



Regulatory Report Card



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Federal Communications Commission

Regulations Impose \$142 Billion in Compliance Costs; More on the Way

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The quality of regulation depends heavily on its transparency. Taking to heart Justice Louis Brandeis’s belief that sunshine is the best disinfectant, the purpose of this report card is to gather important information about federal regulatory agencies from scattered sources in one place in order to make it accessible to the public. This report card focuses on the Federal Communications Commission (FCC).

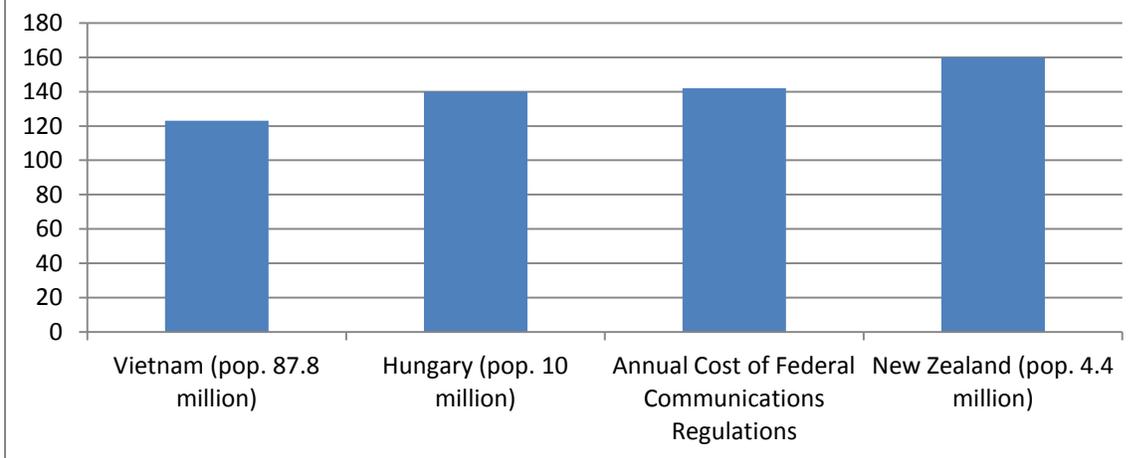
The FCC “regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories,”¹ as well as cellular networks and broadband Internet provision.

The federal government began regulating radio broadcasts more than a century ago.² Congress passed the Radio Act of 1912 in response to the Titanic disaster, during which the nearest ship, the SS Californian, missed the distress call because its radio operator was not on duty.³ The Radio Act of 1927 established the Federal Radio Commission, which was given the power to approve or deny commercial broadcast licenses to prevent overcrowding on the dial. Broadcast licenses were previously only required for amateur operators.⁴

<p>F5: >\$100 billion EPA: \$353 billion HHS: \$184.8 billion <u>FCC and Telecom Regulation: \$142 billion</u> Department of Labor: \$116.3 billion Financial Regulation (several agencies): \$102.5 billion</p>
<p>F4: \$10 billion - \$100 billion Department of Transportation: \$61.8 billion DHS: \$55.32 billion</p>
<p>F3: \$5 billion - \$10 billion Energy Department: \$9.809 billion USDA: \$9.05 billion Department of the Interior: \$5.2 billion</p>
<p>F2: \$1 billion - \$5 billion Department of Education: \$3.302 billion HUD: \$1.827 billion Department of Commerce: \$1.801 billion Department of the Treasury: \$1.32 billion Department of Justice: \$1.25 billion</p>
<p>F1: <\$1 billion U.S. Access Board (ATBCB): \$851 million Nuclear Regulatory Commission: \$414 million FERC: \$336 million CPSC: \$193 million EEOC: \$121 million</p>

Source: Wayne Crews, “Tip of the Costberg” working paper.

Figure 1. Annual Cost of Federal Communications Regulations Compared to National 2011 GDPs (\$ Billions)



Sources: Wayne Crews, "Tip of the Costberg" working paper; World Bank National GDP Rankings, <http://data.worldbank.org/data-catalog/GDP-ranking-table>.

