

**Perhach, William**

**From:** Graham, John  
**Sent:** Monday, December 06, 2004 2:47 PM  
**To:** Martin, Catherine; Arbuckle, Donald R.; Fraas, Arthur G.; Morrall III, John F.; Belton, Keith B.; Noe, Paul R.; Vandersarl, Elizabeth  
**Cc:** Cooney, Phil  
**Subject:** FW: note from Wayne Crews at CEI (Reg Reform Options for Admin and Congress)

fyi

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**From:** Wayne Crews [mailto:wcrews@cei.org]  
**Sent:** Monday, December 06, 2004 2:05 PM  
**To:** Noe, Paul R.; Graham, John  
**Cc:** Fred Smith  
**Subject:** RE: note from Wayne Crews at CEI (Reg Reform Options for Admin and Congress)

Dr. Graham and Paul -- We have the draft regulatory reform "masterwork"(!) at last--"Reviving Regulatory Reform: Options for the President and Congress. (This is the report we told you about at breakfast recently.)

I've attached it---if you have any trouble opening, let me know, it's big at 100+ pages--so my apologies for the file size. We will do a final release in January, around the time of the 109th, but Fred and I really hope this draft will be useful to you and that we can work with you on a regulatory agenda in the interim...let us know if there's anything at all we can do.  
 best, wayne

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**From:** Wayne Crews  
**Sent:** Tuesday, November 23, 2004 10:22 AM  
**To:** 'Paul\_R.\_Noe@omb.eop.gov'; 'john\_graham@omb.eop.gov'  
**Cc:** Fred Smith  
**Subject:** note from Wayne Crews at CEI

Dr. Graham and Paul....I mentioned I had a CEI paper that is an abbreviated version of what would come out from us in a few weeks....I pasted in that paper below--it contains a basic set of recommendations, including setting up a "Regulatory Report Card" as an element of annual reporting or the Budget, and also a brief discussion on cost budgeting, and accountability issues. (The title pokes some fun at how boring the topic can be!) (Somehow the bottom was cut off the html I pasted below, but the full pdf of the same is linked here:  
<http://www.cei.org/pdf/1722.pdf>)

The "report card" section has the detail on what used to be contained in the "Annual Report on EO 12291," which was part of the "Reg Program." Be nice to revive that info--as I mentioned, knowing which agencies are \*not\* performing analysis is useful info in and of itself.

We enjoyed breakfast, was really nice to see you both again. Have a great Thanksgiving!

Best, wayne

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10/7/2005

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## **Jump, Jive an' Reform Regulation**

Studies

by Clyde Wayne Crews

February 29, 2000

Full Study Available In PDF Format

Cost-benefit analysis has long been a centerpiece of regulatory reform proposals, with mixed success. Policymakers still largely don't know the full benefits and costs of the regulatory enterprise. The January 2000 Office of Management and Budget (OMB) *Draft Report to Congress on the Costs and Benefits of Federal Regulations* is the latest attempt to survey the extent of the regulatory state, but has severe limitations both in execution and enthusiasm.

The cost-benefit analysis that Congress requires in OMB's reports is informative, but it is not itself capable of bringing the largely unaccountable regulatory state congressional control. Instead, improved measures to enhance *congressional accountability* and *cost disclosure* matter most to any regulatory reform effort. Effective regulatory reform must make regulatory costs as transparent as possible through such tools as improved annual cost and trend reporting, and enact institutional reforms that allow voters to hold Congress responsible for the regulatory state by ensuring a congressional vote on major agency rules before they are effective. One such proposal is the Congressional Responsibility Act introduced by Rep. J.D. Hayworth (R-AZ) and Sen. Sam Brownback (R-KS). Rather than merely try to force resistant and unaccountable agencies and the OMB to report on regulatory benefits, Congress should internalize the need to demonstrate and maximize regulatory benefits.

*Jump, Jive* makes the following proposals aimed at improving Congress's accountability and cost disclosure:

- **Halt Regulation Without Representation: Require Congress to Approve Agency Regulations**
- **Publish an Annual Regulatory Report Card**
- **Require that Agencies Calculate Costs, but not Benefits**
- **Lower "Major Rule" Thresholds**
- **Create New Categories of Major Rules**
- **Explore Regulatory Cost Budgets**
- **Publish Data on Economic and Health/Safety Regulations Separately**
- **Disclose Transfer, Administrative and Procedural Regulatory Costs**
- **Explicitly Note Indirect Regulatory Costs**
- **Agencies and the OMB Must: (1) Recommend Rules to Eliminate and (2) Rank Rules' Effectiveness**
- **Create Benefit Yardsticks to Compare Agency Effectiveness**
- **Reconsider Review and Sunsetting of New and Existing Regulations**
- **Establish a Bipartisan Regulatory Reduction Commission to Survey Existing Rules**

Introduction: The Excessive costs of cost-benefit analysis

Income and excise taxes are the costs of government that citizens pay directly, but there are also indirect costs of government that consumers and businesses bear. Pollution controls, workplace and consumer product regulations, price and entry regulations—all these are well-known components of the regulatory machinery. Health, safety and environmental regulations alone cost between \$174 and \$234 billion of dollars each year according to the Office of Management and Budget's (OMB) January 2000 *Draft Report to Congress on the Costs and Benefits of Federal Regulations*.<sup>2</sup> Economic regulations and paperwork costs add billions more. Knowing how much of citizens' resources the federal government consumes is a fundamental requirement if consumers are to safeguard their pocketbooks.

