

# The Other National Debt Crisis

How and Why  
Congress Must Quantify  
Federal Regulation

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*By Wayne Crews*

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## How and Why Congress Must Quantify Federal Regulation

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### Executive Summary

When lawmakers neglect runaway federal regulation—the ongoing debt crisis notwithstanding—they disregard the biggest threat Washington poses to economic health, enterprise, and jobs. America today is, in a sense, “closed for business.” While we can take comfort in the notion that there will always be an America, current policies seem directed toward assuring that it may be located elsewhere.

The United States has the largest government on Earth. Our great wealth permits that bulk much like a bigger dog can have more fleas. But the spending and regulatory burden can no longer be tolerated. In the colonial period, a 1722 letter “Of the Restraints which ought to be laid upon publick Rulers,” by Thomas Gordon noted:

*A nation has but two sorts of usurpation to fear; one from their neighbours, and another from their own magistrates....[F]or one people undone by foreign invaders, ten have been undone by their own native rogues, who were entrusted to defend them.*

No foreign power is invading the United States, but our own overgrown government sometimes threatens to “undo” from within. At long last, public opinion is pushing Congress to deal with spending. But no less urgency attaches to dealing with regulation.

Regulation is regarded as government’s impartial tool for checking the excesses of the free market. But what if it is government that helps create those excesses? What if it were the case that federal government accounts for fully a quarter of national income, overwhelmingly beyond that of any industry or sector Washington presumes to impartially regulate? What, then, keeps that vast government in check?

Regulatory compliance costs—the unbudgeted costs of federal paperwork, as well as environmental, financial, economic, and health and safety rules—occupy heights equivalent to total annual federal budgetary costs in the 1990s. Rules issue from over 50 departments, agencies and commissions by the thousands, and rarely does Congress clear out old rules. Agency personnel issue “guidance documents” that can escape even limited procedural scrutiny.

Over the past century and a half, our ancestors created an America where GDP roughly doubled every 25 years. Today it is the federal budget that doubles regularly, and rapidly, while GDP growth figures waver. The federal budget reached \$2 trillion and \$3 trillion for the first time only within the last decade. The 2011 projected deficit of \$1.48 trillion is as large as the sum of all federal budgetary outlays of 1994. Even after the summer 2011 debt-limit deal, savings between 2012 and 2021 that still await the debt commission’s package top out at \$2.3 trillion, meaning that spending will be “only” \$43 trillion instead of \$46.055 trillion. The volume of transfer payments rattled the country during the July 2011 debt ceiling negotiations, yet those entitlement

obligations remain intact in the debt deal. The ratchet goes one way, occasionally pausing for spending freezes, at best, rather than actual cuts.

The carnage inflicted on the American economy is man-made. Nothing special about 2011 dictates that America's historic doubling of GDP should end.

Restraints on spending and popular support for deficit cutting imperative make regulation an increasingly attractive alternative for politicians and bureaucrats seeking to increase their power. Pressures to regulate will grow. But as legendary management guru Peter Drucker noted, to manage one has to measure. Regulatory reporting and disclosure is a basic and necessary, but not sufficient, step in taming this other "national debt," the regulatory state.

Older rules need routine review and purging, and permanent procedures to get that done on an annual basis need to be put in place. Congress should also consider creating a regulatory cost budget, since, as in other walks of life, 20 percent of the rules can account for 80 percent of the costs.

Disclosure is just the start of the "liberate to stimulate" agenda Congress needs to implement to revitalize the American economy. Congress should consider other extensive curbs on regulation, including freezes, moratoria, expiration dates on new rules, and a Regulatory Reduction Commission to annually assemble packages of regulations to eliminate via an up-or-down vote (much like the Base Closure and Realignment Commission).

Ultimately, voters need the ability to hold Congress directly accountable for regulations by requiring congressional approval of new rules. Thus, legislation that will lead to costly agency rules regulating, say, lamp ballast energy efficiency may or may not make sense to a congressman who may have to vote directly to approve the accompanying costs.