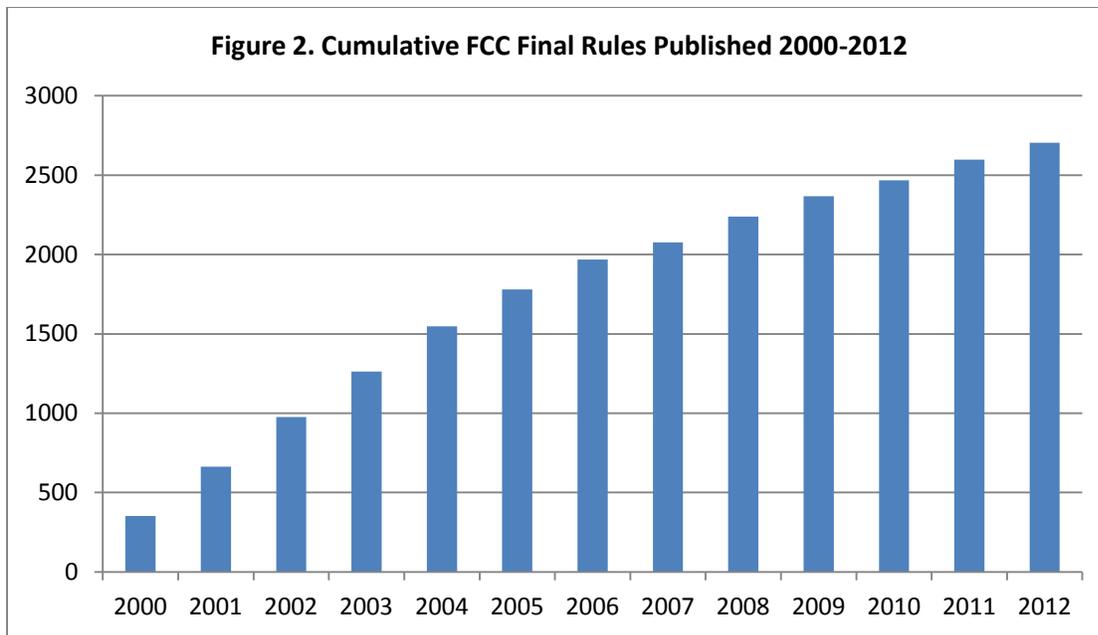
Congress established the Federal Communications Commission as an independent agency on June 19, 1934, when it passed the Communications Act of 1934. It took over the duties of the Federal Radio Commission, which was then abolished. The FCC also took over the Interstate Commerce Commission's jurisdiction over telegraph and telephone communications.⁵ The FCC was originally headed by seven commissioners, with Eugene O. Sykes serving as the first chairman. By mid-1935, the FCC had 329 Washington-based employees and an additional 113 in field service.⁶

Today, the FCC employs just under 2,000 full-time equivalent employees.⁷ Its requested budget for fiscal year 2013 is \$346.78 million.⁸ There are currently five FCC commissioners, who are chosen by the president and serve five-year terms. Julius Genachowski is the current chairman.

Size and Scope of FCC Regulations

A 2012 Competitive Enterprise Institute working paper puts the cost of federal communications regulations at \$142 billion per year, making it the third most expensive branch of regulation, after the Department of Health and Human Services (\$184.8 billion) and Environmental Protection Agency (\$353 billion).⁹ This is on par with the entire 2011 national gross domestic products of Vietnam (\$123 billion), Hungary (\$140 billion), and New Zealand (\$160 billion).¹⁰

From 2000-2012, the FCC published 2,705 final rules in the *Federal Register*, the daily depository of all proposed and final federal rules and regulations. Over the same time period, it published a total of 1,652 rules in the Regulatory Plan and the Unified Agenda in the *Federal Register*, which lists federal regulatory actions at various stages of implementation. This seems to indicate a transparency problem, since more than 1,000 final rules were promulgated without



Source: Advanced article searches for final FCC rules by year at <http://www.federalregister.gov>.

first appearing in the Unified Agenda. This problem was at its worst from 1999 to 2006, when final rules outnumbered proposed rules in the Unified Agenda by more than a two-to-one ratio in most years. The spring 2012 Unified Agenda was never published. The fall 2012 edition was not published until the Friday before Christmas, which resulted in minimal press coverage. This represents a greater federal transparency problem that extends well beyond the FCC.

