COUNCIL on FOREIGN RELATIONS

Renewing America
Progress Report and Scorecard

Quality Control
Federal Regulation Policy

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Quality Control: Federal Regulation Policy

INTRODUCTION

The number of federal regulations and hours required to complete federal paperwork have been rising steadily for decades. Under President Obama, the impact of regulations has been increasing, too. New laws enacted by Congress have dramatically changed regulation of the financial and health-care industries, and Obama has continued the long-standing regulatory push to protect the environment and conserve energy. Although a certain level of regulation is needed to keep the environment clean, the public healthy and safe, and markets well-oiled and stable, many policymakers worry that too much regulation can stifle economic growth.

The American public is deeply divided over whether businesses face too many regulations, and Republicans and small-business leaders have grown more concerned over the course of the Obama presidency. Yet when asked about specific regulations, such as standards on air quality, fuel efficiency, or workplace safety, most Americans favor the status quo.

Although regulations may be increasingly costly for U.S. businesses, and for small businesses especially, they do not appear to pose a competitive disadvantage for U.S. companies relative to those based in other advanced economies. Compared with other G7 countries, the United States has consistently been among the easiest places to do business, offering one of the least regulated economies and the least burdensome regulatory systems.

Research on the economic effects of regulation is underdeveloped, though available evidence suggests most regulations have brought benefits that are worth the economic costs. Some of the most costly regulations, which affect air quality, have also produced the biggest benefits. Nevertheless, the federal government could do more to lower burdens on businesses without compromising the objectives of regulation.

In particular, the U.S. regulatory management system, or the way in which federal regulations are designed, could be improved. The system has changed little since the early 1980s and focuses almost exclusively on cost-benefit analysis before regulations are put into place, rather than in hindsight when it is clearer whether or not a regulation is working. As a result, the stock of older regulations accumulates without an institutionalized process for determining which regulations should be repealed or changed. Even the analysis before regulations are implemented could be better informed through empirical research and more sensible and proportionate examination of all draft regulations: some come with overly detailed analysis that impedes decision-making, whereas others escape oversight altogether.

The United States used to be the trailblazer in regulatory reform. The rest of the rich world has caught up, however. Countries such as Australia, Canada, and the United Kingdom can now lay claim to being at the cutting edge of regulatory management. They have implemented systems that better manage the existing stock, for example, with regulatory budgets and automatic reviews, while improving the filter for new regulations through empirical study.

Efforts to revamp the U.S. federal regulatory system are stalled. Regulatory management under President Obama has been hardly distinguishable from that of every other administration since President Jimmy Carter. Dozens of congressional proposals have been made that would bring the U.S. system more in line with countries at the forefront of regulatory innovation. These proposals fall short on several dimensions, however, focusing on more restrictions like regulatory budgets and automatic reviews without directing more resources toward empirical research and improving retrospective analysis.

HOW THE REGULATION SYSTEM WORKS

Regulation is the third principle instrument (along with taxing and spending) that governments use to achieve policy goals.[1] In the United States, Congress passes statutes outlining the broad contours of regulations. Federal departments and agencies within the executive branch then write and enforce specific rules or regulations.

The federal regulatory reach is huge. It affects everything from the food and medicine we consume to the efficiency of the cars we drive, the safety of our workplaces, the clarity of the air we breathe, and the way we save for retirement. A full-time federal workforce of three hundred thousand keeps the regulatory system running. More than three thousand new regulations are issued every year, most of which are minor or technical, though roughly forty to fifty are economically significant, which is defined as those with an annual cost to the economy of at least $100 million.[2] The rate of new rulemaking has been roughly constant over time, but the number of new statutes passed by Congress has been decreasing for decades.[3]

More than taxing and spending, regulations do not easily lend themselves to simple and transparent accounting. Regulations are also often written by civil servants who are not directly accountable to the public. To keep the quality of regulations in check, governments create regulatory management systems.

In the U.S. federal government, responsibility for overseeing this quality-control process falls mostly on the executive branch, specifically the Office of Information and Regulatory Affairs (OIRA). Congress has taken a backseat in regulatory management policy, which is largely set by executive orders issued by the president.[4] But presidential directives and OIRA's oversight do not cover regulatory agencies that are technically independent and beyond the president's control, including the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Federal Trade Commission (FTC).

