating a regulatory climate that promotes innovation. For example, they can provide a system of intellectual property rights, conduct or facilitate research and development (R&D) efforts, provide the infrastructure necessary to support innovation (e.g., assigning spectrum for wireless networks), or remove barriers to entry for new products and processes. However, federal agencies can unintentionally limit innovation if their regulations and guidance are too costly, too vague or unpredictable, or poorly timed.

- **Cost-Effectiveness:** Regulations always involve costs. Some of these costs are experienced by regulated businesses, as they divert investment from R&D toward regulatory compliance. But costs are also incurred by other businesses up and downstream of regulated entities, or by the public at large. Often, the benefits of a regulation outweigh these costs. However, regulatory programs differ dramatically in their cost-effectiveness.²¹ Additionally, certain types of regulatory design (e.g., market mechanisms) offer efficiencies over others (e.g., prescriptive command-and-control). More efficient regulations allow for greater investments in innovation.
- **Uncertainty:** When regulatory requirements are unclear or unpredictable, businesses delay investment decisions, including investment in innovation. High policy uncertainty, coupled with variable profitability of investment options, stifles innovation.²² For example, autonomous vehicles (AVs) have faced significant regulatory uncertainty for years. The Federal Motor Vehicle Safety Standards (FMVSS),²³ which lay out safety regulations governing all motor vehicles, speak generally of "drivers" and "operators." Not only is it unclear how the FMVSS regulations apply to autonomous vehicles, but states also differ in their interpretations of how their laws apply to AVs. This uncertainty has curbed investment in an innovative new industry.²⁴ For AVs and other emerging technologies, regulators should clarify requirements and avoid creating or perpetuating uncertainty.
- **Delayed Final Rules:** Sometimes regulatory issues are not resolved on any reasonable timetable. It is not unusual for a final regulation to be issued years after a proposed rule, and a few remain pending a decade after proposal. For example, in 1998 the EPA proposed the NSPS YYY regulation, which would specify performance standards for new sources of air pollution for certain chemical manufacturers.²⁵ More than 20 years later, this proposed

regulation has never been finalized, nor has EPA indicated whether it ever will be. Proposed regulations that are not finalized within a reasonable period have a chilling effect on investment and innovation in the sector where regulation is anticipated.

To promote innovation and achieve policy goals, the federal government must consider each of these three concerns — excessive cost, uncertain requirements, and inordinately long delays — when promulgating or amending regulations. To this end, the Biden Administration should follow and expand upon best practices laid out in Clinton- and Obama-era executive orders governing the regulatory process, discussed next.

Enhance and Extend Clinton and Obama Administration Executive Orders

For decades across administrations of both parties, agencies have been required to follow a robust process when issuing regulations, particularly those that are determined to be economically significant.²⁶ The core framework of the modern regulatory process was established in 1993 by E.O. 12866 and later supplemented by OMB Circular A-4 (2003). The Obama Administration expanded on this framework in E.O. 13563 (2011), which declares the following principles:

Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.²⁷

Business Roundtable wholeheartedly endorses each of these principles. BRT was encouraged when President Biden reaffirmed them on his first day in office through the issuance of his Presidential Memorandum on Modernizing Regulatory Review. A sound regulatory process helps agencies avoid arbitrary decisions and leads to higher-quality rules that achieve their intended policy objectives and can withstand judicial scrutiny. A process supported by judicial review also helps to assure a minimum level of quality and rationality in regulatory actions regardless of the administration issuing them. While every incoming administration has specific policy priorities, U.S. interests are not served by a whipsaw of regulatory actions and retractions. The key is to ensure that a rational, evidence-based, transparent, and accountable regulatory process is in place, and to follow that process. The Biden Administration has a prime opportunity, as it revisits the principles and processes that govern regulatory review, to ensure that our federal government has a regulatory process that benefits all Americans.

The core tenets of producing high-quality rules include:

- Identifying a compelling public need for new regulatory action;
- Engaging the public through the notice-and-comment process;
- Assessing the costs and benefits of a proposed regulatory action and reasonable alternatives

in an objective, transparent and reproducible manner using the best available scientific, technical, and economic information;

- Selecting a regulatory alternative only if its benefits justify the costs; and
- Reviewing the real-world effects of the most important regulations to ensure they are producing the net benefits envisioned.