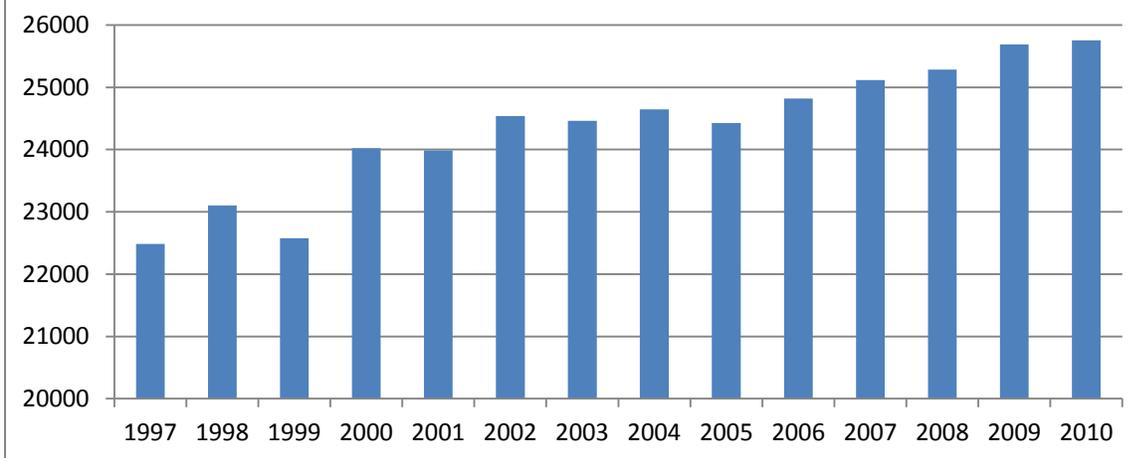
Federal agencies published a total of 3,706 final rules in 2012. Of those, 108 came from the FCC, for an average of one new final FCC rule every 2.3 working days. The agency placed an average of 145 rules in the Unified Agenda from 2002-2010.¹¹ There was a sharp drop beginning in 2011, with 103 rules at various stages of the pipeline. Only 86 rules appeared in the fall 2012 Unified Agenda.¹²

As new regulations pass, old ones are rarely deleted. The result is that the FCC's total regulatory burden tends to increase from

year to year. According to a Mercatus Center working paper by Omar Al-Ubaydli and Patrick A. McLaughlin, Title 47 of the *Code of Federal Regulations*, which covers telecommunications, has at least 25,574 specific regulatory restrictions as of 2010. This is up from 22,484 regulatory restrictions in 1997.¹³ They arrived at these numbers through text analysis, searching the Code of Federal Regulations for terms such as "shall," "must," "may not," "prohibited," and "required."¹⁴

Over the period 2002-2011, 295 FCC regulations appeared in the Unified Agenda that affected state governments. An additional 197 rules affected local governments. Of the 1,386 final FCC rules from 2002-2010, 1,062 of them, or 76.6 percent, affect small businesses. Of the 103 final rules the FCC published in 2011, 78 affect small businesses.

Figure 3. Total Regulatory Constraints in Title 47 of the Code of Federal Regulations, "Telecommunications"



Source: *regdata.org*, Mercatus Center at George Mason University.

Recent and Upcoming Rules

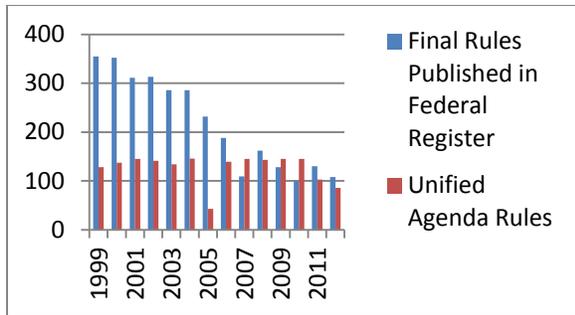
The fall 2012 Unified Agenda lists 86 rules from the FCC in various stages of the regulatory pipeline. Seven of them are “economically significant,” meaning they impose at least \$100 million in economic impact in a given year.

