Boosting Regulatory Transparency

Comments of the Competitive Enterprise Institute On
The Office of Management and Budget's

2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act

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July 31, 2013

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OVERVIEW

Coherent federal regulatory agency decision-making requires linkage between agency choices—and consequences for those choices.[1] At the same time, central review of agencies' regulations by OMB plays a vital role in sound policy.[2]

Unlike private entities that face opportunity costs, agencies' future regulatory actions are not constrained in the wake of any given regulation they issue. Agencies regulate heedless of what other agencies are doing, and can make little contribution to government-wide priority setting among competing goals. Agencies often regulate with little concern for cost, and with no worry that regulating one aspect of the economy or public health will impact the ability to regulate another. The result is over-reach.

It cannot be surprising that agencies lack adequate constraints when issuing regulations, since the Congress that delegates power to them itself lacks restraint. Legislation encroaches on more and more aspects of normal daily life. The national government recognizes few constitutional bounds that would otherwise constrain interference in finance, education, retirement, healthcare, communications and Internet, personal privacy and the right to anonymity, cybersecurity, energy access, infrastructure, environmental amenities or markets for safety.

OMB can do only so much on its own; since Congress itself creates over-regulation via delegation and permitting a separation of powers lapse, it is the proper reform target—just as Congress is occasionally the target of proposals like term limits, committee reform, and other restraints.

Thus, other than curtailing excessive governmental power in the first instance, and in turn the delegation of excessive legislative power to unelected agencies in the second, the only administrative response to agency excess is to aggressively monitor and audit what agencies do, and report it publicly.

So while it may lack substantial authority, this is why the review function and annual assessment of regulatory impacts by the Office of Management and Budget (OMB), such as that laid forth in the 2013 *Draft Report to Congress on the Costs and Benefits of Federal Regulations* (henceforth *Draft Report*), matters.[3] Regulation and taxes are both means of achieving governmental ends—both impact aggregate output, prices and employment. Policy should strive toward tolerating no "off-budget" or unacknowledged government-caused expenses, whether fiscal, regulatory, interventionist, "transfer" or paperwork.

We can improve OMB annual review, but fundamental reform entails congressional accountability and ending "regulation without representation"[4] rather than merely denouncing derivative agencies or scolding OMB's Office of Information and Regulatory Affairs (OIRA) for failing to properly audit the regulatory state.

The expedited procedure by which Congress may enact disapprovals of regulations established by the Congressional Review Act of 1996[5] was an important concession to this principle of separation of powers, but not to the practicalities of the political gains from delegation and an expanded state.

Democratic accountability will require something like the Regulations from the Executive in Need of Scrutiny (REINS) Act, "to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law."[6]

Variants of what is now REINS have existed since the 1990s (Rep. J.D. Hayworth of Arizona, Rep. Nick Smith of Michigan and Sen. Sam Brownback of Kansas all introduced congressional accountability legislation). The basic idea provides for limiting regulatory agency discretion via an expedited but mandated congressional vote on major (usually "economically significant" rules with $100 million in annual impact) regulations. **Potentially burdensome new regulation become subject to the legislative procedures that they on that they in fact are, thereby "reining" in the failure to maintain constitutional separation of powers between legislation and execution**. **Some of that power would return to elected lawmakers.**

Congress could also consider international efforts like those of the Netherlands and the United Kingdom to address regulatory burdens. One strategy in both systems is the creation of independent bodies, which not only review regulations in *ex ante* and *ex post* fashion, but submit proposals for repealing regulations. Congress embraced a similar concept when it created the Defense Base Closure and Realignment Commission in 1989.

In the meantime, though, OMB must do the best job of reviewing and documenting the regulatory state that it possibly can, and the *Draft Report* is the current vehicle. *Congressional accountability* and *disclosure* should matter most in regulatory reform; and within that framework, OMB has considerable control of the latter. Certain options, presented below, can help ensure that OMB's reporting effort advances truth in regulation and that future editions' usefulness increases.

The Scope of Regulatory Review

Rules officially reviewed by OMB represent a small proportion of the total since before the turn of the century. In the regulatory pipeline at year-end 2012, according to the *Regulatory Plan* and the *Unified Agenda of Federal Regulations*, 63 federal departments, agencies and commissions had just completed or were at work on 4,062 rules and regulations at various stages of planning and implementation (pre-rule, proposed, final, completed). Of these, 224 were designated economically significant (loosely, $100 million-plus in annual impact.[7] By calendar year end 2012, 3,708 rules were finalized.[8]

Today's official narrative maintains that "major" and "economically significant" rules account for the bulk of regulatory costs. OMB intones that "the benefits and costs of major rules, which have the largest economic effects, account for the majority of the total benefits and costs of all rules subject to OMB review."[9]

"Subject to OMB review" is a necessary qualifier—with its own "economically significant" implications. The non-reviewed status of most rules small and large, such as controversial independent agency rules like the Federal Communications Commission's net neutrality order,[10] cast doubt on intimations that the annual *Costs and Benefits* report is inclusive and comprehensive. OMB's cost-benefit breakdowns incorporate only benefits and costs of "major" executive agency (not independent agency) rules that agencies or OMB have expressed in quantitative, monetary terms, omitting numerous categories and cost levels of rules altogether.

A few years back, OMB more explicitly recognized that costs could significantly exceed those made explicit in its annual reports, a stance far better situated for informing regulatory oversight. For example, in 2002 OMB allowed that, "Based on the information released in previous reports, the total costs and benefits of all Federal rules now in effect (major and non-major, including those adopted more than 10 years ago) could easily be a *factor of ten or more larger* than the sum of the costs and benefits reported."[11] (Italics added.) This is an acknowledgement of the inherent incompleteness of national regulatory reporting, and that the aggregate number of hundreds of billions annually jettisoned since OMB's 2001 report wasn't necessarily off base.[12]

The "factor of ten" or more was repeated subsequently, for example in a February 3, 2003 OMB memo, "With New Information on Federal Regulations, OMB Releases Draft Cost-Benefit Report"[13] as well as in the 2004 final report (but with ten year look-backs rather than six year).[14] The explicit emphasis that costs could be substantial was downplayed in subsequent reports, replaced by insistence that "reported monetized benefits continue to be significantly higher than the monetized costs."[15] Note again the need for qualifiers, here "reported" and "monetized."

For fiscal year 2012 (October 1, 2011– September 30, 2012), OMB reviewed 47 executive agency major rules with some combination of cost and benefit estimates,[16] (in contrast to the 3,708 rules great and small finalized in calendar year 2012).[17] Of these 47 rules, only 14 had cost *and* benefit calculations expressed in dollar terms. This is the block that OMB features prominently in its annual expositions of net benefits of the regulatory enterprise, and the one that gets reported publicly and used by regulatory advocates.

OMB estimates that this subset of rules sports anticipated costs of between $14.8 billion to $19.5 billion in 2001 dollars.[18] Twenty-two others implemented budgetary spending programs; such "budget rules" are officially considered transfers rather than regulations. Of the remaining 11 rules, agencies provided partial benefit and/or cost estimates.