The cornerstone of smart regulation is cost-benefit analysis (CBA). A well-conducted CBA ensures that a proposed rule will provide net benefits to society, including a careful accounting of how a proposed rule would likely affect innovation and other economic considerations. Recently, the Supreme Court has clarified that consideration of costs and benefits, where permissible, can be necessary for a rule not to be considered arbitrary and capricious.²⁸ As economists Michael Livermore and Richard Revesz wrote in a recently published book on the regulatory process, “rules that were adopted [during the Obama Administration] on the basis of sound evidence and careful reasoning have proven more difficult to undo. Based on this lesson, it may seem obvious that the best course of action is to . . . integrate cost-benefit analysis with a progressive regulatory agenda.”²⁹

The President’s memorandum on Modernizing Regulatory Review calls on OMB, informed by public engagement with relevant stakeholders, to develop a set of recommendations for updating and improving the regulatory review process:

- The memorandum recommends an update to Circular A-4 “to ensure that the review process promotes policies that reflect new developments in scientific and economic understanding, fully accounts for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects.” Like E.O. 12866, Circular A-4 has proven to be remarkably durable. But it is more than seventeen years old and could benefit from an update. An updated circular could address newer scholarship on quantifying benefits and costs, assessing benefits that are unquantifiable, and appropriate discount rates. Any revisions should be subject to public comment and peer reviewed, as occurred with Circular A-4.
- OMB is also tasked with proposing “procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.” E.O. 12866 identifies “distributive effects, and equity” as elements of net benefits, and Circular A-4 addresses distributional effects. Regulations that have net benefits nationally can potentially have severe negative impacts on particular geographic or demographic communities, and these impacts often have not received adequate attention. Assessing and acting upon distributional consequences is complicated,³⁰ though that is not a reason not to try. It is crucial, however, that any recommendations require rigor and comprehensiveness so that good policy is not skewed by unrepresentative anecdotal information.

OMB could encourage agencies to conduct active and culturally competent outreach to affected communities of interest to assess distributional effects. But OMB should not heed calls for it to systematically weigh input from regulated businesses less than input from other groups — an approach that would likely violate the Administrative Procedure Act.

- The memorandum asks OMB to “consider ways that OIRA can play a more proactive role in partnering with agencies to explore, promote, and undertake regulatory initiatives that are likely to yield significant benefits.” When he was OIRA Administrator, John Graham issued several “prompt letters” urging agencies to take actions, including initiating rulemakings, regarding recognized problems within their jurisdictions. Under the Biden Administration, OIRA’s expertise in identifying and assessing costs and benefits could be helpful to agencies (including independent regulatory commissions) in determining the optimal actions they could take to address compelling problems. Such consultations should bear in mind the principles articulated in E.O. 12866, including assessing alternatives to direct regulation.
- Finally, the memorandum directs OMB to “determine an appropriate approach with respect to the review of guidance documents.” This is an area of broad agreement, as the recently revoked Trump Administration E.O. 13891³¹ largely duplicated OMB’s “Bulletin for Agency Good Guidance Practices,”³² which dates from 2007 and is still in effect. Business Roundtable urges the Biden Administration to reaffirm three key elements of these directives: nonbinding language, public notice and comment on draft significant guidance documents, and agency web portals that contain all currently effective guidance documents.

Long-Standing Bipartisan Recommendations for Improving the Regulatory Process

While existing executive orders and agency guidance provide a sound basis for producing smart regulation, current policy could be improved in several respects not addressed in the President’s recent memorandum. Improvement opportunities include a stronger commitment to early notification and public comment; better preparation for conducting retrospective reviews; holding independent regulatory commissions to the same standard as other agencies; and avoiding duplication and reducing fragmentation and overlap through improved agency coordination.

- **Stronger commitment to early notification / public comment.** Engaging the public early in the regulatory process is a longstanding best practice. EO 13563 states that “before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are...potentially subject to such rulemaking.”³³ Business Roundtable has long supported requiring agencies to publish a “notice of initiation” when they commence a major rulemaking to allow stakeholders to provide agencies with suggestions about how to achieve their regulatory goals most cost-effectively. Other approaches, such as requests for information, public meetings, or Advance Notices of Proposed Rulemakings, can also inform agency decision-making and have been used in recent years to assist agencies in crafting rules.³⁴ Bipartisan legislation introduced in previous Congresses has contained this approach and, if enacted, would improve public engagement on major rulemakings.³⁵

While NPRMs are important, key decisions, including the stringency of a proposed regulation or whether a non-regulatory approach could address the relevant market failure, have often already been made by the time an NPRM is published. A commitment to engaging the public earlier in the regulatory process can prevent agencies from getting too far down a particular path that may, based on public comment, prove to be unnecessarily costly or unworkable, and can help agencies optimize their approach when doing so is easier and cheaper.

