

# Regulatory Reform *and* Agency Oversight

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the 116th Congress*



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# Regulatory Reform and Agency Oversight

# 1

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

*Article I, Section 1, U.S. Constitution*

After decades of growth, the rate of issuance of new federal regulations has slowed under the Trump administration. One notable executive order (E.O.) requires agencies to add zero net costs and to eliminate at least two existing regulations for each new one enacted. The actual ratio of rules eliminated to rules enacted since the E.O. was issued has been closer to five to one. To date, it is difficult to tell whether total costs have merely stopped growing or have actually decreased. A major reason for that is a lack of publicly available agency data and shortcomings in the data that agencies make public. Yet overall regulatory growth has almost certainly slowed, likely saving billions of dollars for consumers and producers over the past two years.

The reforms so far have mostly come via executive order rather than legislation. That means that the next president can undo most Trump-era reforms with the stroke of a pen. Congress' job now is not merely to keep this momentum going, but to carry its own weight in pushing reform. To do that, it must reassert the legislative authority it has over-delegated to regulatory agencies. Although Congress has played a role in eliminating certain individual regulations, no measures yet enacted address the systemic problem. The rules of the rulemaking game have allowed the federal regulatory state to grow larger than Canada's entire gross domestic product (GDP)—

and will allow it to keep growing without further reform. The rulemaking process itself is where Congress most needs to act.

### **Congress should:**

- ◆ Defund unapproved agency initiatives, and, where applicable, use the Congressional Review Act to rein in agency overreach.
- ◆ Improve regulatory disclosure, transparency, and cost analysis of regulations and guidance. A first step could be to implement a regulatory report card to tally regulatory costs and flows in a user-friendly way and promote more accurate reporting to enable analysis of the regulatory enterprise by third parties.
- ◆ Implement a bipartisan regulatory reduction commission and regulatory sunset procedures.
- ◆ Require votes on major rules—those with estimated annual costs of \$100 million or more. One option is to enact the Regulations from the Executive in Need of Scrutiny (REINS) Act (H.R. 26, 115<sup>th</sup> Congress).
- ◆ Implement a limited regulatory cost budget.

There are two main areas in which Congress can enact meaningful reform. One is to rein in regulatory guidance documents, which we refer to as “regulatory dark matter.” When an agency issues a new regulation, it is required to go through a notice-and-comment period, as specified in the Administrative Procedure Act (APA). Agencies sometimes dodge that requirement by regulating instead through *Federal Register* notices, guidance documents, memoranda, bulletins, administrative interpretations, and other means outside standard rulemaking procedure.

The other area is a variety of reforms to increase agency transparency and accountability of all regulation and guidance. The fact that the *Code of Federal Regulations* now exceeds 180,000 pages and contains more than 1 million individual regulatory restrictions, with annual estimated costs of around \$2 trillion, is an indictment of the current rulemaking process. To encourage better agency behavior, Congress should require:

- ◆ Annual regulatory report cards for rulemaking agencies;
- ◆ Regulatory cost estimates from the Office of Management and Budget (OMB) for more than just a small subset of rules; and

- ◆ Retrospective review of existing rules that have real-world data by which to gauge their effectiveness.

To improve regulatory cost accountability, in 1996 Congress passed the Congressional Review Act (CRA), which set up a period of 60 legislative days after agency publication of a regulation during which the rule will not take effect. That pause affords Congress an opportunity to pass a resolution of disapproval to repeal the regulation. To its credit, the 115<sup>th</sup> Congress invoked the Congressional Review Act to overturn agency rules for the first time since early in the first term of the George W. Bush administration. Congress should keep this power in mind for when agencies issue regulations without authorizing legislation.

Although there is little bipartisan appetite for working with the Trump administration on reforms, the environment could change, particularly concerning certain low-hanging-fruit reforms, such as better disclosure.

To put those recommendations into context, specific shortcomings in oversight of the ordinary, everyday rules and regulations should be noted.

**First**, the central review process conducted by the White House Office of Management and Budget to ensure that rule benefits exceed their costs is lacking. This executive branch regulatory review was initially formalized by President Ronald Reagan's Executive Order 12291 (February 17, 1981) and extended in less strict form by subsequent executive orders from other presidents. As the Table 1.1 shows, of the more than 3,000 rules issued by agencies annually, cost-benefit analyses reviewed by OMB typically exist for only about a dozen, with a handful of other rules accompanied by a reviewed cost analysis.

