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The Simple ABC's of Regulatory Reform

By Clyde Wayne Crews Jr.[1]

Streaming out of Washington now are sometimes bizarre regulations covering, among other things; workplace ergonomics, flammability rules for upholstered furniture, emission limits for sport utility vehicles, and even energy efficiency standards for consumer goods and lamp ballasts. The 1998 *Federal Register*'s 68,571 pages -- containing 4,899 final rules -- scale record heights not seen since Billy Beer was for sale.[2]

The roughly $700 billion the public pays to comply with regulations, often concealed in prices of goods and services, rivals 1997's pretax corporate profits of $734 billion. High enough to exceed Canada's entire gross national product, regulatory costs might be thought of as a hidden tax on top of the $1.7 trillion of taxpayers' money the federal government spends annually on its various ends.

Quarrelling with federal agencies for producing this torrent however, or requiring that agencies more thoroughly assess benefits before regulating, is largely a wasted effort. Since Congress is responsible in the first place for the underlying statutes that propel most regulation, attempts to force agencies to police themselves may miss the mark.

The key to managing regulation lies in Congress's admitting that the regulatory high tide is, at root, its own handiwork. Too much lawmaking power has been delegated to agencies, over which voters have precious little control. Regulatory reform, rather than being seen as a technocratic cost-benefit campaign demonizing agencies, should instead be understood as *congressional reform*, much like term limits or subjecting Congress to its own laws.

Making costs clearer. The House-passed Mandates Information Act (H.R. 350), now on its way to the Senate, is an example of astute regulatory reform that targets Congress rather than blames agencies. This bill allows any member to invoke a "point of order" against new legislation costing the public more than $100 million annually. The point of order will rarely be invoked, and the simple majority required to waive it is hardly a hurdle for legislation expected to pass anyway. Its innovation is institutionalization of the principle that Congress will always have a chance to explicitly object to excessive regulatory costs before they hit anyone's pocketbook.

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[2] Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Policymaker's Snapshot of the Federal Regulatory State,* forthcoming 1999 edition.

Thus, legislation that will lead to costly agency rules regulating lamp ballast energy efficiency may or may not make sense to a congressman who may have to vote directly to approve costs. Congress must set legislative priorities based on more thorough assessments of potential benefits of laws that will later spawn regulation.

Presumably, Congress understands precisely the benefits it is trying to achieve with new legislation: therefore it should be prepared to acknowledge and defend what it expects people to spend to achieve those benefits when agencies issue regulations.

The public's right to know. While Congress must exercise primary control of regulatory growth at its end, disclosure by agencies clearly has a role in making congress more accountable to the public as well. The bipartisan Regulatory Right-to-Know Act, versions of which have been introduced in the House and Senate (H.R. 1074 and S. 59), would require annual reports on the scope of the regulatory state that include historical data and projections.

The Right-to-Know Act does make the mistake of over-emphasizing agency-driven benefit analyses of their own regulations at the expense of easier-to-gather cost & numerical data. (Rare is the agency that will admit the benefits of its rules do not justify the costs.) But the bill would set important new standards for official disclosure in several ways. It would require an annual report on regulatory costs and benefits by the Office of Management and Budget (OMB), allow public comment on OMB's report, and enhance objective critiques of agency rules by requiring OMB to recommend revisions to outdated or wasteful regulatory programs.

Thorough cost analyses should be provided for agency programs and rules in the annual OMB report whenever possible, which admittedly is no easy job. But assembling annual regulatory data need not always be a grueling exercise. Other data will prove very useful to policymakers as well. The Right-to-Know concept should extend well beyond cost and benefit tallies alone, and include current and historical data such as the following:

Items to summarize in an annual "Regulatory Report Card" (Current and prior four years)
• *Federal Register* analysis: total numbers of proposed and final rules issued by each agency during the previous five years
• Numbers of major ($100 million) and minor rules during the previous five years, and in the works at the proposed, and final stages
• Numbers/percentages of major rules featuring and *lacking* cost and benefit estimates
• Numbers of rules impacting agency procedures alone
• Numbers/percentages of rules facing statutory or judicial deadlines
• Numbers/percentages of rules reviewed by OMB, and actions taken
• Regulatory turnover: numbers of proposed rules which are new, vs. carryovers

These and other simple, easy-to-compile-and-summarize statistics should be included in an annual OMB "Regulatory Report Card." This information would help starkly disclose levels of regulatory activity, as well as reveal likely areas where accountability and disclosure can stand

improvement. For example, knowing what we *don't* know in terms of regulatory benefits can sometimes be as important as knowing what we do know, and expanding the Right-to-Know Act to incorporate such non-cost data is an ideal way of getting to the facts.

Institutionalizing regulatory oversight. Congress's scapegoating of agencies and the ensuing unaccountable regulatory drift would be at least partly checked by newfound cost-consciousness, and disclosure provided by such reforms as the Mandates Information and Right-to-Know bills. As Congress becomes seen as more accountable for regulation, it will face increasing incentives to make certain that benefits exceed costs from its own perch, rather than expect agencies to do it. A side effect of newfound incentives to attend to benefits is that Congress may be inspired to try to streamline the subject matter, perhaps by holding annual hearings to assemble yearly packages of reforms or reductions to consider, and on which to hold no-amendments-allowed votes. Institutionalizing such ongoing regulatory oversight probably won't get rid of much regulation, but it would further clarify the regulatory debate and keep regulatory costs illuminated under the same sustained spotlight as ordinary government spending. Plus ongoing oversight might dampen the tendency to overreach in the future.

Making Congress more answerable for regulatory costs and increasing disclosure, as the bipartisan Mandates Information and the Right-to-Know proposals will do, will help ensure that costs and benefits get taken into account far better than spitting more venom at agencies. Accountability and disclosure would begin placing the results of bad regulatory decision-making at Congress's doorstep rather than that of regulated parties alone. That an agency's basic impulse is to overstate benefits will never change: Congress has to take charge here. Only Congress can survey the entire regulatory state and weigh relative cross-agency benefits properly. Accordingly, agencies that now think within their own squares and today rarely admit a rule has negligible benefits, might be inspired to compete with one another to prove in congressional oversight hearings that their least-effective rules save more lives than others'. A newly accountable Congress would be inspired to listen. OMB's annual surveys will help in that critical job.

Beyond the Mandates Information and Right-to-Know proposals, the pinnacle of accountability would be a mandatory vote by Congress to approve agencies' noteworthy rules. As lawmakers, agencies may be part of the assembly line, but our elected Congress should pass the ultimate law. Yet, even if Congress itself approved all substantial agency regulations, the need for more formal disclosure of regulatory data -- the fundamental right to know -- remains. Other than taxing and spending, imposing regulatory costs is the only way that the government accomplishes its ends: That process shouldn't operate on auto-pilot, or under wraps, any more than our fiscal budget should. Mandates Information and Right-to-Know-style legislation subject the government's regulatory activity to the openness the public deserves to see.

Ultimately, regulatory accountability must come, not from merely forcing greater requirements for technical analysis of costs and benefits upon resistant agencies, but from institutional changes. These changes will shine a light on federal regulatory activity, and tightly specify the purpose, and reach of the regulatory powers Congress delegates to agencies in the first place. Then, the incentives to balance costs and benefits will be inescapable, and not something that must be forced.