- **Better preparation for conducting retrospective reviews.** While effective regulation is a necessary part of a well-functioning government, the steady increase in the number of regulations on the books underscores the importance of retrospective review, in which agencies periodically review select regulations to determine how well these regulations accomplish the goals they were intended to accomplish. The current regulatory process requires agencies to justify a major regulation using an *ex-ante* cost-benefit analysis that projects large societal net benefits. But agencies should also periodically analyze the realized costs and benefits (including employment effects) generated by the regulation using an *ex-post* analysis. Have the problems these rules were intended to address been solved — or have they changed? If the problems remain, could they be addressed more effectively, or more cost-effectively?

Every presidential administration in the last three decades has called for agencies to conduct retrospective reviews of existing regulations.³⁶ But these efforts have historically achieved relatively little, as agencies rarely reassess existing regulations to determine whether they are still necessary. Part of the reason for this failure are simple matters of resources or habit. But the key problem is that retrospective review typically involves agencies having to develop surveys or other tools to identify and assess impacts after the fact. The easier, cheaper and more defensible approach would be to have a plan in place, when a rule is promulgated, that identifies metrics and data collection strategies to evaluate the effects of the regulation.

Such a “prospective” retrospective review approach enjoys broad bipartisan support, from former Obama Administration officials Cass Sunstein and Michael Greenstone to environmental law experts Michael Livermore and Richard Revesz.³⁷ Richard Morgenstern,³⁸ of the environmental research nonprofit Resources for the Future, describes a consensus among policy analysts that “future regulations should be designed in ways that facilitate evaluation of their consequences and thus promote retrospective analyses.”

Developing a retrospective review plan with as many specifics as possible is also consistent with OMB guidance and recommendations from the Administrative Conference of the United States.³⁹ A prospective retrospective review plan should specify the regulation’s objectives; define the metrics the agency will use to evaluate how well the rule accomplishes those objectives; and outline a plan for collecting data on these metrics. These actions will increase the likelihood that a robust retrospective review — a bipartisan goal for several decades — would actually occur.

- **Hold independent regulatory commissions to the same standard as everyone else.** Despite promulgating hundreds of rules over the last two decades, independent regulatory commissions (IRCs), including the Securities and Exchange Commission, Federal Communications Commission, Consumer Product Safety Commission, Federal Energy Regulatory Commission, and Federal Trade Commission, are not required to assess the costs and benefits of these actions. While certain statutes require that certain IRCs consider the economic impact of certain rulemakings,⁴⁰ the requirements in these statutes are generally weaker than executive order requirements for covered agencies and do not require a detailed analysis of proposed rules or a demonstration that a rule’s benefits justify the costs.

Moreover, while existing OMB guidance urges IRCs to quantify costs and benefits of major regulations whenever feasible,⁴¹ in practice they rarely do so.

The general lack of transparency regarding how (or if) the costs and benefits of major IRC rulemakings are assessed has prompted some members of Congress to propose bipartisan legislation that would impose on them the CBA requirements that covered agencies already face.⁴² This approach is supported not just by Business Roundtable, by also by the Administrative Conference of the United States, the National Academy of Public Administration and the American Bar Association.⁴³

However, while action from Congress is preferable, the Biden Administration should exercise its constitutional authority to extend regulatory oversight to IRCs.⁴⁴ Such an action would echo and strengthen President Obama's E.O. 13579, which directed IRCs to "promote ... a regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation" and said IRCs "should comply" with CBA requirements "[t]o the extent permitted by law."⁴⁵ More recently, OMB directed all agencies (including IRCs) to regularly submit to OIRA a list identifying the rules they plan to issue and whether they think those rules will be "major," and instructed them to follow OMB's best practices for conducting cost-benefit analysis to make this determination.⁴⁶

So far, the Biden Administration has not expressly included IRCs in its executive orders or memoranda addressing regulation. However, the Administration did revoke E.O. 13891, which increased transparency and accountability of agency guidance documents, including those issued by IRCs.⁴⁷ Business Roundtable believes this is a step in the wrong direction and urges President Biden to consider re-implementing some of the features of E.O. 13891 in future executive actions and ensuring those and similar actions apply to all regulatory agencies, including IRCs. While it may be appropriate for these actions to accommodate the practical fact that IRCs act through votes of a board or commission rather than a single individual, ultimately IRCs should be held to the same standards of analysis, transparency, and accountability as other regulators.