Plenty gets omitted. In the most recent Small Business Administration report on small business regulatory impacts, the authors noted:[19]

> *[R]egulations implemented directly through the legislative process are outside the OMB review process. Furthermore, the totality of rules, both existing and new, with anticipated impacts below $100 million, and not subject to the Paperwork Reduction Act, are also outside the OMB review process.*

It's been noted that OMB's cost-benefit roundup leaves out independent agencies' compliance costs. As expressed over a decade ago in its 2002 *Report to Congress*, "OMB does not review regulations of the independent agencies or any regulations that are not determined to be 'significant' under the E.O. 12866 definition."[20]

OMB has recently acknowledged the non-triviality of omissions. Here's OMB's 2011 disclaimer:[21]

> *It is important to emphasize that the figures here have significant limitations. When agencies subject to Executive Orders 13563 and 12866 have not quantified or monetized the benefits or costs of regulations, or have not quantified or monetized important variables, it is because of an absence of relevant information. Many rules have benefits or costs that cannot be quantified or monetized in light of existing information, and the aggregate estimates presented here do not capture those non-monetized benefits and costs. In fulfilling their statutory mandates, agencies must often act in the face of substantial uncertainty about the likely consequences. In some cases, quantification of various effects is highly speculative. …In addition, and significantly, prospective estimates may contain erroneous assumptions, producing inaccurate predictions... While the estimates in this Report provide valuable information about the effects of regulations, they should not be taken to be either precise or complete.*

The upshot is that major, significant or economically significant rules with cost estimates are a fraction of the total number of rules in the pipeline or finalized, and the number with cost *and benefit* analysis an even smaller proportion despite repeated annual emphasis that "reported monetized benefits continue to be significantly higher than the monetized costs." [22]

A major problem with the annual roundup is the inherent randomness; had a different set of rules been "monetized," it would have produced an entirely different net benefit range. Both benefit calculations and cost calculations for the regulatory enterprise seem glaringly absent or inadequate. The reported ranges of net benefits we get annually, while widely quoted,[23] are essentially meaningless as an annual assessment or for making inferences with year to year comparisons.

We require a better sense of proportion regarding review that occurs. In its latest draft *Costs and Benefits* report, OMB tells us that "From fiscal year 2003 (FY 2003) through FY 2012, Federal agencies published 37,786 final rules in the Federal Register. OMB reviewed 3,203 of these final rules under Executive Orders 12866 and 13563."[24]

OMB reviews significant rules, not just economically significant or major rules; nonetheless, still fewer than 10 percent of all rules are reviewed whether or not costs and benefits enter into the picture in any way. As for costs, we can also wonder at claims that the overall regulatory state provides more benefit than cost by looking at what proportion of rules we possess any cost information whatsoever.

The nearby table *The Funnel -- On the Depth of Regulatory Cost Review, 2001-Present*, shows that of the flow of several thousand agency rules issued annually, a relative handful get cost analysis, let alone cost *and benefit* analysis. The chart depicts major rules reviewed during the fiscal years 2001 to the present as reported in consecutive OMB reports, and shows the proportion of rules that have any cost analysis whatsoever. The proportion of major rules with cost analysis averages only around 35 percent; the proportion of all rules with any cost analysis at all as a percentage of the annual flow of final rules in the *Federal Register* has averaged just .4 percent. In any given year, the percentage of all rules great and small that have cost analysis has never reached one percent; the highest was .8 percent. Benefits fare even more poorly.

Even agencies officially subject to the relevant executive orders may not supply cost estimates when they ought. Nobody's head rolls if they don't. As periodically noted in the *Federal Register*: [25]

> *The Regulatory Plan and the Unified Agenda do not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.*

Tip of the Costberg project on the cost of federal regulation: Wayne Crews -- www.tenthousandcommandments.com

The Funnel -- On the Depth of Regulatory Cost Review, 2001-Present
(http://bit.ly/15kLq9p)

	Major Executive Agency Rules Reviewed by OMB: Both costs & benefits	Rules w/ Costs Only	Grand Total, rules w/ costs	Costs Absent	Total Rules	"Budget" Rules	Total OMB Major Rule Reviews	Federal Register Final Rules	Costed Rules as % of Major Rule Flow	Costed Rules as as % of Finalized* Rule Flow
OMB 2002, Table 7, p. 38	14	13	27	7	34	53	87	4,132	31.03%	0.65%
OMB 2003, Table 1, p. 6	3	0	3	3	6	25	31	4,167	9.68%	0.07%
OMB 2004, Table 1, p. 7	6	4	10	4	14	25	39	4,148	25.64%	0.24%
OMB 2005, Table 1-3, p. 12	11	7	18	8	26	19	45	4,101	40.00%	0.44%
OMB 2006, Table 1-3, p. 7	13	2	15	6	21	24	45	3,943	33.33%	0.38%
OMB 2007, Table 1-3, p. 8	7	1	8	2	10	18	28	3,718	28.57%	0.22%
OMB 2008, Table 1-3, p. 10	12	4	16	2	18	22	40	3,995	40.00%	0.40%
OMB 2009, Table 1-3, p. 14	13	6	19	2	21	21	42	3,830	45.24%	0.50%
OMB 2010, Table 1-3, p. 20	16	12	28	5	33	33	66	3,503	42.42%	0.80%
OMB 2011, Table 1-4, p. 23	18	8	26	8	34	32	66	3,573	39.39%	0.73%
OMB 2012, Table 1-5,6	13	6	19	5	24	30	54	3807	35.19%	0.50%
OMB 2013, Table 1-5,6	14	9	23	2	25	22	47	3708	48.94%	0.62%
TOTALS	**126**	**63**	**189**	**52**	**241**	**302**	**543**	**42,917**	**34.81%**	**0.44%**
Benefits %									23.20%	0.29%

Source: Compiled by W. Crews from OMB, various fiscal years' editions of Report to Congress on Costs and Benefits,
available at http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress;
Notes: *Finalized rules are presented by calendar year; other data by fiscal year.
Budget rules are "regulations implement[ing] or adjusting Federal budgetary programs, which primarily caused income transfers, usually from taxpayers to program beneficiaries.

So if an agency prefers not to quantify costs a rule's cost, it simply may not, and it doesn't appear. This is why points of order for Congress to object to *any* rule not tied to a cost estimate need consideration, rather than merely objections to major or economically significant rules.

A related concern but one not explored in detail here is the imposition of federal mandates on states; agencies are interpreting their own quality of adherence to mandate relief efforts, and may acknowledge too few of their rules that "trigger" a mandate. While policymakers wouldn't dream of doing away with the fiscal budget that tracks government spending, a lack of transparency and accountability for regulatory costs prevails despite compounded regulatory intervention.[26]

Most rules don't get reviewed; Even when review happens, benefit analyses are highly sensitive to basic assumptions about how regulations translate into benefits and whose opinions carry the day. Both there and on the cost side, vast gaps dominate. For greater perspective on regulatory review, it is important to note an even greater range of costs of governmental intervention that get omitted, compounding the difficulty of OMB's ability to present an accurate picture.

Kinds of Regulatory Costs Neglected In Review

What follows is a non-exhaustive list of overarching untallied costs that modern executive orders and directives do not capture well, but that matter to those affected**:**

Loss of Liberty Costs

Regulatory bureaus, whether federal or state, aren't particularly adept at capturing the value of lost liberty and choice.

