The Regulatory Right-to-Know Act

Making Regulatory Disclosure Work

Testimony of
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Committee on Government Reform
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The Regulatory Right-to-Know Act:
Making Regulatory Disclosure Work

Good Morning, Mr. Chairman, my name is Clyde Wayne Crews Jr., and I am the director of Competition and Regulation Policy at the Competitive Enterprise Institute. I appreciate the opportunity to appear before the subcommittee today. It is a great pleasure for me and for my organization. CEI is a Washington-based public interest group established in 1984, with a current annual budget of about $3 million and a staff of 35. CEI works to educate and inform policymakers, journalists and other opinion leaders on market-based alternatives to political programs and regulations. CEI also engages in public interest litigation to protect property rights and economic liberty.

The Competitive Enterprise Institute's Regulatory Reform Project seeks to promote policies that maximize the disclosure of information on regulatory costs and numbers and types of regulations, and that ultimately make regulators accountable to the voter. Among the Project's goals are procedural regulatory reforms -- of which Regulatory Right-to-Know is a prime example – as well as reforms in specific categories of regulation such as antitrust and electricity. Few Americans believe they should be bound by "laws" enacted by people they didn't elect. Appreciating the power of that fundamental tenet of democracy will provide the grounding and moral legitimacy for remounting a successful bipartisan overhaul of the non-representative regulatory state. The uniqueness of CEI's regulatory project is employing congressional accountability and regulatory disclosure as the fundamental principles of regulatory reform.

A key product of CEI's regulatory reform project is the annual report *Ten Thousand Commandments: An Annual Policymaker's Snapshot of the Federal Regulatory State*, the 1999 edition of which will be released the week of March 22, 1999. The publication is an effort to highlight regulatory data, facts and figures in a simple, straightforward fashion. Many of these elements are the very stones and mortar whose disclosure the Regulatory Right-to-Know Act (H.R. 1074) would make *mandator*y and *official*. CEI would be delighted to see *Ten Thousand Commandments* and reports like it made superfluous by the official annual reporting that would result from the Regulatory Right-to-Know Act.

To lay the groundwork for the need for Regulatory Right-to-Know, some highlights from the 1999 edition of *Ten Thousand Commandments* follow:

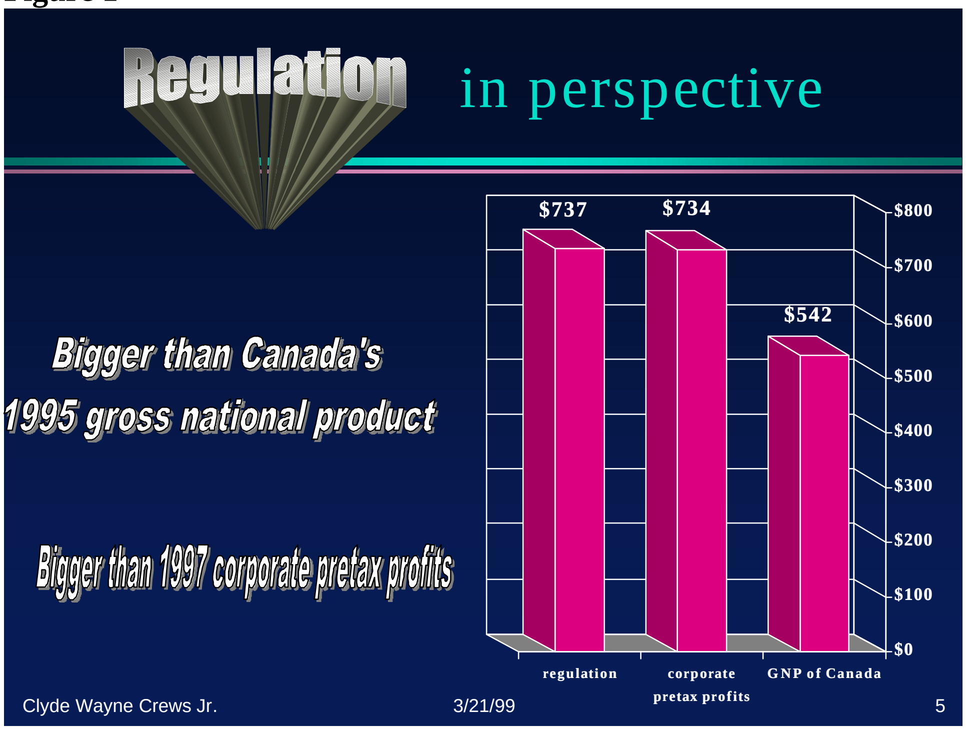
Regulations in Perspective, 1999

• Costs of Regulations

The total costs of complying with off-budget social regulations total up to $230 billion according to the Office of Management and Budget. A more broadly constructed competing estimate by Thomas D. Hopkins that includes economic regulatory costs and paperwork costs pegs regulatory expenditures (updated for inflation) at $737 billion in 1998.

If Dr. Hopkins is right, 1998's regulatory costs amounted to 44 percent the size of all federal outlays of $1.6 trillion. In other words, the off-budget government is approaching half the size of the budgeted one, and is bigger than Canada's GNP ($542 billion in 1995), and larger than corporate pretax profits ($734 billion last year). (See Figure 1)

Figure 1



Sources: Thomas D. Hopkins, Bureau of Economic Analysis, *Statistical Abstract of the U.S.*

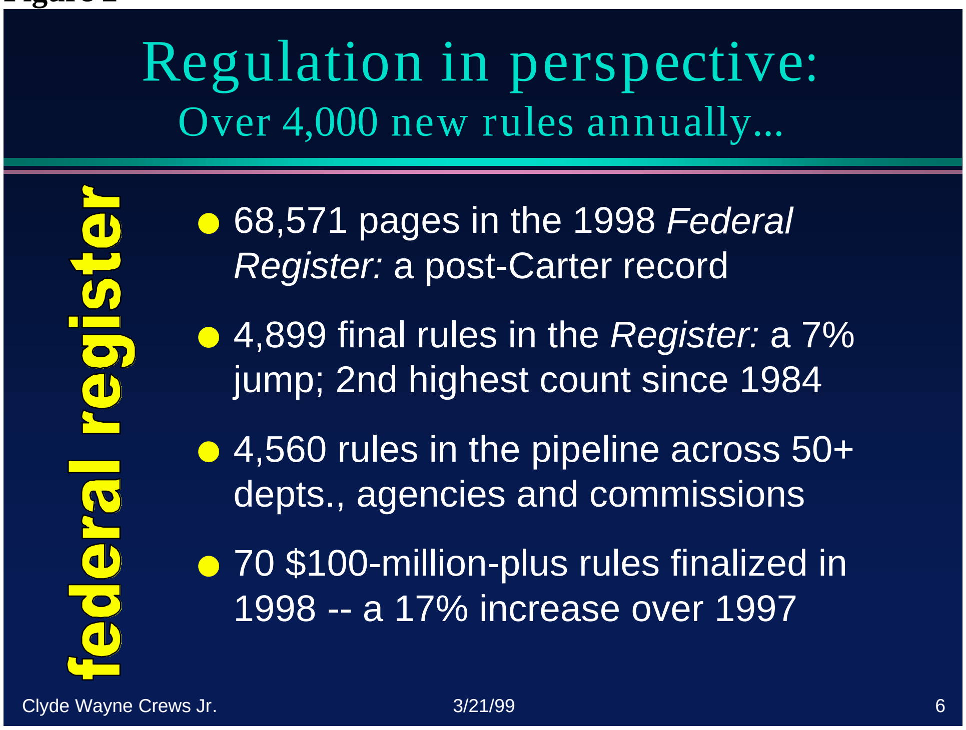
Other information about regulatory costs:

- ✓ Regulatory costs absorb 9 percent of U.S. gross domestic product, $8,499 billion last year.
- ✓ Agencies spent $17.5 billion to manage the regulatory state in 1998. Counting the $737 billion in off-budget costs, that brings the total regulatory burden to $754 billion.
- ✓ The average family of four's 1997 after-tax income of $36,423 contained $7,239 in hidden regulatory costs. Thus regulatory costs consume 20 percent of the after-tax family budget.

- Numbers of Regulations – 4,899 rules in 1998

- ✓ The 1998 *Federal Register* contained 68,571 pages, the highest level since Jimmy Carter's presidency and a 6 percent jump over 1997. (Figure 2 summarizes *Federal Register* data.)
- ✓ Agencies issued 4,899 final rules in 1998's *Federal Register*, a 7 percent jump over the year before, and the second-highest count since 1984.
- ✓ According the General Accounting Office's database, 70 final rules costing at least $100 million each were issued by agencies in 1998, a 17 percent increase over the 60 issued the year before.
- ✓ Agencies have issued over 21,000 final rules over the past five years.

Figure 2



Source: Office of the Federal Register, National Archives and Records Administration

- ## Numbers of Regulations – 4,560 rules in the works

- ✓ According to the October 1998 *Unified Agenda of Federal Regulations*, 4,560 regulations are now in the pipeline throughout the 50-plus federal departments, agencies and commissions (at either the pre-rule, proposed, final, completed or long-term stages).
- ✓ Of the 4,560 regulations now in the works, 117 are "economically significant" rules that will cost at least $100 million apiece annually. That indicates that new regulations to impose at least $11.7 billion yearly in future off-budget costs are in the pipeline.
- ✓ The top five rule-producing agencies account for 2,152 rules, or 47 percent of all rules under consideration. (The agencies are: the Department of Transportation, the Environmental Protection Agency, the Department of the Treasury, the Department of Agriculture and the Department of Health and Human Services.)

- ✓ Rules affecting small businesses have increased 37 percent over the past five years, from 686 in 1994, to 930 in 1998.

• Numbers of Regulations - EPA spotlight

- ✓ The Environmental Protection Agency (EPA) alone expects to issue 462 of the 4,560 planned rules.
- ✓ The EPA's rules now in the pipeline will cost at least $3.5 billion annually.
- ✓ Fewer than half of the EPA's planned $100 million rules are accompanied by quantitative benefit estimates, according to CEI's review of the EPA's 1998 *Regulatory Plan*.

Overview: Why improved disclosure as provided in the Right-to-Know Act (H.R. 1074) is essential

The Regulatory Right-to-Know Act (H.R. 1074) is important also because it makes disclosure of the regulatory state an inherent part of running the federal government, and because it re-emphasizes the important policing role of central review of regulations. Some research suggests that centralized review helps level the playing field for consumers by increasing the rate of return to lobbying for dispersed groups (like consumers) relative to concentrated special interests, since they need to influence one entity rather than a host of them.[0] So Right-to-Know may also enhance fairness in addition to increasing disclosure.

The Right-to-Know Act takes regulatory disclosure to its next logical level given the recent reforms Congress has already put into place. Since 1994, bills implementing paperwork reduction reform, unfunded mandates reform, a requirement that Congress get the opportunity to review new regulations before they are effective, and small business regulatory relief, have passed. The Right-to-Know bill, with its wide bipartisan sponsorship, is likely to pass. Members shouldn't discount the merits of keeping the analysis simple, however. The Act could easily report data such as that appearing above, all in such a way that it is easily graspable by the public rather than merely by regulatory policy specialists, policymakers and academics.

The need for greater analysis of regulatory impacts was made clear in the 105th Congress's *Survey of Federal Agencies on Costs of Federal Regulations* (Committee Print 105-A), prepared by staffers of Commerce Committee Chariman Tom Bliley. Recognizing that regulations are fundamentally interventions in the marketplace, the Commerce Committee sent 13 federal agencies questionnaires in compiling its report, intending to learn how agencies consider and document the costs of the regulations they issue. Among the report's conclusions, the committee noted "We have found that the agencies have little, if any idea of how their regulations affect the American people."[1]

The queries sought the paperwork documenting the regulatory costs the agencies imposed, the procedures used to determine those costs, and comparisons of actual and anticipated costs.

Significantly, the agencies were specifically asked *not* to prepare new documents. The intent was to determine if agencies - as guardians of public health, safety and economic well being -- exercised rudimentary benefit-cost assessments of their own accord.

Alas, agencies seemingly were not to be bothered. The Committee regarded as "disturbing" the "pattern across practically all regulatory agencies of neglect of the documentation and consideration of regulatory costs." The report found that "none of the agencies under the Commerce Committee jurisdiction has a basis to make fully informed or defensible decisions about the promulgation and review of regulations; agencies cannot possibly know whether they are doing more good than harm."

And as for the sweeping, big-picture questions that ought to engage mighty agencies wielding all-embracing power -- such as regulation's impact on consumer prices, its contribution to U.S. job loss, and to the delay of life-improving inventions and technologies; "Federal agencies never answer these questions - they never even ask them." The Regulatory Right-to-Know bill's requirement that OMB report on the impacts of regulation on the federal and lower-level governments, the private sector, small business, wages, prices and productivity would remedy this lapse. Greater disclosure and accountability are warranted and readily attainable.