As Congress becomes more answerable for regulation, it will face greater incentives to ensure that benefits exceed costs as determined by independent analysis, rather than by agencies' own estimates. Greater ongoing oversight might dampen the tendency to overregulate in the future, thus creating pressure for a "regulatory ceiling" to parallel the fiscal debt ceiling. Regulation does not control itself, and agencies will not apply the brakes. We have to do it, through our elected representatives. Washington needs to learn that it is OK for the federal government to not try to regulate everything—that sometimes it is alright for regulatory state to be little bitty, and not bother us too much.

*Those who expect to reap the blessings of freedom must,  
like men, undergo the fatigue of supporting it.*

— Thomas Paine<sup>1</sup>

*It's all right  
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— Alan Jackson<sup>2</sup>

When lawmakers neglect runaway federal regulation—the ongoing debt crisis notwithstanding—they disregard the biggest threat Washington poses to economic health, enterprise, and jobs. America today is, in a sense, “closed for business.” While we can take comfort in the notion that there will always be an America, current policies seem directed toward assuring that it may be located elsewhere.

The United States has the largest government on Earth. Our great wealth permits that bulk much like a bigger dog can have more fleas.<sup>3</sup> But the spending and regulatory burden can no longer be tolerated. In the colonial period, a 1722 letter “Of the Restraints which ought to be laid upon publick Rulers,” by Thomas Gordon noted:

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Regulation is regarded as government’s impartial tool for checking the excesses of the free market.<sup>5</sup> But what if it is government that helps create those excesses?<sup>6</sup> What if it were the case that federal government accounts for fully a quarter of national income,<sup>7</sup> overwhelmingly beyond that of any industry or sector Washington presumes to impartially regulate? What, then, keeps that vast government in check?

The scope of today’s government is not a left vs. right issue. Business leaders across the political spectrum warn of the damage created by federal regulatory overreach—this in an era in which both parties claim that jobs are the priority.

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Home Depot co-founder Bernie Marcus told *Investor's Business Daily*:  
*Having built a small business into a big one, I can tell you that today the impediments that the government imposes are impossible to deal with. Home Depot would never have succeeded if we'd tried to start it today. Every day you see rules and regulations from a group of Washington bureaucrats who know nothing about running a business. And I mean every day. It's become stifling.*<sup>8</sup>

In an earnings results conference call, Wynn Resorts CEO Steve Wynn said of Washington:

*[T]his administration is the greatest wet blanket to business, and progress and job creation in my lifetime. And I can prove it and I could spend the next three hours giving you examples of all of us in this marketplace that are frightened to death about all the new regulations, our health care costs escalate, regulations coming from left and right.*<sup>9</sup>

Sometimes actions do the talking. Investor George Soros, among the largest funders of liberal causes, returned funds to investors in his Quantum Fund allegedly due to uncertainties and burdens stemming from the Dodd-Frank financial law.<sup>10</sup>

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Over the past century-and-a-half, our ancestors created an America where GDP roughly doubled every 25 years. Today, it is the federal budget that doubles regularly, and rapidly, while GDP growth figures waver.<sup>12</sup> The federal budget reached \$2 trillion<sup>13</sup> and \$3 trillion for the first time only within the last decade. The 2011 projected deficit of \$1.48 trillion<sup>14</sup> is as large as the sum of all federal budgetary outlays of 1994.<sup>15</sup> Even after the summer 2011 debt-limit deal, savings between 2012 and 2021 that still await the debt commission's package top out at \$2.3 trillion,<sup>16</sup> meaning that spending will be “only” \$43 trillion instead of \$46.055 trillion.<sup>17</sup> The volume of transfer payments rattled the country during the July 2011 debt ceiling negotiations, yet those entitlement obligations

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### **Alas, Cutting Spending Will not Suffice**

Given Washington's growth over a mere decade, spending commitments require slashing, not just reduction as specified in the recent Budget Control Act or the 2008 levels articulated in the House Republicans' 2010 *Pledge to America*. Instead, policy makers have effectively established that significant spending cuts will not happen in 2011 or 2012. The debt ceiling increased, just as it has numerous times, and spending will rise. Indeed, virtually no proposal with momentum envisions a government smaller per capita in the foreseeable future.

Unfortunately, even balancing the budget at half of today's levels would not address the hostile regulatory climate referenced by the business executives quoted above. Moderating that regulatory state can unleash economic growth that could make runaway spending less devastating.