Whether the issue is the ability to communicate anonymously online, energy standards for residential dishwashers, e-cigarettes that emit water vapor instead of noxious chemicals, the size of beverages, whether or not menus have calorie labels, whether or not to use ethanol, where the opening on one's washing machine appears—it is not sufficient that others are not harmed by one's activity; seemingly liberty must yield and authorities must decide.

With the rise of the nanny state comes a loss of the right to disagree and go one's own way, to agree to take risks. OMB's reports do not capture the loss of liberty; they do not measure costs as if paternalism were frowned upon. Indeed, they measure *benefits* often as if paternalism were a good thing.

Economic Cost and Impact Omissions

Economic costs of enabling a regulatory environment and its close cousin, the interventionist environment, get short shrift. These include;

Permitting restrictions and denial of access to resources: Nobody's working and jobs aren't teed up while awaiting permits for access to energy resources, obviously. The

Environmental Protection Agency (EPA) and the Interior Department are notorious, but costs of most of their restrictions do not appear in OMB reporting.

<u>The costs of "rent-seeking"</u>: Firms often actively seek regulation when it disadvantages competitors. Environmental rules, privacy mandates and antitrust are examples. OMB reports neglect the phenomenon.

<u>The distortions of crony capitalism</u>: Examples include bailouts in traditional industries like GM and new ventures like Solyndra, Farm Bill subsidies, government funded pet technologies. Government funding has implications for the trajectory of regulation, and the spending itself is distortionary compared to what the marketplace otherwise would have done.

<u>Differential effects of rules</u>: The very existence of regulation ends up picking winners when something new comes along, in that there are complex differential effects on incumbents with hands tied relative to newcomers, such as in the communications industry. Wealth creation and technology won't advance at same rate in a regulated firm as a less regulated one.

<u>Indirect costs</u>: Indirect costs as opposed to direct compliance costs can be difficult to assess, such as economic distortions and ventures not pursued. The EPA acknowledges it still doesn't hear enough from small business, and that public comment is limited [27] But small businesses that were never created don't comment on negative impacts of regulations. Indirect costs can take many forms.

<u>Economic effects of the minimum wage</u>: The impact on the avoidably unemployed but voiceless invisible aren't of much concern to the policymaker establishment.

<u>Most regulations impacting mostly every industry and sector</u>: Actually, apart from a relative handful of rules—only a few dozen—that appear over the past decade in the OMB roundups with which we are concerned, plus some paperwork tallies and a few industry reports, interventions impacting mostly every industry and sector (like railroading, aviation, energy, electric power and telecommunications) get left out.

Also conceptualization of entire *categories* of interference—like antitrust, federal control of the money supply, federal manipulation of housing markets, the embrace of a "too big to fail" stance and its inevitable regulatory consequences—get omitted.

<u>Perpetuation of early-20th century style infrastructure regulation</u>: The costs of siloed, regulated infrastructure could be far more significant than many realize.

Early electricity and telecommunications were characterized by competing, overlapping, redundant, maybe even ugly, infrastructure—but not natural monopoly. Cronyism led to establishment of regulatory commissions to outlaw competition and guarantee returns. Instead of changing that, the modern approach is to propose "infrastructure banks" accompanied by a heavy government hand, while simultaneously contradicting that by interfering with major private projects like pipelines.

The stock of infrastructure could be far larger. Network industries—water, sewer, telecom, Internet, electricity, transportation—could work together to build infrastructure rather than invest separately and be regulated separately. The persistence of regulation that keeps infrastructure eternally segregated has left us with less robust networks, less overlap and redundancy than would be optimal. The cost appears nowhere.

"The Costs of Benefits"

Governmental decisions, not just private action, can adversely impact health and safety. The ways risks are identified and society made safer and healthier have not all been discovered by a priestly elite, and do not all lie within government's ambit.

Benefits are best seen as forms of *wealth*. When "regulation" removes values like risk reduction, or privacy, or cybersecurity or safety from competitive pressures, agencies undermine actual *regulation*. They impose *costs*.

Complex technologies also require that private risk-management institutions like insurance and liability emerge alongside (consider nuclear energy, homeland security, nanotechnology, biotechnology, financial instruments, cybersecurity). The same wealth status also applies to information, and information mandates such as those affecting disparate concerns like privacy standards and food labeling can backfire. It is irresponsible for government to interrupt and induce people into becoming overly helpless or dependent—then claim their interventions are a benefit. Their interventions are a cost.

Costs of Poor Regulatory Processes

<u>Costs of rules not deemed "economically significant" by the agencies but that in fact are</u>: Many of the thousands of regulations issued by agencies may exceed $100 million annually, but no one actually knows and they never get counted (See "The Funnel" above for perspective.)

<u>Cumulative effects of rules</u>: As rules accumulate, their overlap can worsen regulatory outcomes. Underbrush is never cleared, a problem noted across the political spectrum.[28] A recommendation regarding this will appear later.

<u>"Guidance Documents" with economically significant impact:</u> Decisions may be made by agencies, and parties pressured to act without formal regulation or thorough understanding of costs. Examples include EPA Clean Water Act jurisdictional guidance, and the Federal Trade Commission's "Guidance" on disclosure of paid search engine results.[29]

As noted in a July 2012 U.S. House Committee on Oversight and Government Reform publication:[30]

> *Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However… they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply.*

<u>"Budget" or "Transfer" Rules</u>: Budget rules implement federal budgetary programs, primarily income transfers from taxpayers to beneficiaries.

Such wealth transfers matter, since governmental programs are plausibly and often correctly regarded as improperly displacing what private sector could do, depending upon one's philosophy concerning who ought to be primarily in charge of health care, retirement and other matters.

Some budget rules are reported on, but not included in OMB's net benefit tally. OMB does note that these entail transfer costs (which matter to the parties not on the receiving end) and deadweight losses thus far unaccounted for:[31]

> *[T]ransfer rules may…impose real costs on society to the extent that they cause people to change behavior, either by directly prohibiting or mandating certain activities, or, more often, by altering prices and costs. The costs resulting from these behavior changes are referred to as the "deadweight losses" associated with the transfer. The Regulatory Right-to-Know Act requires OMB to report the social costs and benefits of these rules, and OMB encourages agencies to report these costs and benefits for transfer rules; OMB will consider incorporating any such estimates into future Reports.*

<u>Unfunded mandate on States</u>: Congress should consider fuller treatment both on the budgetary and regulatory side.[32]

<u>Regulation by International Treaty</u>: International regulatory costs are terra incognita. Treaties regulate: attempted greenhouse gas agreements and the law of the sea treaty; the Outer Space Treaty. OMB does not track such costs.

Job Costs of Regulations

It's all but official government policy that regulations have no overall employment effect: they displace employment in one area and grow it in another, it's claimed. Perhaps in a static technical sense that can be correct from an economist's standpoint. Alas, most people are not economists.

Each of these unknowns constitutes a dissertation and a *Report to Congress* in itself. We remain far from grasping the impacts of government intervention on our liberty and prosperity. OMB's review encompasses an even smaller fraction of intervention than realized.

RECOMMENDATIONS TO IMPROVE REGULATORY DISCLOSURE

This comment contends that the bulk of regulatory impacts get omitted. There's no fundamental solution apart from addressing over-delegation and governmental power itself, because checks and balances alone do not suffice since they are no longer applied.

Recognizing that, while OMB's measurement or non-measurement of costs is not defining, they are important. There are specific ways OMB's roundups could be even more useful and inform the regulatory enterprise; a non-exhaustive review of some of them appears below.