Themes to guide successful regulatory reform: accountability and disclosure

Regulatory costs – such as those posed by pollution controls, workplace regulations and consumer product regulations -- sap the economy of hundreds of billion of dollars each year by any estimate. The traditional responses have been calls for enhanced cost-benefit analysis and risk assessment, reviews of new and existing regulations, and reducing paperwork. All are important, but their limitations must be recognized as well.

In making the case for significant reforms of the regulatory state, the laudable goals of ensuring that benefits exceed costs and that regulated risks are significant have unfortunately failed to inspire, as evidenced by the 104th and 105th Congress' unsuccessful comprehensive regulatory reform efforts, as well as the relative lack of consensus on the format and content of such reports at the Office of Management and Budget (OMB) for nearly two decades. Although policymakers have long called for precisely such agency cost-benefit analyses and risk assessments of federal health and safety rules, even today, no coherent, enforceable, publicly understandable regulatory monitoring policy exists.

One problem with emphasizing cost-benefit analyses and risk assessments of health and safety rules has been the ease with which such demands gets misrepresented by pro-regulation demagoguery. As Competitive Enterprise Institute President Fred Smith noted, last year's regulatory reform effort was characterized by opponents and the media as: "Mad-dog Republican ideologues join with robber-baron capitalists to regain the right to add poison to baby food bottles." The fact that ill-conceived regulations themselves actually cause harm got lost in the sound-bite sewer.

Last year's comprehensive regulatory reform bill, opponents claimed, would bog agencies down in tedious cost-benefit analyses, and its judicial review provisions would tie up the courts with frivolous lawsuits against agencies.

There is considerable reason to doubt these claims. Yet even if cost-benefit analysis were perfected, fundamental regulatory reforms would still await. OMB, as a watchdog of federal agencies, can do only so much on its own: agencies issue most significant regulations because they are required to by Congress in the first place – thus they can police themselves only to a limited extent. Since Congress itself is the source of overregulation, Congress must become the target of regulatory reform in the final analysis -- just as Congress is the target of popular proposals like term limits, committee reform, and other reforms aimed at reining in government over-reach. Regulatory reform, rather than being seen solely as a technocratic cost-benefit campaign, should be understood also as *congressional reform*. Rather than solely denounce derivative agencies or scold OMB for failing to properly "audit" the regulatory state, regulatory reform must institute congressional accountability and curtail the excessive delegation of power to unelected federal agency employees in the first place. The Congressional Review Act of 1996, which gave Congress an expedited procedure to enact disapprovals of inappropriate legislation, was an important acknowledgement of this principle.

In the meantime, the bipartisan Right-to-Know Act, by establishing an annual report on regulations and keeping the report simple and digestible, can lay the groundwork for greater success by laying bare the scope of the regulatory state. (See Figure 3.)

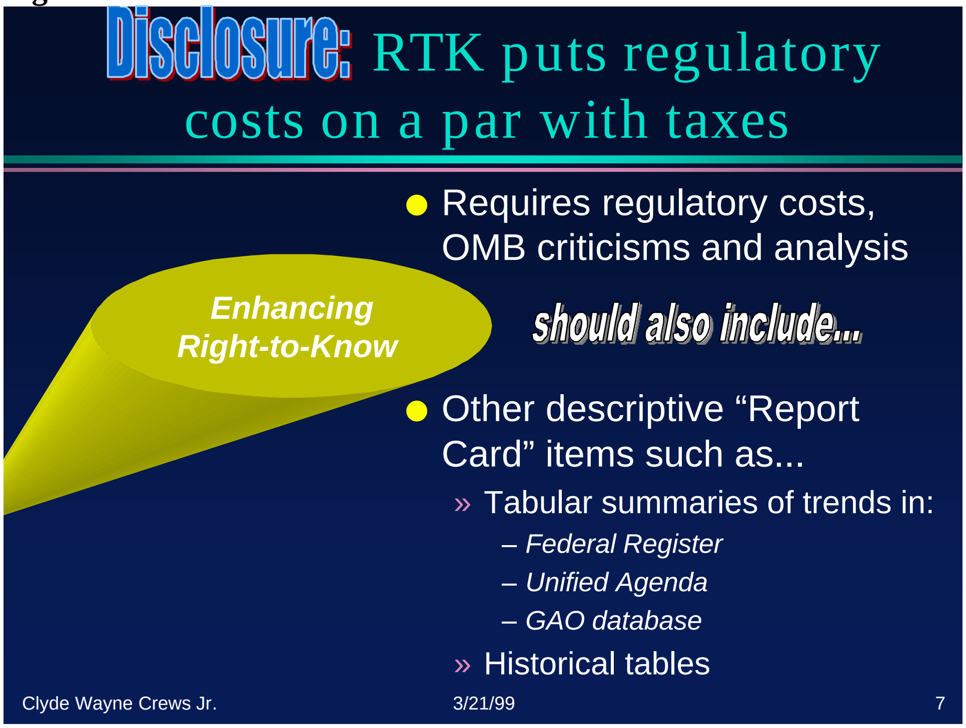
Figure 3

Other than curtailing the delegation of excessive legislative power to unelected agencies -- which is the fundamental source of regulatory excess -- the only response to agency excess is to aggressively monitor and audit what agencies do. This is why a review function and an annual assessment of regulatory impacts by the Office of Management and Budget (OMB) like that laid forth in OMB's 1998 *Report to Congress to Congress on the Costs and Benefits of Federal Regulations*, and made permanent with the Regulatory Right-to-Know Act, matters so much. Since regulation and taxes are both means of achieving governmental ends -- and since both have impacts on aggregate output, prices and employment -- policy should avoid unacknowledged government-caused expenses, whether fiscal or regulatory. The Right-to-Know bills disclosure provisions will ultimately help provide incentives for Congress itself to ensure that regulatory benefits exceed costs.

Ensuring the Right-to-Know Act's Success

The OMB must do the best job of reviewing and documenting the regulatory state that it possibly can, and continuing the *Report to Congress* as the Right-to-Know bill will do is the essential step because it ensures that *disclosure* spearheaded by the OMB orients future regulatory reform. Right-to-Know recognizes that OMB stands in a unique position to maximize "truth in regulation" by enhancing its report, thereby helping ensure that OMB's oversight efforts succeed and continually improve every year. Following are some of the ways -- such as emphasizing simplicity, creating more informative, user-friendly "Report Cards," and calling for more boldness from OMB -- that the Right-to-Know Act can put regulatory costs on a par with taxes in terms of public disclosure. (See Figure 4).

