Liberate to Stimulate

Policy makers frequently propose spending stimulus as a way to grow economies. It rarely goes well. A regulatory liberalization stimulus, however, can offer confidence and certainty for businesses and entrepreneurs. Proposals like those described in this section can help Congress achieve that goal. Meanwhile, the executive branch can take immediate steps to stress regulatory streamlining and actions such as requiring rules and guidance to be submitted to Congress and the GAO as intended by the Congressional Review Act. In addition, President Trump should issue a new executive order outlining principles for guidance preparation and disclosure.

Steps to Improve Regulatory Disclosure

Certainly, some regulations' benefits exceed costs, but net benefits and actual costs are difficult to quantify. Without more complete regulatory accounting than we get today, it is difficult to know whether society wins or loses as a result of rules.[179] Pertinent, relevant, and readily available regulatory data should be summarized and reported publicly to help create political pressure for better disclosure and reform. One incremental but important step toward greater openness would be for Congress to require—or for the administration or OMB 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 are crucial. Congress routinely overdelegates legislative power to unelected agency personnel. Reining in off-budget regulatory costs can occur only when elected representatives assume responsibility and end "regulation without representation." Changes made by comprehensive regulatory reform, such as the Regulatory Accountability Act, could help induce Congress to internalize pressures that would inspire cost-benefit appraisals before issuing open-ended directives to agencies to write rules.[180] More stringent limitations on delegation, such as requiring congressional approval of rules, are essential.

Regulations fall into two broad classes: (a) those that are economically significant (costing 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 highlight in its annual regulatory reports. 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. One helpful reform would be for Congress to require agencies to break up their cost categories into tiers, as depicted in Table 11. Agencies could classify their rules on the basis of either (a) cost information that has been provided in the regulatory impact analyses that accompany some economically significant rules or (b) separate internal or external estimates.

Without more complete regulatory accounting than we get today, it is difficult to know whether society wins or loses as a result of rules.

Table 11. 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

Further, much of the available regulatory information is difficult to compile or interpret. To learn about regulatory trends and acquire information on rules, interested citizens once needed to comb through the Agenda's 1,000-plus pages of small, multicolumn print. Today they can compile results from online searches and agencies' regulatory plans and sites like regulations.gov. That is all well and good, but data from the Agenda could be made more accessible and user-friendly if elements of it were officially summarized in charts and presented as a section in the federal budget, in the Agenda itself, or in the *Economic Report of the President.* Suggested components of this regulatory transparency report card appear in Box 5.[181] In addition to revealing burdens, impacts, and trends, this user-friendly material would reveal more clearly what we do *not* know about the regulatory state. We need to better quantify the qualitative, so to speak; to know, for example, the percentage of rules that failed to quantify costs, and the percentage of rules that failed to quantify benefits.

Furthermore, the growing use of regulatory guidance documents, memoranda, and other "regulatory dark matter" to implement policy calls for far greater disclosure on these kinds of agency issuances than exists now, since these can be regulatory in effect but are nowhere to be found in the Agenda. Inven-

Box 5. 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

torying such "dark matter" is difficult to do, but not impossible. Legislation such as the Guidance Out of Darkness (GOOD) Act (H. R. 4809) would help remedy the disclosure problem.[182]

In addition, we have little ability to distinguish between additive and subtractive rules and guidance in terms of burdens imposed. Congress should require agencies to classify their regulatory and deregulatory actions separately and to harmonize rule classifications across agencies.[183] Current reporting also distinguishes poorly between rules and guidance affecting the private sector and that affecting internal governmental operations.

Given such a basic framework, additional information could be incorporated into the report as warranted—for instance, success or failure of special initiatives such as executive branch restructuring or specific regulatory reform efforts. Providing historical tables would prove useful to scholars, third-party researchers, members of Congress, and the public. 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.

Ending Regulation without Representation: The "Unconstitutionality Index"— 34 Rules for Every Law

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

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.[184] Agencies face significant incentives to expand their turf by regulating even without established need. It is hard to blame agencies for carrying out the very regulating they were set up to do in the first place. Better to point a finger at Congress.