- Improve agency coordination to avoid duplication and reduce fragmentation / overlap.** Business Roundtable has long recognized that a sound federal regulatory system is critical to protect American consumers and strongly supports this important policy goal. At times, however, multiple federal agencies are responsible for overseeing a given market activity, creating the potential for inefficiency. Such regulatory overlap poses significant challenges to American businesses and can dampen economic activity across the wider U.S. economy. Regulatory overlap increases policy uncertainty, erects new barriers to entry and reduces competitiveness — which, in turn, stifles job creation, innovation and investment. Such overlap can inflict real costs on businesses through repetitive inspections and data collection efforts and is particularly burdensome when agencies issue conflicting rules with inconsistent standards.

Almost every U.S. President since Herbert Hoover (including Presidents Obama and Trump) has recognized such challenges and taken steps to improve regulatory efficiency and

effectiveness,⁴⁸ testifying to the bipartisan nature of this issue.⁴⁹ While BRT recognizes that some progress has been made,⁵⁰ more work is needed to reduce unnecessary regulatory overlap. Legislative action to clarify the jurisdictions of various federal agencies is often the most effective and lasting intervention, but additional executive action can help address the problem. In situations where multiple agencies have responsibility for oversight, it is important to designate a lead regulator (or conduct joint rulemakings). Tools such as memoranda of understanding and interagency working groups can also be helpful. Finally, it is critical to communicate with industry actors using clear guidance in regulatory areas that are prone to jurisdictional overlap.

These actions should be applied in a forward-looking manner to avoid new instances of overlap that may arise as U.S. businesses and entrepreneurs continue to innovate using the latest technologies. Anticipating the potential for regulatory overlap in emerging industries and taking steps to avoid it will help ensure that U.S. businesses continue to serve as global leaders in innovation.

Finally, the Biden Administration should ensure that OIRA is fully empowered to ensure process is followed. When OIRA was created in 1981, the office was authorized to maintain 90 full-time staff members. Staffing levels have fallen by a third since that time: as of FY2020, OIRA comprised 61 full-time equivalents.⁵¹ OIRA plays a key role in ensuring smart regulation, and it is important that this agency be provided with the resources it needs to fulfill its mission.

III. Strengthen International Regulatory Cooperation

The fast pace and global scale of technological innovation present new challenges to the regulatory process. Many of these innovative technologies raise complex questions, including data-related issues like privacy and security, for which regulation has an inherently global effect. Other products and services traded internationally face foreign regulatory regimes that are not fully compatible with U.S. regulations.

Smart, global coherence across regulatory regimes must be achieved through international regulatory cooperation — indeed, such cooperation is crucial to the future global competitiveness of U.S. businesses. Equally important, foreign regulatory regimes must not have extraterritorial effects that can impair the ability of U.S. enterprises to benefit from the opportunities afforded them by U.S. regulations. International regulatory cooperation will also assure better and more consistent protection of confidential business information, thereby strengthening the incentive to invest in innovation.

International regulatory cooperation can take many forms, and the optimal processes for achieving cooperation vary depending on sector, regulatory need and other circumstances. The Biden Administration should adopt a whole-of-government approach to identify and address key differences between U.S. and foreign regulatory regimes. In acting to address those differences, the Administration should be open to choosing those processes that are best for each context, and secure agreement to them by foreign regulators, all while simultaneously modeling smart regulation principles at home that encourage innovation and promote the interests of U.S. businesses abroad.