Since 1980, when Congress created OIRA, each president's management framework has been remarkably bipartisan and consistent across administrations. The system is institutionally designed to assess and improve the quality of new regulations before they are implemented. At the heart of the framework is a cost-benefit analysis, which is calculated by federal agencies and departments for economically significant regulations.[5] All draft regulations (along with any required cost-benefit analysis) are sent to OIRA for review and final approval. OIRA sends a majority of draft rules back to departments with requested changes, sometimes with suggestions for how to improve submitted cost-benefit analyses. OIRA staffers spend most of their time collecting and sharing information about best practices from across the federal government, listening to input from affected industries and consumer groups, and ensuring that draft regulations fit with the administration's policy agenda.[6]

IDEOLOGICAL DIVISIONS: BALANCING SOCIETY-WIDE BENEFITS VERSUS PRIVATE-SECTOR COSTS

Policymakers from across the political spectrum would agree that a certain level of regulation is needed to keep the environment clean, the public healthy and safe, and markets well-oiled and stable.

But even if society as a whole ultimately benefits, economic costs are associated with any regulation. Those costs usually hit businesses first but are then passed on to employees through lower wages and job cuts or to consumers through higher prices.

Democrats and Republicans appear most divided over whether the benefits justify the costs. Republicans tend to worry about the regulatory burden leveled on businesses and place a higher priority on minimizing regulatory costs. For example, Rick Perry, the former Republican governor of Texas, invoked his state's low-regulation environment to explain its impressive job-growth record.[7] Democrats tend to be more willing to place regulatory costs on the private sector to achieve what they believe are larger net benefits for society.

PUBLIC OPINION: DIVIDED ON REGULATIONS GENERALLY, IN FAVOR SPECIFICALLY

American public opinion on federal regulation falls along partisan lines. Republicans are far more likely than Democrats to believe there is too much regulation of business. Since the Great Recession and during the Obama presidency, the partisan gap has widened considerably—and is almost entirely explained by growing concern among Republicans. Today 79 percent of Republicans believe the government regulates business too much; only 26 percent of Democrats agree, a difference of fifty-three percentage points.[8] During the George W. Bush presidency, the gap between the two parties was half as large.

A survey of small-business executives mirrors the Republican polling trend. The share who indicate that "government regulation and red tape" are their most important problem has been increasing over the course of the Obama presidency. For the past three years, it was among the survey's most commonly cited problems.[9] Public criticism of regulations has picked up as well. Between 2007 and 2011, media mentions of "job-killing regulations" went from just four appearances per year to seven hundred.[10]

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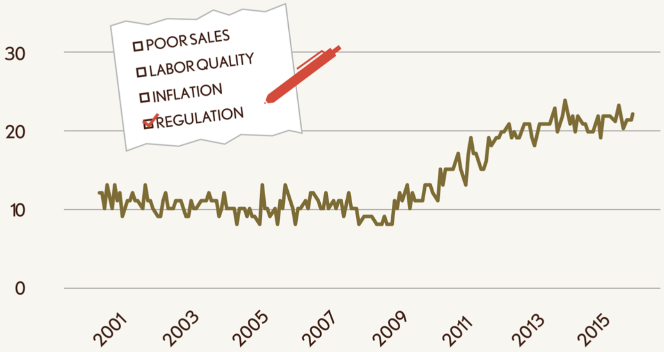
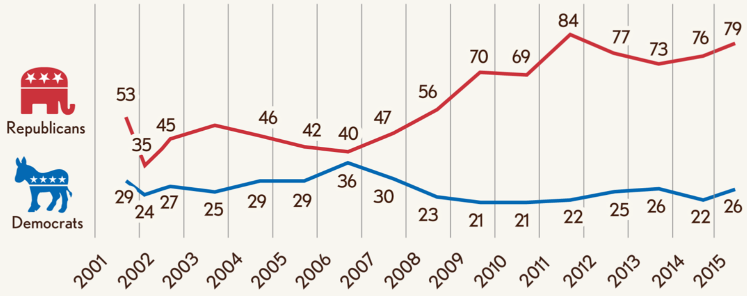
Partisan Divide



Percent of firms selecting regulation as single most important problem

Small businesses have grown more concerned about regulations under Obama.



Percent of Americans who say government is overregulated, by party

Over the same period, Republicans increasingly believed businesses are overregulated.

The public as a whole appears more favorable toward specific regulations, however. In a 2012 Pew survey, the vast majority of Americans (and a clear majority of Republicans) either favored current levels or wanted more regulation for the environment, car safety and efficiency, and workplace safety. Survey results were the same twenty years ago, suggesting public opinion has been remarkably consistent and positive about specific federal regulations.[11]

REGULATION'S AMBIGUOUS EFFECT ON THE ECONOMY

Empirical research remains underdeveloped regarding regulation's effect on the economy. Economists have not settled on a good way to measure overall regulatory burden, often resorting to crude proxies like the number of pages in the list of all federal regulations or the number of restrictive words like *must* or *should* on that list.[12] Because of these data limitations, the best empirical studies take on a specific regulation rather than the full stock of regulations. Largely unknown is how the average business is affected by the cumulative set of regulations, or whether certain regulations harm or help different kinds of business activity, such as innovation or entrepreneurship.