**Second**, the Administrative Procedure Act's notice-and-comment rulemaking process is broken. Agencies often fail to issue notices of proposed rulemaking for a substantial portion of their rules, which undermines democratic accountability and the public's opportunity to weigh in on rules that affect them, according to a December 2012 Government Accountability Office (GAO) report.

**Third**, aside from rarely defunding agency actions, Congress rarely uses its most powerful accountability tool, the Congressional Review Act, to pass resolutions of

**Table 1.1** Proposed Breakdown of Economically Significant Rules

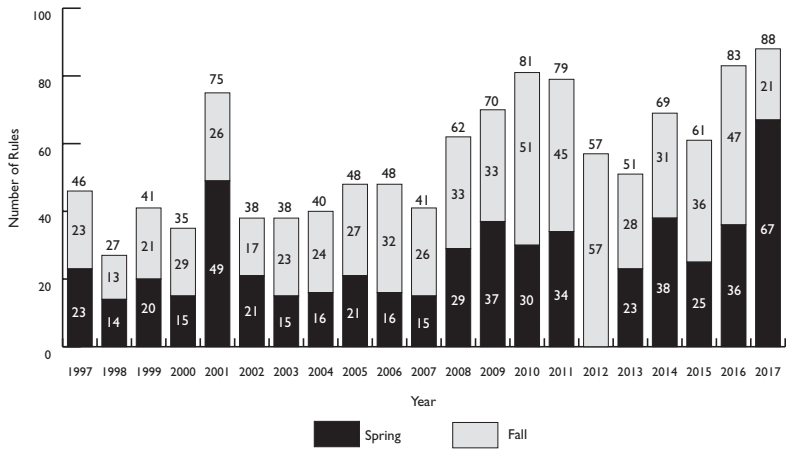
Year	Rules with costs and benefits	Rules with costs only	Grand total, rules with costs	Federal Register final rules
2001	14	13	27	4,132
2002	3	0	3	4,167
2003	6	4	10	4,148
2004	11	7	18	4,101
2005	13	2	15	3,943
2006	7	1	8	3,718
2007	12	4	16	3,995
2008	13	6	19	3,830
2009	16	12	28	3,503
2010	18	8	26	3,573
2011	13	6	19	3,807
2012	14	9	23	3,708
2013	7	11	18	3,659
2014	13	3	16	3,554
2015	21	6	27	3,410
2016	16	32	48	3,853
2017	n/a	n/a	n/a	3,281
<b>Total</b>	<b>197</b>	<b>124</b>	<b>321</b>	<b>64,382</b>

Sources: Costed rule counts: OMB, various editions of *Report to Congress* on regulatory costs; Federal Register Final Rules: author search on [Federalregister.gov](https://www.federalregister.gov) advanced search function.

disapproval of costly or controversial agency rules. Its 2017 invocation to repeal 15 rules from the end of Barack Obama's presidency was the first time Congress had invoked the CRA since the 2001 repeal of a Department of Labor (DOL) ergonomics rule.

**Fourth**, even if Congress were more inclined to assert its legitimate authority over the regulatory enterprise, the Congressional Review Act has long been undermined by agency nonobservance of its procedures. As Curtis W. Copeland demonstrated in a paper prepared for the Administrative Conference of the United States, many final

**Figure 1.1** Annual Completed Economically Significant Rules in the Unified Agenda, 1997–2017



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2017 edition, <https://cei.org/10kc2017>.

rules were not properly submitted by agencies to the GAO's Comptroller General and to Congress, as required under the CRA. That submission is necessary should Congress introduce a formal CRA resolution of disapproval of an agency rule, so its neglect creates a major lapse in accountability.

With spotty public notice and inadequate accountability, it is imperative for Congress to go on the record frequently regarding the merits of particular regulations. This matters because although the number of rules has decreased overall from about 3,500 per year during the Obama administration to about 3,300 per year during the Trump administration, that still averages to a new regulation roughly every two and a half hours, 24 hours a day, seven days a week. That is a lot of activity for anybody to be able to monitor.