The most controversial recent FCC regulation involves network neutrality, a policy that prohibits broadband networks from prioritizing one type of content over another. The agency published a final rule titled, “Preserving the Open Internet” on September 3, 2011, which would impose many net neutrality rules without congressional approval.¹⁵

The regulation is currently being contested before the D.C. Circuit Court in the case *Verizon v. FCC*.¹⁶ The Competitive Enterprise Institute, along with the Cato Institute, Tech Freedom, and the Free State Foundation filed an amicus brief in the case, arguing that net neutrality violates both the

First and Fifth Amendments.¹⁷ Net neutrality violates the First Amendment because network owners would lose the right to choose what speech they allow on their networks. Net neutrality also violates the Fifth Amendment’s takings clause because it is a form of regulatory taking without just compensation. CEI scholars have written extensively about these and other reasons why net neutrality is bad policy.¹⁸

Another important upcoming FCC initiative is a wireless spectrum auction. Since the 1990s, the FCC’s model for assigning spectrum has been loosely based on Nobel Prize-winning economist Ronald Coase’s 1959 paper, “The Federal Communications Commission,” which argued for auctioning it off to the highest bidder.¹⁹ With the rise of smartphones, tablets, and other wireless computing devices, the demand for spectrum is higher than ever. That means this auction could raise tens of billions of dollars for the federal Treasury.



With the stakes so high, it is important that the FCC run the auction fairly and efficiently. The upcoming auction will be what is called an incentive auction, whereby incumbent holders of spectrum are encouraged to relinquish it in exchange for a share of the auction proceeds. The goal is to move spectrum from lower-valued uses, such as over-the-air television broadcasts, to higher-valued uses, such as increased 4G LTE and Wi-Fi network capacity.

Critics worry that the FCC might rig the auction for political reasons. The FCC is forbidden by law from turning away qualified bidders from auctions. But, as CEI’s Fred Campbell points out, the FCC might place a cap on how much spectrum one holder may own, with the express purpose of excluding telecom companies such as Verizon and AT&T.²⁰ This would not only cause consumer harm to those firms’ data-hungry customers, it would also potentially reduce the auction proceeds. This should be a concern in this time of trillion-dollar federal deficits.

Suggested Reforms

There is much the FCC can do to improve its transparency and the quality of its rulemaking. The agency should publish annual report cards similar to this one, aggregating data from diverse sources into a single publicly accessible document. The public, policy makers, and journalists would better understand how effectively the FCC is

pursuing its mission and thus hold it accountable.

The FCC’s regulations affect the high-tech sector more than those of any other agency. Telecommunications technologies are rapidly changing, so FCC regulations are especially vulnerable to becoming dated or obsolete. Every year, the FCC should evaluate its older rules and repeal the ones that no longer apply; have been rendered obsolete by new technologies, regulations, or private action; or have been demonstrated to do more harm than good.

An independent annual commission is better suited to this task, since agencies have little incentive to recommend reducing their own size and scope. But in the absence of third-party review, the agency should at least exercise this basic regulatory housecleaning. The FCC should also avoid a “regulate first, ask questions later” attitude toward emerging technologies in order to avoid slowing down innovation and progress.

The FCC should also be more forthcoming with its cost analyses. Currently, the agency is only required to publicly disclose estimated costs for rules that are classified as “significant” under Executive Order 12866 (either having \$100 million in economic impact in a given year, or raising a novel legal or policy issue²¹), or “major” under the Congressional Review Act (more than \$100 million in economic impact in a given year in 1995 dollars²²), which allows Congress to vote on major rules. Such rules are reviewed by the Office of Management and Budget, though the FCC sometimes includes its own cost estimates, even when not required to.

Every rule should be published with its estimated cost, even those not classified as significant or major. A rule can cost as much

as \$99 million per year and still be exempt from cost reporting requirements. These estimates are best done by an independent third party, since the FCC has an incentive to understate costs and overstate benefits. But the FCC's own estimates would still be better than no estimates at all.

The federal government should also publish an annual total estimated cost of all FCC rules currently in effect. The FCC's \$347.6 million budget is far from the only cost it imposes on taxpayers and businesses.

Notes

¹ Federal Communications Commission website, "What We Do," <http://www.fcc.gov/what-we-do>.

² Federal Communications Commission, "A Short History of Radio with an Inside Focus on Mobile Radio," Winter 2003-2004, p. 4. www.fcc.gov/Bureaus/OSEC/library/legislative_histories/110.pdf.

³ Bill Kovarik, (New York: Continuum, 2011), 213. For the full bill text of the Radio Act of 1912, see <http://earlyradiohistory.us/1912act.htm>.

⁴ For the full bill text of the Radio Act of 1927, see <http://www.americanradiohistory.com/Archive-Stevenson-Burgess-Others/Federal%20Radio%20Act%201927.pdf>.

⁵ For the full bill text of the Communications Act of 1934, see <http://transition.fcc.gov/Reports/1934new.pdf>.