Existing research suggests the political rhetoric blaming economic woes or successes on regulation tends to be overblown. One controversial study, sponsored by the Small Business Administration, found gigantic economic costs, but also failed to measure benefits.[13] No relationship is apparent between the level of regulatory burden among U.S. states and their unemployment rate or their rate of business startups and failures. More prosperous states have more regulation, though this may be because wealthier communities demand it.[14] Studies have not found robust results for the "pollution haven" effect, in which firms are induced to move to regions where environmental regulations are less stringent. This may be in part because the most heavily regulated industries, such as mining, wood products, and energy production, are not very mobile.[15] Michael Porter of Harvard Business School argues that stricter environmental codes can be a competitive advantage because they promote innovation in more efficient production techniques.[16] It makes intuitive sense that regulations are, on average, costlier for smaller businesses because they do not have the advantage of scale.[17] Small business cannot afford to spend the staff time that large businesses can to comply with regulations. But the most costly regulations hit big polluters the most; these polluters tend to be large corporations, not small businesses.[18] Studies that analyze the effect of regulations on job creation have found both positive and negative effects, but they are always small and usually localized.[19] No good research exists on how small-business employment may be affected. At least for larger employers, regulations do not appear to be a significant cause of job loss; employers attribute few mass layoffs of fifty or more employees to government regulation (see table 1).[20]

As for federal regulations, the best evidence suggests nearly all economically significant rules pass the cost-benefit test.[21] Environmental regulations, by far the most costly, carry the greatest benefits by making Americans healthier. The Clean Air Act, enacted in 1970 and tightened with stricter pollution standards ever since, dramatically reduced the fine-particle matter in the air that Americans breathe. As a result, Americans have fewer asthma and heart attacks, miss fewer days of school and work, and live longer. The act also gradually eliminated lead from gasoline, which impairs children's cognitive abilities. Since 1980, the Environmental Protection Agency (EPA) estimates that the lead regulation decreased the level of lead in Americans' bloodstreams by more than 90 percent.[22]

For some regulations that do not pass the monetary cost-benefit test, regulators can decide that human benefits nonetheless justify the high cost. Take a recent regulation that required rear-view cameras in new cars by 2018. Although it will cost an estimated $140 per car to install, even auto manufacturers supported the measure as a way to prevent horrific accidents, such as parents backing over their infant children.[23]

Past government cost-benefit analyses of draft environmental regulations have generally overestimated both costs and benefits, with no

TABLE 1. SURVEY OF REASONS FOR MASS LAYOFF EVENTS

	2012	*2011*	*2010*	*2009*	*2008*	*2007*
Number of mass-layoff events	6,500	6,596	7,247	11,824	8,259	5,363
Percentage of mass layoffs attributed to government regulations	0.3	0.2	0.2	0.1	0.3	0.3

Source: Bureau of Labor Statistics (2013).

systemic bias in either direction.[24] The costs are overestimated in large part because government agencies undercount the private sector's ability to adapt and innovate in response to regulation.[25] The Clean Air Act's phaseout of chlorofluorocarbons (CFCs), for example, which harm the ozone layer, ended up being much less costly to manufacturers than had been anticipated because scientists quickly developed new chemical compounds to replace CFCs.

WHERE THE UNITED STATES STANDS

The total number of federal regulations has been increasing at a fairly steady pace since the government started keeping track in the mid-twentieth century.[26] However, compared with the Bill Clinton and George W. Bush administrations, the cost of new regulations is up.[27] An average of fifty-five new economically significant rules have been enacted per year during the Obama administration, versus an average of forty per year under George W. Bush. Although the average significant rule has been more costly under Obama, official government figures suggest benefits have also been higher.[28] According to one analysis, the Obama administration added more new regulatory restrictions (both big and small) than any other president since Carter.[29]

The paperwork collection burden, which includes time spent filling out forms online, has been rising, too.[30] Although information technology should enable streamlined data collection, technology has not yet put a dent in the hours Americans spend doing federal paperwork.