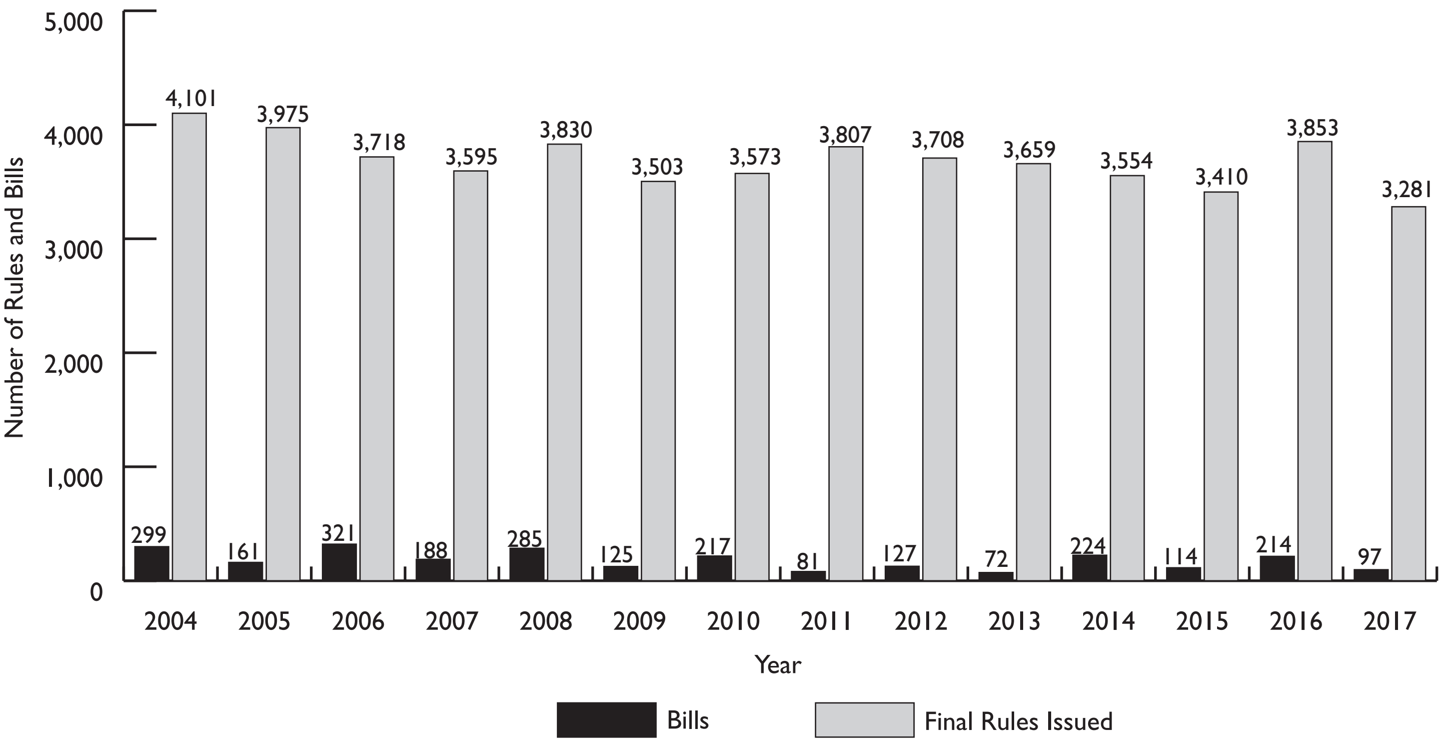
For perspective, consider that in calendar year 2017 regulatory agencies issued 3,281 final rules, whereas the 115th Congress passed and President Trump signed into law a comparatively few 97 bills.[185] Thus, there were 34 rules for every law in 2017 (see Figure 24). The Unconstitutionality Index ratio can vary widely, of course; while Trump's rule count was lower, the number of laws enacted was down even more. The average over the past decade has been 28 rules for every law. Rules issued by agencies are not usually substantively related to the current year's laws; typically, agencies administer earlier legislation. (Appendix: Historical Tables, Part I, depicts the Unconstitutionality Index dating back to 1993 and shows by way of comparison the numbers of executive orders and the numbers of agency notices.) If agency public notices and executive orders are considered, non-legislative policy making assumes even greater importance as an issue of concern.

Regulators rather than Congress do the bulk of U.S. lawmaking.

Growing debt and deficits incentivize Congress to regulate rather than to increase government spending to accomplish policy ends. Suppose Congress wanted to boost job training. Funding a job training 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, Washington could mandate for Fortune 500 companies to implement job training programs, 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.

An annual regulatory transparency report card is worthwhile and needed, but it is not the complete response. Regulatory reforms that rely on agencies policing themselves will not

Figure 24. The Unconstitutionality Index, 2004–2017



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.

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 accountable regulation. To that end, Congress should vote on agencies' final rules before such rules become binding on the public.

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 (REINS) Act (H. R. 26, S. 21), sponsored by Rep. Doug Collins (R-Ga.) and Sen. Rand Paul (R-Ky.), offers one such approach.[186] The REINS Act 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 via congressional approval or disapproval of new regulations by voice vote rather than roll-call vote. What matters is that Congress would go on record for whatever laws the public must heed.

If Congress does not act, states could take the ball from Congress. Many state legislators have indicated support for the Regulation Freedom Amendment, which reads, in its entirety:

> 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.[187]

The main goal of reform should be congressional, rather than agency, approval of regulations and regulatory costs. 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.

These changes are necessary but not sufficient. Legislative regulatory reform and executive branch streamlining are pieces of more fundamental debates. Congress is responsible for the fiscal budget, yet deficits are the norm. The bigger questions are over the role and legitimacy of the administrative state and the proper size and scope of government in a constitutional republic.