Agencies Should Calculate Costs But Not Benefits

A federal agency faces nontrivial incentives to overstate benefits of its activities and to enlarge its scope; This is not derogatory, the theory of bureaucracy and insights of public choice economics virtually compel it.[33]

Such incentives are at least as great as inclinations for those impacted by regulation to overstate costs. But those impacted lack the power to compel. Agencies enjoy the power of compulsion, so their getting it right matters more, and is more of a concern to policymakers than the exaggerations of someone affected by regulation.

Agencies benefit estimates may be subjective and self-serving. Worse, when agencies freely offset costs of a regulation with benefits, as they all are invited to do via net-benefit reporting, rarely will any regulation fail to qualify from an agency's viewpoint. It is not impossible, but nearly so.

It is important to note also that OMB's roundup that it reports annually as a consolidated "net benefit" range is fundamentally arbitrary in that it relies upon the happenstance that each year a certain handful of rules just happen by chance to have *both* benefits *and* costs quantified. Different set of rules quantified, wholly different net-benefit range.

While OMB has long maintained (since 1994) that "The advantage of regulation is that it can improve resource allocation or help obtain other societal benefits,"[34] that begs the question of *whose* resources, or *whose* societal benefits: society doesn't speak with one voice.

For these and other reason, agencies should concentrate solely on assessing and fully presenting the *costs* of their initiatives—much as our fiscal budget focuses only on the amounts of outlays and deficit, not their benefits.[35] As it stands, OMB must present both costs and benefits (but in practice does not, as seen in The Funnel). An annual accounting statement intended to accurately portray the scope of the regulatory state should relieve agencies of benefit calculation responsibilities altogether. Known benefits are what Congress should have had in mind before delegation regulatory power.

We don't offset the *taxes* individuals pay with the benefits those taxes provide to others to arrive at a *net* tax burden. Doing so would be an obvious and intolerable wealth transfer that few apart from grateful recipients would tolerate. Abuses would result from the fact that persons enjoying the benefits of regulations and persons paying for those benefits are not always, or perhaps rarely, the same people.

Regulatory benefits are difficult to compute and compare with costs, but even benefits of federal *on-budget* activities are difficult to assess: How does one for example, trade off benefits of federal outlays on Amtrak versus money spent on welfare? A regulatory regime that leaves benefit assessments up to agencies alone magnifies such ambiguities. The findings of a January 1997 House Commerce Committee report on regulatory costs basically still stands: "We have found that the agencies have little, if any idea how their regulations affect the American people" and that "agencies cannot possibly know whether they are doing more good than harm."[36]

OMB's emphasis on what it seems to regard as obvious net benefits of social regulations contrasts with the Small Business Administration's 2012 report on the *Impact of Regulatory Costs on Small Firms* which estimated annual costs around $1.7 trillion.[37] That report and its findings were criticized by OIRA's then-administrator Cass Sunstein; however OMB pegged costs at roughly equivalent magnitudes in the late 1990s and early 2000s.[38]

It happens to be the case, of course, that the Regulatory Right-to-Know Act that required OMB to produce the *Draft Report*[39] called for cost *and* benefit calculations, and OMB must comply to the best of its abilities until future legislation amends that approach. In the meantime, especially since rules sporting both cost and benefit assessments are scarce regardless, an invigorated approach to cost analysis is workable.

Interestingly, OMB has observed in past *Reports* that "an excessive amount of resources should not be devoted to estimating the total costs and benefits of all Federal regulations" since gathering such information is so daunting, and it doesn't tell us how to reduce existing burdens.[40] Results of the current methodology affirm this perspective, in part; evaluation of costs and benefits has proven limited, assessing only the major regulations of the past decade and a half.

Laying bare the extent of the regulatory state is difficult, and there are ways to rationally avoid applying "an excessive amount of resources" to the task. Omitting benefit calculations from the process would help cut down on OMB's (and agencies') devoting an "excessive amount of resources." It would eliminate half the job, one might say, allowing agencies to improve cost assessments in the preparation of Regulatory Impact

Analyses, which face public comment. The requirements of Executive Order 12866 and Executive Order 13563 can undergird improved cost analysis; future executive orders could strengthen requirements, and focus more on costs.

Focusing on costs doesn't mean benefits can be ignored. Quite the contrary; the goal of this proposed change is to heighten the importance of *genuine relative benefits of agency rules*. As with the tax code, *Congress* should make the "grand judgments" about where benefits lie and take responsibility for the benefits or lack thereof implied in the regulatory priorities that prevail across agencies. Congress already "establishes" implicit priorities given the potential benefits that the various agencies might provide, given their current mandates.

No agency can save more than 100 percent of the population, and the agencies added together cannot save more than 100 percent of the population. And we've noted earlier that agencies are not necessarily entitled to regard themselves the source of benefits. Policy needs to recognize realities regarding benefit claims. If OSHA saves more lives than EPA, Congress's future allocation of relative regulatory authority could reflect that. Agencies acting of their own accord, imposing costs and ignoring tradeoffs with respect to other agencies' "use" of regulatory authority ensures over-regulation.

Insisting that agencies focus on costs could prod them toward maximizing benefits without forcing them to do it. Congress could reapportion regulatory authority based on results achieved or unachieved. That is, rather than simply claim a net benefit for every rule, agencies should "compete" to prove that they save the most lives or advance some other value at least cost—or risk having their "budgets" reallocated by Congress.

De-prioritizing benefit calculations would also leave breathing room for agencies to grapple with indirect costs. It would also avoid the intellectual chaos of trying to speak coherently about "net benefits" when costs and benefits assessments are, in fact, highly subjective, often measured best on different metrics, and rarely discernible by third parties *at all*.[41] All cost estimates, and certainly benefit estimates, have a fundamental invalidity to them.[42]

Fully portraying costs in annual regulatory reports to Congress will be fraught with difficulties and uncertainties enough: OMB should keep the job manageable by concentrating on that task, and letting Congress answer for benefits.

OMB Should Critique Agency Benefit Claims

Until OMB and agencies focus on cost calculations exclusively, a proper OMB attitude toward agency benefit claims is essential.

The presumption underlying regulatory agency activism is one of deeply embedded market imperfection, readily solved by superior, objective political and administrative decision-making. Indeed, the very basis of regulation is the belief, in my view discredited, that government actors are non-self-interested, that political markets are fairer than private markets. Regulations, as currently construed, often don't work; As expressed by John Tamny in *Forbes*:[43]

> *The banking crackup from 2008 is the latest evidence that regulations are much more than worthless. We implicitly ask the charitably average people who migrate toward regulatory jobs to see the future, but if they could, they wouldn't be regulators. Regulations on their very best day severely distract the productive while inhibiting the profit motive, and then on their worst they lead to tragedies of the Bernie Madoff variety for creating a false impression that qualified people are minding the store*

But the faith in top down, planned administration is everywhere. OMB remarked in its earliest *Benefits and Costs* report that "It is…difficult to imagine a world without health, safety and environmental regulation. Could a civil society even exist without regulation?"[44] That is not the choice, of course; the question is what institution is more appropriate to advancing discipline and safety, political ones or something else. There is always "regulation": No firm operates in a vacuum. The choice is between political discipline, vs. competitive discipline and other market institutions. Further, one invoking "market failure" must recognize political failure as well. For example, much environmental regulation is "necessary" because of the failure to define property or use rights over resources and amenities in the first place. Thus regulation perpetuates government failure rather than resolving alleged market failure.