OBAMA-ERA POLICY LEGACY: MORE REGULATION OF FINANCE, HEALTH CARE, AND THE ENVIRONMENT

The federal government has dramatically extended the federal regulatory reach into finance and health care over the past five years. The 2010 Dodd-Frank bill, for example, was designed to avert future financial crises and prevent banks from being "too big to fail," necessitating government bailouts. The bill covers everything from consumer protection and private hedge funds to how banks trade derivatives, take on systemic risk, and write mortgages. The regulatory burden and paperwork costs have been significant. The bill created three

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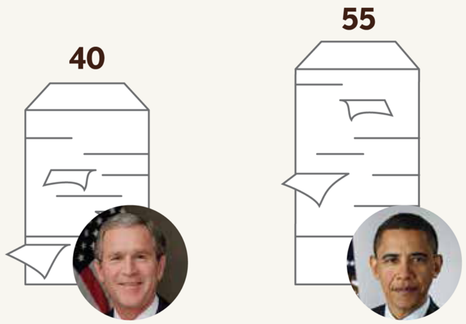
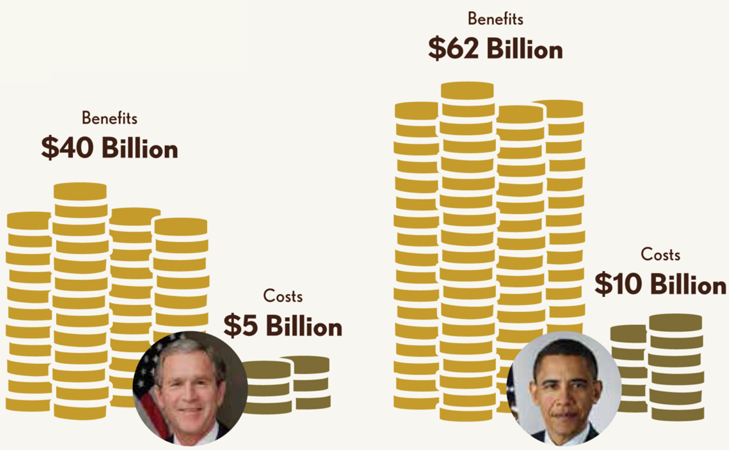
By the Numbers



Average annual number of new major regulations

Under Obama, the average annual number of new major economic regulations is up.



Annual average of new major regulations, 2015 dollars

But the net benefits are also up.

new regulatory offices, including the Consumer Financial Protection Bureau with roughly one thousand employees. The bill itself was 848 pages long and could lead to more than ten thousand pages of new regulations or rules, some 20 percent of which has not yet been finalized.[31] Supporters of Dodd-Frank, however, insist that the burden is justified if it helps to avert financial crises like the most recent one, which lowered net U.S. household wealth by $16 trillion, or 24 percent, between 2007 and 2009.[32]

The 2010 Affordable Care Act (ACA), commonly known as Obamacare, is the biggest change to government health-care policy since the creation of Medicare and Medicaid in 1965. It aims to decrease the share of uninsured Americans while trying to dampen spiraling and unsustainable public and private health-care costs. The health insurance industry, which must now accept more clients regardless of preexisting conditions, is most affected. Critics worry about how the employer mandate will affect medium-sized businesses, given that it will force them to buy health insurance for their full-time employees. Although the rollout of the online application and insurance market exchanges was marred by technical glitches, the system is now up and running. The uninsured rate has declined. But it is too soon to tell whether the ACA will produce a sustained slowdown in health-care costs, which had already begun to slow during the Great Recession.[33]

Although Dodd-Frank and the ACA dominate the headlines, some of the most economically significant regulations during Obama's presidency—and nearly every previous administration for decades—have involved protecting the environment and improving energy efficiency. Obama has continued to strengthen Clean Air Act restrictions on pollutants and was the first to use the Clean Air Act to regulate carbon dioxide (CO_2) emissions that cause climate change. The rule, finalized in 2015, aims to lower CO_2 emissions from existing coal power plants, which are responsible for the largest share of the country's CO_2 output, by 30 percent by 2030.[34] Historically, new standards applied only to new plant construction. Industry groups have promised to fight them hard, claiming it will lead to higher electricity prices for consumers and job losses in coal-producing states like West Virginia. But proponents claim that natural gas or cleaner-energy industries will meet the electricity demand and create new jobs. Obama has also increased energy efficiency standards on cars, motors, and electrical appliances such as microwaves, laundry machines, and light bulbs.

U.S. BUSINESSES FACE LOWER REGULATORY BURDEN THAN COMPETITORS

Although no data directly compares regulatory and paperwork burdens across countries, available evidence suggests that U.S. companies are not more burdened than their competitors abroad. The U.S. economy has long been among the least regulated in the world. The United States is currently the top-ranked large rich country in the World Bank's Ease of Doing Business Index, and has been so for every year but one since the index was first compiled in 2001.[35] The index is a composite of a host of objective variables, including how long it takes to start a business, availability of credit, procedures for registering property, and the enforcement of contracts—which, taken together, are a reasonable starting point for comparing regulatory burden. OECD indicators broadly corroborate the index; the United States scores better than any other G7 country by having less complex regulatory procedures, fewer administrative burdens, and lower entrepreneurship barriers, though other English-speaking countries are close behind.[36] Unfortunately no similar indicators compare regulation benefits between countries.