At root, overregulation results from a breakdown of checks and balances under the Constitution's separation of powers. Overdelegation by Congress has enabled regulatory agencies to assert control over wide swathes of the American economy through both rules and guidance. On one hand, regulatory streamlining requires far

more congressional oversight of agency regulatory actions, including hearings, better information disclosure, and slashing of agencies' budgets when they exceed their bounds. On the other hand, Congress needs to grapple with the reality that it has relinquished much of its legitimate authority to the executive branch.

In a two-pronged approach, Congress must heighten (a) disclosure of regulatory matters and (b) its own accountability for "laws" made by regulatory agencies—either formally, as notice-and-comment regulation, or informally, as guidance and "dark matter." At the least, Congress can start by recognizing the fundamental need to enforce the Administrative Procedure Act's already limited scrutiny of rules and incorporate guidance into the process.

## IMPROVE REGULATORY OVERSIGHT AND ACCOUNTABILITY

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Recent years have seen increasing overreach by the executive branch, as several administrations and regulators have increasingly attempted to impose policy while circumventing Congress. Yet Congress often has stood by in the face of this power grab. Such regulatory excess has led to (a) labor force participation that remains low despite numerous job openings and a low overall unemployment rate, (b) reduced business ownership, (c) lower self-employment rates among the young, (d) declining rates of small business formation, and (e) more businesses closing than are being created.

The Office of Management and Budget, in its 2016 *Information Collection Budget of the U.S. Government*, estimates that 9.78 billion hours were required to complete regulatory paperwork requirements in FY 2015. In addition, OMB's 2015 *Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates*, which surveys regulatory costs and benefits, pegs the cumulative costs of 120 selected major regulations from 2004 to 2014 at between \$68.4 billion and \$102.9 billion annually (in 2010 dollars). The report is chronically published late; the 2015 and 2017 reports were not even published in their assigned calendar year, and the 2018 draft report remains unpublished as of this writing.

Federal spending is the squeaky wheel that gets attention from lawmakers, the media, and the public, particularly because the federal debt has more than doubled since 2008. But decades of cumulative regulation may have even greater effects. Official disclosures fail to adequately capture the regulatory state's magnitude, with its interventions, bans, uncertainty, wealth destruction, job loss, stifling of entrepreneurship, and loss of liberty. Government solutions to perceived market failures can have consequences that are

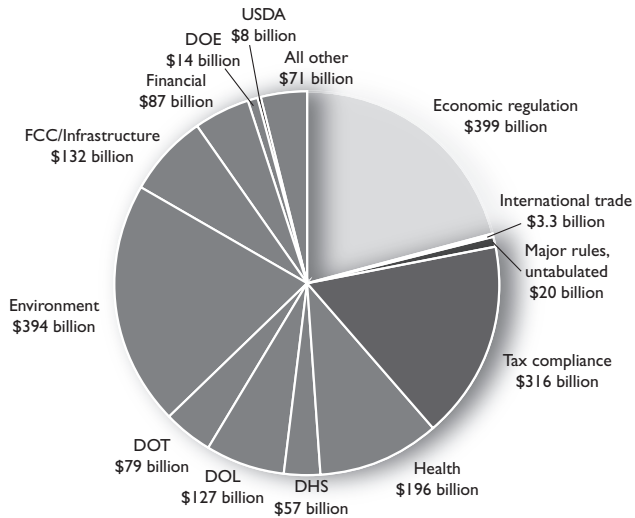
### **Congress should:**

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- ◆ Hold oversight hearings on aggressive agency initiatives.
- ◆ Insist that agencies adhere to the Administrative Procedure Act's notice-and-comment rulemaking process.
- ◆ Defund appropriations for agency initiatives that have not been approved by Congress.
- ◆ Introduce resolutions of disapproval under the Congressional Review Act for overly burdensome or controversial rules.



**Figure 1.2.** 2018 Estimate for the Annual Cost of Federal Regulation and Intervention, \$1.9 Trillion



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2017 edition, <https://cei.org/10kc2017>.

worse than the problem they seek to address. Regulators cannot respond rapidly to changes in fields such as health care, finance, infrastructure, and cybersecurity. Central, bureaucratic regulation can undermine actual regulation and discipline. Agency pursuit of benefits imposes costs of its own when agencies interfere with the improvements in health, safety, and environmental and economic health that are driven by competitive processes and by consumer and social demands.

