

# PARALYSIS BY ANALYSIS

*Jim Tozzi's regulation to end all regulation*

By Chris Mooney

If you stand near the fountain at the center of Dupont Circle in Washington, D.C., and gaze up at the surrounding buildings, you should be able to spot a large brass telescope in a seventh story window above Books-A-Million. The instrument belongs to Jim Tozzi, a former Reagan budget official, well-remunerated corporate consultant, self-described regulatory policy “nerd,” and self-confessed voyeur. The telescope has become a “landmark,” brags the 65-year-old Tozzi, a gleeful cut-up whose “JJT” monogrammed shirt cuffs belie his musician-jive patter. “That can get you in a lot of trouble,” he adds. “I’m a dirty old man. I love it.”

If Tozzi is shameless about his extracurricular activities, he’s equally proud of the work that occupies his daylight hours. As the flamboyant head of an industry-funded, for-profit think tank called the Center for Regulatory Effectiveness, Tozzi has made his career in the decidedly unflamboyant field of government regulation. In the three decades or so since the Environmental Protection Agency, Occupational Safety and Health Administration, and other agencies were formed, industry has become adept both at weighing down the rulemaking process with years of preliminaries and at challenging regulations once promulgated. And for years, Tozzi — thanks to official contacts and regulatory expertise gleaned from two decades in government — has been a master of the game, gumming up the regulatory works and, as he puts it, giving environmentalists and consumer advocates “gastronomical pains.”

But now Tozzi has a chance to change the rules of the game itself. With assistance from the Bush administration, a little-known statute called the Data Quality Act — conceived by Tozzi and passed with little debate by Congress three years ago — allows businesses to challenge not just government regulations, but the taxpayer-sponsored science which agencies rely upon to formulate these rules in the first place.

On its face, the Data Quality Act merely requires government agencies to field complaints over the data, studies, and reports they disseminate, in order to ensure the “quality, objectivity, utility, and integrity” of the information. Though seemingly unobjectionable, this provides a new workload for agencies that could impinge upon their other duties. But it’s just the beginning. The Bush administration has used the DQA as a springboard to implement an unprecedented “peer



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review" system for government science, a cumbersome set of protocols that was strenuously opposed by the nation's science community, which saw little in the original plan resembling standard academic peer review. (The White House later released a revised "peer review" bulletin that appeared to respond to some of these criticisms, but failed to entirely mollify detractors.)

If these efforts succeed, industry groups will have a new set of tools to stop regulations before they even get started — often by using questionable scientific critiques paid for by industry to challenge legitimate science sponsored by taxpayers. "Anyone who is involved in the regulatory process knows it begins ten years or so before you ever see a rule," says William Kovacs, a Chamber of Commerce vice president who's met with Tozzi "a hundred times" to plot strategy. The Data Quality Act "allows you to begin inputting, and access the process [from] the very beginning." In fact, the act may also enable businesses to file lawsuits against agencies that reject data quality complaints, a potentially powerful new device in the deregulatory arsenal that could let motivated groups head sensible regulatory changes off at the pass. "Up until the Data Quality Act, the courts almost uniformly held you couldn't get judicial review of government reports," says law professor Sidney Shapiro of the University of Kansas, a member scholar of the Center for Progressive Regulation.

Already, Tozzi's Data Quality Act has led to suits challenging a government report on climate change and a National Institutes of Health study on diet, both of which represent state-of-the-art scientific work in their fields. The latter suit was recently filed by the Chamber of Commerce and the Salt Institute, an industry group, as a strategic test case to establish judicial review under the Data Quality Act. Slowly, Tozzi and allies are laying the groundwork for a broader assault on the regulatory state. Data quality, says Kovacs, is going to have "a revolutionary impact on the regulatory process."

**T**ozzi's realm is a subterranean world of arcane rules and obscure alphabet-soup agencies. A self-described "market-based conservative," he's become a master of helping companies challenge the scientific underpinnings of government rules by

zooming in, telescope-like, on alleged flaws in individual studies. Tozzi says he's trying to "regulate the regulators" — blocking agencies from releasing weak data or questionable information. Yet most of the studies that Tozzi and his allies challenge are actually pretty reliable.