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### Figure 1: Estimates of the Total Annual Benefits and Costs of Social Regulations

(in billions of 1996 dollars, as of 1999)

	<i>Benefits</i>	<i>Costs</i>
<i>Environmental Regulations</i> .....	\$97 to 1,595	\$124 to 175
<i>Transportation Regulations</i> .....	\$84 to 110	\$15 to 18
<i>Labor Regulations</i> .....	\$28 to 30	\$18 to 19
<i>Other</i> .....	\$55 to 60	\$17 to 22
<b>Total Costs</b> .....	<b>\$264 to 1,795</b>	<b>\$174 to 234</b>
 <i>Net benefit range \$30 to \$1,621</i>		

Source: OMB, *Draft Report to Congress on the Costs and Benefits of Federal Regulations, January 2000*.

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Many observers recognize that regulations often are not well-targeted and cost more than they should. Concerned reformers call for such measures as improved cost-benefit analysis, better assessment of risks to ensure that real rather than trivial hazards are targeted, periodic reviews of statutory regulations, and reductions in regulatory paperwork. Such reforms are important, but they have their limits. They don't get to the fundamental question of who should be in charge of the regulatory state.

Despite widespread appreciation that regulations can get out of hand, the highly charged political atmosphere that erupts upon any hint of a comprehensive reform effort has seemingly rendered Congress incapable of overhauling the regulatory state and making its activities more above-board.<sup>3</sup>

Wide-ranging cost-benefit analyses and risk assessments of health and safety reforms, the changes that reformers most often seek, are easily portrayed by opponents of regulatory overhaul as attacks on agencies, and even on the very notions of public health and safety. As Competitive Enterprise Institute President Fred Smith noted, the most recent high-profile regulatory reform effort (as part of the Republican "Contract With America") was characterized by opponents as "Mad-dog Republican ideologists join with robber-baron capitalists to regain the right to add poison to baby food bottles."<sup>4</sup> The notion that ill-conceived regulations can cause harm received scant attention, and still does.

Important incremental reforms have been made, however. Unfunded mandates reform, small business regulatory relief, and paperwork reduction have been implemented. Another important development over the past few years has been the improvement in regulatory disclosure stemming from the requirement that OMB issue its reports to

Congress. While agreement on these reports' format and content has been elusive, the reporting has been valuable and should be made permanent rather than commanded on a year-to-year basis through an add-on to an appropriations bill, as has been the history of this document. Yet another important development has been the compilation of a database on regulations, and sometimes their costs, by the General Accounting Office (GAO).<sup>5</sup>

There is considerable room for improving both content and format of OMB's reports. Nevertheless, cost-benefit analysis—or any kind of procedural reform, for that matter—still doesn't amount to fundamental regulatory reform. OMB, the federal agency watchdog, can do only so much on its own; agencies issue most of their significant regulations because Congress requires it, so they couldn't police themselves even if they wanted to. Along with the important role OMB plays, institutional reforms in the way Congress regulates are needed. Therefore this paper addresses both the roles of both Congress and OMB.

The Constitution designates an elected Congress, not agencies, as America's lawmaking body. Excessive, regulatory agency lawmaking is made possible by Congress either deliberately or carelessly delegating too much legislative power to agencies. Instead of maligning these "out of control" agencies, Congress ought to end "regulation without representation" at its congressional source by approving agency rules upon completion but before they are binding on the public. Without accountability to Congress, agencies can regulate with little concern for weighing costs and benefits. Agencies can never be held accountable to voters, so poor regulatory policies are unlikely to affect their ability to proceed undisturbed—no matter how much OMB's reports improve.

The mischaracterization of regulatory reform will persist and sink every major regulatory reform initiative until Congress is targeted rather than derivative agencies that are doing Congress's bidding. The link between agency proposals and congressional responsibility for outcomes must be reestablished. Furthermore, emphasizing congressional accountability instead of cost-benefit analysis is consistent with other popular reforms that aim at reining in congressional power such as term limits, committee reform, and lobbying reform. Moreover, agencies pay little heed to what other agencies are doing, and thus inherently cannot contribute to government-wide priority setting among competing regulatory goals. That is a job for Congress. Figure 2 puts regulatory reform's major requirements in a nutshell.

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### Figure 2: What Does Regulatory Reform Require?

- Cost-benefit analysis? Perhaps, but not really the answer.
- **Cost disclosure** and **congressional accountability** matter most.

The challenge is to make regulatory *costs* as transparent as possible through such tools as annual regulatory reporting, and for voters to have the ability to hold Congress directly responsible for regulations by requiring its approval of new rules. That process would permit Congress to internalize the responsibility to demonstrate and maximize regulatory benefits, rather than try to force resistant and unaccountable agencies to do the same thing. In addition to these ongoing processes, the existing body of rules should be reviewed occasionally.

In other words, "No regulation without representation!" Regulatory reform should be a populist, not technical, issue.

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The key contribution of regulatory reform should not be the increasing accuracy of cost estimates alone, but its role in making Congress more accountable for the regulatory state. Enhancing congressional accountability would help improve regulatory benefits as a by-product by forcing Congress to put its stamp of approval on regulations in full public view. Similarly, agencies brought before oversight committees would often be induced to "compete" for the right to regulate by openly comparing the severity of the risks they regulate with those of other agencies. Since excessive delegation of legislative power to unelected agencies, rather than a failure to perform cost-benefit analysis, is the fundamental root of regulatory overreach, and it is Congress that must be reformed. The following

section provides further details on this theme, and remaining sections cover regulatory disclosure and review.