Policy makers' choice is not between regulation and no regulation, but over which institutional frameworks are more appropriate to advancing health, safety, efficiency, and innovation. For every market failure cited to justify government intervention, one can find offsetting political and bureaucratic failure. Price regulation increases prices or creates shortages. Internet net neutrality regulation would undermine communications infrastructure's potential. Much environmental regulation came about because of the lack of property or use rights in certain resources—again, government failures.

Unfortunately, many businesses not only favor regulation but actively pursue it to disadvantage competitors. At the very minimum, policy makers should challenge

agency benefit claims and demand better justification because agencies may selectively overstate them.

Experts: Clyde Wayne Crews Jr., Ryan Young

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## REIN IN OVERREGULATION AND REGULATORY “DARK MATTER”

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Regulations require more transparency and scrutiny, but so do agency guidance documents, memoranda, bulletins, and other “nonrules” that may duck the notice-and-comment and central review processes applied to routine rules. Thousands of such documents are issued annually—far more than the number of rules. Such “regulatory dark matter” can amount to off-the-books regulation.

### **Congress should:**

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- ◆ Ensure that the oft-neglected Administrative Procedure Act’s notice-and-comment requirement for rules is appropriately applied.
- ◆ Abolish, downsize, reduce the budgets of, and deny appropriations to agencies, subagencies, and programs that pursue regulatory actions that are not authorized by Congress.
- ◆ Repeal or amend enabling statutes that sustain a regulatory enterprise or program.
- ◆ Subject regulatory guidance, alongside ordinary rules, to greater scrutiny by the Office of Management and Budget. Exposing the costs of guidance can provide a public record for future legislative reforms of guidance-as-regulation. President Reagan’s Executive Order 12291 provides a model to follow in that it put the onus of demonstrating the need for a new rule on agencies. Guidance should be held to the same standard.
- ◆ Apply the Congressional Review Act’s 60-day resolution of disapproval process to rules, and extend it to guidance. Then if guidance grows, the public will be able to see those instances in which Congress could have acted to stop or call attention to it but did not.
- ◆ Introduce bills to repeal guidance as appropriate.

The basis of the modern regulatory process is the Administrative Procedure Act of 1946 (P.L. 79-404), which set up the process of public advance notice of rulemakings. It gave the public the opportunity to provide input and comment before a final rule is published in the *Federal Register*, subject to a 30-day period before it becomes effective. However, the APA has a huge loophole that regulators often exploit. Agencies can avoid notice and comment for “good cause,” as determined by the agencies themselves. As a 2016 Congressional Research Service report noted:

While the Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules, the statute’s “good cause” exception permits agencies to forgo Section 553’s notice and comment requirement if “the agency for good cause finds” that compliance would be “impracticable, unnecessary, or contrary to the public interest” and bypass its 30-day publication requirement if good cause exists.

That allows agencies to avoid scrutiny of a wide array of rules. Agencies’ declarations face insufficient oversight, yet they are binding. Congress has several options for enforcing adherence to the APA, and thus affirm the separation of powers.

### Recent Examples of Regulatory “Dark Matter”

- ◆ **Internal Revenue Service** and **Department of Health and Human Services** waivers of provisions of the Patient Protection and Affordable Care Act
- ◆ **Housing and Urban Development** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act
- ◆ **Environmental Protection Agency** Clean Water Act interpretive guidance on “Waters of the United States”
- ◆ **Securities and Exchange Commission (SEC)** interpretive “Commission Guidance Regarding Disclosure Related to Climate Change”
- ◆ **Education Department** series of guidance documents imposing new mandates on colleges and schools on issues ranging from bullying and harassment to gender identity
- ◆ **U.S. Department of Agriculture’s Forest Service** “Notice of Final Directive” on permanent Ecosystem Restoration policy
- ◆ **Department of Labor Wage and Hour Division’s** “Administrative Interpretations” on independent contracting and on joint employment
- ◆ **Department of Labor** guidance documents regarding the Process Safety Management standards for hazardous chemicals
- ◆ **Equal Employment Opportunity Commission** series of guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks
- ◆ **Consumer Financial Protection Bureau** “Bulletin” on “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act”
- ◆ **Council on Environmental Quality** Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change

Amendments to the Administrative Procedure Act have intended to subject complex and expensive rules to additional analysis. Those reforms include:

- ◆ Paperwork Reduction Act of 1980 (Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–3521);
- ◆ Regulatory Flexibility Act (to address small business impacts, Pub. L. 96-354); and
- ◆ Congressional Review Act, which enables Congress to vote on a resolution of disapproval to reject agency regulations (5 U.S.C. § 801–808).