Four overarching principles should serve as a guide:

- Regulatory globalization and competition.** In a global economy, where international companies operate in many different countries and the costs to comply with differing regulatory regimes are high, the nation with the strictest regulations can effectively preempt others. This phenomenon, sometimes called the “Brussels Effect,” is becoming increasingly common; a well-known example is the European Union’s General Data Protection Regulation (GDPR), which has become the default data regulation across the globe for companies who operate internationally.⁵² The Administration should recognize this increasing development, establish principles and standards for containing and managing it while seeking to avoid market fragmentations, and organize itself to identify and address it through new interagency dialogues that acknowledge the power of these forces. In working with other countries to ensure compatibility, the Administration should prioritize and maintain the regulatory independence of the United States.
- Regulatory system compatibility.** The United States should work with foreign nations and international bodies to streamline their respective regulatory systems and make them more compatible to promote coherence and minimize conflicting requirements — and to prevent, eliminate, or reduce differences that are unnecessary or harmful to U.S. interests. These differences can be as vast as one nation heavily regulating an activity while the U.S. relies on voluntary standards or market forces. But even minor inconsistencies between regulatory systems can make it more difficult for U.S. businesses to operate internationally. U.S. and foreign agencies should engage the public and other stakeholders in developing regulations; make regulations more performance-oriented and accepting of *equivalence* (rather than identity) of foreign regulatory regimes; adopt common approaches to the display of product or consumer information and labeling; implement compatible platforms for industry submission of product information for regulatory review; establish fair and responsive dispute resolution procedures; and coordinate on implementation, post-implementation review, and evaluation of regulations.
- Assessment of regulatory conformity.** Enormous opportunities exist to eliminate differences and redundancies in agencies’ processes for evaluating compliance (e.g., tests, inspections, clinical trials, and certifications) with specific regulations. Even countries with similar regulatory standards can have substantially different enforcement or assessment procedures that, in practice, can disadvantage U.S. businesses. Countries should adopt a level playing field for regulatory compliance assessment. To improve processes for determining regulatory conformity, agencies should rely on relevant international voluntary standards; ensure that the United States is well-coordinated and actively engaged in the development of standards and tools on the global stage; and share compliance information.
- Adoption and promotion of smart regulatory practices.** In developing regulations, agencies across the globe should use the best available information and employ analytical methods and processes that are best suited for assessing the information. Just as importantly, they should engage stakeholders throughout the process to ensure that the issue at hand is adequately understood, that regulation is the necessary response, and that the most efficient and effective regulatory approaches are selected. The United States can be a leader

in promoting this type of smart regulation abroad, by exchanging technical or scientific information or data (including coordinating research agendas and co-funding research); agreeing to rely on common approaches for risk assessment and cost-benefit analysis; evaluating alternatives to regulation; leveraging relevant international voluntary standards as the basis for regulations; and specifying *performance* requirements (rather than design characteristics) wherever possible.

The newest and most innovative technologies are some of the best candidates for international regulatory cooperation, as they do not yet face mature regulation in most countries. Examples include:

- **Artificial Intelligence (AI):** Artificial intelligence (a term that encompasses machine learning or deep learning) refers to systems that use advances in computing and data analytics to approximate human behavior. While the United States has engaged in efforts to set global standards to promote an innovation-focused agenda, China has taken a state-focused approach and the European Union has prioritized privacy and related considerations. These divergent strategies have thus far impeded international coordination and cooperation efforts. The Biden Administration thus has an opportunity to lead the world in regulatory coordination on AI issues.
- **Autonomous Vehicles (AVs):** The burgeoning AV industry capitalizes on innovations in machine learning and applies them to vehicles. The United States currently sits at the forefront of AV innovation, but regulatory variation across states has inhibited the development of a national standard that would serve as the basis for global coordination efforts. Since car markets cross borders, AVs are also a trade issue.
- **Data Regulation:** Data regulation is centered around three interlinking concepts: (1) data protection (i.e., restrictions on how data are handled), (2) data flows (i.e., restrictions on where data can be moved and processed), and (3) data localization requirements (i.e., restrictions on where data is stored). Given the lack of a unifying data privacy regime in the United States, the European Union's GDPR is the primary global standard for businesses with international operations. In addition, data localization requirements are becoming increasingly commonplace, often conflicting with prior U.S. efforts made towards better international alignment. Due to the nature of data and its various uses, regulatory standards are generally non-divisible—that is, a company is likely to adopt a global response to regulation, even if imposed by just one significant regulator. As such, in the absence of a mature U.S. framework, the European Union has become the *de facto* global standard, and the GDPR framework has been exported to non-EU countries and businesses.
- **5G Technology:** 5G networks are next-generation telecommunications technologies that allow for faster speeds, lower latency, and greater connectivity between devices and sensors. 5G dominance is considered a national priority by both the United States and China due to 5G's foundational role in supporting emerging technologies (e.g., AVs and the Internet of Things). This presents a potentially significant obstacle to international regulatory coordination as countries seek to set standards on their own terms. To date, countries have set different standards for the security of 5G infrastructure, with the United States leading the effort to ensure security of 5G components. Given that 5G will provide the foundation for a large and

growing share of global economic activity and critical infrastructure, promoting international interconnectedness and interdependency — and consistent and secure 5G standards and trusted vendors — is critical.