## **HALT REGULATION WITHOUT REPRESENTATION: REQUIRE CONGRESS TO APPROVE AGENCY RULES**

Despite the constitutional stipulation that "All legislative Powers herein granted shall be vested in a Congress of the United States," mandates issued by unelected agency employees are laws. Delegation severs the crucial connection between the power to establish regulatory programs, and responsibility for the results of those programs, institutionalizing regulation without representation. Congress benefits when agencies get the blame for regulatory overreach. Delegation allows Congress to take credit for popular regulatory initiatives, while blaming agencies for costs.

Since cost-benefit analysis is inevitably caricatured as an attempt to put price tags on human life, there may be broader public appeal in a campaign to end regulation without representation. A 1999 Competitive Enterprise Institute survey found that 76 percent of Americans "agree that Congress should be required to approve regulations written by federal bureaucrats and administrators before they take effect.<sup>6</sup> Not only is congressional accountability a more appropriate principle around which to structure regulatory reform, it may be more politically achievable and defensible than cost-benefit or risk assessment analysis in many instances—such as the obvious case when benefits are not quantifiable in dollar terms. Where cost (or cost-benefit) analyses cannot be conducted, or appear impossible to conduct, it is difficult to know whether a particular rule is worthwhile. In such instances the case for sending a rule of uncertain merit back to Congress for approval is clear and compelling.

There has been some progress in the direction of accountability. The 104th Congress passed the Congressional Review Act (CRA), which set up a process for congressional disapproval—not active approval, however—of agency rules. At least symbolically, that was an important recognition of the need for congressional accountability; however short it falls of requiring that Congress go out of its way to approve regulations. Under the law, when an agency publishes a final regulation, a 60-day waiting period commences, a pause that allows Congress to pass a resolution of disapproval to halt the regulation should it so decide. However, the CRA has yet to stop a rule, largely because Congress benefits from the ability to delegate power. Delegation also allows Congress, facing a fundamental time constraint, to increase the amount of legislation it creates, and therefore the number of voting interest groups that it appeases.<sup>7</sup>

The CRA's requiring rule disapproval rather than approval creates another problem. Suppose Congress were to pass a resolution of disapproval and reject a rule. Should the President veto the resolution, Congress would then need to summon a two-thirds supermajority to strike the undesired regulation. This turns the legislative process backward: it should be hard to pass bad law, not to get rid of it. The Congressional Responsibility Act introduced by Rep. J. D. Hayworth (R-AZ) and Sen. Sam Brownback (R-KS) would go the extra step beyond CRA of requiring congressional approval of agency rules.<sup>8</sup>

A concern with having Congress approve agency rules will be that the legislative process may become bogged down. This isn't the case. Congress can approve agency rules on an expedited basis, or vote on bundles of rules at a time. Clearly Congress can design whatever process it chooses to deal with agency rules on a fast-track basis: the point is that it must deal with agency rules. What kind of society is it that makes so many laws that the elected legislature can't even pass them all? If Congress is spending too much time approving agency rules, that's significant in a fundamental way that it has delegated too much power.

If answerable for agency-wide priorities, Congress stands in a position to maximize overall benefits in a way that isolated agencies performing cost-benefit analysis could never do. Federal agencies by design are devoted to a single or limited purpose, and have no incentives to assist in the setting of government-wide priorities by making cross-agency comparisons of regulatory options. Thus, only congressional accountability for rules can avoid agency tunnel vision that afflicts regulatory policy. There is no escaping the requirement that Congress must set and approve the broad goals.

Ending regulation without representation would also lessen the problems caused by the fact that agencies are disinclined to quantify or state regulatory costs and benefits in money terms. If rules return to Congress for final approval, Congress will answer for their worthiness regardless of whether agencies take into account costs and benefits. So long as accountability applies, the inability or unwillingness of agencies to conduct cost-benefit

analysis is little cause for concern: every elected representative will be on record as either in favor of or opposed to a particular regulation. If regulatory benefits aren't apparent, or if regulatory costs are excessive, citizens have recourse at the ballot box that they will always lack with agencies.

In this sense congressional accountability would offer greater assurances that a regulation's benefits exceed costs. A congressional disinclination to rubber-stamp unjustified rules could inspire agencies to ensure their rules meet a reasonable cost-benefit benchmark before sending them to Congress.

There is no question that Congress likes the fact that delegation allows agencies to take the heat. Given that fact, perhaps one way to get started instituting congressional accountability would be to require a congressional vote for major rules whose costs cannot be quantified, as well as for rules with statutory deadlines that agencies and OMB will never assess. Even stringent cost-benefit analysis wouldn't have much effect in these particular instances, so the need to return such rules to Congress is more apparent.

While the public awaits full congressional accountability (indeed it could be a very long wait) steps can still be taken to aggressively monitor and audit agency output. This is the other half of the accountability and disclosure approach to regulatory reform. The incremental regulatory reform options that follow—including Regulatory Report Cards—all have full accountability as their goal. Like the spotlight the annual federal budget shines on government tax policy, a Regulatory Report Card would publicize regulatory costs and trends. That in turn could improve congressional accountability by providing agencies and Congress incentives to ensure that (implied) benefits exceed costs. Even if Congress were to enact the ultimate reform and approve every agency regulation, annual regulatory cost disclosure would remain important. After all, imposing taxes and imposing regulations can be substitutes for one another. Pressures to maintain the U.S. budgetary surplus could increase pressures to regulate unless the "regulatory budget" is known as well.

### **Publish an Annual Regulatory Report Card**

The OMB has regarded the adding up of the many varieties of regulatory costs as an apples and oranges exercise and an "inherently flawed approach."<sup>9</sup> Nonetheless some effort to present an aggregate estimate of all costs must be made.