In addition, various presidential executive orders govern central review of rules by the OMB to address cost–benefit analysis for some rules. Ronald Reagan’s E.O. 12291 set up central review of agency rules by OMB. However, President Bill Clinton’s E.O. 12866 restored “primacy” to agencies, thereby weakening the process. Although President Obama issued several orders ostensibly to streamline regulation, his underlying “pen and phone” approach to policy making eclipsed any regulatory curtailment.

Moreover, the APA’s “good-cause”-weakened requirement to publish notice of proposed rulemaking and allow public comment does not apply to agency guidance, memoranda, and other regulatory dark matter.

Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (P.L. 79-404, § 553)

With respect to significant guidance, some executive (not independent) agencies comply with a 2007 OMB memo on “Good Guidance Principles”—in effect, guidance for guidance. “Significant” guidance includes those agency issuances estimated to have an annual economic effect of \$100 million or more, similar to the definition for significant and major rules. With conspicuous exceptions—such as the Departments of Energy, Housing and Urban Development, and Health and Human Services—some agencies continue to invoke the 2007 OMB memo and follow its directive of maintaining Web pages devoted to their significant guidance. Unfortunately, the

directive is a suggestion rather than a command; it allows, for example, for the Food and Drug Administration (FDA) to report no significant guidance, even though it has issued hundreds of thousands of pieces of acknowledged final guidance documents since the 1970s.

Experts: Clyde Wayne Crews Jr., Ryan Young

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## STRENGTHEN DISCLOSURE WITH A “REGULATORY REPORT CARD”

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Regulatory information is often publicly available but difficult to compile or interpret. A regulatory report card that makes such information more accessible would go a long way toward increasing transparency. Since the early 1980s, regulatory oversight has been governed primarily by the semi-formal central review of economic, environmental, and health and safety regulations by OMB’s Office of Information and Regulatory Affairs. The process is insufficient, as OMB review captures only a fraction of the federal regulatory enterprise—less than 1 percent of rules have “audited” cost-benefit analysis. By requiring a periodic publication that summarizes available but scattered data, Congress could make complex regulatory data more user friendly and encourage public accountability.

### **Congress should:**

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- ◆ Require agencies to present data regarding regulation and guidance to Congress and the public in a format comparable to the federal budget’s Historical Tables.
- ◆ Require streamlined, one-location, online disclosure of economically significant guidance from both independent and executive agencies, augmenting what a few agencies already voluntarily publish on the basis of the 2007 OMB memorandum to agencies.
- ◆ Require centralized disclosure of the thousands of guidance documents issued annually that do not rise to agencies’ reckoning of “significant.” Currently, those documents are scattered under numerous monikers and across various websites, if they are published at all.

The Reagan and first Bush administrations formalized such disclosure in a document that accompanied the Federal Budget known as the *Regulatory Program of the United States Government*. The compilation included a lengthy appendix, “Annual Report on Executive Order 12291,” which could provide a template for accessible disclosure of information about rules as well as guidance and dark matter. The *Regulatory Program’s* run concluded in 1993 when the Clinton administration replaced E.O. 12291 with E.O. 12866 as part of that administration’s 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 regulatory benefits and costs, and the *Information Collection Budget* have been published late—or sometimes not at all, in the case of the *Unified Agenda*.

A regulatory report card could take the form of a modified and reinstated *Regulatory Program* or a compilation of regulatory data published as chapters or appendixes in the Federal Budget, the *Economic Report of the President*, the *OMB Benefits and Costs* report, or other existing data sources.