International regulatory cooperation is a non-partisan issue with a long, bipartisan history. It was the focus of E.O. 13609, “Promoting International Regulatory Cooperation,” issued under the Obama Administration. With this executive order, the Obama Administration acknowledged that the differences among regulatory approaches of U.S. agencies and their foreign counterparts may impair the ability of American businesses to export and compete internationally. It tasks the Regulatory Working Group established by Clinton-era E.O. 12866 with coordinating among federal agencies to promote international regulatory cooperation to reduce, eliminate, or prevent such unnecessary differences in regulatory requirements.

Key Components of a New Executive Order on International Regulatory Cooperation

- Establish a whole-of-government approach, requiring that U.S. agencies:
 - Consider in every regulatory context the potential interaction between U.S. and foreign regulatory regimes;
 - Take action, at the earliest possible stage, to ensure consistency and non-interference among U.S. and foreign regulatory regimes; and
 - Communicate and coordinate with their foreign counterparts to establish consistent approaches to regulation and eliminate differences that are unnecessary or harmful to U.S. interests.
- Annually survey domestic stakeholders and report on:
 - Differences between U.S. and foreign regulations that are currently hampering innovation or domestic economic growth or are likely to do so, and
 - Recommendations for how to eliminate or reduce those differences.
- Direct agencies to report to the Regulatory Working Group (RWG) differences between regulations that it administers and foreign regulations that constitute *de facto* trade barriers, slow the development of new technologies, or have extraterritorial application to U.S. businesses.
- Regularly convene meetings of the RWG to develop, implement and update an Action Plan to identify and address key differences between U.S. and foreign regulatory systems.
- Promote emerging technologies by determining and implementing optimal ways of addressing new regulatory issues so as to remove roadblocks to innovation.
- Maintain the regulatory independence of the United States, so that U.S. entities can benefit from the opportunities afforded them by U.S. regulations.

The Obama Administration's executive order was a good start, but the Biden Administration can improve upon it by issuing a new or revised executive order to drive an international regulatory cooperation effort across all agencies. The Administration should take a whole-of-government approach to identifying the potential interaction of U.S. and foreign regulatory approaches and establish consistent approaches wherever possible to prevent, eliminate, or reduce differences that are unnecessary or harmful to U.S. interests. It should also direct agencies to review international regulatory implications during the rulemaking process.

International regulatory cooperation is an urgent issue. It is crucial for the U.S. and its counterparts to get their regulatory frameworks right the first time, because it is far more difficult and time-consuming to make them coherent later. By prioritizing international regulatory cooperation, the Biden Administration can ensure that the United States continues to be a leader in innovation and equitable economic growth.

IV. Conclusion

To achieve its goals for infrastructure investment, clean energy, and economic recovery, the Biden Administration must reform federal permitting and regulatory processes and engage in international regulatory cooperation. Business Roundtable supports these goals and aims to serve as a resource for the Administration as it determines the best ways to modernize and improve the regulatory system, through executive orders, requests of Congress, and agency guidance. Innovation, economic growth and opportunity, and the clean energy transition will all benefit from a move toward smarter regulation.