The question is not whether an economic order requires "regulation" or planning. Rather, the question is: *Who will do that planning?*[45] Of course resolving such deeply philosophical discussions as whether markets, competitive rivalry, insurance and liability innovations, and the common law are better protectors of the public than regulation is well beyond the scope of this report.

Nonetheless it would be helpful for OMB to acknowledge the ease with which regulation can do more harm than good, and resort a bit less to granting benefit of the doubt to regulators. By effectively placing the burden of proof on those who would remove a rule rather than on those who would impose it in the first place, OMB and our regulatory regime systematically recommend few reductions or eliminations of rules.

There had been a phase of economic liberalization, a dismantling of inefficient economic regulations (rail, air, telecommunications) because of a realization that such regulation does more harm than good, serving special interests. For example, price regulation has not been shown to work for consumers, but it has been shown to increase prices.[46]

Thus it is not even the case that, as OMB once put it, that "businesses generally are not in favor of regulation."[47] Business not only generally favors regulation, but often sought regulation in the first place. Consumers did not ask for the Interstate Commerce Commission, for example, or for the state regulation of utilities, or for the antitrust laws:

such regulation was secured by the elite that sought and succeeded at protecting profits and eliminating competition.[48] If economic regulatory agencies are subject to capture by special interest groups (and many of these are the independent agencies that OMB doesn't review at all), it is no great leap to conclude that much of what is considered social or health and safety regulation may likewise be something else entirely, and a bad, maybe even unsafe, deal for consumers.

For example, food labeling restrictions that limit health claims benefit entrenched food producers that already enjoy positive reputations, yet such laws passed, and more are proposed. Upstart companies are less able to compete on the basis of health characteristics thanks to restrictions, and thus may emphasize less important features like convenience, microwaveability, and taste.[49] As a result of "regulation," the health characteristics of newly introduced food products can decline—the opposite of regulation's alleged intent but perfectly in line with the interests of the already established. Since regulation so profoundly affects profits, "social" or "safety" regulations are equally suspect. Butter producers portrayed margarine as unsafe and dirty at the dawn of the margarine industry.[50] Abuse of "environmental" regulations to transfer wealth or protect profits abound.[51] Here are just a few bullets on why benefits may be less than envisioned, and disappoint:

- Benefits may be less because of agencies incentives to overstate them (the flip side of the incentive of businesses to overstate costs; discussed at length earlier with respect to a hypothetical agency re-focus on costs).
- Benefits are selectively expressed: for example, structurally safer cars may induce some to drive more recklessly, placing *others* at risk (the moral hazard problem).
- The benefits of a particular regulation are rarely compared with benefits that could be secured in another agency, given that resources to apply toward safety concerns are not infinite.
- Benefits are rarely compared with the benefit of leaving the compliance dollars in the hands of the public for them to do as they will; they may waste them, they may buy fire extinguishers, safer cars, health care, and insurance.
- Regulations serve as *lower bounds*: once in compliance, there may be no competitive edge gained by a firm that exceeds a particular rule's requirements. In this sense, regulatory "benefits" are actually *imposing costs by removing safety, or health, or privacy or some other value as competitive features*. Clearly regulators should not take credit for the benefits that business would provide anyway, and certainly not when their regime lessens competitive benefits.

OMB should temper the inclination to assume benefits rather than to the non-existence of benefits, and recognize that environmental and social regulation is subject to the same political failure and regulatory pork barreling that virtually fully characterizes economic regulation.

OMB Should Compile a Regulatory Transparency Report for Prominent Annual Publication

Reformers would benefit from more concise official presentation of regulatory trends and costs. The often-cited "number of Federal Register pages" is a tired gauge that, while worth reporting, reveals little about actual regulatory burdens.[52]

In the new 2013 *Draft Report*, OMB outlined what it says it believes to be the bulk of the costliest rules for the past fiscal year (2012), and the past decade. OMB's summaries in the *Draft Report* of the available cost-benefit data provided by the agencies for these rules is useful compared to the alternative—combing information scattered across more than 4,000 separate rule entries in *Unified Agenda of Federal Regulations*.

It would be of immense value to scholars, third party researchers, Congress and the ongoing reform effort to go farther, to summarize more detail and supplemental regulatory data provided by the agencies in accordance with Executive Orders. Such scattered data could be condensed and published as a short chapter in the Federal Budget, the *Economic Report of the President*, the *Benefits and Costs* report or some other stand-alone document. Such a Regulatory Transparency Report has the advantage of not requiring enactment of enhanced benefit-cost requirements, nor would it necessarily even require a presidential signature to put into play. It could likely be accomplished by OMB initiative.

Significant *non-cost* information not currently assembled could easily be published and would be of immense value, just as hard numbers would be. OMB could summarize quantitative and non-quantitative data into summary charts and provide historical tables. Trends could prove vital information and enable cross-agency comparisons over time.

Here is a sampling of dispersed data, much already compiled or readily compiled or available to searchers at reginfo.gov, that should be officially published annually in summary form by program, agency and grand total, as described in *The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation*:[53]

Regulatory Transparency Report Card:
Recommended Official Summary Data by Program, Agency & Grand Total
(with Five-Year Historical Tables)

- Tallies of "economically significant" rules and minor rules by department, agency, and commission.
- Numbers and percentages of rules impacting small business
- Depictions of how regulations accumulate as a small 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 lacking cost estimates, with a short explanation for the lack of cost estimates.
- Analysis of the Federal Register, including number of pages and proposed and final rule breakdowns by agency.

- Number of major rules reported on by the GAO in its database of reports on regulations.
- Ranking of most active rule-making agencies.
- Identification of rules that are deregulatory rather than regulatory.
- Rules that affect internal agency procedures alone.
- Number of rules new to the Unified Agenda; number that are carry-overs from previous years.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them.
- Rules for which weighing costs and benefits is statutorily prohibited.
- Percentages of rules reviewed by the OMB and action taken. (This could resemble The Funnel presented earlier)

Much of this subject matter was incorporated into the S. 3572, the "Restoring Tax and Regulatory Certainty to Small Businesses Act" introduced by Sen. Olympia Snowe (R-Maine) in the 112th Congress, but never passed.[54]

In the absence of statutory regulatory reform and congressionally stipulated transparency reporting, and so long as agencies continue to calculate benefits, OMB can take initiative. For example, presenting the percentages of rules with, *and without*, benefit calculations would reveal whether or not we can truly say the regulatory enterprise is doing more harm than good. The "Funnel" presented earlier aims at this conceptualization.

Requiring annual highlight reporting would affirm the importance of disclosure and in the process *reveal to what extent Congress itself is responsible for the regulatory burden*. It would help emphasize that Congress put in place many of the statutory deadlines that make vigorous regulatory analysis difficult or impossible. That would shift future debate away from regulatory reform and back to congressional accountability, a perhaps more helpful formulation.

As OMB is aware, the presentation of some of this data would not be a new exercise.