An economics Ph.D. who hung around New Orleans until he realized he'd never make it playing jazz, Tozzi began his Washington stint in 1964, reviewing regulations at the Army Corps of Engineers. Having established a reputation as "that nerd over there in the Pentagon that really likes to review rules," as he puts it, Tozzi later joined the Office of Management and Budget during the Nixon administration. Tasked with scrutinizing regs churned out by the newly created Environmental Protection Agency, he became infamous for second-guessing the agency's enforcement efforts. Environmentalists would ask, "Christ, who's running EPA—Tozzi?" he recalls with a cackle. Tozzi stayed at the budget office through the election of Ronald Reagan, who named him deputy head of a new OMB division dedicated to overseeing proposed regulations. Soon enough, Tozzi's domain became known as the "black hole" of the regulatory process for its reputation of sucking in rules proposed by agencies and never letting them see light again. He earned the nickname "Stealth." "I don't want to leave fingerprints," he once told the *Washington Post*.

In 1983, after 20 years of learning how to induce regulatory sclerosis from the inside, Tozzi set up a consulting shop — Multinational Business Services — to do it from the outside. MBS clients have included everyone from chemical companies to tire and rubber manufacturers, but Tozzi's most controversial client was undoubtedly the tobacco industry, which during the 1990s sought to battle the emerging scientific consensus that secondhand smoke was a danger to those who were over-exposed to it, particularly people living or working with smokers. One of tobacco's strategies was to advocate standards for "good epidemiology" that would have made it almost impossible to conclude that secondhand smoke was dangerous. These standards insisted that unless secondhand smoke doubled your risk of getting cancer, it should be ignored — a standard, notes tobacco researcher Stanton Glantz of the University of California-San Francisco, that would bar regulation of nearly any environmental toxin.



Tozzi played a key part in this push, earning hundreds of thousands of dollars from Philip Morris for such activities as supporting “legislative mandates on epidemiological standards” and increasing “debate on [secondhand smoke] risk assessment within EPA,” according to internal company documents. In one instance, Tozzi deployed a phalanx of lobbyists to his old haunts at the OMB to block the implementation of a government medical code, used for Medicare and Medicaid claims, that tracked secondhand smoke illnesses. By presenting itself as “a defender of good science, not tobacco,” noted the *Los Angeles Times* in a 1995 article, Tozzi’s company succeeded in getting the rule changed — an obscure but major victory for his client. As he explains today, had the government been allowed to accumulate such statistics, tobacco firms “could have been subject to tons of legal actions saying, ‘Look at all these illnesses caused by secondary smoke.’”

Although Tozzi says tobacco companies are no longer contributing to the Center for Regulatory Effectiveness (founded in 1996), the fight over secondhand smoke was very much a warm-up for his later efforts. Among other work he did for Philip Morris during the mid- and late-1990s, Tozzi circulated information and proposals concerning two pieces of legislation. The first, a “data access” law, would allow interested parties to obtain, under the Freedom of Information Act, “all data produced” by any publicly funded scientific study. The second was the Data Quality Act (though Tozzi insists it was originally his idea and that other industries besides tobacco were interested as well). Together, the proposals would allow regulated companies to conduct detailed internal audits of unfavorable studies—and then battle to stop those unfavorable studies from getting translated into unfavorable regulation.

By the end of the 1990s, as formerly obscure government studies became widely and easily obtainable on agency web sites — sometimes affecting a firm’s stock valuation simply by being posted — business groups and their GOP allies made a concerted effort to make Tozzi’s proposals a reality. And instead of calling for the kind of massive “regulatory reform” campaign that had fizzled in 1995, they took a backdoor approach, attaching Tozzi’s proposals to must-pass appropriations bills. The data access amendment, also known as

the “Shelby Amendment” for its sponsor Richard Shelby (R-Alabama), was passed in 1998, and subsequently minimized in scope by a wary Clinton administration. The Data Quality Act rolled through three years ago, and was welcomed with open arms by the Bushies. Now Tozzi’s timebomb sits waiting to detonate. In the end, says Kovacs, “what we’re going to get is far more than we could have ever gotten by having a comprehensive regulatory law passed.”