Endnotes

- 1 See CEQ (2020), [Environmental Impact Statement Timelines \(2010-2018\)](#), p. 8-11, and Permitting Dashboard; [Flowchart for Covered Project Definition](#).
- 2 See [H.R. 22: FAST Act](#).
- 3 See Permitting Dashboard; [Flowchart for Covered Project Definition](#).
- 4 See Permitting Council, [Accountability Scorecard for Q4 2020](#).
- 5 See CEQ (2020), [Environmental Impact Statement Timelines \(2010-2018\)](#), p. 8-11.
- 6 *Id.* at 10.
- 7 See [Desert Quartzite Solar Project](#), [Gemini Solar Project](#), [Yellow Pine Solar Project](#).
- 8 See [Borderlands Wind Project](#), [Chokecherry Sierra Madre Wind Project Phases 1 and 2](#).
- 9 See [Hudson River Rebuild by Design Project](#).
- 10 A fix to the FAST-41 sunset provision was contained in [S.1976 \(116th Congress\)](#).
- 11 See [Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects](#).
- 12 Following issuance of EO 13807, on April 9, 2018, twelve federal permitting agencies, including several independent regulatory commissions, signed a Memorandum of Understanding to streamline permitting by implementing the One Federal Decision framework outlined in the Executive Order; see [Memorandum of Understanding: Implementing One Federal Decision Under Executive Order 13807](#).
- 13 See [Eagle Shadow Mountain Solar Project](#); CEQ (2020), [Environmental Impact Statement Timelines](#) (2010-2018), p. 8-11.
- 14 See [E.O. 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis](#), § 7(b).
- 15 See [Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act](#), 85 Fed. Reg. 43304 (July 16, 2020).
- 16 See Business Roundtable Comments on Proposed Rulemaking, [Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act](#). The new rule also clarifies that actions with only minimal federal involvement or funding are not “major” federal actions if there is not major federal control or responsibility; supports greater use of categorical exclusions where appropriate; establishes presumptive page limits; encourages early engagement with stakeholders during the scoping process to identify relevant issues at the earliest stage of the process to help focus resources on the most important issues; makes a series of changes to accommodate existing and future technology; and codifies key court decisions and guidance that have been issued over the past 40-plus years.
- 17 See Bipartisan Policy Council, [Letter on CEQ’s Update on NEPA Regulations](#).
- 18 See, for example, Kadakia, K., Patel, B. & Shah, A. (2020), [Advancing digital health: FDA innovation during COVID-19](#). *npj Digit. Med.* 3, 161; Lynch, H.F., Dickert, N., Zettler, P., Joffe, S.; Largent, E. (2020), [Regulatory flexibility for COVID-19 research](#). *Journal of Law and the Biosciences*, 7(1), Isaa057; European Medicines Agency (2020), [Global regulators work towards alignment on policy approaches and regulatory flexibility during COVID-19 – update #4](#).
- 19 See [E.O. 13563: Improving Regulation and Regulatory Review](#).
- 20 See [Memorandum for the Heads of Executive Departments and Agencies: Modernizing Regulatory Review](#), 86 Fed. Reg. 7223 (Jan. 26, 2021).
- 21 Economist John Morrall compared 76 regulatory actions across multiple agencies from 1967 – 2001 and identified wide variation in cost-effectiveness. See Morrall III, J. (2003), [Saving Lives: A Review of the Record](#), AEI-Brookings Joint Center on Regulation Working Paper 03-6. According to the OMB 2017 [Report to Congress on the](#)

[Costs and Benefits of Federal Regulation](#), the vast majority of social benefits from regulation are attributable to EPA air regulations.

22 See Ishii, J. and Yan, J. (2004). [Investment under Regulatory Uncertainty: U.S. Electric Generation Investment since 1996](#). Working Paper. Center for the Study of Energy Markets. Berkeley, CA. See Hoffmann, V. et al. (2008), [A Taxonomy for Regulatory Uncertainty—Application to the European Emission Trading Scheme](#), Environmental Science & Policy 11(8):712-722.

23 See National Highway and Transportation Safety Administration, [FMVSS](#).

24 See Carp, J. (2018). [Autonomous Vehicles: Problems and Principles for Future Regulation](#). University of Pennsylvania Journal of Law and Public Affairs. 4(1):81-148.

25 See EPA, [Rule and Implementation Information for Standards of Performance for New Stationary Sources - Volatile Organic Compound Emissions from the Synthetic Organic Chemical Manufacturing Industry Wastewater](#).

26 See Executive Order 12866 (1993), [Regulatory Planning and Review](#), §§ 1(a), 1(b)(6), 6(a)(3); Executive Order 12291 (1981), [Federal Regulation](#), §§ 2, 3.

27 E.O. 13563 (2011) [Improving Regulation and Regulatory Review](#).

28 In *Michigan v. EPA* (135 S. Ct. 2699 [2015]), the Court concluded that the only reasonable interpretation of statutory provisions authorizing regulation where “appropriate and necessary” is to pay “at least some attention to cost,” as well as benefits, adding that “it is unreasonable to read an instruction to an administrative agency to determine whether ‘regulation is appropriate and necessary’ as an invitation to ignore cost” (Id. at 2702-2708). Further, all the justices agreed that “[c]ost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing ‘a standard-setting process that ignore[s] economic considerations.’” (Id. at 2716-2717; citation omitted).

