

Liberate to Stimulate

A regulatory liberalization agenda would provide genuine economic stimulus and offer some confidence and certainty for businesses and entrepreneurs. Proposals like those described next can help achieve that goal.

Steps to Improve Regulatory Disclosure

Certainly, some regulations' benefits exceed costs, but net benefits or even actual costs are known for very few. Without more complete regulatory accounting, it is difficult to know whether society wins or loses as a result of rules.¹²¹ Pertinent, relevant, and readily available regulatory data should be summarized and reported publicly to help create pressures for even better disclosure and reform. An incremental but important step toward greater openness would be for Congress to require—or for the Office of Management and Budget to initiate—publication of a summary of available but scattered data. Such a regulatory transparency report card could resemble the presentation in *Ten Thousand Commandments*.

Accountability and disclosure matter. Congress must cease delegating legislative power to unelected agency personnel. We need institutional changes that force Congress to internalize pressures that would push it to make cost-benefit assessments *before* issuing open-ended directives to agencies to write rules. Reining in off-budget regulatory costs can occur only when elected representatives assume responsibility and end “regulation without representation.”

Regulations fall into two broad classes: (a) those that are economically significant (cost-

ing more than \$100 million annually) and (b) those that are not. Agencies typically emphasize reporting of economically significant or major rules, which OMB also tends to emphasize in its annual assessments of the regulatory state. A problem with this approach is that many rules that technically come in below that threshold can still be very significant in the real-world sense of the term.

Moreover, agencies need not specify whether any or all of their economically significant or major rules cost only \$100 million or far more than that. Instead, Congress could require agencies to break up their cost categories into tiers. Table 10 presents one alternative for assigning economically significant rules to one of five categories. Agencies could classify their rules on the basis of either (a) cost information that has been provided in the regulatory impact analyses that accompany many economically significant rules or (b) separate internal or external estimates. The Unified Agenda and annual OMB reports to Congress could be made more user-friendly by adopting these reforms.

Much of the regulatory information that is available is difficult to compile or interpret. To learn about regulatory trends and acquire information on rules, interested citizens need to either comb through the Agenda's 1,000-plus pages of small, multicolumn print or compile results from online searches and agencies' regulatory plans. Data from the Unified Agenda could be made more accessible and user-friendly if officially summarized in charts each year and presented as a section in the federal budget, in the Agenda itself, or in the *Economic Report of the President*.¹²²

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Table 10. A Possible Breakdown of Economically Significant Rules

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

A regulatory transparency report card would reveal more clearly what we do not know about the regulatory state. Information could be added to the report as warranted—for instance, success or failure of special initiatives, such as “reinventing government” or regulatory reform efforts. Providing five-year historical data would prove useful to scholars, third-party researchers, and members of Congress. By making agency activity more explicit, a regulatory transparency report card would help ensure that policy makers take the growth of the regulatory state seriously. Recommended components for a regulatory transparency report card appear in Box 4.

Ending Regulation without Representation: The Unconstitutionality Index—27 Rules for Every Law

Agencies do not answer to voters. Yet in a sense, regulators and the administration, rather than Congress, do the bulk of U.S. lawmaking. But agencies are not the only culprits. For too long, Congress has shirked its constitutional duty to make the tough calls. Instead, it delegates substantial law-making power to agencies and then fails to ensure that they deliver benefits that exceed costs.¹²³

Box 4. Regulatory Transparency Report Card, Recommended Official Summary Data by Program, Agency, and Grand Total, with Five-Year Historical Tables

- Tallies of economically significant rules and minor rules by department, agency, and commission
- Numbers and percentages required/not required by statute or court order
- Numbers and percentages of rules affecting small business
- 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
- 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 Government Accountability Office in its database of reports on regulations
- Ranking of most active rulemaking agencies
- Identification of rules that are deregulatory rather than regulatory
- Identification of rules that affect internal agency procedures alone
- Number of rules new to the Unified Agenda; number that are carryovers from previous years
- 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

There were 18 rules for every law in 2016.

Agencies face significant incentives to expand their turf by regulating even without demonstrated need. The primary measure of an agency’s productivity—other than growth in its budget and number of employees—is the body of regulation it produces.¹²⁴ One need not deplete too much time and energy blaming agencies for carrying out the very regulating they were set up to do in the first place. Better to point a finger at Congress.