Whatever its format, a federal regulatory transparency report card should include the following:

- ◆ Tallies of economically significant, major, and nonmajor rules by department, agency, and commission
- ◆ Tallies of significant and other guidance documents and memoranda by department, agency, and commission
- ◆ Numbers and percentages of rules and guidance documents that affect small business
- ◆ Depictions of how agencies' 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 a grand total
- ◆ Numbers and percentages lacking cost estimates, with reasons for the absence of cost estimates (such as rules for which weighing costs and benefits is statutorily prohibited)
- ◆ Aggregate cost estimates of regulation: grand total, paperwork, economic (possibly divided by sector, for example, financial or communications), social, health and safety, and environmental
- ◆ *Federal Register* analysis, including numbers of pages and breakdowns of final rules by agency
- ◆ Number of major rules reported by GAO in its database of reports on regulations
- ◆ Rankings of the most active executive and independent rulemaking agencies
- ◆ Identification of agency actions that are deregulatory rather than regulatory
- ◆ Rules and guidance purported to affect internal agency procedures only
- ◆ Number of rules that are new to the Unified Agenda
- ◆ Number of rules that are carryovers from previous years
- ◆ Numbers and percentages of rules that face statutory or judicial deadlines that limit executive branch options to address them
- ◆ Rules for which weighing costs and benefits is statutorily prohibited
- ◆ Percentages of rules reviewed by OMB and action taken

Regulations fall into two broad classes: (a) those that are economically significant—costing more than \$100 million annually—and (b) those that are not. Many rules that technically fly below the \$100 million “significant” threshold can still be highly significant in the real-world sense of the term. Congress could require agencies to break cost categories into tiers that are more descriptive of their real-world costs. Table 1.2 presents one possible itemization option.

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

Such additional disclosure is also needed for regulatory guidance documents, memoranda, and other regulatory dark matter that have been neglected in the regulatory oversight process.

Experts: Clyde Wayne Crews Jr., Ryan Young

### ***For Further Reading***

- Clyde Wayne Crews Jr., “The Other National Debt Crisis: How and Why Congress Must Quantify Regulation,” *Issue Analysis* 2011 No. 4, October 4, 2011, Competitive Enterprise Institute, <https://cei.org/issue-analysis/other-national-debt-crisis>.
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## IMPLEMENT A REGULATORY REDUCTION COMMISSION AND SUNSETTING PROCEDURES

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Much concern gets expressed over agencies' issuing of new regulations, but Congress should also seek to prune those regulations already on the books that have accumulated over decades. An option is to create a Regulatory Reduction Commission and task it to convene periodically to comb through the federal rulebook and compile a package of obsolete or burdensome rules for repeal.

### **Congress should:**

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- ◆ Appoint a bipartisan Regulatory Reduction Commission to conduct hearings, assess agencies' accumulated rules and regulations, and assemble an annual package of proposed regulatory reductions, subject to an up-or-down vote by Congress, with no amendments allowed.
- ◆ Include sunset provisions for rules in any new legislation that directs agencies to implement regulations.

Modeled on the military Base Closure and Realignment Commission (BRAC), the Commission on Regulatory Relief and Rollback was first proposed in 1995 by Sen. Phil Gramm (R-TX). A similar 2004 House proposal, the Commission on the Accountability and Review of Federal Agencies, would have addressed agencies and programs in need of rollback. The Progressive Policy Institute has detailed a similar idea, calling it a Regulatory Improvement Commission.

The BRAC model's bipartisan, independent structure helped Congress take on the politically difficult task of closing obsolete military bases that provide jobs in members' districts by bundling them into a single legislative package. BRAC formulated a list of recommended base closures set to go into effect after a given time interval unless Congress enacted a joint resolution of disapproval. If no such resolution was passed, the closures happened automatically. That technique could be applied to the similarly difficult regulatory arena.

Any commission recommendation that does not require legislation could be implemented by the president. Hearings, combined with the bundling of regulations, would make the commission's recommendations more difficult to oppose politically—everybody stands a good chance of getting “hit,” thus providing political cover all around.

International precedent for streamlining exists. The Netherlands and the United Kingdom both set up autonomous, nongovernmental bodies to review regulation—the Regulatory Reduction Committee in the Netherlands and the Better Regulation Commission in the U.K. Both sought to reduce regulatory burdens by 25 percent over a four-year period, and they achieved some success.