**B**usiness groups haven’t wasted much time making use of Tozzi’s labors. Last August, the Competitive Enterprise Institute, a conservative think tank partly funded by the energy industry, filed suit under the Data Quality Act over a Clinton-era report on global warming, known as the National Assessment of Climate Change. Though the suit was ultimately settled out of court, government lawyers agreed to attach a disclaimer to the report stating that it was “not subjected” to the Data Quality Act. There’s little evidence that the study was flawed. But the suit appears to have given the Bush administration a pretext to ignore the National Assessment when it issued its own 10-year plan on climate change research in June 2003.

In September 2003, Tozzi submitted a data quality complaint challenging the government’s intent to use a World Health Organization report in assembling U.S. dietary guidelines. The WHO report called for individuals to cut dietary intake of so-called “free sugars” — a recommendation considered utterly uncontroversial among mainstream nutritionists, but sharply opposed by the sugar industry, which stood to lose a fortune if the WHO used the report to bolster a global anti-obesity strategy. (Tozzi admits his petition was filed on behalf of “somebody in the food business,” but declined to be more specific.) Here, too, “data quality” was merely a cudgel by which to block the government from considering good science when making policy.

Tozzi likes to point out that the act has not gummed up the federal regulatory system with challenges, as some environmentalists feared. But that may not last for long. Even now, Tozzi and his allies are preparing to expand the act’s scope by making agency rejection of a data quality complaint grounds for a lawsuit. “Somebody has to test whether

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it's judicially reviewable," says Kovacs. If they succeed, they'll have created two new entry points into the regulatory process. Industry groups will not only be able to saddle agencies with scientific complaints over their studies that could be costly and time-consuming to answer. They'll also be able to force agencies to defend their responses in court. Hence the term Tozzi's critics often apply to his type of strategy: "Paralysis by analysis."

Tozzi also points out that the Data Quality Act can be used by anybody. And to be sure, a few opportunistic environmental groups have filed data quality complaints with agencies. Most of the current challenges, however, have been brought by industry, which shouldn't come as much of a surprise. Over the past few decades, business interests have spawned an entire infrastructure to generate so-called "counter research," exploiting the nuance and openness inherent to good science in order to "manufacture uncertainty" where little exists. Now that capacity can be deployed not only at the

back end of the regulatory process — the P.R. battles waged in the popular and scientific press — but also at the front end, before regulators can get their shoes on.

Tozzi himself insists that he doesn't have anything against government or bureaucrats—after all, he used to be one. He says he just wants government to run more efficiently, and believes that "if you intervene in the market, there should be a compelling need to do so, and you should demonstrate that." But while there are no doubt some bureaucrats who live to stick it to big business, the Data Quality Act is transparently a solution in search of a problem. As legal scholar Wendy Wagner of the University of Texas pointed out in a recent article entitled "The 'Bad Science' Fiction," there's little evidence to support the notion that government agencies churn out "junk science" or that their existing peer review protocols are inadequate. The Center for Regulatory Effectiveness, Wagner charges, "provides virtually no evidence to support its assumption that a bad-science problem exists."

**T**hat hasn't stopped Tozzi from seeking to increase the Data Quality Act's scope in a variety of ways.

He's written letters both to the WHO and universities warning that if they want their science to influence the U.S. government, it had better meet data quality standards. In one controversial letter, Tozzi even invoked the Data Quality Act in an attempt to disallow comments submitted to the Environmental Protection Agency by an environmental group.

Most importantly, he's drafted sample legislation for states. Near the close of a long interview in his spacious office, Tozzi stands up, saunters past his piano and a globe containing a hidden alcohol stash, and collects from his desk a sheet of paper that he's been saving for me. The state of Wisconsin, Tozzi says, has adopted a version of the Data Quality Act. "It's like kudzu, baby," says Tozzi. "You can spray it, shoot it — here," he says, handing over the text of the act. "Now there'll be a whole rumor mill around Washington," he continues. "There's that goddamn Tozzi." •

## Piedmont Environmental Council