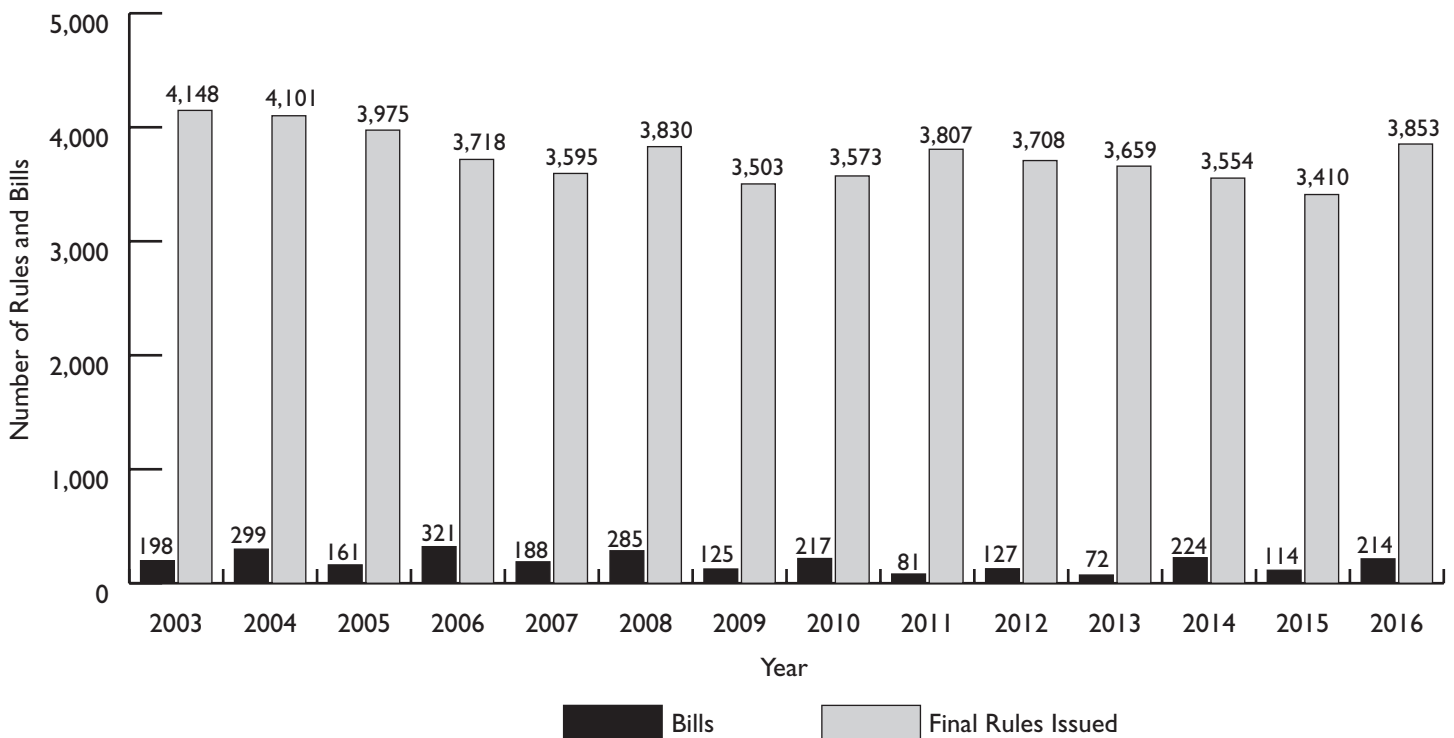
For perspective, consider that in calendar year 2016 regulatory agencies issued 3,853 final rules, whereas the 114th Congress passed and President Obama signed into law a comparatively few 214 bills.¹²⁵ Thus, there were 18 rules for every law in 2016 (see Figure 24). The ratio can vary widely, but the average over the decade has been 27 rules for every law. Rules issued by agencies are not usually substantively related to the current year’s laws; typically, agencies adminis-

ter earlier legislation. Still, this perspective is a useful way of depicting flows and relative workloads.

If agency public notices and executive orders are considered, non-legislative policy making assumes even greater importance. (Appendix: Historical Tables, Part I, depicts the Unconstitutionality Index dating back to 2000 and shows just by way of comparison the numbers of executive orders and the numbers of agency notices.)

An annual regulatory transparency report card is worthwhile and needed, but it is not the complete answer. Regulatory reforms that rely on agencies policing themselves will not rein in the regulatory state or fully address regulation without representation. Rather, making Congress directly answerable to voters for the costs that agencies impose on the public would best promote account-

Figure 24. The Unconstitutionality Index, 2003–2016



Source: Federal Register data from National Archives and Records Administration and from Crews tabulation at <http://www.tenthousandcommandments.com>. Public Laws data compiled from Government Printing Office, Public and Private Laws at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>; and from National Archives, Previous Sessions: Public Law Numbers at <http://www.archives.gov/federal-register/laws/past/index.html>.

able regulation. Congress should vote on agencies' final rules before such rules become binding on the public.

Increasing congressional accountability for regulatory costs should be a priority in today's era of debt and deficits. Concern about mounting national debt incentivizes Congress to regulate rather than to increase government spending to accomplish policy ends. Suppose Congress wanted to create a job training program. Funding the program would require approval of a new appropriation for the Department of Labor, which would appear in the federal budget and increase the deficit. Instead, Congress could pass a law requiring Fortune 500 companies to fund job training, to be carried out according to new regulations issued by the Department of Labor. The latter option would add little to federal spending but would still let Congress take credit for the program. By regulating instead of spending, government can expand almost indefinitely without explicitly taxing anybody one extra penny.

Affirmation of new major regulations would ensure that Congress bears direct responsibility for every dollar of new regulatory costs. The Regulations from the Executive in Need of Scrutiny Act (REINS) Act (H.R. 26, S. 21), sponsored by Rep. Doug Collins (R-Ga.) and Sen. Rand Paul (R-Ky.), offers one such approach.¹²⁶ It would require Congress to vote on all economically significant

agency regulations—those with estimated annual costs of \$100 million or more. It has passed the House in the current and three previous congressional sessions but has not moved forward in the Senate.

To avoid getting bogged down in approving myriad agency rules, Congress could vote on agency regulations in bundles. Another way to expedite the process is by allowing congressional approval or disapproval of new regulations to be given by voice vote, rather than by tabulated roll-call vote. What matters is for Congress to go on record for whatever laws the public must heed.

States could take the ball from Congress. Many state legislators have indicated support for the Regulation Freedom Amendment, which reads, in its entirety:¹²⁷ “Whenever one quarter of the members of the U.S. House or the U.S. Senate transmit to the president their written declaration of opposition to a proposed federal regulation, it shall require a majority vote of the House and Senate to adopt that regulation.”

Congressional rather than agency approval of regulations and regulatory costs should be the goal of reform. When Congress ensures transparency and disclosure and finally assumes responsibility for the growth of the regulatory state, the resulting system will be one that is fairer and more accountable to voters.

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