Without consistent summary information about regulatory trends and costs, the ability to debate reform measures is squelched. A considerable amount and variety of regulatory data already exists, but is scattered across government agencies rather than assembled intelligibly in one location. In fact, more than 4,000 rules from more than 50 departments, agencies and commissions appear in the *Unified Agenda of Federal Regulations* each year. Of these, well over 100 are considered "economically significant," meaning they cost at least \$100 million annually. This information and much more could be easily condensed and published as an annual chapter on the state of regulation: its cost, and its impact on productivity, gross national product, competitiveness, and so on. The summaries could be compiled into a few charts and historical tables either in the federal budget, the *Economic Report of the President*, or the *Unified Agenda*. Even without enactment of stringent cost-benefit requirements, the data would provide valuable information to researchers, scholars, policymakers and the regulated public.

Items that might be included in a Report Card include: total numbers of major and minor rules produced by each agency; costs of economically significant or major rules; numbers of rules lacking cost estimates; the top rule-making agencies; numbers of rules facing statutory or judicial deadlines; numbers of rules impacting small businesses, and state and local government. Figure 3 includes these and other examples:

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### **Figure 3: Regulatory Report Card with 5-year historical tables**

- "Economically significant" rules and minor rules by department, agency and commission
- Numbers/percentages impacting small business and lower-level governments

- Numbers/percentages featuring numerical cost estimates
- Tallies of existing cost estimates, with subtotals by agencies and grand total
- Numbers/percentages lacking cost estimates
- Short explanation lack of cost estimates
- Analysis of the *Federal Register*: Number of pages, proposed and final rule breakdowns by agency
- Numbers of major rules reported on by the GAO in its database of reports on regulations
- Most active rule-making agencies
- Rules that are deregulatory rather than regulatory
- Rules that affect internal agency procedures alone
- Rollover: Number of rules new to the Unified Agenda; number that are carry-overs from previous years
- Numbers/percentages required by statute vs. rules agency discretionary rules
- Rules for which weighing costs and benefits is statutorily prohibited
- Percentages of rules reviewed by the OMB, and action taken

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A Report Card would provide a range of relevant regulatory information without bogging down in the controversial "net benefit" analyses emphasized by OMB in its annual reports. Note that where costs aren't available, the proportion of each agency's significant rulemakings lacking estimates can easily be tabulated and published. This exercise wouldn't be wasted effort; rather, knowing where cost estimates do and do not exist would help highlight the best and worst agency efforts at cost disclosure and competence in congressional oversight. Knowing the percentages of rules with and without benefit calculations would reveal whether or not we can truly say the regulatory enterprise is doing more harm than good. Cumulatively, years of reporting will help uncover any agency attempts to circumvent regulatory disclosure, such as any proliferation of minor rules to avoid the \$100 million threshold that would trigger an economically significant or major label. A flurry of minor rules might indicate that major rules are being broken up to escape the major classification.

With an eye toward improving Report Cards (and the OMB reports created under current law), Congress could have agencies prepare their own detailed assessments of the scope and costs of their regulations. The Environmental Protection Agency's *The Benefits and Costs of the Clean Air Act 1990 to 2010* is a notable recent example, and received notice and criticism in the OMB Draft Report.<sup>10</sup> The findings of such aggregate studies, combined with annual Report Cards and increasing doses of congressional accountability, would help assure more informed policymaking.

Until 1993, information such as numbers of proposed and final rules, and major and minor rules was collected and published in an annual document called the *Regulatory Program of the United States Government*, in an appendix titled "Annual Report on Executive Order 12291." This report specified what actions a then-more-aggressive OMB took on proposed and final rules it reviewed, along with data for the preceding 10 years. The *Regulatory Program* also provided considerable detail on specific regulations that were sent back to agencies for reconsideration, and listed rules withdrawn. The report also included 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* was

abandoned when the Clinton administration replaced EO 12291 with an order that returned rulemaking primacy to the agencies and reduced OMB's oversight authority.

The material featured in the former *Regulatory Program* should be revived as part of the annual Report Card. In a small way, what the fiscal budget is to tax policy, the *Regulatory Program* was to regulatory policy. It helped portray the off-budget scope of government, if not in terms of actual regulatory costs, at least in terms of trends in numbers of rules at the agencies. Figure 4 provides an overview of charts and tables formerly compiled in the *Regulatory Program*.<sup>11</sup>

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#### Figure 4: Information Collected in the former Regulatory Program of the U.S. Government

- Total number of OMB reviews of regulations, by agency; presented in number, and as a percentage of the total. The material was presented in pie charts and tables
- Number of 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 twenty most active rule-producing agencies, by number of rules reviewed, 1981-1991
- 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;" "Statutory or judicial deadline"
- Several pages of detail on the actions taken on rules reviewed
- Average review time
- A listing of rules exempted from review procedures
- Numbers of *Federal Register* pages, current and prior years
- Analysis of aggregate pages published in the *Federal Register* (total pages; average pages per month; percentage change year to year; percentage change from 1980 to present)
- 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 percent. These were broken down into New requirement; Revision to existing requirement; Elimination of existing requirement, and Other
- Number of final rule documents by agency

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The very fact that OMB often must rely on outside estimates of the costs imposed by the government it helps administer speaks volumes about the lack of accountability over regulatory costs, and the value of enhancing regulatory reporting. But even without formal cost-benefit requirements, an official Report Card would reveal the scope of the regulatory state. While illustrating agency effectiveness, it would also reveal Congress's own



responsibility for the extent of the regulatory burden: By showing which rules face congressionally mandated statutory deadlines or prohibitions on cost-benefit analysis, policymakers would gain a better sense of how regulation often is not subject to agency control.

