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TESTIMONY

THE SEARCHING FOR AND CUTTING REGULATIONS THAT ARE UNNECESSARILY BURDENSOME ACT OF 2014

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House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law

February 11, 2014

Chairman Bachus, Ranking Member Johnson, and members of the committee: thank you for inviting me to testify today. As an economist and senior research fellow at the Mercatus Center at George Mason University, my primary research focuses on regulatory accumulation and the regulatory process, so it is my pleasure to testify on today's topic.

The accumulated stock of regulations contains a multitude of unnecessary burdens. As the title of the legislation that is the subject of this hearing implies, the current regulatory system makes it difficult to identify and eliminate such unnecessary burdens.

In examining the reforms under consideration, first, I will discuss why regulatory accumulation is a public policy problem: regulatory accumulation creates substantial drag on economic growth by impeding innovation and entrepreneurship.

Second, I will discuss the search for obsolete, unnecessary, duplicative, or otherwise nonfunctional regulations, covering both why similar searches in the past have failed and what could be done differently to increase the odds of success. In my estimation, an independent group or commission is necessary to successfully identify unnecessary regulatory burdens.

Third, I will address the difficulties of eliminating unnecessary regulatory burdens, once identified. Here I point to the wisdom of the crafters of the BRAC process.

Finally, I will cover specific recommendations for effectively reducing the problem of regulatory accumulation and compare the SCRUB Act to these recommendations.

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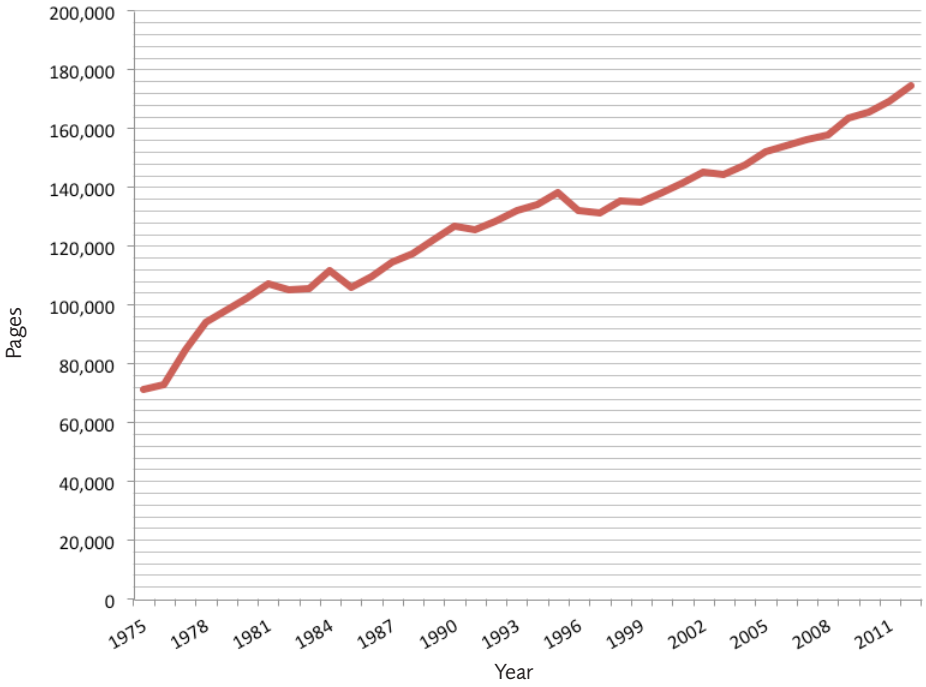
Figure 1. Total Number of Pages in the Code of Federal Regulations, 1975–2012



1. "UNNECESSARILY BURDENSOME": THE CONSEQUENCES OF REGULATORY ACCUMULATION

Regulatory accumulation may be a term that few people understand, although its consequences can be substantial. It is worthwhile to define what I mean by the terms "regulation" and "regulatory accumulation." As I have written in previous congressional testimony, regulations restrict choices by design.[1] In its most basic definition, a regulation is a law that "seeks to change *behavior* in order to produce desired *outcomes*," and it does this by requiring or forbidding certain actions.[2] Federal regulations, published in the *Code of Federal Regulations*, can place restrictions on the choices of individuals, large manufacturers, high-tech startups, small businesses, state and local governments, and even the federal government itself.