Previously, information such as numbers of proposed and final rules, and major and minor rules was collected and published in an annual *Regulatory Program of the United States Government*, in an appendix titled "Annual Report on Executive Order 12291." This report, discontinued in 1993, specified what actions OMB took on proposed and final rules it reviewed per that order, along with the preceding 10 years' data. It provided considerable detail on specific regulations that were sent back to agencies for reconsideration, and listed, such as, for example:

- Rules withdrawn;
- Comparisons of the most active rule-producing agencies; and
- Analysis of numbers of pages and types of documents in the *Federal Register*.

The *Regulatory Program* ended when the Clinton administration replaced EO 12291 with EO 12866, a directive intended "to reaffirm the primacy of Federal agencies in the regulatory decision-making process."[55]

In a limited way, what the budget is to fiscal policy, the *Regulatory Program* was to regulatory policy. It helped portray the off-budget scope of government, if not in terms of actual regulatory costs, at least in terms of trends in numbers of rules at the agencies. Other material appearing in the *Regulatory Program* included:

- Tables and pie charts depicting the total number of OMB reviews of regulations, by agency, presented in number, and as a percentage of the total.
- Number of expensive "major" ($100 million-plus) and non-major rules, by agency.
- A chart comparing the major and non-major rules from current and previous years.
- A brief description of all major proposed and final rules.
- The 20 most active rule-producing agencies, by number of rules reviewed, with history.
- A chart on types of actions taken on rules reviewed by OMB. "Total Reviews" were broken down as follows:
  - "Found consistent [with executive order principles] without change;"
  - "Found consistent with change;"
  - "Withdrawn by agency;"
  - "Returned for reconsideration;"
  - "Returned because sent to OMB improperly;"
  - "Suspended;"
  - "Emergency;" and
  - "Statutory or judicial deadline."
- Detail on the actions taken on rules reviewed.
- Average review time for new rules taken by OMB.
- A listing of rules exempted from review procedures.
- Numbers of *Federal Register* pages for the current and prior years.
- Analysis of aggregate pages published in the *Federal Register*, including total pages, average pages per month, percentage change year to year, and percentage changes over time.
- A breakdown of overall proposed and final rule documents in the *Federal Register*.
- Analysis of aggregate final rule documents published in the *Federal Register* by number and percentage. These were broken down into "New requirement," "Revision to existing requirement," "Elimination of existing requirement," and "Other."
- Number of final rule documents by agency.

Since OMB's *Draft* estimate of regulation's 10-year *cumulative* cost (despite its flaws and arbitrariness) remains an annual fixture, it should be combined with an enhanced transparency featuring both cumulative and yearly costs. Initiating a Transparency Report Card or reinstating the "Annual Report on E.O. 12291" like that published in the former *Regulatory Program* should be pursued.

OMB Should Designate Multiple Classes of Major Rules in Transparency Reporting

Regulations are loosely broken into those that are "economically significant" (over $100 million in annual impacts), and those that are not. But that threshold only tells us the *minimum* level of costs. For example, given the definition of what an economically significant rule is, we can infer only that the 224 major rules in the 2012 *Unified Agenda*, when fully implemented someday, will have economic impacts of at least $22.4 billion annually (100 million times 224 rules), but we can't glean any more than that without exploring Regulatory Impact Analyses accompanying rules.

Any Regulatory Transparency Report should naturally include the number of economically significant (or "major") rules, but this designation would be far more informative if expanded to show observers more than a minimum level of costs. OMB could develop guidelines recommending that agencies separate economically significant rules into separate categories that represent increasing costs, to be presented in the Regulatory Transparency Report. The following chart offers one suggested breakdown:

Proposed Breakdown of "Economically Significant" Rules	
Category 1	> $100 million, <$500 million
Category 2	> $500 million, < $1 billion
Category 3	> $1 billion
Category 4	> $5 billion
Category 5	>$10 billion

This particular breakdown is merely one option for presenting numbers within each category, and was included in the "Restoring Tax and Regulatory Certainty to Small Businesses Act" (S. 3572) noted previously. The "economically significant" designation could be made substantially more meaningful if a breakdown by category were implemented: knowing that a rule is or is not economically significant simply tells us too little unless we dig up a Regulatory Impact Analysis or peruse the copious *Unified Agenda*. For example, some cost estimates of the EPA New Source Performance Standards rule figure about $738 million annually.[56] Appreciating EPA is imposing a "Category 2" rule and the like could be more informative shorthand than merely knowing that the rule is "economically significant"

OMB Should Separately Categorize "Economic," "Social/Environmental" and "Administrative" Rules

OMB's ability to address economic regulation as opposed to health and safety rules is undermined by its lack of a mandate to review independent agency rules.

Nonetheless, OMB's prior willingness to entertain the notion by researchers such as Robert Hahn of the American Enterprise Institute that some economic regulation "produces negligible benefits" was a dramatic official development.[57] OMB remains on the right track distinguishing between economic and environmental and social regulation in its recent report,[58] an approach it has used since it first began issuing annual reports. While the current *Draft* cites that same report as "outdated," OMB does a commendable job in citing research on both sides of the argument, some claiming regulation imposes net costs, others net benefits.[59]

The weakest rationale for government interference in the economy is that of economic intervention. This seems to be the case whether the issue is grand-design government intervention, such as "fine-tuning" of the macro economy, or direct government management of an specific industry's output and prices (such as agricultural quotas or electricity generation prices) or entry into an industry (such as trucking). Even assuming pure motives, economic interventions fail owing to the impossibility of central economic planning and calculation. Moreover regulations aren't necessarily rooted in "public interest," compounding regulatory failure and serving interests of the regulated parties rather than the public interest.

Since the role of health and safety regulation is so different from economic regulation, separate presentation in the *Report to Congress*, any Regulatory Transparency Report or elsewhere make sense from the standpoint of comparing relative merits of regulations as the scope of OMB's surveys grows. There are obvious conceptual differences that render meaningless comparisons of, for example, purported economic benefits from a trade regulation with lives saved by a safety regulation. Since the two types of benefits allegedly achieved are on the one hand of the economic variety, and on the other of a health and safety variety, no basis exists for comparing the two. There is no single objective metric, and thus their costs should be presented separately. To the extent that analyses such as the *Draft Report* help discredit economic regulation, such regulations can be removed from the purview of government altogether (perhaps a utopian thought), leaving Congress and OMB the smaller task of controlling and documenting costs of environmental, health, and safety regulations.

Economic regulation lost its luster compared to environmental or health and safety rules (although there is a resurgence of it in banking, energy, telecommunications and infrastructure). Nonetheless, where health and safety rules reveal that they too have "private interest" underpinnings, the case can be made for their rollback.

OMB Should Improve "Transfer" Cost Assessments

Paralleling the distinction between "economic" and "social" regulation, process rulings like leasing requirements for federal lands and revenue collection standards and service-oriented administrative *paperwork*—such as that for business loans, passports and getting government benefits already appear separately in OMB reports, and in some cases the Information Collection Budget.[60]

It is clear that certain administrative costs represent, not regulation as such, but rather "services" secured from government by the public. But that does not make it appropriate not to actively disclose them, or to fail to anticipate their entailing future costs or having displacement or deadweight effects (some of these were noted earlier in the section on "Kinds of Regulatory Costs Omitted"). Similarly, it is important not to lump service-related paperwork in the same category with the tax compliance burden and other involuntary, non-service-related process costs such as workplace reporting requirements. All these are hardly minimal and should be tallied where possible.