### **Require that Agencies Calculate Costs, but not Benefits**

One way to help stem the unending controversy over having agencies weigh regulatory benefits and costs is to simply stop attempting to have agencies weigh costs and benefits. The problem with agency-driven cost-benefit analysis is that, to work, an agency would often need to admit that a rule's benefits do not justify the costs. That rarely happens.

Agencies face incentives to enlarge their scope by overstating and selectively expressing benefits of their activities. If agencies are encouraged to offset costs of regulation with benefits, as net-benefit analysis requires, regulations will rarely fail a cost-benefit test in the eyes of agencies. No matter how costly or inconvenient, a 15 mph speed limit and mandatory 15-foot bumpers would save lives; some agency somewhere could legitimately claim the benefits therefore outweigh the costs.

Agencies should concentrate solely on assessing and fully presenting the costs of their initiatives—much as the federal budget focuses only on the amounts of taxes, not the benefits of the dollars spent.

Emphasizing costs doesn't mean that benefits can be ignored, by any means. In the act of legislating, Congress makes calls regarding where legislative benefits lie and raises taxes and appropriates funds accordingly. Likewise, regulatory benefits sought should be articulated by a Congress that takes responsibility for agency regulatory priorities. If Congress were required to approve agency rules, its implied priorities would become revealed given the potential benefits within the agencies' purview. If agencies operate within an environment in which they will likely be required to defend their regulatory initiatives in oversight hearings and face the requirement that Congress shall bestow final approval or disapproval upon their rules, they may be more inclined to produce rules that have clearer benefits and lower costs. Focusing agencies' attention on costs of their initiatives can indirectly prod them toward maximizing benefits by competing to prove that they save the most lives or achieve some other regulatory goal at lower cost than a rival agency. As a result, Congress may choose to rethink some regulatory priorities.

As the legislative prime mover, Congress must make the judgements about which benefits are worth securing through legislation and, ultimately, regulation. The proper time to assess regulatory benefits is while Congress is contemplating legislation that later will become translated into regulations. Saving benefit appraisals solely for the time regulations are written is backward. *Those benefits were presumably the reason for Congress's seeking legislation in the first place.* Doubtless, the manner in which agencies implement rules will have different impacts on benefits; but that doesn't change the fundamental point that the pursuit of certain specified benefits must pre-justify regulation. It is not up to unelected regulators to concoct rationalizations after the fact. Once again the importance of the concept of "no regulation without representation" arises: agencies shouldn't unilaterally decide that benefits are present and that regulations are justified; that determination is a matter for elected lawmakers.

Net-benefit analysis suffers from other problems. The taxes individuals pay are not in any way offset by the benefits those taxes provide: No one speaks of a *net* tax benefit with the implication that taxation costs individuals nothing since benefits outweigh the costs. Only grateful recipients would tolerate such claims. Similarly, regulations transfer wealth, and benefits from those transfers don't necessarily accrue to everyone equally. An agency's claim that a regulation produces benefits begs the question of whose benefits are promoted, and whose resources were used to achieve those benefits. Moreover, the reality of benefits is often a matter of considerable debate. For example, whether such initiatives as the Department of Energy's costly energy efficiency requirements for appliances are beneficial or wasteful will never be agreed upon. Such disagreements are another argument for congressional approval of regulations rather than agency free rein.

There is yet another advantage of stripping agencies of benefit calculation requirements (They may and should assess benefits voluntarily, of course). Calculating cost-benefit information is a daunting task. But setting aside benefit calculations in the interest of allowing more informative cost analysis will truncate OMB's (and agencies') calculation job. As stipulated by executive order, agencies already assess the costs of some of their major (\$100

million-plus) rules with Regulatory Impact Analyses, and these analyses are subject to public comment. But eliminating the mandatory benefit assessment greatly frees resources to improve these analyses. It is difficult enough for policymakers to agree on the benefits of on-budget activities whose costs are fully known (Amtrak, highways, welfare), let alone off-budget regulations.

Agency net-benefit estimates also are notoriously wide-ranging, making it difficult to conclude anything about the effectiveness of the regulatory state. The OMB reports a huge range of possible net benefits, noting that "health, safety and environmental regulation produces between \$32 billion and \$1,621 billion of net benefits per year."<sup>12</sup> Moreover, of the thousands of regulations, just a relative handful may be responsible for the bulk of benefits.

As a practical matter, OMB would be unlikely to aggressively review all agency benefit estimates. In 1999, Agencies were at work on 4,538 rules.<sup>13</sup> But in preparing the 2000 *Draft Report to Congress*, the OMB reviewed 44 of them, less than one percent.<sup>14</sup> What is more, the OMB often monetizes annual benefits only for those rules for which agencies have already quantified them in some manner.<sup>15</sup> Clever agencies can avoid scrutiny by not quantifying benefits. Given that prominent reform proposals today call for recognition of "non-quantifiable" benefits, with the implication that these offset costs, agencies are invited to exaggerate benefits, as well as present yawning ranges of benefits. Finally, *independent* agencies—unlike executive agencies that are required to perform some cost-benefit analysis—present "relatively little quantitative information on the costs and benefits of major rules."<sup>16</sup> Beefing up requirements for cost disclosure would be both more achievable and more useful.

Agencies should assess as accurately as possible the costs of their initiatives, which would allow them to more fully analyze more rules with the staffing resources that otherwise would have been directed at benefit assessments. Regulatory benefits are properly Congress's worry. Agencies' proper role is to achieve Congress's pre-determined benefits at least cost, not to determine what those benefits are. This approach will help assure that Congress discloses what it thinks is reasonable for the public to spend to achieve those benefits.