Measuring Regulatory Accumulation

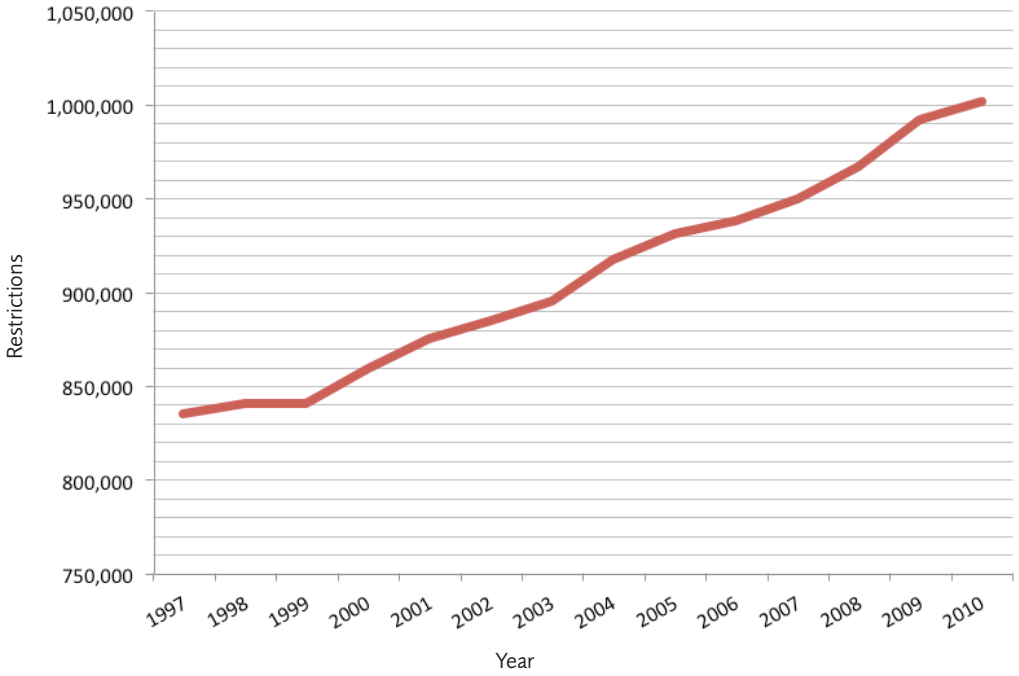
Federal regulation in the United States has consistently grown for decades. One way to measure the growth of federal regulation is to count the number of pages published each year in the *Code of Federal Regulations*. The *Code of Federal Regulations* is published annually and contains the legal text of all federal regulations in effect each year. That means one can simply look at the number of pages published in the *Code of Federal Regulations* in a given year to get a rough approximation of the extent and complexity of all federal regulations in effect in that year. Figure 1 shows the number of pages published in the *Code of Federal Regulations* each year from 1975 to 2012.

As figure 1 shows, the number of pages published in the *Code of Federal Regulations* has grown over the tenures of all recent presidents. In 1975, there were 71,224 pages of regulation. In 2012, 174,545 pages of regulation were published.[3]

Of course, not all pages are the same. Another way to assess the extent and complexity of federal regulation is to look at the actual number of restrictions—words that create binding, legal obligations either to do something or

1. Significant portions of this section are taken or adapted from testimony given before the Senate Judiciary Committee, Subcommittee on Oversight, Federal Rights, and Agency Action in August 2013. Patrick A. McLaughlin, "On the Human Costs of the US Regulatory System: Should Congress Pressure Agencies to Make Rules Faster?," http://mercatus.org/sites/default/files/McLaughlin_human-costs_testimony_073013.pdf.
2. Cary Coglianese, "Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy." Expert Paper No. 1, Organisation for Economic Co-operation and Development, 2012, http://www1.oecd.org/regreform/regulatory-policy/1_coglianese%20web.pdf.
3. Source: https://www.federalregister.gov/uploads/2013/05/OFR-STATISTICS-CHARTS-ALL1-1-1.pdf.