Figure 4



- OMB should compile a simplified "Regulatory Report Card" of available regulatory statistics for publication in the *Federal Budget* or the *Economic Report of the President*

Reformers are handicapped by the relative lack of official *concise* presentation of known information about regulatory trends and costs. The popular and often-cited "number of *Federal Register* pages" is a tired gauge, and one that reveals little about actual regulatory burdens. In the new *Report to Congress*, OMB did a commendable job outlining the bulk of the costliest, "economically significant" rules for the period April 1, 1997 through March 31, 1998. OMB's summaries in the *Report to Congress* of the available cost-benefit data provided by the agencies for these rules is a giant step above the standard presentation of this information -- scattered across more than 4,000 separate rule entries in the 1,000-plus pages of the *Unified Agenda of Federal Regulations*, with nary a digestible summary table in sight.

One tweak of the Right-to-Know bill that would be of immense value in the ongoing reform effort to Congress, scholars and the very third party reviewers whose input is stressed in the bill would be to *more fully summarize the regulatory data already provided but scattered across government agencies*. This information includes, but is not limited to: total numbers of major and minor rules; available cost tallies for the current year's rules; numbers of major rules reported on by the GAO in its database; numbers of rules with statutory and judicial deadlines; the top rule-making agencies; and *Unified Agenda* data on rules impacting small businesses, and state and local government. Such data could be easily condensed and published as a part of OMB's Right-to-Know report or as a chapter in either the Federal Budget, the *Economic Report of the President*, or the *Unified Agenda of Federal Regulations*. A simplified "Regulatory Report Card" has the advantage that it does not immediately require enactment of more stringent cost-benefit requirements, while Right-to-Know as it currently stands certainly will.

In other words a significant amount of the "non-cost" information not currently assembled intelligibly in one location, easily could be. Much of it would be of immense value, just as hard cost numbers would be. It would be remarkably informative in telling us about the extent of the regulatory state, primarily because it would help policymakers determine whether it does more good than harm. OMB could summarize all quantitative and non-quantitative data into a handful of charts, and provide historical tables as well. Trends in this data will prove vital information, facilitating cross-agency comparisons over time.

Figure 5 provides a sampling of dispersed data already compiled that should be officially published annually in summary form *by program*, *agency*, and *grand total*:

Figure 5

Requiring annual publication of such summary information would acknowledge and validate its status as an important component of the disclosure process, and quickly reveal to what extent Congress itself is responsible for the regulatory burden. For example, it would help emphasize that Congress put in place many of the statutory deadlines that make vigorous regulatory analysis impossible. And so long as agencies continue to calculate benefits, 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.

As OMB is aware, the presentation of some of this data would not be a new exercise. Portions of this information, such as numbers of proposed and final rules and number of reviews, were formerly collected and published in a “sister” document to the Budget -- the *Regulatory Program of the United States Government* -- but that process has since been abandoned. This report specified what actions a then-more-aggressive Office of Information and Regulatory Affairs took on proposed and final rules it reviewed, with data going back 10 years. The report also included comparisons of the most active rule-producing agencies, detailed the specific regulations that were sent back to agencies for reconsideration, listed rules withdrawn, and provided analysis of pages and types of documents in the *Federal Register*. Reinstating the *Regulatory Program*’s “Annual Report” would be an easy step for the Right-to-Know bill. As part of the presentation, OMB should also present the top five or 10 rule makers in both number and in cost. Tallying costs is important, but where costs aren’t available, the percentage of each agency’s significant rulemakings lacking estimates can be ascertained. That would help highlight the best and worst agency efforts at getting a handle on costs. As years pass, cumulative reporting also will help uncover any efforts to circumvent the regulatory review process, such as any proliferation of "minor rules" to avoid the “economically significant” or “major” rule label.

As the Figure 5 suggests, breaking out information on numbers and types of rules impacting small business would be important as well, and easy to achieve by using the annual *Unified Agenda*. According the Small Business Administration, small businesses account for 50 percent of employment in the United States, 44 percent of sales, and 39 percent of GDP. The Regulatory Flexibility Act requires federal agencies to assess the impacts of their regulations on small business, and it explicitly recognizes that fixed regulatory burdens are greater relative burdens for small firms than for large ones (since such firms have less output over which to spread costs, and since such costs absorb a greater share of a small firm's operating budget). Since data on which rules impact small business are available in the *Unified Agenda*, the Right-to-Know Act should require that it be summarized as well.

Non-cost data clearly isn’t useless: it can be made quantitative by revealing the percentage of rules for which benefits are and are not known, for example. Plus it would make Right-to-Know legislation more meaningful by officially reporting hard facts and numbers, not solely “net benefit” analyses guaranteed to be controversial and continually debated. While OMB’s *Report to Congress* estimate of the regulation’s aggregate and annual incremental costs becomes the annual fixture it should, the Right-to-Know Act should combine it with assorted Regulatory Report Card-style information. Together they would constitute the best ongoing official disclosure of the regulatory state ever published.

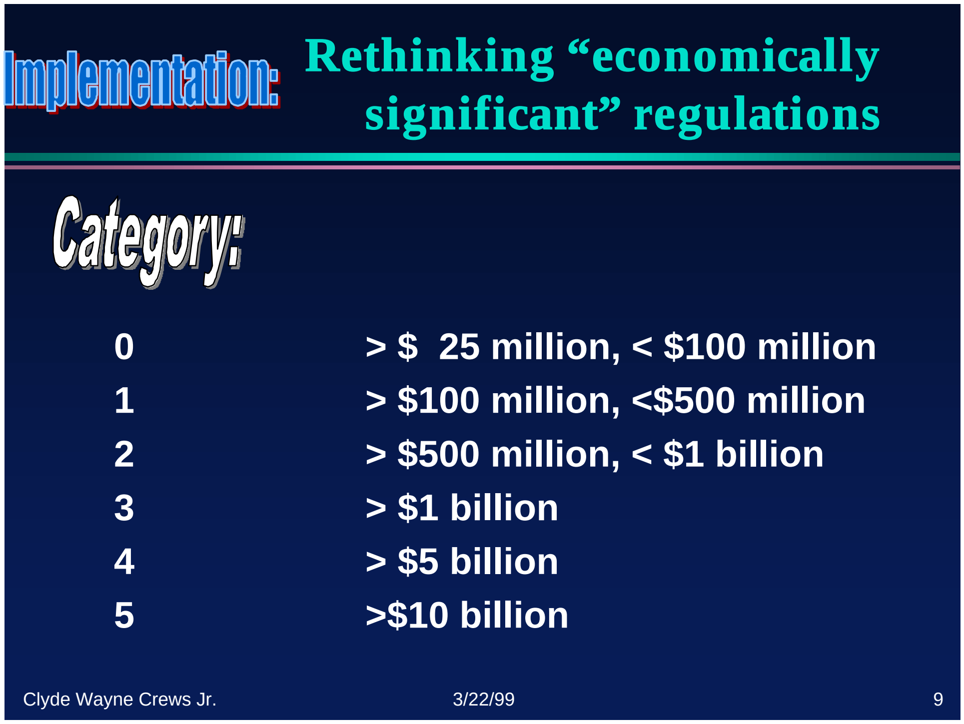
• The Right-to-Know Act should lower the threshold for "economically significant" or "major" rules, and have OMB designate multiple classes of them