### Lower "Major Rule" Thresholds

If OMB and agencies concern themselves primarily with disclosing regulatory costs, that presents an opportunity to improve reporting and present far more meaningful analysis than that seen today. Under current policies, agencies designate rules "economically significant" or "major" when they cost at least \$100 million annually. The October 1999 *Unified Agenda of Federal Regulations*, for example, contained 137 major rules at various stages in the pipeline.<sup>17</sup> If implemented, these rules will cost at least \$13.7 billion (\$100 million times 137 rules) annually. But note that this threshold only reveals the *minimum* level of costs. The new OMB *Draft Report to Congress*, to its credit, includes tables listing major rules individually, along with their cost estimates where available.

OMB's report as well as most significant studies of regulatory costs naturally focus on major rules, by implication taking agencies at their word that the remaining body of regulations isn't significantly costly. But this isn't necessarily so. The "major" classification would capture more rules if the threshold were lowered. After all, costly rules of up to \$99 million can yet dodge the "major" or "significant" label and escape close review by the OMB and other parties. Examples include workplace rules under consideration at the Occupational Safety and Health Administration to address slip, trip and fall hazards.

To address regulations that deserve to be analyzed but that escape scrutiny because they cost less than \$100 million, the "major" rule threshold should be reduced to, for example, \$25 million annually. This is still a high level of yearly costs. Lowering the threshold will increase the number of rules brought to public attention each year. Disclosing a wider range of costs is fairer to the public, more consistent toward instilling greater accountability in the regulatory system, and not particularly difficult either, especially if agencies are focusing their attention on regulatory costs instead of benefits. With the emphasis placed on costs, the reporting burden becomes much more manageable as well as more informative.

### Create New Categories of Major Rules

As noted, if OMB and agencies emphasize disclosure of regulatory costs—rather than net benefits—to the best of their abilities, that would allow for the presentation of cost analyses considerably more meaningful, and in greater number, than available today. Lowering the threshold at which a rule qualifies as economically significant to

capture more regulations is one important step in improving cost disclosure. In addition to lowering the threshold, disclosure would be improved by grouping rules in terms of increasing costs. A new shorthand, beyond merely "economically significant," to refer to increasingly costly classes of major rules would be worthwhile.

The economically significant threshold merely specifies a *minimum* level of costs, revealing that a rule costs more than \$99.9 million—but not *how much* more. For example, as noted, the 137 major rules in the October 1999 *Unified Agenda* will cost at least \$13.7 billion annually. But that's the best one can tell without combing through the Agenda or agency cost analyses.

The adoption of additional categories of major rules could easily be realized. OMB and agencies (or Congress) could develop simple guidelines for breaking up economically significant rules into separate categories that represent increasing levels of annual costs, summaries of which could be presented in annual Regulatory Report Cards. Figure 5 offers one suggested breakdown of regulations by assigning them an official category:

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#### Figure 5: Proposed Breakdown of Economically Significant Rules

Category 1 > \$100 million, <\$500 million

Category 2 > \$500 million, < \$1 billion

Category 3 > \$1 billion

Category 4 > \$5 billion

Category 5 >\$10 billion

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The benchmark categories, the ones above or some variant, could be selected based on a review of the costs of major rules over the past few years to get an idea of the range of regulatory costs the various agencies are typically generating. By assigning rules to categories, the economically significant designation would carry substantially more meaning than it currently does. Today, merely knowing that a rule is economically significant tells far too little, unless one takes needless, troublesome extra steps of digging up a regulatory impact analysis for more cost detail. For example, some studies of EPA's ozone-particulate matter regulations find that by 2010, the ozone component will cost at least \$1.1 billion, and that the particulate matter portion will cost \$8.6 billion annually.<sup>18</sup> In this case, knowing that EPA imposed "Category 3" and "Category 4" rules would be far more informative shorthand than merely knowing that both rules are economically significant.

#### Explore Regulatory Cost Budgets

From the government's point of view, spending and regulating can be substitutes for one another. That means pressures to maintain the federal budget surplus could increase pressures to regulate. That possibility increases the urgency of accounting for regulatory costs.

Some have proposed formal regulatory budgeting, which would go beyond the mere reporting of costs. There are many potential versions of a cost budget, some better than others.<sup>19</sup> Lamar Smith, Texas Republican, proposed a version in the 103rd Congress that would require House and Senate budget committees to allocate new regulatory costs for the upcoming seven years to the appropriate authorizing committees, who would in turn allocate costs among agencies. Points of order would apply when agencies under an authorizing committee's jurisdiction report regulatory costs that exceed their allocation. Any member could offer legislation under an expedited procedure to freeze regulations within a committee's jurisdiction.

Another offering, perhaps simpler to implement, is the 106th Congress's bipartisan Mandates Information Act, which would go further in the direction of congressional accountability. This bill would require that Congress explicitly take account of private sector mandates by instituting a point of order against legislation that would cost

more than \$100 million annually. The Congressional Budget Office would provide the cost estimates on which Congress would base its decision. If raised, the point of order would halt action on bill unless waived by a simple majority vote. By this measure, Congress implicitly approves the imposition of regulatory costs at the time new legislation is created. By requiring cost disclosure for new legislative mandates, Congress would assume significantly more responsibility for what agencies do. Annual cost information by agency and a grand total could be provided to the public in the annual Regulatory Report Card.