Figure 2. Total Number of Restrictions, 1997–2010



not to do something, such as "shall," "must," and "may not." This permits a more narrow focus on the components of regulatory text that are truly restrictive, as opposed to, for example, text that merely provides information or opinion. In a project called RegData, made publicly available on the website of the Mercatus Center at George Mason University, economics professor Omar Al-Ubaydli and I have done exactly that.[4] Figure 2 shows the total number of regulatory restrictions published in regulatory text in the *Code of Federal Regulations* from 1997 to 2010.

Figure 2 corroborates the impression given by figure 1: regulation has been consistently growing. Moreover, these measures of regulation allow economists to study the consequences of the accumulation of regulation.

The Consequences of Regulatory Accumulation

The buildup of regulations—regulatory accumulation—has economic consequences. When regulations are created in reaction to major events, "new rules are [placed] on top of existing reporting, accounting, and underwriting requirements. . . . For each new regulation added to the existing pile, there is a greater possibility for interaction, for inefficient company resource allocation, and for reduced ability to invest in innovation. The negative effect on US industry of regulatory accumulation actually compounds on itself for every additional regulation added to the pile."[5]

A. Compliance Costs

In all cases, regulatory intervention in the market is costly. According to the Office of Management and Budget, the cost of compliance with federal regulations alone—that is, the cost that regulations directly impose on regulated entities—likely totals in the tens of billions of dollars annually.[6] A simple example of direct compliance costs is the

4. Al-Ubaydli, Omar, and Patrick McLaughlin, "RegData: A Numerical Database on Industry-Specific Regulations for All US Industries and Federal Regulations, 1997–2010" (Mercatus Working Paper No. 12-20, Mercatus Center at George Mason University, Arlington, VA, 2012), and http://regdata.mercatus.org.

5. Michael Mandel and Diana Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform" (Washington, DC: Progressive Policy Institute, 2013), 3–4.

6. Office of Mgmt. and Budget, Exec. Office of the President, Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulation and Unfunded Mandates on State, Local, and Tribal Entities (2012), available at http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

fee regulated professionals, such as stockbrokers, must pay to obtain licenses when those licenses are required by regulations.[7] But some compliance costs are surprising. For example, restaurants sometimes must pay to have food inspectors perform inspections in the evening, when the restaurant is open, instead of during the day when food inspectors typically work.[8]

B. Opportunity Costs—Forgone Innovation and Entrepreneurship

In addition to money outlays to pay compliance costs, regulation necessarily results in what economists call "opportunity costs"—productive activity forgone because scarce resources are devoted to regulatory compliance. If a restaurant owner has to spend an evening showing the food inspector around, the owner cannot spend that same time greeting customers and ensuring that they have a quality dining experience. Whatever resources are devoted to regulatory compliance could have been used in other ways, and the forgone return on the most valuable of these other potential uses represents an additional cost of regulation—above and beyond the compliance cost alone.