If OMB and agencies concern themselves primarily with disclosing regulatory *costs* rather than benefits, as they should, then that presents an opportunity to improve and present far more meaningful cost analyses than anything available today. Today, regulations are usually loosely broken into those that are "economically significant" (over $100 million in annual costs), 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 ascertain only that the 117 major rules in the October 1998 *Unified Agenda* will, if implemented, cost *at least* $11.7 billion ($100 million times 117 rules) annually. But outsiders can't glean any more than that without combing tediously through the *Agenda*. The recent *Report to Congress* improved over the prior year's edition by including tables listing economically significant rules individually, along with their cost estimates (although the costs estimates were not added up.) But a better shorthand to refer to classes of costly rules would be worthwhile.

The "major" designation would be far more informative if expanded slightly in the Right-to-Know Act. The problem with today's definition of economically significant or major rules is that the bulk of rules can escape close scrutiny by the OMB, because they can cost up to $99 million and yet dodge the "significant" label. The remedy is to alter the threshold to, for example, $25 million annually -- which is still a huge amount of costs. Disclosing a wider range of costs is fairer to the public, plus if agencies are directed to focus principally on costs of rules rather than benefits (for reasons described below) the reporting burden becomes much more manageable as well as more informative.

To that end, OMB should develop simple guidelines and recommend that agencies break economically significant rules up into separate categories that represent increasing costs, to be presented in the Regulatory Report Card. The following chart offers a suggested breakdown:

Figure 6



The Figure 6 particular breakdown is merely one workable suggestion. OMB should select permanent categories based upon a review of costs of major rules over the past decade or so. It is apparent that the "economically significant" designation could be made substantially more meaningful: 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 ozone-particulate matter rule suggest that by the year 2010, the ozone portion will cost at least $1.1 billion, and that the particulate matter portion will cost $8.6 billion annually at that time.[2] Knowing that EPA imposed "Category 3" and "Category 4" rules would be far more informative shorthand than merely knowing that both rules are "economically significant."

• Agencies should emphasize costs rather than benefits

The previous sections mentioned shifting emphasis to cost disclosure rather than cost-benefit analysis. There are good reasons for the approach. It is well understood that the typical agency faces nontrivial incentives to overstate the benefits of its activities and to enlarge its scope. Benefit estimates can be highly subjective, and if an agency is allowed to offset costs of a regulation with benefits, as is currently the case in "net-benefit" reporting, rarely will any regulation fail to qualify from an agency's point of view. For example, benefits of such programs as energy conservation requirements will never be agreed upon, because some regard such programs as harmful rather than beneficial.

Indeed, even OMB is unwilling to say in its *Report to Congress* that it is prepared to recommend any revision or elimination of existing regulations. Despite the fact that it is the Office of Management and Budget and has been reviewing regulations for 20 years, OMB says that "At this stage we do not believe we have enough information to make definitive recommendations on specific regulatory programs."[3] Indeed, the OMB merely endorses a few reform initiatives that agencies came up with their own. In spite of its unique knowledge of the regulatory state, it takes cover behind the comments by Senator Glenn during debate over the legislation that led to the creation of the *Report to Congress* that "OMB will not have to engage in extensive analyses of its own, but rather is expected to use existing information."[4] The OMB also notes that "[I]t is the agencies that have the responsibility to prepare these analyses, and it is expected that OIRA will review (but not redo) this work.[5]

Along with the lack of enough aggressiveness toward agency rules, the OMB reports a huge range of possible net benefits. The OMB reports that "health, safety and environmental regulation produces between $30 billion and $3.3 trillion of net benefits per year."[6] That tremendous range makes it difficult to draw any conclusions about the effectiveness of the regulatory state. But the real problem with being too accepting of "net benefit" numbers applied to the entire regulatory enterprise is that, of the thousands of regulations that up to now exist, just a handful may be responsible for the bulk of benefits, leaving the rest of the regulatory state's benefits questionable. In a letter to OMB Director Jacob J. Lew, Sens. Fred Thompson (R-Tenn.) and Ted Stevens (R-Alaska) on the draft version of the OMB's now-final report, noted that "[T]he estimates in the draft report of the total annual benefits of social regulations range from $93 billion to $3.3 trillion. Most of this is attributed to two major regulations on lead and particulate matter."[7]

As a practical matter, it also happens to be the case that OMB will never review all agency benefit estimates anyway, especially if the definition of "economically significant" rules remains as it is, at $100 million annually. For the 1998 *Report to Congress*, the OMB reviewed less than 1% of the 4,720 final rule documents from agencies.[8] Moreover, the OMB often includes and monetizes annual estimates only for those rules for which agencies have already quantified benefits.[9] Agencies may learn quickly to avoid scrutiny by not quantifying benefits. Moreover, the Right-to-Know Act itself calls for inclusion of "non-quantifiable" benefits. That's an invitation to more yawning gulfs like OMB's $30 billion to $3 trillion one, and makes impossible the kind of "point estimate" for regulatory benefits and costs that some commenters on the OMB's annual reports have advocated. Plus the Right-to-Know bill assumes the benefit estimates from agencies will be there for OMB to review in the first place -- but they won't be until Thomson-Levin-style comprehensive regulatory reform legislation stipulating cost-benefit analysis and risk assessment, is enacted.

Additionally, the problem exists that independent agencies "provide relatively little quantititative information on the costs and benefits of regulations for major rules, especially compared to the agencies subject to E.O. 12866."[10]

Given the nearly intractable problems surrounding any such notion as objective regulatory net benefits, any annual accounting statement intended to accurately portray the scope of the regulatory state should relieve agencies of benefit calculation responsibilities altogether. Agencies and OMB should concentrate solely on assessing as fully and as accurately as possible the costs of their initiatives, which would allow them to more fully analyze far more rules. This approach would also parallel our fiscal budget, which focuses only on the amounts of taxes, not their benefits. Properly, the benefits of regulations are Congress's worry -- it presumably knows the benefits it is seeking when it passes legislation that agencies later implement with regulatory directives. Congress therefore should be prepared to specify what it thinks it is reasonable to expect people to spend to achieve those benefits. Agencies should then seek to attain those benefits at least cost.