Review and sunseting expiration requirements written into laws and regulations could also incentivize agencies to repeal outdated rules. Although continuation of rules likely will be common, the procedure could improve transparency reporting, and thus incentivize reforms indirectly. Widespread sunseting throughout government could lessen the effectiveness of the interest-group mobilization that could be prompted by an approaching sunseting deadline affecting a single agency.

Experts: Clyde Wayne Crews Jr., Ryan Young

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## REQUIRE VOTES ON MAJOR OR CONTROVERSIAL RULES

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Congress passed 97 laws in 2017, but agencies issued 3,281 rules—a ratio of 34 rules for every law. As administrative law has replaced the representative republican version our founders envisioned, congressional overdelegation to bureaucrats has widened the disconnect between the *power* to establish regulatory programs and *responsibility* for the results of those programs. As Columbia University law professor Philip Hamburger notes, the emergence of an unaccountable regulatory state enabled regulators to create “laws” in defiance of the Constitution, which “expressly bars the delegation of legislative power.”

The Congressional Review Act, with its resolutions of disapproval, represents a tilt back toward the principle of congressional accountability, but it has rarely been used. Further, the CRA effectively requires a two-thirds supermajority to strike “laws” that Congress never passed in the first place—so the flow of rules only increases. The solution is to require congressional affirmation for agency rules, guidance, and other proclamations likely to have significant economic impact.

### **Congress should:**

- ◆ Pass the Regulations from the Executive in Need of Scrutiny Act, which would require major rules with annual costs of \$100 million or more to be voted on by Congress before they become effective.
- ◆ Once passed, expand the REINS Act to cover:
  - Any controversial rule, whether tied to a cost estimate or not.
  - Guidance documents and other agency decrees.

Public accountability for Congress and agencies should require that no major or controversial agency rule becomes effective *until* it receives an *affirmative* vote by Congress. This is crucial, because:

1. The potential for abuse of the “good cause” exemption is always high;
2. Most agencies do not quantify most rules’ costs; and
3. Costly rules can escape the “significant” classification by bringing their cost estimates in below the \$100 million threshold.

The REINS Act passed the House of Representatives in the 113<sup>th</sup>, 114<sup>th</sup>, and 115<sup>th</sup> Congresses, and should be revisited. Democratic accountability is most important. Cost–benefit analyses matter less when every elected representative goes on record as either supporting or opposing a particular regulation.

Experts: Clyde Wayne Crews Jr., Ryan Young

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## IMPLEMENT A REGULATORY COST BUDGET

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Federal spending, taxes, and the deficit get plenty of attention, but it is equally important to monitor and reduce *nontax* government expenditures. The concept is both bipartisan and not new. For example, former Sen. Lloyd Bentsen (D-TX) proposed an annual regulatory budget in 1979. Recent legislative offerings include Sen. Marco Rubio's (R-Fla.) National Regulatory Budget and Sen. Mike Lee's (R-Utah) Article I Regulatory Budget Act, introduced in May 2016.

A regulatory budget could help incentivize other reforms, such as cost analysis and sunseting. It would also allow Congress to allocate regulatory cost authority among agencies and better distinguish between categories such as economic, health and safety, and environmental regulations.

### **Congress should:**

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- ◆ Require agencies to present annual regulatory cost projections to Congress as part of the appropriations process. This would enable Congress to better decide what level of regulatory burden it is willing to impose on a given industry or region.
- ◆ Require a “one in, one out” procedure for new rules. A regulatory budget would make this possible beyond the executive order now in place. Like the regulatory reduction commission, this idea holds bipartisan appeal. For example, Sen. Mark Warner (D-Va.) has recommended offsetting every new rule by eliminating an existing one. Such a one in–one out system amounts to a status quo regulatory “budget,” or a freeze at current levels.

A comprehensive regulatory cost budget would include individual tallies from agencies that would parallel the fiscal budget. Congress would specify the total cost budget for which it is willing to be held accountable and divide it among agencies. Budgeting would force agencies to “compete” to ensure that their least effective mandates save more lives per dollar or correct some alleged market imperfection better than those of another agency. That should improve decision making and adherence to congressional intent. A comprehensive budget poses political risks, so limited versions should be implemented first.



