Reforming Regulations and Agency Oversight

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America has debated "Energy in the Executive" since the *Federalist Papers.* But President Barack Obama's second-term agenda takes the concept to a new level with respect to regulation, promising to act without Congress when he can.

In the past, presidents have used executive orders both to rein in regulation and expand it. Ronald Reagan's Executive Order (E.O.) 12291 set up central review of agency rules by the Office of Management and Budget (OMB), giving voice to hitherto voiceless consumers. Bill Clinton's E.O. 12866 returned "primacy" to agencies, undermining the process. Although Obama has issued several orders to streamline regulation, his "pen and phone" approach to policy making eclipses efforts to curtail regulation in any meaningful manner.

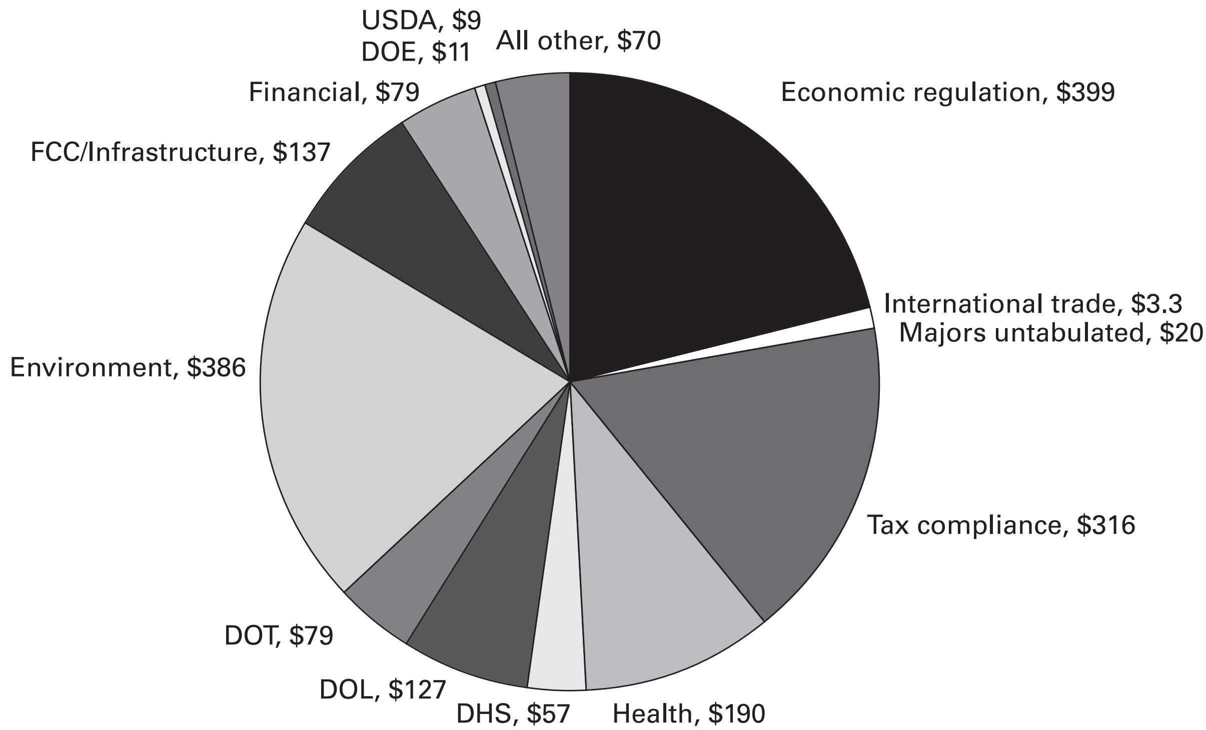
The Office of Management and Budget (OMB) estimates annual regulatory costs of up to $102 billion, as of 2013. Other reported costs include the *Information Collection Budget*'s 9 billion hours of compliance paperwork. But those hours do not come close to measuring the overall costs of the nearly $2 trillion regulatory state, with its interventions, bans, and permitting, resulting in uncertainty, wealth destruction, job loss, stifling of entrepreneurship, and loss of liberty.

The growth of federal spending is a problem. But decades of regulation may have even greater effects. Regulation is occasionally redistributive, often burdensome, and usually costly. Government solutions to perceived market failures often have consequences worse than the supposed problem they were designed to address. Regulatory bureaus cannot respond rapidly to changes in fields like health care provision, finance, infrastructure, and cybersecurity.

Since the 1980s, regulatory controls, such as semiformal central review of economic, environmental, and health and safety regulations, and analysis by the OMB's Office of Information and Regulatory Affairs have proven insufficient. OMB review captures a fraction of the regulatory enterprise.