A starting point is easy to identify: In order to restrain the impulse to regulate everything, Washington must measure regulation as it measures spending. That is one "entitlement" the wealth-creating private sector deserves, for a change.

### **Big Regulation**

Like spending and deficits, government regulation occupies record heights. Thousands of regulations stream out of Washington yearly, and somebody, somewhere, can claim to justify every single one.

The 2010 *Federal Register* set a new record at 81,405 pages and contained 3,573 final rules.<sup>19</sup> Proposed rules are up by nearly 20 percent. The trillion-plus dollars the public pays in regulatory compliance, often passed on to consumers in the form of higher prices, exceeds pre-tax corporate profits and dwarf corporate income taxes. Regulatory costs, high enough to exceed Canada's entire gross national product in some years,<sup>20</sup> function as a hidden tax on top of nearly \$4 trillion the federal government spends annually.

Requiring that agencies more thoroughly assess benefits before regulating is a largely wasted effort, given today's institutional framework of delegated, unchecked rulemaking power. Attempts to force agencies to police themselves are useful but miss the mark, because Congress created the underlying statutes that propel most regulation. Moreover, such requirements are not enough to overcome agencies' incentives to add staff, budget, and new regulatory turf.

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Alongside spending, unchecked regulation is a recipe for extended economic suppression. Republicans and Democrats alike have promoted—or been unable to stop—this flood of new regulation. Consider just a few newer regulatory bequests to America.

- The Dodd-Frank financial law has generated thousands of pages and millions of words of new rules, but even these comprise less than half of the total forthcoming rules to be written.<sup>21</sup>
- The Patient Protection and Affordable Care Act health care bill has already required waivers and tax reporting relief.<sup>22</sup>
- The ongoing denial of access to new domestic energy resources undermines affordable energy, undermining expansion and jobs.
- The Environmental Protection Agency’s (EPA) ambitious agenda—comprising clean energy, carbon dioxide regulation, ozone standards, and Utility Maximum Achievable Control Technology emissions rules and more—seems not to be creating promised “green” jobs.<sup>23</sup>
- The Federal Communications Commission (FCC) issued a sweeping “net neutrality” infrastructure control rulemaking in December 2010<sup>24</sup> without congressional authorization (a proposal that threatens the very concept of network liberalization in infrastructure more broadly).<sup>25</sup>
- In a conceit similar to net neutrality, the Internet “kill switch” proposal to protect cybersecurity and critical infrastructure would undermine the ability of private parties to expand these values and flexibly protect large-scale assets. The Department of Homeland Security envisions “18 critical infrastructures”<sup>26</sup> that government must somehow oversee.
- Congress and agencies are engaged in numerous bipartisan efforts to regulate online privacy and define the parameters of tomorrow’s information sharing. Information is a form of wealth and the downside of excessive intervention here is significant.
- Threats of antitrust regulation continue to be directed at vital industries, distorting entire economic sectors and benefiting politically connected competitors. Even Tea Party favorite Republican Senator Mike Lee of Utah is a leading supporter of antitrust action against Google.

Such emblematic developments, coupled with legacy regulations, certify that controlling spending alone will not enable a sustainable recovery anymore.

Early in 2011, President Obama did issue (unenthusiastically) an Executive Order<sup>27</sup> asking agencies to review and remove outdated regulations, but the entire effort merely dabs at a few billion dollars’ worth of redundant or obvious rules.

Reforms must become a priority for the administration and Congress, because no viable mechanism exists for measuring or disciplining regulation comparable to even the limited control applied to spending. The task is to do something about it.

### **Limitations of Recent Executive Orders in Regulatory Oversight**

The president should follow through on uprooting regulations per his January 2011 Executive Order. Then he should extend it to all regulations—including those generated by his administration, not just those that are, to quote, “outdated.” Unfortunately, President Obama has directed much of his administration to set up new federal superstructures governing the private energy, financial, health, and communications markets. The concept of a light regulatory touch runs counter to the Obama administration’s very operating philosophy. This needs to change.