Agencies would concentrate on assessing costs, much as the fiscal budget focuses on costs, not just benefits. Benefits are what Congress must supervise in the first place via its lawmaking and budgetary authority. Although compliance costs are difficult to calculate, they would be easier to manage than separate cost and benefit calculations for every single rule—which is not being done anyway. Agencies regulating recklessly could lose the squandered budgetary allocation to a rival agency or even face elimination.

Pitfalls of regulatory budgeting include:

1. The risk of creating perverse incentives to expand the size of government due to the elevation of utilitarianism over individual rights in the pursuit of social benefits;
2. The reality that, apart from raw compliance, cost calculations are subjective and involve mere estimations; and
3. The temptation to generate a phony net benefit budget.

The latter would mean no end to regulation, as it would give agencies fodder to argue that cutting their regulatory budgets costs lives.

Regulatory transparency, a regulatory reduction commission, rule sunseting, one in–one out procedures, and congressional approval of rules all would lay the needed foundation for more comprehensive versions of a regulatory cost budget. Regulatory budgeting can only really work atop a solid foundation of accountability. In particular, an accountable Congress that answers for uncalculated regulatory cost is a prerequisite for a properly functioning regulatory budget.

Experts: Clyde Wayne Crews Jr., Ryan Young

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## RESTRAIN THE RUNAWAY ADMINISTRATIVE STATE BY REINING IN CHEVRON DEFERENCE

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*Chevron* deference is the legal doctrine under which courts generally defer to regulatory agencies' interpretations of their enabling statutes. That means that when an agency's statutory interpretation undergoes judicial review, it need only be considered reasonable by the court to pass legal muster. So, although a court may believe that its own interpretation is a superior reading of the law, under *Chevron* deference, it would have to give way to the agency's interpretation.

From an institutional perspective, *Chevron* deference flies in the face of the judiciary's role, as Chief Justice John Marshall famously put it, "to say what the law is." *Chevron* deference operates under the assumption that Congress intended for courts to defer to agencies' interpretation of statutes. That runs counter to Congress's express stipulation in the Administrative Procedure Act that "the reviewing court shall decide all relevant questions of law."

### **Congress should:**

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- ◆ Pass the Separation of Powers Restoration Act (SOPRA, H.R. 76, S. 1577, 115<sup>th</sup> Congress), which would direct courts to stop giving controlling deference to agency interpretations of rules' enabling statutes.
- ◆ In expectation of a possible increased administrative burden on Article III courts, complement passage of SOPRA with a modest appropriation to support another 36 appellate judges and 140 district court judges plus the accompanying clerks and assistants.

The U.S. Supreme Court established this doctrine in its seminal 1984 ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* In that ruling, the court set up a now widely used two-step test for courts to review agency interpretations of their own rules under the relevant statutes. At Step 1, the reviewing court asks "whether Congress has spoken directly to the precise question at issue." At this point, "if the intent of Congress is clear, that is the end of the matter" because courts "must give effect to the unambiguously expressed intent of Congress." However, if "the statute is silent or ambiguous with respect to the specific issue," the court moves on to *Chevron* Step 2, whereupon "the question ... is whether the agency's answer is based on a permissible construction of the statute."

From a practical perspective, *Chevron* deference has been a crucial impetus for the growth of the administrative state. Because of the richness of the English language, it is easy for an agency to engineer ambiguity into virtually any statutory provision. Having thus engendered a textual imprecision, the agency can then advance an expansive interpretation that grants itself greater regulatory authority.

At its theoretical core, the *Chevron* deference doctrine is based on the Supreme Court's assumption that Congress intended for administrative agencies, rather than judges, to interpret statutes, because of the former's comparative expertise and accountability. In making that assumption, the Supreme Court overlooked the possibility that Congress' intent may run counter to that of the executive branch. For that reason, Congress should look to provide a judicial check on the powers of the executive, regardless of administrative agencies' supposed expertise in interpreting statutes.

Given that *Chevron* deference is a function of supposed congressional intent, it is long past time for Congress to express its will as to which branch of government should have the power to interpret the law.

Experts: Iain Murray, Myron Ebell, Marlo Lewis

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