Regulations and interventions require more transparency and scrutiny, but so do executive orders, guidance documents, memorandums, bulletins, and other "nonrules" that skirt notice and comment and the central review process. Even the notice and comment in the Administrative Procedure Act is insufficient, because final rules increasingly are not submitted to the Government Accountability Office and to Congress as required under the Congressional Review

Figure 1.1 Annual Cost of Federal Regulation and Intervention 2015 Estimate, $1.882 Trillion



Source: Wayne Crews, *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway, 2015 Edition*, Social Science Research Network (SSRN), 2014, http://ssrn.com/abstract=2502883 and Competitive Enterprise Institute (CEI), 2014, http://www.tenthousandcommandments.com.

Act (CRA). That submission is necessary should Congress introduce a formal resolution of disapproval of an agency rule under the Act, so its neglect counts as a major lapse in accountability.

The choice is not between regulation or no regulation, but over what institutional framework is more appropriate to advancing health, safety, and efficiency. For every supposed market failure cited to justify government intervention, there is a potential offsetting political and bureaucratic failure. For example, price regulation has not been shown to work for consumers but has been shown instead to affect supply or access. Much environmental regulation now seen as necessary actually came about because of the lack of property or use rights in resources and amenities in the first place. Such regulation perpetuates government failure.

It is not even the case that, as OMB once put it that businesses generally do not favor regulation. Many businesses not only favor regulation but actively pursue it. Consumers did not lead the charge for the Interstate Commerce Commission, or for the state regulation of utilities, or for antitrust laws—those were secured by politically connected industries to protect profits and to restrict competition.

Policy makers should challenge agency benefit claims and demand better cost analysis, since agencies may overstate benefits and may tout benefits selectively. Agency pursuit of "benefits" has its own costs, particularly agencies that interfere with the improvement in health and safety innovation driven by competitive processes and consumer and social demands.

CONGRESSIONAL OVERSIGHT AND REFORM

> All legislative Powers herein granted shall be vested in a Congress of the United States.
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> —Article 1, Section 1, U.S. Constitution

We need more aggressive oversight of agency regulatory actions, including hearings, better information disclosure, and withholding of the purse and slashing budgets of agencies when they exceed their bounds.

Congress should:

- Make greater use of the Congressional Review Act (CRA) to rein in agency overreach.
- Pass the Achieving Less Excess in Regulation and Requiring Transparency (ALERRT) Act, which would promote greater transparency, more accurate reporting, and analysis of regulations.
- Pass the Regulations from the Executive In Need of Scrutiny (REINS) Act, which would require Congress to vote on major rules—those with estimated annual costs of $100 million or more.
- Require creation of a Regulatory Transparency Report Card to tally up regulatory cost estimates and other regulatory data in a single publicly accessible document.

In the 113th Congress, the House of Representatives passed both the ALERRT and REINS Acts, but neither was taken up by the Senate. The 114th Congress should send both to the president to either sign or veto. Whichever course he chooses will send a strong signal regarding his administration's commitment to curbing overregulation and promoting transparency.

Congressional Review Act. To improve regulatory cost accountability, the 104th Congress passed the Congressional Review Act in 1996. That law sets up a 60-day period following agency publication of a regulation during which the rule will not take effect. That 60-day pause affords Congress an opportunity to pass a resolution of disapproval to halt the regulation. Congress has rarely used it. Although nodding toward congressional accountability, the CRA requires a two-thirds supermajority to strike "laws" that Congress never passed in the first place. Apart from the repeal of an intrusive Department of Labor ergonomics rule that would have put undue burdens on home offices, the law has not worked as intended.

REINS Act. As administrative law has replaced the type our Founders envisioned, congressional overdelegation to bureaucrats has created a disconnect between the *power* to establish regulatory programs and *responsibility* for the results of those programs. In 2013, 72 laws were passed by Congress, but 3,659 agency rules were established—a ratio of 51 rules for every law. Legal scholar Philip Hamburger has noted the rise of preconstitutional, monarchy-style prerogative in defiance of our Constitution, which "expressly bars the delegation of legislative power."

Public accountability for Congress and agencies should require that no major or economically significant agency rule becomes law *until* it receives an *affirmative* vote by Congress. The REINS Act, which passed the House in the 112th and 113th Congresses, would establish one such procedure for major rules with annual costs of $100 million or more.

However, agencies do not quantify most rules' costs, and many costly rules can escape the "significant" classification by their cost estimates coming in at just below the $100 million threshold. Therefore, Congress should consider expanding the REINS Act to cover *any* controversial rule, regardless of whether it is tied to a cost estimate. Congressional approval should also extend to guidance documents and other agency decrees. Cost-benefit analyses matter less when every elected representative goes on record as either supportive of or opposed to a particular regulation.