U.S. REGULATORY MANAGEMENT: AN OUTDATED SYSTEM

The United States used to be the trailblazer in regulatory quality management. In 1969, it was the first country to mandate environmental impact assessments, and the EPA developed some of the original cost-benefit analytical methods. In 1980, the United States was the first to set up an oversight body (OIRA), the first to institutionalize cost-benefit analysis, and the first to make paperwork reduction an explicit goal. The rest of the world looked to the United States for the gold-standard model in regulatory management. Since the early 1980s, some marginal improvements have been made to the U.S. system, such as more transparency and more attention to the effects on small business and of unfunded federal mandates on state and local budgets. But its fundamental architecture has not changed in more than thirty years, and the system should be improved.

Most importantly, the U.S. system does not have an institutionalized process for analyzing and updating the existing stock of regulations. A cost-benefit analysis is produced before a regulation is enacted and therefore must rely on uncertain assumptions. Almost no analyses are

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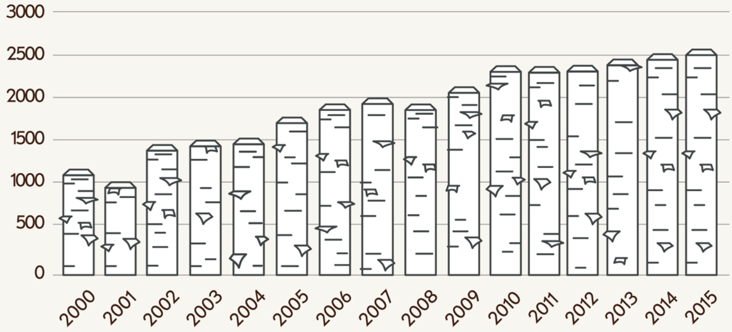
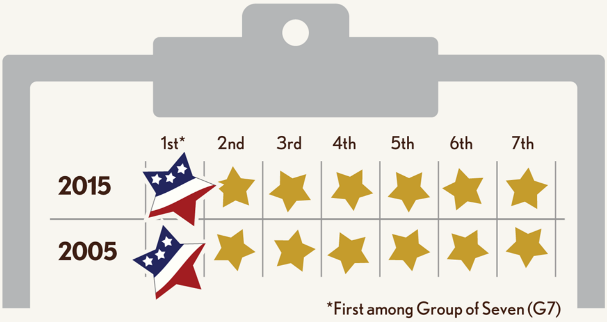
Burdens



Government-wide paperwork hours (no treasury), billions of hours

The number of hours Americans spend dealing with federal paperwork has been going up.



Ease of doing business

But when compared internationally, the United States is consistently among the easiest places to do business.

conducted afterward, however, to determine whether those assumptions were correct and whether the regulation is having its intended effects.[37] Nonetheless, federal regulators update many rules at their discretion, often in response to criticisms from businesses or interest groups.[38] Every president since Carter has directed the federal bureaucracy to review old regulations and cut away any excess. But these reviews have been ad hoc and their methodology rudimentary, in part because the way the federal government designs regulations does not lend itself to retrospective review.[39] Ideally, provisions for data collection to measure any impact and a review timeframe should be written into a statute from the beginning. Such preparation, however, almost never occurs.

Except for those that apply to food and medicine, U.S. regulations are not empirically tested, although regulations are more empirically informed than in the past.[40] Behavioral economics research has shown, for example, that information framing and data presentation can have a significant effect on consumer behavior. This has been embodied in fuel-efficiency disclosure displays on new cars at the dealer, which try to overcome the human tendency to favor short-term over long-term gains. Five-year fuel-savings estimates need to be presented in a clear and concrete way so that consumers can focus more on long-term savings even if more fuel-efficient cars have a higher upfront price tag. There is also a general understanding that market-based approaches (e.g., cap-and-trade emission programs) or choice-based “nudges” (e.g., default savings accounts) work better than command-and-control mandates. A small government office was created in 2014, dubbed the Nudge Unit, to apply behavioral economics principles to make existing regulations more effective. According to the unit’s first report in 2015, they have already had some success; for example, they set up personalized text message reminders to help low-income students stay on track for college.[41] An even smarter system would test the specific regulations in randomized controlled trials, teasing out cause and effect and taking out as much uncertainty as possible in any cost-benefit analysis. This is already standard procedure for the Food and Drug Administration (FDA).