Laying bare the extent of the regulatory state is essential despite its difficulty, but leaving out benefit calculations would help OMB (and agencies') devote more resources to cost disclosure. Agencies already do a reasonable job assessing costs for $100 million rules through the preparation of Regulatory Impact Analyses, which face public comment, and through the requirements of Executive Order 12866. That work can be credibly built upon. It happens to be the case, of course, that the legislation that required OMB to produce the *Report to Congress*, as well as the Right-to-Know Act, call for cost *and* benefit calculations, and therefore OMB must comply to the best of its abilities until that approach is changed.

Of course, focusing on costs doesn't mean benefits can be ignored. They should simply be addressed differently. As with the tax code, *Congress* should make the "grand judgments" about where regulatory benefits lie and take responsibility for the benefits or lack thereof implied in the regulatory priorities that prevail across the agencies. Congress already "sets" priorities implied by the potential benefits that the various agencies might provide, given their purview. Allowing agencies to focus on costs could prod them toward maximizing benefits within those bounds. Rather than simply claim net benefits for every rule, agencies should "compete" to prove that they save the most lives at least cost when compared to other agencies. Ultimately, that dynamic would allow Congress to reapportion regulatory authority based on results achieved or unachieved. For example, if it is determined that OSHA saves more lives than EPA, Congress's future lawmaking and the resulting allocation of regulatory authority could reflect that.

Leaving off benefit calculations would also offer more of a chance for agencies to grapple with *indirect* costs – themselves a immense calculation problem -- and also avoid the intellectual chaos of trying to speak coherently about "net benefits" when such benefits are subjective, wildly disagreed upon, and often measured best on different metrics and thus rarely discernible by third parties. Consider that we don't offset the *taxes* individuals pay with the benefits those taxes provide to others to arrive at a *net* tax burden. Abuses could 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. Even benefits of federal on-budget activities are difficult to compare with costs: How does one for example, trade off benefits of federal outlays on Amtrak versus money spent on welfare?

Such ambiguities would become greatly magnified in a regulatory regime that left benefit assessments up to agencies alone. Moreover, while OMB stated in an earlier version of the *Report to Congress* that "The advantage of regulation is that it can improve resource allocation or help obtain other societal benefits," that begs the question of *whose* resources, or *whose* societal benefits: society doesn't speak with one voice.

Grasping costs fully in preparing any annual regulatory survey will be fraught with difficulties and uncertainties enough. The Right-to-Know Act should keep the OMB's job more manageable by concentrating on cost disclosure, and would likely be much more useful than several more years of the kind of reports OMB is doing now.

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- As long as Right-to-Know retains benefit calculation requirements, the OMB must be more willing to criticize agency benefit claims.

Until OMB and agencies shift their focus to cost calculations alone, a proper attitude toward agency benefit claims is essential. And indeed, OMB appears skeptical of some EPA claims of the benefits of its clean air regulatory programs, for which the EPA's "estimate implies that the average citizen was willing to pay over 25 percent of her personal income per year to attain the monetized benefits."[11]

An unspoken presumption underlying regulatory activism is that markets are not perfect but that political decisionmaking somehow can be. Indeed, the fount of regulation is the belief that government actors are non-self-interested, that political markets are fairer than private markets. The OMB remarked in an earlier year's Steven's *Draft Report* that "It is…difficult to imagine a world without health, safety and environmental regulation. Could a civil society even exist without regulation?"[12] While getting to the bottom of such deeply philosophical discussions as whether markets and the common law better protect the public than regulation is well beyond the scope of this report,[13] it is important for OMB to be more willing to acknowledge the ease with which regulation can do more harm than good.

OMB appears too comfortable granting the benefit of the doubt to regulators. By 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 ultimately fails to recommend any reductions or elimination of rules, but merely restates and supports some reforms that agencies are already undertaking. Interestingly, in the face of the prevailing, unquestioning acceptance of the benefits of "social" regulation, our society is on the other hand engaged in widespread dismantling of economic regulations (electricity, telecommunications) because of a realization that such regulation does more harm than good. It has become clear that economic regulation often merely serves special interests. For example, price regulation has not been shown to work for consumers, but it has been shown to increase prices and aid some producers.

Thus it is not the case that "businesses generally are not in favor of regulation."[14] Business not only generally favors regulations that transfer wealth to them, but often seeks the regulation in the first place. Consumers did not ask for the Interstate Commerce Commission, for example, or for the state regulation of utilities: such regulation was sought by the regulated to protect profits. But if economic regulatory agencies are subject to capture by special interest groups, it is no great leap to conclude that much of what is considered "social" regulation may likewise be quite self-centered.

Indeed, health and safety regulation can tend to aid the regulated, and potentially produce a bad deal for consumers. For example, food labeling restrictions that limit health claims may benefit entrenched food producers that already enjoy healthy reputations. 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. As a result, the health characteristics of newly introduced food products may be caused to decline -- the opposite of regulation's alleged intent. Since regulation can easily be exploited to protect profits, many examples of "social" or "safety" regulations must be carefully considered as well. Butter producers tried to portray margarine as unsafe and filthy at the dawn of the margarine industry, for example. Likewise, examples of environmental regulations being abused to transfer wealth or protect profits abound.

There are other reasons OMB should recognize benefits may not always be as high as agencies claim as it carries out the directives of the Right-to-Know Act:

- ✓ Benefits may be less because of agencies incentives to overstate them (the flip side of the incentive of businesses to overstate 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 or by state and local regulatory authorities.
- ✓ 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 as a competitive feature.

OMB should temper the inclination to give the benefit of the doubt to agency benefit claims, and recognize that environmental and social regulation is subject to the same political failure and regulatory "pork barreling" that often accompanies economic regulation. It is, however, heartening to see that OMB has acknowledged that health and safety are *competitive* features and that businesses will strive to provide them without regulation.[15] The Right-to-Know Act should emphasize OMB's role in ensuring that regulators do not take credit for the benefits that business would provide anyway.

- In aggregate and annual cost estimates, the Right-to-Know Act should separately categorize economic, social/environmental administrative, and "agency only" rules.

OMB properly distinguishes between economic and environmental/social regulation in its aggregate cost estimates. Moreover, OMB's willingness to conclude that the benefits of economic regulation are "expected to be small"[16] is a dramatic official development.