ALERRT Act. The ALERRT Act would improve public disclosure of annual regulatory output. Specifically, it would (a) codify various executive orders' requirements on cost analysis and make them enforceable, (b) extend flexibility for small business, (c) require least-costly regulatory alternatives, and (d) allow hearing-based proceedings for costly rules. As noted, it passed the House in 2014, but it was not taken up by the Senate.

Regulatory Transparency Report Card. Regulatory information is available, but it is often difficult to compile or interpret. It would be valuable to more effectively summarize regulatory data provided by the agencies as a chapter in the federal budget, the *Economic Report of the President*, the OMB's *Benefits and Costs* report, and other data sources. Previously, information such as numbers of proposed and final rules was collected and published in the annual *Regulatory Program of the United States Government*, in an appendix titled "Annual Report on Executive Order 12291." The *Regulatory Program* ended in 1993 when the Clinton administration replaced E.O. 12291 with E.O. 12866 as part of the aforementioned reaffirmation of agency primacy.

Worse, in recent years, federal agency oversight reports—such as the Unified Agenda of Federal Regulations, the OMB *Report to Congress* on regulations, and the *Information Collection Budget*—have been published late, and in the case of the Unified Agenda, not at all.

The fall 2011 edition of the Agenda did not appear until January 20, 2012, whereas the spring 2012 edition was never published. A single edition for 2012 with no seasonal designation finally appeared the Friday before Christmas, with no clarity on how its methodology might have been affected by the delay. In spring 2013, something called the "Spring 2013 Update to the Unified Agenda of Federal Regulatory and Deregulatory Actions" appeared instead of the normal Unified Agenda. And in late 2013, the fall edition was published the day before Thanksgiving.

By requiring periodic publication of a summary of already available but scattered data, Congress could go a long way toward making regulatory data more user friendly.

Data to be officially summarized and published annually should include the following:

- Tallies of economically significant, major, and nonmajor rules by department, agency, and commission;
- Numbers and percentages of rules affecting small business;
- Depictions of how regulations accumulate as a business grows;
- Numbers and percentages of regulations that contain numerical cost estimates;
- Tallies of existing cost estimates, including subtotals by agency and grand total;
- Numbers and percentages of regulations *lacking* cost estimates, with reasons for absence of cost estimates;
- *Federal Register* analysis, including number of pages and proposed and final rule breakdowns by agency;
- Number of major rules reported on by the Government Accountability Office in its database of reports on regulations;
- Rankings of most active executive and independent rulemaking agencies;
- Identification of rules that are deregulatory rather than regulatory;
- Rules said to affect internal agency procedures alone;
- Number of rules new to the Unified Agenda;
- Number of carryovers from previous years;
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them;
- Rules for which weighing costs and benefits is statutorily prohibited; and
- Percentages of rules reviewed by the OMB and action taken.

Regulations fall into two broad classes: (a) those that are economically significant, that is, costing more than $100 million annually; and (b) those that are not. However, many rules that technically come in below that threshold can still be very significant in the real-world sense of the term. Congress could require agencies to break up their cost categories into tiers that would be more descriptive of their real-world costs. One possible breakdown is shown in Table 1.1.

Knowing only that a rule is or is not economically significant reveals little. For example, some cost estimates of the Environmental Protection Agency's (EPA's) New Source Performance Standards rule figure its cost at around $738 million annually. Appreciating that the EPA is imposing a Category 2 rule would make for a more useful shorthand regarding its costs than referring to mere "significance."

Expert: Wayne Crews

Table 1.1 Proposed Breakdown of Economically Significant Rules

Category 1	> $100 million, < $500 million
Category 2	> $500 million, < $1 billion
Category 3	> $1 billion, < $5 billion
Category 4	> $5 billion, < $10 billion
Category 5	> $10 billion

For Further Reading

Wayne Crews, "The Other National Debt Crisis: How and Why Congress Must Quantify Regulation," *Issue Analysis* 2011 No. 4, Competitive Enterprise Institute, October 2011, https://cei.org/issue-analysis/other-national-debt-crisis.

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REGULATORY BUDGET

Federal spending, taxes, and the deficit get plenty of attention. But it is equally important to monitor and reduce the nontax expenditures the government imposes. A regulatory budget could help incentivize other reforms like cost analysis and sunsets. It would also allow Congress to allocate regulatory cost authority among agencies and to distinguish among categories like economic, health and safety, and environmental regulations.

A comprehensive regulatory budget should include individual tallies from agencies, paralleling the fiscal budget as much as possible. Congress should specify the total cost budget for which it is willing to be held accountable and should divide it among agencies.

Congress should:

- Pass the National Regulatory Budget Act.

Sen. Marco Rubio (R-Fla.), who recently introduced the National Regulatory Budget Act of 2014, noted that overregulation impedes entry into the middle class by "stifling innovation and competition, depriving workers of opportunities and denying consumers more choices."