⁶ Federal Communications Commission, "First Annual Report of the Federal Communications Commission to the Congress of the United States for the Fiscal Year 1935," (Washington: United States Government Printing Office, 1936), pp. 1-2.

⁷ 2012 Budget Estimate, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304636A1.pdf

⁸ <http://www.fcc.gov/document/fcc-budget-fiscal-year-2013>.

⁹ Wayne Crews, "Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway," pp. 56-57, <http://www.scribd.com/doc/103172296/Tip-of-the-Costberg-On-the-Invalidity-of-All-Cost-of-Regulation-Estimates-and-the-Need-to-Compile-Them-Anyway-August-17-2012-Uncopyedited-Draft>.

¹⁰ World Bank GDP ranking, <http://data.worldbank.org/data-catalog/GDP-ranking-table>.

¹¹ "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions; and from online edition at <http://www.reginfo.gov>.

¹² The FCC rules are listed in the 2011 Unified Agenda in 77 FR 8038-64, <https://www.federalregister.gov/articles/2012/02/13/2012-1664/unified-agenda-of-federal-regulatory-and-deregulatory-actions-fall-2011>, and in the 2012 Unified Agenda in 78 FR 1658-87, <https://www.federalregister.gov/articles/2013/01/08/2012-31514/unified-agenda-of-federal-regulatory-and-deregulatory-actions-fall-2012>.

¹³ Omar Al-Ubaydli and Patrick A. McLaughlin, "The Industry-Specific Regulatory Constraint Database (IRCD): A Numerical Database on Industry-Specific Regulations for All U.S. Industries and Federal Regulations, 1997-2010," Mercatus Center working paper No. 12-20, October 2012, 9.

¹⁴ Ibid, p. 6.

¹⁵ 76 FR No. 185, 59,192-235, <http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf>.

¹⁶ *Verizon vs. FCC*, D.C. Cir. No. 11-1355, <http://www.fcc.gov/document/verizon-v-fcc-no-11-1355-dc-cir-0>.

¹⁷ Brief Amici Curiae or TechFreedom, the Competitive Enterprise Institute, the Free State Foundation, and the Cato Institute in Support of the Appellant, *Verizon vs. FCC*, July 23, 2012, http://techfreedom.org/sites/default/files/Verizon_v_FCC_Amicus_Brief.pdf.

¹⁸ Among other examples, see Wayne Crews, Ryan Radia, and John O'Connor, "Comments of the Competitive Enterprise Institute In the Matter of A National Broadband Plan for our Future," GN Docket No. 09-51, July 21, 2009,

<http://cei.org/sites/default/files/Broadband%20comments%2020090721.pdf>; Ryan Radia, "Does Obama Want to Control the Internet?" Fox News, September 25, 2009,

<http://techliberation.com/2009/09/25/how-government-control-of-internet-threatens-innovation-my-foxnews-com-op-ed-on-net-neutrality/>; and Wayne Crews, "Comments of the Competitive Enterprise Institute In the Matter of Preserving the Open Internet Broadband Industry Practices," GN Docket No. 09-191, WC Docket No. 07-52, January 14, 2010,

<http://cei.org/sites/default/files/Neutrality%20comment%20to%20FCC%20Jan%202010.pdf>.

¹⁹ Ronald Coase, "The Federal Communications Commission," *Journal of Law and Economics* Vol.2, 1-40 (1959). The story of how the FCC adopted Coase's auction proposal is told in Edward López and Wayne Leighton, *Madmen, Intellectuals, and Academic Scribblers: The Economic Engine of Political Change* (Stanford: Stanford University Press, 2013), 135-148.

²⁰ Fred Campbell, "How to Rig an FCC Spectrum Auction in 5 Easy Steps," Tech Liberation Front, December 11, 2012, <http://techliberation.com/2012/12/11/how-to-rig-an-fcc-spectrum-auction-in-5-easy-steps/>.

²¹ President Bill Clinton, "Regulatory Planning and Review," Executive Order 12866, 58 FR 51735-44, http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf. The full definition of "significant" is given on 58 FR 51738. Rules with an economic impact of more than \$100 million in a given year are given the additional label "economically significant."

²² For the full text of the Congressional Review Act of 1995, see <http://usgovinfo.about.com/library/bills/blcra.htm>. The full definition of "major" appears in Section 804.