There seems to exist an emerging recognition that that the weakest excuse 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 whether the issue is 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 the trucking industry). Even if motives are pure, such economic interventions fail. More ominously, many now recognize that motives for regulation aren't necessarily always rooted in the "public interest" at all, that regulation often works in the interests of the regulated parties themselves rather than in the public interest. That's a certain recipe for regulatory failure.

Since the role of health and safety regulation is so utterly different from economic regulation, separate presentation of them required by the Right-to-Know Act would make sense from the standpoint of comparing relative merits of regulations as the scope of OMB's surveys of annual regulatory costs grows. There are obvious conceptual differences that make meaningless comparisons of, for example, purported economic benefits from a trade regulation with lives saved by a safety regulation. To the extent that analyses such as the *Report to Congress* help discredit economic regulation, such regulations can be removed from the purview of government altogether (admittedly a utopian thought), leaving Congress and OMB the smaller task of controlling and documenting costs of environmental, health, and safety regulations. And of course, where health and safety rules reveal that they too have "private interest" origins, they can be jettisoned.

Paralleling an official distinction between "economic" and "social" regulation, the *Unified Agenda* and future regulatory cost studies (or Report Cards) prepared by OMB should further distinguish both these variants of these "interventionist" regulations from those that merely affect the public's dealings with the government. In other words, rulings such as those on benefit eligibility standards, use and leasing requirements for federal lands, and revenue collection standards and such, should appear separately in OMB reports from the economic and environmental and social regulations that normally represent the focus of regulatory reform. This separate category could simply be called "administrative." OMB could also separately present those rules that affect agency procedures only.

• The Right-to-Know Act properly acknowledges indirect impacts of regulations.

The OMB agrees on the importance of assessing indirect effects of regulation and seeks to do more investigating for next year's report.[17] Acknowledging indirect costs is simply a matter of fairness and accountability in government. If government doesn't regard compliance itself as too complex, then how can the government claim that merely assessing the costs of compliance is too cumbersome? Likewise, if indirect costs are too difficult to compute, then how can government credibly argue that compliance is a simple matter?

Ignoring indirect costs would lead to massive understatements of regulatory burdens. Thus, some explicit recognition of indirect costs imposed by regulations is necessary even though precise measurement will be impossible. (It bears mentioning that some types of indirect costs generated by certain regulations are reasonably well known. The documented negative effects of such interventions as the Corporate Average Fuel Economy standards, "drug lag," and the Endangered Species Act are all evidence of the need to monitor indirect costs.) Recognizing and somehow incorporating indirect costs in a reasonable way represents a critical, ongoing problem. Luckily, opportunity costs apply even to the economists at OMB: by avoiding benefit assessments as suggested earlier, manpower resources remain available to better assess indirect regulatory costs.

Another way of dealing with the dilemma of tabulating indirect costs, is to require Congress itself to vote on significant final agency rules where indirect costs are a significant component but difficult to tabulate. Under such a framework, handwringing over indirect costs wouldn't be quite as worrisome. The key contribution of an annual Right-to-Know regulatory accounting is not its accuracy alone, but its role in making Congress more accountable for the regulatory state. Today, no one is held directly accountable to voters for regulatory excess. Thus, one could clearly do worse than settle for rough indirect cost estimates that nonetheless help allocate regulatory dollars in loose correspondence with where an *accountable* Congress believes benefits to lie.

• The Right-to-Know Act should ask the OMB to aggressively recommend rules for revision or elimination.

As noted, OMB is too timid about recommendations for eliminating past-year regulations. Although OMB has said that "Before supportable recommendations are made to eliminate existing regulatory programs or elements of programs, empirical evidence based on analytical techniques… must be developed,"[18] many of the cost-benefit analyses are as good as they ever are going to be. If agency analyses under Executive Order 12866 or if independent analyses appear not to justify a rule, then OMB should be forthright and say so. Nor should OMB shy away from making recommendations about modifying regulatory programs based on plain common sense. OMB might, for example, note the cost of a presumably beneficial regulation, then compare that benefit to the alternative benefits that could be secured if the compliance costs went instead toward hiring policemen or firemen, or simply toward buying buckets of white paint to paint lines down the centers of dangerous rural blacktop roads.

In other words, OMB has the experience and know-how to create a "benefit yardstick" of its own, so to speak, by which it can objectively critique *all* high cost, low benefit rules in an annual Report Card, if the Right-to-Know Act will simply require that it do so. Additionally, the Right-to-Know Act should stipulate that OMB ask *agencies* to propose rules to cut. Or, OMB could have agencies rank their regulations and show how their least effective rules are superior to another agency's rules. Results of such questionnaires could be presented in the Regulatory Report Card.

Further advancing the public's right-to-know

The very fact that OMB -- the *Office of Management and Budget* of all entities -- must rely on outside estimates of the costs imposed by the government it helps administer speaks volumes about the lack of accountability for regulatory costs.

To improve accountability over regulatory costs, 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. This law was an important step toward enshrining the all-important notion of congressional accountability for regulations. However, the CRA has the disadvantage that it effectively requires a 2/3 supermajority to strike a rule if the president decides to veto a disapproval resolution. The superior approach to ensuring congressional accountability would be to enact a bill stipulating that no major agency rule becomes law *until* it receives an *affirmative* vote by Congress. This is in keeping with the Constitutional requirement that "All legislative Powers herein granted shall be vested in a Congress of the United States." (An expedited approval process along with en bloc voting on regulations may be employed to approve rules.)

Policing agency cost-benefit analyses clearly becomes less important if we instead require Congress - our elected representatives -- to approve new agency rules before they are binding on the public. If Congress then does a poor job ensuring net regulatory benefits, we have recourse at the ballot box. We will always lack that leverage with agencies.

In other words, cost-benefit analysis merely stresses *agency* accountability. Far better is stressing *congressional* accountability for all regulations. Today, Congress can take credit for popular legislation like the Clean Air Act while scapegoating "out of control" federal agencies when regulatory compliance costs later spiral. But the agency bureaucrats that Congress blames aren't accountable to voters. In delegating these powers to bureaucrats, Congress has created a disconnect between the power to establish regulatory programs and *responsibility* for the results of those programs.

Making Congress more accountable for regulations would avoid much of the problem of agency tunnel vision: agencies by their nature cannot make the cross-agency comparisons of rules that would aid in the setting of government-wide priorities. Congress itself would become answerable for government-wide priorities, thus producing greater incentives to achieve maximum benefits than cost-benefit requirements imposed on agencies. Ending "regulation without representation" would also lessen the problems caused by the fact that for many regulations, agencies' "understandable response is not to quantify or monetize."[19] In such cases, the rule, like all others, goes back to a Congress that will answer for its efficacy or lack thereof. As long as accountability rules the day, even where cost (or cost-benefit) analyses cannot be conducted, or appear impossible to conduct, the public will have less reason to be concerned about regulatory excess because every elected representative will be on record as either in favor of or opposed to a particular regulation.