Sen. Orrin Hatch (R-UT) also proposed a variant of a regulatory cost budget. During the 103rd Congress, Senator Hatch introduced S. 13, a simple three-year "cost cap" version of a regulatory budget.<sup>20</sup> This proposal was basically a freeze; it would cap regulatory costs at the level prevailing at the time of adoption by requiring any new regulation to be offset by repeal or modification of an existing one. Agencies could freely issue new regulations, but would need to offset the cost by eliminating one or more existing rules of roughly equal cost, or by persuading another agency to eliminate a regulation on its behalf. This is a relatively modest approach, simply holding total regulatory costs at today's aggregate level by requiring that any new regulation be offset by one of equal or greater cost.

The variations on the theme of regulatory cost budgeting are probably endless. What matters is that it be explored. Even if Congress were required to explicitly approve every agency regulation—the "ultimate" regulatory reform—cost tallies would still be essential for the same reasons it is essential that the U.S. formally budget its revenues and outlays. No politician would dream of taxing the public and not providing an accounting of revenues and outlays. Perhaps that policy may eventually apply to regulation also. Preliminary regulatory budgets could be limited in scope to emphasize costs and avoid trying to shift to agencies the accountability that should lie with Congress.

### **Publish Data on Economic and Health/Safety Regulations Separately**

An assumption underlying regulatory activism is that markets aren't perfect but that political decisionmaking can make up for that shortcoming. The very basis of regulation is the belief in the selflessness of government actors and the fairness of political markets relative to private ones.

That presumption certainly deserves critical analysis. Suffice it to say that, indeed, environmental rules and health and safety rules are popular, generally regarded as advancing the public welfare. But economic regulation, on the other hand, has clearly lost much of its luster over the past decades. Whether wholesale intervention like macroeconomic fine-tuning, or more limited government management of an industry's output and prices (such as agricultural quotas, rules governing electricity generation prices or rules restricting entry into the trucking industry), economic regulation no longer is automatically assumed to advance consumer welfare.<sup>21</sup>

In its cost estimates over the years, OMB has properly distinguished between economic regulations on the one hand, and environmental/social regulation on the other. While OMB finds net benefits of the entire regulatory enterprise to be positive, separating regulations into either the "economic" or "social" category would help underscore the relative lack of benefits of economic regulation.

One reason economic regulation is no longer regarded as efficient is that regulations don't always spring from a desire to protect the public interest. Often regulation is used to transfer wealth to protect the interests of the regulated parties themselves instead of the public interest. That guarantees regulatory failure. Campaigns to deregulate economic sectors like electricity and telecommunications partly embody a general realization that regulation can hurt more than it helps.

Less recognized is that both environmental and social regulations are likewise subject to political failure and "pork barreling." Even health and safety regulation can harm consumers and benefit regulated firms seeking to protect profits through political means, for instance by seeking to hobble a competitor by raising its costs through regulation. The Food and Drug Administration's food labeling restrictions, for example, limit the health claims food producers can make. But that policy may benefit established food producers that already enjoy healthy reputations and the good graces of the public by making it difficult for upstarts to compete on the basis of health characteristics. To compete, newcomers must instead emphasize features like microwaveability, convenience or taste. The imposed downplaying of health features of new products could have precisely the opposite effect expressed by regulators in their justifications for the regulation.

Other examples of the misuse of regulation include butter producers' attempts to portray margarine as unsafe and filthy at the dawn of the margarine industry,<sup>22</sup> and the advocacy of environmental regulations by businesses that calculate the costs will drive their competitors out of business.<sup>23</sup>

Since health and safety regulations differ in intent from economic regulation, costs and trends in them should be presented separately in Regulatory Report Cards. Purported economic benefits from a trade regulation cannot in any meaningful way be compared with lives saved by a safety regulation. Since no common basis exists for comparing the benefits of economic regulation with health and safety regulation, separating the two kinds of rules will offer reviewers the opportunity to better assess the merits of each, and also better assess when either kind of regulation is being exploited.

### **Disclose Transfer, Administrative and Procedural Regulatory Costs**

Within the economic and health/safety regulatory categories, further breakdowns within a Regulatory Report Card are warranted. Involuntarily borne costs, such as the paperwork costs involved in tax compliance and workplace reporting requirements, are hardly minimal, and it is appropriate to officially disclose these kinds of cost where possible.

**Transfer costs:** Transfer costs are those produced when income shifts from one pocket to another, for example from consumers to farmers through farm production quotas that keep prices artificially high. OMB has properly noted that "Redistributive effects, or 'income transfers' should also be measured, noted, and presented to policymakers to help in forming their decision."<sup>24</sup> The need for disclosure of regulatory transfers is most apparent by analogy to the tax code. Our entire tax code is a gigantic system of income transfer: Surely no politician would claim that, since funds go from one pocket to another there are no real costs, and thus no disclosure (budget) is necessary, and taxes can be ignored. The fact that *someone* pays on the basis of government compulsion, regardless of the benefit to a third party, means that the government must openly account for both taxes and regulation.

For purposes of *disclosure* to the public, it makes little difference whether regulations represent direct compliance costs or transfers. To those paying the costs of the transfer, costs are real enough. The US has not embraced a policy of extreme utilitarianism such that supposedly neutral transfers are acceptable so long as "society's happiness" is maximized. *Individual* rights matter—and that means any governmentally imposed costs that individuals bear should be disclosed. An official policy of ignoring or failing to disclose regulatory redistribution invites abuse and further transfers. Regulations and taxation both are subject to interest group manipulation.

**Administrative and procedural costs:** Analogous to the distinction between economic and social regulation, regulatory cost studies or Report Cards should further distinguish "interventionist" initiatives that regulate private conduct from those that merely affect the public's dealings with the government.