The way the U.S. system uses cost-benefit analysis should also be more sensible and proportionate. For draft regulations where both costs and benefits can be quantified and monetized, the U.S. impact analyses are among the best in the world.[42] Some scholars even argue there is too much of an emphasis on quantification in the U.S. system; it does not always lead to more informed policy decisions and can come at the expense of considering alternative options.[43] It is often impossible to quantify in dollars the effects of a specific regulation. Indeed, the assessments for most major regulations do not monetize both costs and benefits, and usually for understandable reasons. In one famous case, a federal regulation forced prisons to take dramatic steps to reduce prison rape. Economists were hamstrung trying to quantify the benefits in dollars, though few doubted the regulation's worth and it was eventually approved. In other situations, economists are only able to construct such dense calculations that hardly anyone can judge the merits.[44]

Impact analyses can also be gamed or ignored, depending on the goals of the administration at the time. Regulations that are higher priorities for the current administration tend to elicit less rigorous cost-benefit analyses.[45] This held true for the George W. Bush administration regarding homeland security, just as it did for the Obama administration with health care. For these signature policies, the White House was involved in designing the regulations and the process was rushed—tight deadlines, no public comment period, and only a few days at OIRA to check for analytical rigor.[46] A crucial 2015 Supreme Court decision could set the bar higher for cost-benefit analyses in the future: the ruling struck down a new EPA regulation on mercury pollutant standards on the grounds that costs were overlooked.[47]

Although some regulations receive extremely detailed analytical treatment, others receive none. Only economically significant regulations fall under OIRA oversight and require a cost-benefit analysis. Smaller individual regulations, which encompass 99 percent of all regulatory actions, rarely receive any impact analysis, even simple back-of-the-envelope calculations.[48] Independent agencies, many of which are responsible for writing hugely expensive regulations, are beholden to fewer analytical requirements, ostensibly to preserve their political and institutional independence. The quality of their analysis, when done, is consistently lower than that of other agencies under OIRA oversight.[49] The independent SEC, for example, provided impact analysis for Dodd-Frank regulations that was widely criticized as late, poor, and incomplete.[50]

Obama's Management Legacy: More of the Same, but Committed to Improvement

Obama's signature regulatory oversight policy—a retrospective review that required agencies to sift through old regulations and eliminate obsolete ones—was not so new.[51] Perhaps the only difference from every other presidential-sponsored review since Carter is that Obama required each department to publish assessment plans twice a year, thus cementing reviews into bureaucratic calendars. But the methods have been no better than those of the past; data and analytical methods are still insufficient.[52] Once again, independent agencies were exempt.

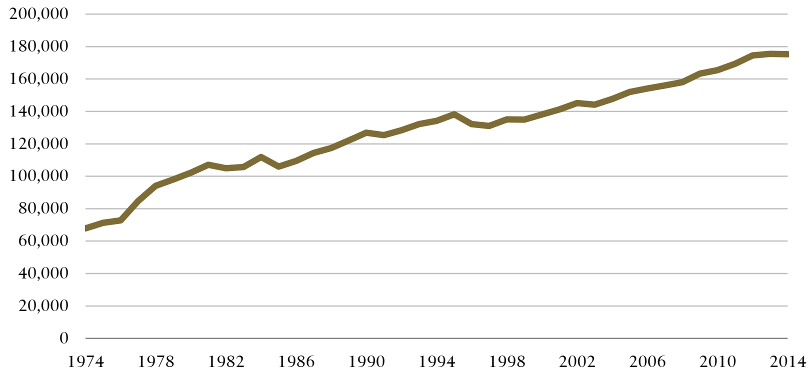
To the disappointment of many Republicans, the review plans contained not just regulatory cuts, but also enhancements to make regulations more effective. After four years of review plans, the White House claims the cumulative cuts totaled $22 billion in compliance cost savings.[53] But when the enhancements are also factored in, there may have been an overall increase in burden. In the most recent set of reviews from July 2015, there is actually a net increase in costs of $14.7 billion, and in paperwork hours of thirteen million, just two agencies planning to reduce overall burdens.[54] The plans contain few new or original look-backs; nearly 90 percent of the rulemakings in the July 2015 report were recycled from previous reports. Although data limitations make comparisons difficult, a tally of net changes in the pages of federal regulations suggests Obama's look-back accomplished less burden reduction than previous efforts (see figure 1).[55] And as in earlier reviews, only a very small percentage of the existing stock was taken off the books (see figure 2).

The Obama administration says it is committed to improving how retrospective reviews are conducted and to empirically testing more draft regulations. The White House has instructed regulators to design new regulations in a way that allows for easier subsequent reviews.[56] But according to an assessment of eighteen proposed rules in 2014, none prepares for retrospective analyses.[57] In their 2011 retrospective review plans, the Departments of Transportation, Labor, and the Interior promised to use more randomized-controlled experiments in their regulation-design process.[58] It remains to be seen, however, whether they follow through on their commitments, especially without dedicated funding for experimental trials.