C. Example: Regulatory Inhibition of Potentially Life-Saving Innovation

The accumulation of restrictions over time also means individuals in the economy have less liberty to entrepreneurially seize an opportunity, less control over the uses of their own resources, and less ability to innovate. This means would-be entrepreneurs are sometimes prohibited from creating a new product that could potentially improve consumers' quality of life or even save lives. For example, the National Highway Traffic Safety Administration (NHTSA) has regulations restricting how headlights on cars can be designed. While those NHTSA regulations allow headlights to automatically switch between high and low beam and swivel to shine light around a curve in the road, they do not allow designers to implement any sort of adaptive setting that could dim the high beam only at the appropriate spots in the road. One major reason why cars have low beams is so that drivers can switch to low beams when another car is approaching. Without switching from high beams, the oncoming driver can be temporarily blinded. Of course, there are still other potential hazards, obstacles, and people on other parts of the road. While switching to low beams has the benefit of not blinding the oncoming driver, it has the cost of reducing visibility, particularly on the sides of the road. Toyota, Mercedes, and Audi have all created systems that dim only a select portion of the high beam when another car is approaching. This selective dimming allows the driver to still see the sides of the road, where pedestrians may be walking, while simultaneously keeping the high beams from blinding oncoming drivers. While these systems have been built and sold in Europe and Asia, they cannot be sold in the United States because of NHTSA regulations.[9] This entrepreneurial innovation could have happened in the United States; more importantly, these adaptive headlights could save some pedestrians' lives.

D. Example: Regulatory Inhibition of Green Entrepreneurship

The city of Logan, Utah, recently experienced a more subtle example of how regulations can inhibit entrepreneurial activity. In 2004, the city began considering the installation of a "micro-hydropower" turbine in the city's culinary water system.[10] Micro-hydropower systems often do not require dams, thus reducing their environmental impact on the river's ecology. Instead, water from a river is typically diverted into a pipeline, where a waterwheel or turbine produces electricity from the kinetic energy in the flowing water. Conceptually, a micro-hydro system can be thought of as a waterwheel placed in a pipeline. That was the case for Logan's project—in fact, there was already a pipeline and water from a river was already diverted into the pipeline, and a building was already in a

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7. FINRA requires "General Securities Representatives" to pass a Series 7 exam. See http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/Qualifications/P011051.

8. See *Regulation Nightmares*, CNN Money (Sept. 22, 2011), http://money.cnn.com/galleries/2011/smallbusiness/1109/gallery.regulation_nightmares/4.html.

9. Gabe Nelson, "Toyota Puts High Beams on Headlight Regulation," *Automotive News*, May 13, 2013, http://www.autonews.com/article/20130513/OEM11/305139967#axzz2a4R2r6ou.

10. Megan E. Hansen, Randy T. Simmons, Ryan M. Yonk, and Ken J. Sim, "Logan City's Adventures in Micro-Hydropower: How Federal Regulations Discourage Renewable Energy Development" (Mercatus Working Paper No. 13-24, Mercatus Center at George Mason University, Arlington, VA, 2013).

location on the pipeline that could house the micro-hydro turbine. This project could create green power for 185 local homes, without any environmental impacts from the construction.[11]

Unfortunately, while the idea initially appeared economically feasible, Logan City learned the hard way not to undertake any new entrepreneurial projects of similar size or scope, even if (or perhaps especially if) the project involves the preservation of the environment. The city ran into a "federal nexus of regulation," resulting in years of waiting for permits, unnecessary testing, and ultimately delay on the delivery of an environmentally friendly source of electricity. As policy analyst Megan Hansen and economists Randy Simmons, Ryan Yonk, and Ken Sim wrote on the subject,

> Many of the same regulations designed to protect the environment created obstacles for Logan City's environmentally friendly micro-hydro project. The Endangered Species Act (ESA) required [Logan City project engineer Lance] Houser to show that the project would not adversely affect any species or habitat listed under the act "on a project that disturbed nothing outside of an existing building" (personal communication [with Houser], December 12, 2012). FERC requires permit applicants to complete a draft biological assessment to "address project effects on federally listed or proposed species or critical habitat in the project vicinity" (FERC 2008, 11). In Logan City's case, this requirement meant conducting analysis to show that the county's three species listed as "candidate" species, one as in "recovery," and three as "threatened" would not be harmed by the project (U.S. Fish & Wildlife Service, n.d.). Although the ESA was intended to protect the environment, in Logan City's case it ended up creating obstacles for an environmentally friendly project.