If he wants to promote disclosure, the president should issue new executive orders lowering the threshold at which a rule qualifies as “economically significant.” Under current policy, agencies designate rules as “economically significant” or “major” when they cost at least \$100 million annually. The December 2010 *Unified Agenda of Federal Regulations*, for example, contained 224 economically significant rules at various stages in the pipeline.<sup>28</sup>

Most studies of regulatory costs emphasize major rules, implying that the remaining regulations are not significantly costly. That is not necessarily so, because a rule could come in under the \$100 million major-rule threshold and still carry significant costs. Rules costing up to \$99 million can dodge the “major” categorization and thus escape scrutiny by the Office of Management and Budget’s Office of Information and Regulatory Affairs. Thus, reducing the threshold to, for example, \$25 million annually would increase the number of rules brought to public attention each year.

Numerous additional executive orders that foster cost disclosure and therefore amplify pressure for accountability and regulatory relief would be valuable and welcome, but are unlikely to be prepared or enforced now.

### **Regulatory Reform = Congressional Reform**

Reining in government growth requires Congress owning up to the reality that it is responsible for the regulatory surge, by its delegation of lawmaking authority to agency personnel over whom voters have no control. The Constitution specifies that, “All legislative Powers herein granted shall be vested in a Congress of the United States.” But no longer: Consider that, whereas the 111th Congress

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passed and President Obama signed into law a comparatively few 217 bills in calendar year 2010, regulatory agencies issued 3,573 final rules.<sup>29</sup>

Thus, regulatory reform, rather than being a technocratic cost-benefit balancing act, should be approached as *congressional* reform—along the same lines as term limits or requiring Members of Congress to comply with the laws they pass. The Regulations from the Executive In Need of Scrutiny (REINS) Act (H.R.10, S.299), sponsored by Rep. Geoff Davis and Sen. Rand Paul (both Kentucky Republicans), offers one approach. It incorporates the principle of accountability by requiring Congress to vote on economically significant regulations before they wield the force of law.<sup>30</sup>

As far as net benefits are concerned, legislative priorities arise from assessments of potential benefits of laws that will later spawn regulation, and agencies' benefit "calculations" should be beside the point.<sup>31</sup> Presumably Congress is preoccupied with the benefits it is trying to achieve whenever contemplating new legislation. Therefore, Congress should be prepared to explain what it expects citizens to *spend* to achieve those benefits when agencies issue regulations, as all regulatory costs are off-budget otherwise.

Unchecked growth in regulations and costs is rooted in the delegation of lawmaking power from Congress to agencies. Although preoccupied with spending, Congress should now also assess the scope of federal agency regulations affecting manufacturing, finance, energy, technology, the environment, small business, and so forth—and engage in a sustained "liberate to stimulate" campaign to remove barriers to entrepreneurship and hiring. For every spending "stimulus," there is an alternative involving moving barriers away—which indirectly aids the goal of deficit reduction as a bonus.

Regulatory reform requires targeting Congress rather than agencies alone. In the meantime, Congress needs to improve measurement of regulation.

### **Discipline Regulation with Disclosure and Measurement**

Rare is the agency that admits that the benefits of its rules do not justify the costs. Current agency and Office of Management and Budget reporting showcase agencies' own cost-benefit analyses of their own regulations. We need more objective, accessible, easier-to-gather, and informative cost and numerical data to supplement that.

Improved annual reporting that emphasizes cost disclosure and statistics about the history, current scope, and trajectory of the regulatory enterprise—much like the budget itself does for spending and receipts—may in turn help spur congressional regulatory accountability. Taxes are high, but at least one

can open the federal budget and see precisely where outlays and the deficit stand. Regulations escape even that rudimentary visibility.

Disclosing a wider range of costs is fairer to the public, more consistent with instilling greater accountability in the regulatory system, and conforms with President Obama’s campaign promises regarding transparency and open government.<sup>32</sup> Greater disclosure is not particularly difficult or burdensome, especially if agencies are required to focus on regulatory costs rather than the benefits that are Congress’ concern.

Congress should first go after the low-hanging fruit. It should strive to make regulatory trends transparent by requiring that summary regulatory data—classified by type of regulation and by agency—be published in the annual federal budget, the *Economic Report of the President*, a stand-alone document, or some other accessible venue.