OTHER COUNTRIES NOW INNOVATING MORE ON REGULATORY MANAGEMENT

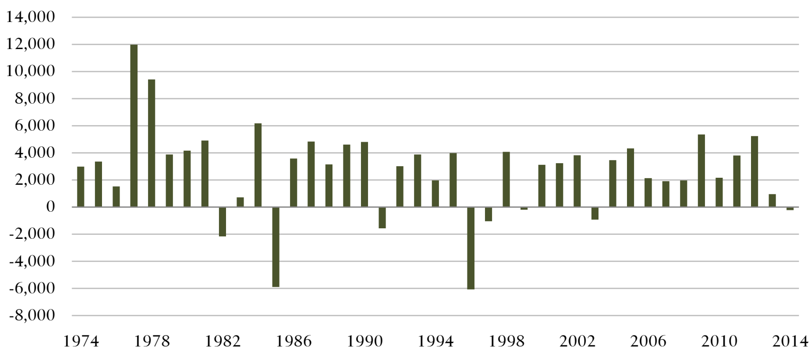
The rest of the rich world, and much of the developing world, has caught up with the United States in regulatory management, creating their

FIGURE 1. NUMBER OF PAGES IN THE CODE OF FEDERAL REGULATIONS (1974–2014)



Source: Office of the Federal Register (2015).

FIGURE 2. CHANGE IN THE NUMBER OF PAGES IN THE CODE OF FEDERAL REGULATIONS (1974–2014)



Source: Office of the Federal Register (2015).

own oversight bodies and standardizing impact analysis.[59] Many countries are better than the United States at reviewing the accumulation of outdated regulations.

In 2009, the United Kingdom dramatically overhauled its system when the Cameron government came to power. It created the Behavioral Insights Team—the original Nudge Unit—to carry out empirical research on regulatory best practices. The UK became the first country to put in place a regulatory budget, originally called one-in, one-out, which later became one-in, two-out, every new regulatory burden now requiring twice the amount of regulatory reduction. Australia, Canada, France, and several smaller European countries now follow regulatory budgeting principles. Although regulatory budgets may unfairly tie future regulations to past regulations, they do force bureaucracies to more carefully weigh regulatory decisions and systematically analyze the existing regulatory stock.

The Netherlands has led the way in reducing administrative burdens. In the mid-2000s, it developed a simple metric for red-tape costs, instructed all agencies to cut those costs by 25 percent within four years, and installed an independent commission to keep tabs on progress. At least officially, the red-tape reduction effort was a success, and several countries are modeling their own cost-cutting efforts after the Dutch.

Australia and Canada have claimed the mantle of regulatory leadership from the United States by implementing a wide range of cutting-edge policies. For example, both countries require across-the-board expiration, known as sunsetting, of all new major regulations within a defined timeframe, usually five to seven years, in the absence of a thorough retrospective review. Australia uses a smart approach to evaluating and managing the stock of old regulations. Instead of siloing retrospective reviews within single government agencies, the regulatory body periodically does "stockade" reviews of the cumulative set of regulations that affect a given industry, which is how businesses actually experience the regulatory system.

The European Union's approach, though not as advanced in managing its stock of regulations as some other governments are, does differ from the U.S. approach in several ways. In the United States, impact-scoring of draft regulations is done by federal departments only after Congress votes on laws. The EU, by contrast, scores the regulatory impact of every piece of legislation before any parliamentary debate or vote. It also scores all draft regulations, big and small, scaling up the analytical detail in proportion to the rule's economic significance.

Many of these policy ideas were originally developed in the United States. Going back to the 1970s, U.S. states have enacted sunsetting provisions. President Carter wanted to require built-in retrospective evaluation plans for all new regulations, and the first head of OIRA in 1980 floated the possibility of establishing a regulatory budget.

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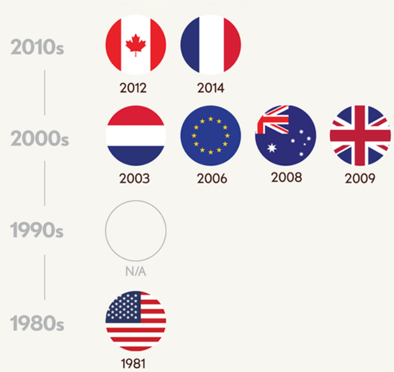
Pace of Reform

Organization for Economic Cooperation and Development score, out of eight, for updating regulations

Many other developed countries, however, are doing a better job at following OECD best practices in regulatory quality management.



Dates of major regulatory overhauls

And other developed countries have been overhauling and modernizing their regulatory management systems, while the U.S. system has changed little in more than thirty years.