Clearly certain agency activities represent "services" provided by government to the public rather than regulation. Rulings such as those changing eligibility for federal programs, use and leasing requirements for federal lands, and revenue collection standards, should be noted separately from the economic and environmental/social regulations that normally represent the focus of regulatory reform. Service-oriented administrative paperwork—such as that for business loans, passports, and getting government benefits—are other examples. Similarly, agencies could also separately present those rules that affect agency procedures only.

### **Explicitly Note Indirect Regulatory Costs**

Apart from direct compliance costs and transfers, regulations can have other impacts on economic productivity, efficiency and safety that are difficult to measure or are not always immediately apparent. Such indirect costs include reduced employment and hampered job creation, costs that ultimately impact consumers. Regulations can have other perverse effects that are properly regarded as "costs." For example, such interventions as the Corporate Average Fuel Economy standards and drug lag at the Food and Drug Administration can cost human lives. The Endangered Species Act, by imposing land use controls once a listed species is detected on private property, can lead property owners to ensure that their property never becomes livable habitat in the first place. The costs here can include both the costs of lost use of property, and the needless loss of species.

All these examples illustrate the need to monitor indirect costs. The ambiguity of indirect costs alone suggests

that policymakers should be particularly sensitive and guard against indirect effects wherever possible. Indeed, some have argued that indirect regulatory costs could even exceed the magnitude of direct costs.<sup>25</sup> Ignoring indirect costs will lead officials to underestimate the true impacts of regulation and thus over-regulate.

Acknowledging indirect costs is a matter of fairness and accountability in government. If indirect costs are too difficult to compute, then government cannot credibly argue that regulatory compliance is simple or straightforward. If government doesn't regard compliance itself as too complex, then the government cannot claim that merely assessing the costs of compliance is too cumbersome.

Explicit acknowledgment of indirect regulatory costs is necessary even though precise measurement will always be impossible. Luckily, opportunity costs apply even to the economists who review regulations: if agencies are no longer required to perform benefit assessments as recommended in this paper, manpower remains available to better assess and describe indirect regulatory costs.

The wrong kind of incentives could be disastrous. If Congress routinely allows regulators to ignore indirect costs, then regulations will tend to impose them. Suppose outright input or product bans are regarded as indirect costs and not counted in regulatory assessments: after all, they involve no direct "compliance costs" as these are generally understood. Under that structure, nearly every environmental regulation could be expected to entail a ban so regulators would avoid posting high regulatory costs. Part of the answer is to exercise particular caution when imposing those types of regulations—such as product bans—most likely to lead to indirect costs. Determining the sorts of regulatory activities that tend to impose indirect costs would require further analysis.

Ultimately, the only way to properly incorporate indirect regulatory costs into governmental priorities is to require Congress to approve significant final agency rules and thereby internalize such costs. At that level of accountability, handwringing over indirect costs becomes unnecessary. There is no shame or failure in settling for indirect cost estimates that are admittedly rough, so long as regulatory dollars are ultimately allocated in loose correspondence with where an *accountable* Congress believes benefits to lie.

#### **Agencies and the OMB Must: (1) Recommend Rules to Eliminate and (2) Rank Rules' Effectiveness**

Agencies and the OMB should recommend rules to eliminate each year, of their own accord, however unlikely this is without congressional action. OMB, in its *Draft Report to Congress*, is too timid about recommending regulations to eliminate. Instead, OMB grants benefit of the doubt to regulators, going so far as to claim that the agencies' presentations of certain of their deregulatory priorities counts as a recommendation for reform since OMB had provided guidance to them earlier. OMB notes, "The 164 regulations under development in the *Regulatory Plan* may be viewed as specific recommendations for regulatory improvement or reform based on statutory mandates and the Administration's priorities."<sup>26</sup>

In fact, agencies have compiled *Regulatory Plans*—annual documents in which they specify priorities for the upcoming year—since 1994, well before OMB was ever required to perform its reports to Congress on regulatory costs and benefits. In spite of its unique knowledge of the regulatory state, all the OMB ventures to do is restate and endorse a few of the agencies' self-offered reforms—ones they were already undertaking. OMB's reluctance here has received congressional support as well. Sen. John Glenn (D-OH), during debate over legislation that led to the creation of the 1998 *Report to Congress*, noted that "OMB will not have to engage in extensive analyses of its own, but rather is expected to use existing information."<sup>27</sup> The OMB likewise noted, "[I]t is the agencies that have the responsibility to prepare these analyses, and it is expected that OIRA will review (but not redo) this work."<sup>28</sup>

Therefore, getting agencies to recommend rules to regulate will require some significant prodding. To clear out regulatory underbrush, Congress should ask agencies to propose rules to cut at the time they offer their submissions for the annual Report Card. If agencies claim not to be able to recommend rules to cut, there are other options. Congress could instead rank health and safety agencies' regulations in terms of potential lives saved, for example. That would let Congress view the costs or emphasis of various agencies' rules in light of their effectiveness, which would set the stage for getting agencies to compete to prove that their least effective rules are superior to another agency's rules. The results of such an exercise could be presented in the Regulatory Report Card.

Regulatory impulses typically place the burden of proof on those who would remove a rule rather than on those

who would impose it in the first place. But increasing the degree to which agencies compete with one another should help bring to the surface the fact that regulatory benefits may not always be what they seem, and give OMB the ammunition it needs to recommend cuts in regulation:

- Agencies' have incentives to overstate benefits (just as businesses have incentives to overstate costs).

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