29 Livermore, M; Revesz, R. (2020). *Reviving Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health*, Oxford University Press, p.5.

30 See, e.g., Dooling, B (2021). [The regulatory savvy of Biden's early executive actions](#).

31 E.O. 13891, [Promoting the Rule of Law Through Improved Agency Guidance Documents](#) (Oct. 9, 2019).

32 OMB, [Final Bulletin for Agency Good Guidance Practices](#), 72 Fed. Reg. 3432 (Jan. 25, 2007).

33 Executive Order 13563(2011). [Improving Regulation and Regulatory Review](#); Section 2(c).

34 Administrative Conference of the United States Recommendation 2018-7, [Public Engagement in Rulemaking](#) (Dec. 2018).

35 See, e.g., S. 1419, the “[Early Participation in Regulations Act](#)” (reported on a bipartisan basis by the Homeland Security & Governmental Affairs Committee in May 2019), S. 951, the “[Regulatory Accountability Act](#)” (also reported on a bipartisan basis from the same committee in May 2017).

36 See, for example: President Reagan’s Task Force on Regulatory Relief; President George H.W. Bush’s Council on Competitiveness; President Clinton’s National Performance Review framework; President George W. Bush’s request for public nominations of problematic rules for OIRA review; President Obama’s [Executive Order 13563](#) and [Executive Order 13610](#), requiring covered agencies to submit retrospective review plans; and President Trump’s [Executive Order 13771](#), which requires agencies to rescind two old rules for every new significant rule they issue while ensuring that the cost of the new rule is no higher than the cost of the rescinded rules.

37 See Sunstein, C. (2014), [The Regulatory Lookback](#), 94 Boston University Law Review 579; Greenstone, M. (2009), [Toward a Culture of Persistent Regulatory Experimentation and Evaluation](#), Tobin Project Inc.; Livermore, M; Revesz, R. (2020). *Reviving Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health*, Oxford University Press.

38 See Morgenstern, R. (2017), [Retrospective Analysis of U.S. Federal Environmental Regulation](#), Cambridge University Press.

- 39 Administrative Conference of the United States (ACUS) (2014). Retrospective Review of Agency Rules.
- 40 The Regulatory Flexibility Act, which includes IRCs in its coverage, requires each agency to determine if a rule will have a significant economic impact on a substantial number of small entities, and if so to describe the steps the agency has taken to minimize that impact. See 5 U.S.C. §§ 603-605. Also, the Securities and Exchange Commission, Federal Deposit Insurance Corporation and Commodity Futures Trading Commission are each required to consider the costs and benefits of certain regulations they propose under various statutes, including the Securities Exchange Act, the National Securities Market Improvement Act, the Riegle Act and the Commodities Exchange Act.
- 41 OMB Circular A-4 (2003), Regulatory Analysis.
- 42 See, e.g., S. 181, the “Startup Act” (2015).
- 43 See Administrative Conference of the United States, Recommendation 88-9, “Presidential Review of Agency Rulemaking,” 54 Fed. Reg. 5207 (February 2, 1989), ¶ 2; National Academy of Public Administration, “Presidential Management of Rulemaking in Regulatory Agencies” (January 1987), American Bar Association, Recommendation 302 (August 7–8, 1990).
- 44 The Justice Department’s Office of Legal Counsel recently opined on the constitutionality of such oversight. See “Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies” (Oct. 8, 2019).
- 45 Executive Order 13579 (2011). [Regulation and Independent Regulatory Agencies](#).
- 46 OMB Memorandum M-19-14 (2019). [Guidance on Compliance with the Congressional Review Act](#).
- 47 E.O. 13981 (2019), [Promoting the Rule of Law Through Improved Agency Guidance Documents](#).
- 48 Relyea, H. (2008). [Executive Branch Reorganization and Management Initiatives: A Brief Overview](#). Congressional Research Service Report for Congress; Nakamura, D.; and O’Keefe, E. (2012). [“Obama seeks more power to merge agencies, streamline government.”](#) *The Washington Post*
- 49 For example, the Obama-era [E.O. 13563](#) (2011) states: “Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization.”
- 50 See Business Roundtable (2019), [Reducing Regulatory Overlap in the 21st Century](#).
- 51 Congressional Research Service (2020), [Office of Management and Budget \(OMB\): An Overview](#).
- 52 Bradford, Anu (2012), [The Brussels Effect](#). Northwestern University Law Review Vol 107, No. 1.