OMB has begun recognizing that these transfers "may impose real costs on society," may "cause people to change behavior," and result in "deadweight losses."[61] OMB expressed that it "will consider incorporating any such (cost-benefit) estimates into future Reports."[62] More needs to be done to analyze the costs of these transfers and their impacts on individual rights and economic growth.

OMB Should Acknowledge Indirect Costs of Regulations Where Possible

It was noted that indirect costs may be omitted from compliance-focused estimates. In the *Draft Report*, OMB allows that "many regulations affect economic growth indirectly through their effects on intermediate factors,"[63] but is non-committal on whether indirect effects of regulation are a net cost or net benefit.

That uncertainty alone suggests that indirect costs ought to be guarded against and minimized where possible, especially since some have argued that indirect costs of regulation could even exceed the magnitude of direct costs,[64] and since OMB itself at times acknowledged that regulatory costs could be many times the amount it presents annually. The wide range of unmeasured costs itemized above in "Kinds of Regulatory Costs Omitted" heighten the need.

Without a comprehensive account of indirect effects, officials may end up underestimating the true impacts of regulation and thus overregulate as a first response, and relative to the alternatives of taxing and spending (the aforementioned alternative means of achieving governmental ends).

Fairness and accountability in government require acknowledging indirect costs. If the very burden of compliance itself is held to be not overly onerous, then how can the government possibly claim that merely assessing the full costs of compliance is too cumbersome? If indirect costs are too difficult to compute, then government cannot credibly argue that compliance is feasible and fair.

If Congress were to settle on a rule that allows regulators to overlook entire categories of indirect costs (such as bans or disapprovals of pipelines), then regulations could tend toward that very type. Imagine an annual OMB report that addressed only direct costs of regulations—such as the engineering costs of controlling an emission—and that outright input or product or network infrastructure bans are regarded as indirect costs as far as Regulatory Impact Analyses are concerned (assuming one is even prepared at all). Under such scenarios, many regulations could be expected to feature bans or disapprovals so that regulators would avoid posting high regulatory costs despite hardship inflicted. There are no easy solutions, but policymakers can attempt to regulate in ways that avoid indirect costs. Part of the answer is to perform studies and limit those types of regulatory activities most likely to be considered indirect costs.

Ignoring indirect costs means cost understatement. Recognizing and somehow reasonably incorporating those presents a challenge. Luckily, opportunity costs apply even to OMB and agency economists. By downplaying benefit assessments as suggested earlier, extra manpower and resources remain available to better assess indirect regulatory costs.

Another way of dealing with the indirect costs (and economically significant rules) is congressional approval of final agency rules, especially where indirect costs are a significant component. The role of congressional accountability to voters for rulemaking has been noted. Under such a framework, handwringing over indirect costs wouldn't be quite as worrisome, since consequences may be less escapable even without any quantitative analysis.

The reason for an annual regulatory accounting is not solely accuracy, but making Congress more accountable eventually, and inducing agencies to recognize opportunity costs by ensuring that they compete for the "right" to regulate in the open sunshine. We could do worse than settle for rough indirect cost estimates that nonetheless help provide a basis for allocating scarce regulatory dollars in loose correspondence with where a (perhaps one day) more accountable Congress believes benefits to lie.

OMB Should Recommend Rules for Revision and Repeal

OMB is too reluctant to recommend legacy regulations to eliminate. Agencies and the OMB review process should face a higher burden of proof regarding rules' value. If agency analyses under Executive Order 12866 appear not to justify a rule, then OMB should be more forthright about saying so, or expressing doubts.

OMB should encourage agencies to build upon the recent Executive Order 13563's call for agencies to develop and execute plans to: [65]

> *[P]periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome.*

Nor should OMB shy away from making recommendations about modifying regulatory programs based on plain common sense, regardless of executive orders. OMB might note costs of presumably beneficial regulations, then compare those benefits to superior advantages available by hiring policemen or firemen, or buying buckets of white paint to paint lines down the centers of rural blacktop roads.

In other words OMB has the experience and know-how to create a "benefit yardstick" to anchor the Transparency Report and objectively critique high cost, low benefit rules. Additionally, OMB could ask *agencies* to propose rules to cut. Or, OMB could have agencies rank their regulations and demonstrate that their least effective rules are superior to another agency's rules. Results of such questionnaires—rankings of rules—could be presented in the Transparency Report.

In this spirit, the *Draft Report* does make several worthwhile recommendations for regulatory reform, including: [66]

> *[F]acilitating public participation and fostering transparency by using plain language; making objective, evidence-based assessment of costs and benefits an integral part of the regulatory decision-making process; using retrospective review to inform decisions about specific rules and, more broadly, about the appropriate interpretation of impact analyses that feature incomplete quantification; and, finally, aligning agency priorities across all levels of internal hierarchy."*

However, besides reviewing the limited implementation of certain parts of E.O. 13563 including "regulatory look back, reducing paperwork burdens, simplifying government communications, and promoting long-run economic growth and job creation via international regulatory cooperation,"[67] there little said about actually reducing the amount of regulation already in place.

BEYOND THE *DRAFT REPORT*: CONGRESS CAN MAKE OMB'S JOB EASIER

Congress Should Affirm Final Agency Rules Before They Are Effective

To improve regulatory cost accountability, the 104th Congress passed the Congressional Review Act (CRA). 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, should it desire, to pass a resolution of disapproval to halt the regulation. It rarely has that desire. The CRA was an important symbolic nod toward congressional accountability for regulations. However, the CRA effectively requires a 2/3 supermajority to strike a bad rule if the president vetoes a disapproval resolution. And since Congress benefits from delegation and matters do not reach the president's desk anyway, the law doesn't work. (It did halt an "ergonomics" rule, on repetitive motion injuries.[68])

The superior approach to ensuring congressional accountability is to require that no major or economically significant agency rule (or controversial rule) becomes law *until* it receives an *affirmative* vote by Congress. An expedited approval process along with en bloc voting on regulations may suffice). The above-noted REINS Act (Regulations from the Executive In Need of Scrutiny) that passed the 112th Congress would have established that procedure, but no Senate action occurred and the president promised a veto.

The rationale for positive approvals is the constitutional stipulation that "All legislative Powers herein granted shall be vested in a Congress of the United States."[69] Regulatory decisions today are not made by elected representatives—officials whom voters can hold accountable at the ballot box; nonetheless, agency mandates are *laws*.

While the executive branch does overreach and act unilaterally in defiance of separation of powers doctrine, REINS is a bit of a misnomer; Regulations from the executive are in need of scrutiny, but so is Congress' propensity to delegate. Congressional over-delegation of powers to bureaucrats has created a disconnect between the *power* to establish regulatory programs and *responsibility* for the results of those programs. In 2012, Congress passed and the president signed 127 laws; largely unaccountable agencies issued 3,807 rules.[70]

As federal power grows, popular appeal of a campaign to end "regulation without representation" might also. Requiring Congress to approve major and controversial mandates before they become binding law affirms a bedrock principle of accountable government. Accountability embodies a superior regulatory reform than any variant of enhanced cost-benefit or risk assessment. Accountability also avoids the demagogue's effort to caricature cost-benefit analysis as an attempt to put a price tag on human life.

