

CONGRESSIONAL OVERSIGHT AND REFORM

All legislative Powers herein granted shall be vested in a Congress of the United States.

—Article 1, Section 1, U.S. Constitution

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

Congress should:

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

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

Congressional Review Act. To improve regulatory cost accountability, the 104th Congress passed the Congressional Review Act in 1996. That law sets up a 60-day period following agency publication of a regulation during which the rule will not take effect. That 60-day pause affords Congress an opportunity to pass a resolution of disapproval to halt the regulation. Congress has rarely used it. Although nodding toward congressional accountability, the CRA requires a

two-thirds supermajority to strike “laws” that Congress never passed in the first place. Apart from the repeal of an intrusive Department of Labor ergonomics rule that would have put undue burdens on home offices, the law has not worked as intended.

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

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

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

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

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

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

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

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

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

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

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

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

Table 1.1 Proposed Breakdown of Economically Significant Rules

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

For Further Reading

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

———, *Ten Thousand Commandments 2014: An Annual Snapshot of the Federal Regulatory State*, Washington, DC: Competitive Enterprise Institute, 2014, <https://cei.org/10kc>.