U.S. STATES: UNCLEAR WHETHER REFORM INITIATIVES ARE WORKING

Many U.S. states have their own regulatory management systems that include assessment standards and an oversight body. Many of these states have taken steps in recent years to lower regulatory burdens; since the Great Recession, twenty-five states have established new reviews of existing laws, and ten states have imposed some kind of a moratorium on issuing new regulations. Two of the strictest moratoriums are in Arizona and Indiana, where Republican governors have made the policy a cornerstone of their pro-business agendas. As of 2011, twenty-three states still had a sunsetting process, though their popularity has ebbed since the 1970s and 1980s and these provisions are unevenly enforced. Tennessee, for example, applied automatic sunsets every year to all existing state regulations. But the policy has not imposed rigor on the regulatory process; the Tennessee legislature just extends the full list of regulations every year.[60] It is unclear whether any of these state initiatives are improving either the quality of regulations or the business climate. One study found that states' reform initiatives have generally failed at lowering regulatory burden.[61]

CONGRESSIONAL PROPOSALS: BIG ON RESTRICTIONS, SHORT ON IMPROVEMENTS

Although the U.S. system has scarcely changed in decades, this is not for want of trying on the part of Congress. Congressional Republicans have regularly proposed bills that would bring the United States more in line with leading systems around the world. Most of the proposals would ramp up congressional oversight, ranging from imposing stricter cost-benefit-analysis standards to making any new major rule contingent on an affirmative vote. Currently, a rule stands unless Congress votes it down, which almost never happens. Some proposals call for either an automatic review or sunsetting of new major rules. Others would install an independent commission to decide which regulations should be repealed, because federal regulators may have a conflict of interest when grading and rolling back their own regulations. The most far-reaching bill, sponsored by Senator Marco Rubio (R-FL), would impose a budget on all federal regulation costs and paperwork, among many other changes.

The bill that has had the most success in the Republican-controlled House of Representatives—the Regulatory Accountability Act (passed in 2011, 2013, and 2015)—would place more layers of requirements on cost-benefit analysis and extend them to independent agencies such as the SEC, as well as mandate ten-year reviews for new major regulations. Similar provisions have not passed in the Senate.

Democrats tend to be against more restrictive measures, particularly blanket caps on the level of regulation. They are keen on keeping the analysis and review decisions with the regulators, who often know the subject matter best, rather than creating a separate commission. Democrats also worry more about bureaucratic ossification—that more layers of requirements would simply slow down the governance process—though research has not found any evidence of ossification yet.[62]

A prominent Democratic proposal for regulatory reform, sponsored by Senator Amy Klobuchar (D-MN), would create an OIRA counterpart within the legislative branch to analyze major draft regulations and then review those regulations five years later. The office would not perform regulatory impact estimates on possible legislation, like the Congressional Budget Office does with budget scoring. But it would add a dose of bureaucratic competition similar to that of the CBO, which many believe benefited the quality of fiscal accounting coming from the Office of Management and Budget after the CBO's formation in 1975.

FUTURE PROSPECTS

These proposals fail to address three fundamental challenges facing the U.S. regulatory system: retrospective reviews that are not informed by relevant data collection and planning, a lack of empirical testing of regulations, and inconsistent requirements for cost-benefit analysis. Most proposals would make cost-benefit analyses more detailed, quantified, and monetized. But complexity can be the enemy of good decision-making. And the benefits of cost-benefit analysis beforehand, no matter how detailed, will never have the certainty of empirical testing or retrospective analysis. Many prominent congressional proposals mandate retrospective analysis, but none would improve how such analysis is conducted. Reformers are correct to widen the scope of these analyses to include independent regulatory agencies, but legislators should also consider increased EU-style proportionate analysis of smaller regulations along with an increase in initial analysis. An overall cap on the regulatory burden may be hard to justify, especially if most new regulations are easily passing a cost-benefit test. A paperwork budget would make more sense for good governance, however, and it is an idea that could garner support from both Democrats and Republicans.[63]

What is certain is that a serious overhaul of the regulatory management system will require more resources. Performing empirical trials will cost money. Doing careful and thorough retrospective reviews of all major regulations will cost *a lot* of money, which is perhaps one reason why reviews to date have been so poorly executed. No one in Congress has called for a funding boost for regulatory management, even though it would likely pay for itself by improving the cost effectiveness of regulations. In 2000, Congress approved an office in the legislative branch (along the lines of Senator Klobuchar's bill) to undertake impact analyses, but the whole plan fell through when Congress failed to authorize funding in the order of several million dollars.[64] Unless Congress is willing to put some cash toward new initiatives, progress on regulatory reform may have to wait.

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