Congressional accountability also addresses another otherwise intractable problem ignored in regulatory reform proposals; that of agency tunnel vision. Agencies make no cross-agency comparisons of rules for the sake of setting priorities. Only Congress can set government-wide priorities and tradeoffs; there is no way individual agencies can do this acting within their square. Lessening regulation without representation would also respond to the concern that for many regulations "quantification or monetization is not feasible" or "is highly speculative."[71] As long as accountability controls policy, even where cost (or cost-benefit) analyses cannot be conducted, or appear impossible to construct, every elected representative will be on record as either either supporting or opposed to a particular regulation. The public can expect more relief in that manner compared to the status quo.

OMB's yearly efforts at presenting a snapshot of the regulatory burden as embodied in the *Draft Report* would be dramatically aided by congressional accountability, since regularly returning rules to Congress for approval would provide both agencies and Congress with powerful incentives to ensure that (implied) benefits exceed costs. In that environment, agencies may ensure that rules meet a reasonable cost-benefit standard before proposing them, and before sending them to OMB in the first place. Meanwhile a Congress directly accountable for the sweep of regulatory costs may be less likely to approve questionable rules.

Ironically, where today there is little incentive to perform cost-benefit analysis, accountability could "force" agencies and Congress to take those very considerations into account. Accountability belongs in the "necessary but not sufficient" category with respect to accuracy of costs.

Even if Congress were required to approve every agency regulation, OMB's *Draft Report* cost tallies remain essential for the same purposes of simple disclosure and elemental governance that the United States formally budgets tax revenues and outlays. Regulatory Transparency Reporting will always be needed. Moreover, since imposing taxes and imposing regulations can substitutes for one another, pressures to balance the budget can increase pressures to regulate, underscoring the urgency of congressional accountability, regulatory cost accountings and disclosure.

Congress Should Establish an Annual Regulatory Reduction Commission to Streamline Regulation

Congressional accountability obviously would target *future* mandates rather than the existing regulatory state, whose costs OMB pegs at up to $84 billion as of 2013,[72] a far from inclusive underestimate.

To deal with the existing enterprise of hundreds of billions of dollars annually,[73] Congress could put into place an ongoing Regulatory Reduction Commission to streamline aggregate regulation. Former Senator Phil Gramm (R-Texas) first proposed such an idea,[74] modeled on the military Base Closure and Realignment Commission (BRAC). The Progressive Policy Institute has embraced a similar idea, perhaps making this bi-partisan idea capable of the most traction in a regulatory reform campaign.[75] OMB should supplement such an effort by recommending rules for rollback, as noted.

The BRAC model, consisting of a bi-partisan, independent body, helped resolve the politically difficult job of closing obsolete military bases one at a time by instead bundling them for simultaneously consideration. BRAC formulated a list of recommended base closures which were set to go into effect *unless* Congress enacted a joint resolution of disapproval. If no such resolution was passed, the closures were automatic after a period of time.[76]

Carrying the technique over to the regulatory arena, one option is for Congress to appoint a bipartisan Regulatory Reduction Commission to hold hearings assessing agency regulations, and from that survey assemble a yearly package of proposed regulatory reductions. The package would then be subjected to an up or down, all-or-nothing vote by Congress, with no amendments permitted. The approved package would then be sent to the president for a signature. Any Commission recommendation that required no legislation could be implemented by the president. Alternatively the commission recommendations could take effect unless both houses of Congress disapproved of the list, more like BRAC.

The filtering process of holding hearings combined with the bundling of regulations from across the spectrum of government activity would make the Commission's recommendations more difficult to oppose politically compared with alternatives. As in the base closure model, everybody stands a good chance of getting "hit," thus the bundling provides political cover. A Commission could be kept active for as many years as Congress deems necessary. Streamlining rules would make annual surveys of the regulatory state more manageable and improve openness and the quality of disclosure over time, improving the annual Transparency Report process.

There exists other precedent for the streamlining besides BRAC. The Netherlands and the United Kingdom both implemented successful "Better Regulation" models, setting up autonomous, non-governmental 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% for four year periods, which appear to have been achieved with some success.[77]

Congress Should Sunset Rules and Implement a "One In, One Out" Procedure

The UK has created other regulatory reduction mechanisms such as attaching sunsetting and review clauses to new regulations. Sunsetting clauses essentially put an expiration date on new regulations, unless they can be justified through a review process.[78] Similarly, review clauses could incentivize agencies to repeal outdated rules. Both could encourage efficiency and accountability and foster more useful OMB reports.

Another method Congress could copy from the UK is a "one in, one out" procedure. (More recently, a more ambitious "one in, two out" procedure.)[79] Like the reduction commission, this idea holds bipartisan appeal. In the United States, Sen. Mark Warner (D-Virginia) offered a similar idea in the *Washington Post*, proposing offsetting every new rule with the elimination of one somewhere else within an agency itself or elsewhere. "One in, one out" effectively amounts to a regulatory budget at a status quo level; a pause in the size of the regulatory enterprise. If OMB's *Draft Report* helps inform such processes, the document would become substantially more useful.

CONCLUSION

Regulations are often called a hidden tax, and their reach and cost go beyond what OMB reports. The larger story can and should be told. OMB has considerable leeway in making its *Draft Report* on regulations increasingly useful.

By stressing costs rather than benefits, preparing summary Regulatory Transparency Reports capable of rivaling the presentation of the Fiscal Budget, by creating multiple classes of major rules, and implementing numerous other reforms that maximize disclosure, OMB will ensure that annual status reports on regulation continually improve.

Cost disclosure and *congressional accountability* are needed to certify that the regulatory enterprise does more good than harm. OMB can make inroads with respect to disclosure, but only so much. Congress must play the ultimate oversight role and address the culture of "regulation without representation."

[1] For a comprehensive overview of regulatory reform options, see Marlo Lewis Jr., *Reviving Regulatory Reform: Options for the President and Congress*, Washington, D.C.: Competitive Enterprise Institute, 2005. http://www.cei.org/pdf/4446.pdf.
[2] See for detail, James C. Miller III, James C., William F. Shughart II, and Robert D. Tollison, "A Note on Centralized Regulatory Review," *Public Choice*, 43, 1984.
[3] Office of Management and Budget, Office of Information and Regulatory Affairs, *2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, Washington DC, March 2013. Document ID OMB_FRDOC_0001-0118. http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.
[4] For a complete analysis, see David Schoenbrod and Jerry Taylor, "The Delegation of Legislative Powers," in *Cato Handbook for Congress: Policy Recommendations for the 108th Congress*, ed. Edward H. Crane and David Boaz, Washington, DC: Cato Institute, 2003. pp. 77–85, http://www.cato.org/pubs/handbook/hb108/hb108-8.pdf.
[5] Congressional Review Act (5 U.S.C. Chapter 8), http://www.archives.gov/federal-register/laws/congressional-review/
[6] REINS is sponsored in the House of Representatives by Todd Young (R-Indiana) and in the Senate by Rand Paul (R-Kentucky). Text is available at http://toddyoung.house.gov/uploads/REINS%20Act%20-%20113th%20Congress.pdf.
[7]Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute: Washington, D.C. 2013 Edition. http://www.scribd.com/doc/144210931/Wayne-Crews-Ten-Thousand-Commandments-An-Annual-Snapshot-of-the-Federal-Regulatory-State-2013.
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