Meanwhile, for health and safety regulations, Congress can require OMB to recommend revisions to, or elimination of, outdated or wasteful regulatory programs, and to add to knowledge by comparing lives saved by agency for mandates in the health and safety category. (Data exist on deaths and sickness that put bounds on agency claims and inform where compliance resources could do the most relative good.)<sup>33</sup> Agencies cannot take such broad perspectives alone.

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 a lengthy 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 other information, such as:

- 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.”<sup>34</sup>

In a very limited way, what the budget is to fiscal policy, the *Regulatory Program* was to regulatory policy. It helped portray the off-budget scope of

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government, if not in terms of actual regulatory costs, at least in terms of trends in numbers of rules at the agencies. A further breakdown of the *Regulatory Program's* content follows:

- 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.

Getting a clearly defined picture of the off-budget scope of government is a prerequisite for controlling regulatory compliance costs and addressing the negative job impacts that agencies seem reluctant to acknowledge. The policy aim of disclosure would be to compel an environment where Congress is forced to bear the responsibility for regulatory outcomes and to demonstrate that regulatory benefits outweigh costs—rather than pass those decisions on to resistant and unaccountable agencies.

A lack of consistent summary information about regulatory trends and costs undermines the ability to debate today’s worthwhile reform measures. A considerable amount and variety of regulatory data already exist that can be assembled intelligibly to enable analysis. As soon as possible, Congress should revive and expand the data incorporated in the *Regulatory Program* as part of a more comprehensive annual *Regulatory Report Card*. The information would provide valuable input to researchers, scholars, policy makers, and the public, while fostering pressures for congressional accountability.

A *Regulatory Report Card* should provide a range of relevant regulatory information without bogging down in distracting net benefit analyses, which are emphasized by OMB in its annual reports on regulation.<sup>35</sup> Those analyses are based largely on agency self-reporting, which mars their usefulness and the scope of congressional reaction to them. They are also rare.

The *Report Card* should also tabulate and publish the proportion of each agency’s significant rulemakings that *lack* cost estimates. Knowing not only where agency cost estimates exist, but also where they do not, would help highlight the best and worst agency efforts at cost disclosure, inform congressional oversight, and reveal whether the overall regulatory enterprise can credibly be said to do more good than harm. Years of accumulated reporting will help uncover agency attempts to circumvent regulatory disclosure, such as through proliferation of rules without cost estimates or estimates that come in just below the threshold that would tag a rule as economically significant or major.

The *Regulatory Report Card* should include:

- 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.<sup>36</sup>
- 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.

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- 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 the most active rule-making agencies.
- Identification of rules that are deregulatory rather than regulatory.
- Rules that affect internal agency procedures rather than the private sector.
- Number of rules new to the *Unified Agenda*; number that are carry-overs from previous years.<sup>37</sup>
- 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.

A formal step in the disclosure campaign could also entail the establishment by Congress of an Office of Regulatory Analysis to examine rules in detail (an example of which has been proposed by Rep. Don Young (R-AK)<sup>38</sup>). Congress today routinely turns to the Congressional Budget Office for fiscal and budgetary analysis.<sup>39</sup> Regulatory analysis is likewise needed.

### **Beyond Disclosure**

Restraints on spending and popular support for deficit cutting will make regulation an increasingly attractive alternative for politicians and agencies. Pressures to regulate will grow. But as legendary management guru Peter Drucker noted, to manage one has to measure.

Regulatory reporting and disclosure is a basic and necessary, but not sufficient, step in taming this other “national debt,” the regulatory state.

A host of other administrative and legislative steps will be needed in addition to the disclosure campaign outlined here. Older rules need routine review and purging, and permanent procedures to get that done on an annual basis need to be put in place. Congress should also consider creating a regulatory cost budget,<sup>40</sup> since, as in other walks of life, 20 percent of the rules can account for 80 percent of the costs.

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annually assemble packages of regulations to eliminate via an up-or-down vote (much like the Base Closure and Realignment Commission).

Ultimately, voters need the ability to hold Congress directly accountable for regulations by requiring congressional approval of new rules, as legislation like the REINS Act or similar laws would permit. Thus, legislation that will lead to costly agency rules regulating, say, lamp ballast energy efficiency may or may not make sense to a congressman who may have to vote directly to approve the accompanying costs.

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## Notes

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