The Rubio version of the National Regulatory Budget Act would also create an Office of Regulatory Analysis.

Budgeting would force agencies to "compete" to ensure that their least effective, more poorly performing mandates save more lives per dollar or correct some alleged market imperfection better than another agency's rules. That approach should improve decision making and adherence to congressional intent. Agencies would concentrate on assessing costs, just as the fiscal budget focuses on costs and not on benefits. Although the budget's compliance cost calculations would be difficult, they would be easier to manage than separate cost and benefit calculations for every rule, which is not being done anyway.

Agencies regulating recklessly could lose the squandered budgetary allocation to a rival agency, or even face agency sunsetting regulations.

Budgeting can work best within that context: Regulatory Reduction Commission, sunsetting regulations, and one-in-one-out proposals.

Expert: Wayne Crews

For Further Reading

Wayne Crews, "The Other National Debt Crisis: How and Why Congress Must Quantify Regulation," *Issue Analysis* 2011 No. 4, Competitive Enterprise Institute, October 2011, https://cei.org/issue-analysis/other-national-debt-crisis.

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REGULATORY REDUCTION COMMISSION

Modeled on the successful military Base Closure and Realignment Commission (BRAC), the Commission on Regulatory Relief and Rollback was first proposed in 1995 by then-Sen. Phil Gramm (R-Tex.). A similar 2004 House proposal, the Commission on the Accountability and Review of Federal Agencies, would have addressed agencies and programs in need of rollback. The Progressive Policy Institute has developed a similar idea in detail, calling it a Regulatory Improvement Commission.

Congress should:

- Create a Regulatory Reduction Commission and task it to convene periodically.
- Augment the regulatory review process with sunsetting and one-in-one-out rules.

The BRAC model's bipartisan, independent structure helped resolve the politically intractable task of closing obsolete military bases, which provide jobs in members' districts, by bundling them into a single legislative package. BRAC formulated a list of recommended base closures that were set to go into effect after a given time unless Congress enacted a joint resolution of disapproval. If no such resolution was passed, the closures went into effect automatically.

To apply that technique in the regulatory arena, one option is for Congress to appoint a bipartisan commission to hold hearings to assess agency rules and regulations, and from that survey to assemble a yearly package of proposed regulatory reductions. The package would be subject to an up-or-down vote by Congress, with no amendments allowed.

The approved package would then be sent to the president for signature. The president could implement any commission recommendation requiring no legislation. The filtering process of holding hearings combined with the bundling of regulations would make the commission's recommendations more difficult to oppose politically—everybody stands a good chance of getting "hit," providing political cover.

Besides BRAC, there exists international precedent for streamlining. The Netherlands and the United Kingdom both set up autonomous, nongovernmental bodies to review regulation—the Regulatory Reduction Committee in the Netherlands and the Better Regulation Commission in the UK. Both set goals to reduce regulatory burdens by 25 percent over a four-year period, which appear to have been achieved with some success. (See the Organisation for Economic Co-operation and Development *Better Regulation in Europe* reports for the UK and the Netherlands.)

A Regulatory Review Commission could be augmented by embedding sunsetting regulations and in-and-out mechanisms into the process.

Review and sunsetting requirements built into laws and regulations could incentivize agencies to repeal outdated rules. Sunsetting clauses put an expiration date on new regulations (or laws) unless explicitly extended by Congress. Although continuation of rules will likely be common, such a procedure could encourage efficiency, boost accountability, and improve reporting of costs.

Widespread sunsetting across government could lessen the effectiveness of the interest-group mobilization that could be prompted by an approaching sunsetting deadline affecting a single agency. The United Kingdom, as noted, is experimenting with a bulk regulatory reduction approach, and has created sunsetting and review options to apply to new regulations.

Related to sunsetting—and also being tried in the UK—is a one-in-one-out procedure and, more recently, a one-in-two-out procedure. Like the reduction commission, that idea holds bipartisan appeal. In the United States, Sen. Mark Warner (D-Va.) has suggested a one-in-one-out reform, recommending the offsetting of every new rule through the elimination of another rule, either within an agency itself or elsewhere. One-in-one-out amounts to a status quo regulatory "budget," or a freeze at current levels. The OMB's annual *Report to Congress* could help inform the process of creating a culture of repeal.

Experts: Wayne Crews, Ryan Young

For Further Reading

Curtis W. Copeland, Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress, White Paper, Administrative Conference of the United States, July 15, 2014, http://www.acus.gov/sites/default/files/documents/CRA%20Report%200725%20%282%29.pdf.

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———, *Better Regulation in Europe: United Kingdom*. Paris: OECD Publishing, 2010, http://www.oecd.org/gov/regulatory-policy/betterregulationineuropenetherlands.htm.