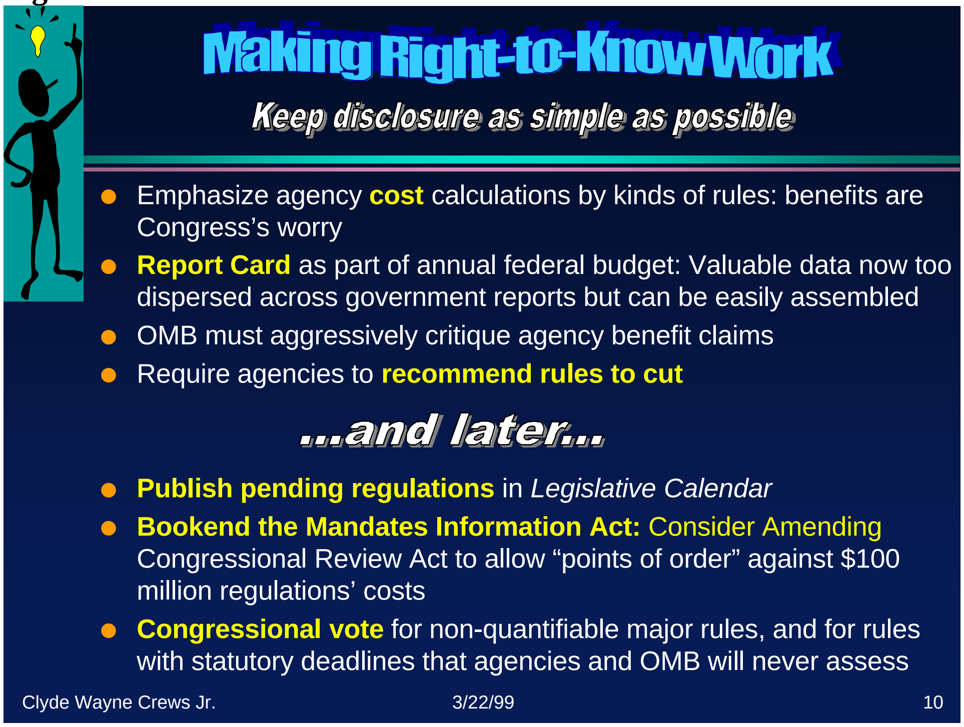
OMB's yearly efforts at presenting a snapshot of the regulatory burden as stipulated in the Right-to-Know bill would be aided by enhanced congressional accountability. A Congress directly accountable for regulatory costs would be less likely to approve questionable rules, therefore, agencies would be more inspired to ensure that their rules met a reasonable cost-benefit benchmark before sending them to Congress. Where today there is little incentive to perform cost-benefit analysis, accountability would "force" agencies and Congress to take those considerations into account.

Even if Congress were required to approve every agency regulation, cost tallies like those the Right-to-Know Act will provide would remain essential for the same reasons it is essential that the U.S. formally budget tax revenues and outlays. Moreover, since imposing taxes and imposing regulations can be substitutes for one another, today's pressures to maintain a balanced budget could increase pressures to regulate, underscoring the urgency of accounting for regulatory costs as the Right-to-Know bill will require.

Conclusion

The Right-to-Know Act offers a supremely useful tool for coming to grips with the regulatory state. Accountability and disclosure are the keys to guaranteeing that the regulatory enterprise always does more good than harm, and OMB has a significant oversight role to play. Other steps to maximize disclosure -- such as preparing summary "Regulatory Report Cards" for prominent presentation in the fiscal budget, focusing on costs rather than benefits, and creating multiple classes of major rules -- could further help ensure that annual status reports on regulation continue to improve and provide the public with the information it deserves. Figure 7 illustrates some of these steps and provides thoughts for future reforms.

Figure 7


Making Right-to-Know Work
Keep disclosure as simple as possible
Emphasize agency cost calculations by kinds of rules: benefits are Congress's worry
Report Card as part of annual federal budget: Valuable data now too dispersed across government reports but can be easily assembled
OMB must aggressively critique agency benefit claims
Require agencies to recommend rules to cut
...and later...
Publish pending regulations in Legislative Calendar
Bookend the Mandates Information Act: Consider Amending Congressional Review Act to allow "points of order" against $100 million regulations' costs
Congressional vote for non-quantifiable major rules, and for rules with statutory deadlines that agencies and OMB will never assess
Clyde Wayne Crews Jr.
3/22/99
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Endnotes

[0] James C. Miller III, William F. Shughart II and Robert D. Tollison, “A Note on Centralized Regulatory Review,” *Public Choice*, 1984, 43, p. 83.
[1] See *Survey of Federal Agencies on Costs of Regulations*, Staff Report Prepared for the Committee on Commerce, U.S. House of Representatives, 105th Congress, 1st Session, Committee Print 105-A, Washington: U.S. Government Printing Office, 1997.
[2] “Costs of Ozone Standard Outweigh Benefits, Final Impact Analysis Shows,” *BNA Daily Environment Report*, No. 142, July 24, 1997.
[3] *Report to Congress*, 1998, p. 84.
[4] *Report to Congress*, 1998, p. 102.
[5] *Report to Congress*, 1998, p. 45.
[6] *Report to Congress*, 1998, p. 16.
[7] Letter to the Honorable Jacob J. Lew, Director, Office of Management and Budget, from Sen. Fred Thompson (R-Tenn.), Chairman, Senate Committee on Governmental Affairs, and Sen. Ted Stevens (R-Alaska), Chairman, Senate Committee on Appropriations, October 10, 1998, p. 2.
[8] *Report to Congress*, 1998, p. 44.
[9] *Report to Congress*, 1998, p. 68.
[10] *Report to Congress*, 1998, p. 60.
[11] *Report to Congress*, 1998, p. 26.
[12] *Draft Report*, 1997, p. 21.
[13] The Competitive Enterprise Institute would argue that much environmental regulation is “necessary” because of the failure to define property or use rights over resources in the first place. Thus, regulation is required due to government failure rather than market failure.
[14] *Draft Report*, 1997, p. 21.
[15] *Draft Report*, 1997, p. 22-23.
[16] *Report to Congress*, 1998, p. 20.
[17] *Report to Congress*, 1998, p. 92.
[18] *Draft Report*, 1997.
[19] *Draft Report*, 1997, p. 4.