Because of the costs of navigating the complex web of federal regulations, a project that should have taken about one year to complete at a maximum cost of $1,400,000 instead required four years and almost $3,000,000. More importantly, Logan City's hard lesson will make it, and perhaps other cities, adopt a much more skeptical attitude toward the economic feasibility of environmentally friendly entrepreneurship. As the city's assistant engineer Lance Houser said after the completion of the project, because of "the cost of the permitting headache and the nightmare and the frustration of the process, there is no economic benefit to doing a project that size again" for Logan City.

E. Regulatory Accumulation and Economic Growth

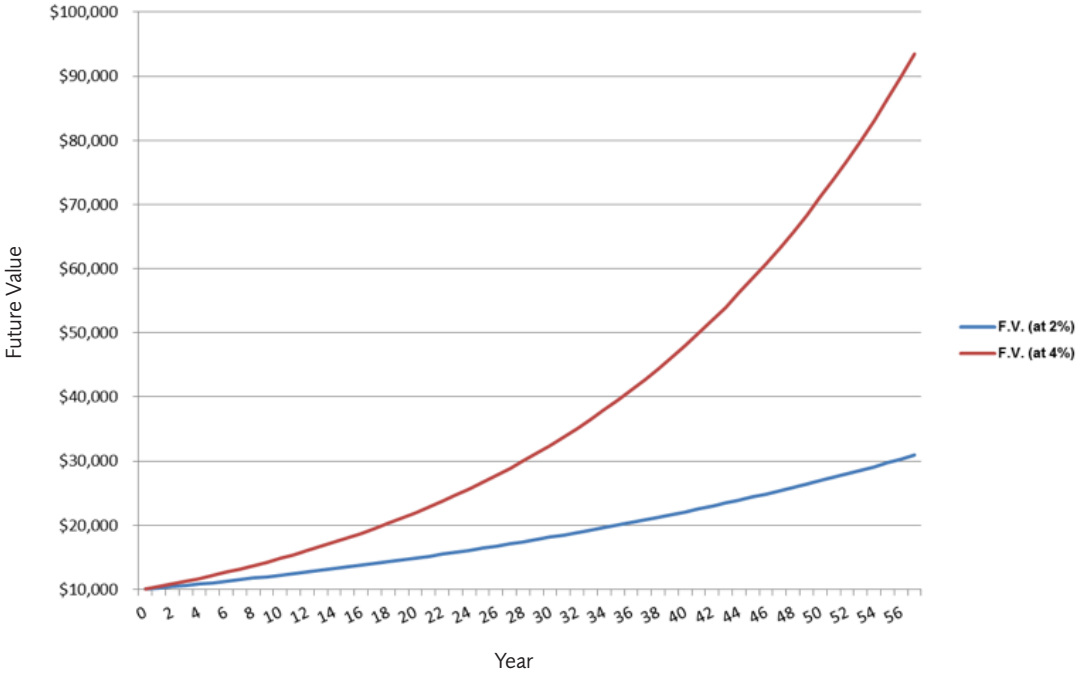
Regulations like those that so frustrated Logan City have been accumulating at a fairly constant rate for more than half a century. As regulations accumulate and block off entrepreneurial choices and potential innovations, the economy suffers. Sustained economic growth depends on innovation and entrepreneurship. A study published last year in the *Journal of Economic Growth* added to the already substantial evidence supporting the point that regulatory accumulation slows economic growth by stifling innovation and entrepreneurship.[12] Using pages from the *Code of Federal Regulations* as its measure of the extent and complexity of federal regulations, this study found that between 1949 and 2005 the accumulation of federal regulations slowed economic growth by an average of 2 percent per year. Considering that economic growth is an exponential process, an average reduction of 2 percent over 57 years makes a big difference. A relevant excerpt tells just how big of a difference:

> We can convert the reduction in output caused by regulation to more tangible terms by computing the dollar value of the loss involved. . . . In 2011, nominal GDP was $15.1 trillion. Had regulation remained at its 1949 level, current GDP would have been about $53.9 trillion, an increase of $38.8 trillion. With about 140 million households and 300 million people, an annual loss of $38.8 trillion converts to about $277,100 per household and $129,300 per person.[13]

That's $277,100 per household in real goods, including health care, that were not produced and consumed because of federal regulation. That number seems almost too high to be believed, but, in fact, it is not out of line with a

11. Ibid., 3.
12. John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* (2013): 1–41.
13. Ibid., 22.

Figure 3. Growth Rate of Initial Investment (at 2.4% over 57 years)



number of other studies that have been produced by such organizations as the World Bank and the IMF, as well as by other scholars.[14] To make more sense of it, consider retirement savings. People save for retirement by investing money in the present, in the hope that those investments will grow fast enough to allow a more comfortable retirement. So consider a case where your invested retirement savings grew 2 percent more slowly each year. How much less would you have when you retire? Invested retirement savings, like the economy, follow an exponential growth path. This means that the rate of growth in one year affects all future years. If you tuck away $10,000 today, and your investments return 5 percent over the course of the next year, that means that you would have $10,500 next year. If that $10,500 returns 5 percent again in the following year, you would have $11,025. On the other hand, if that $10,000 returned only 3 percent in the first year, you would have $10,300 at the end of that year. And if you received 3 percent again in the second year, at the end of the second year, you would have $10,609.

Over the course of 57 years, a difference of 2 percent in the rate of growth leads to a substantial difference in outcomes. Figure 3 shows two growth paths for a sum of $10,000 over a 57-year period—one path growing at 2 percent per year, and the other at 4 percent per year. After 57 years, that initial $10,000 becomes more than $93,500 when growing at a 4 percent annual rate. When slowed to an 2 percent annual growth rate, that $10,000 grows to only about $31,000 over the same timeframe.

The economy grows in a similar way. That is, the economy follows an exponential growth path. Goods, such as computers and machinery, that are produced in one year in the economy contribute to economic growth in the following year. Once that fact is realized, it is easier to understand how a 2 percent difference in economic growth can lead to households being $277,100 poorer because of federal regulation.

Nonetheless, my points do not require you to believe that the total costs of federal regulation are that high. It is

14. For examples, see NV Loayze, AM Oviedo, and L. Serven, "The Impact of Regulation on Growth and Informality: Cross-Country Evidence" (AEI-Brookings Joint Center for Regulatory Studies, Related Publications 05-11, 2005); Simeon Djankov, Caralee McLiesh, and Rita Maria Ramalho, "Regulation and Growth," Economics Letters 92.3 (2006): 395–401; G. Nicoletti et al., "Product and Labor Markets Interactions in OECD Countries" (OECD Economics Department Working Papers, No. 312, OECD, Paris, 2001); Giuseppe Nicoletti and Stefano Scarpetta, "Regulation, Productivity and Growth: OECD Evidence" *Economic Policy* 18, no. 36 (2003): 9–72; Alberto Alesina, Silvia Ardagna, Giuseppe Nicoletti, and Fabio Schiantarelli, "Regulation and Investment," *Journal of the European Economic Association* 3, no. 4 (2005): 791–825.

more important to understand the mechanisms that cause the accumulation of federal regulation to be costly. What exactly is it about regulatory accumulation that causes economic growth to slow?

Two lynchpins of economic growth—innovation and competition—can be negatively affected by regulations. Although even the best-crafted regulation can inhibit innovation, there is substantial evidence that inflexible regulations, like design standards requiring only high- and low-beam headlights and nothing in between, stifle innovation. For example, regulations that impose specific technologies—such as catalytic converters in vehicle exhaust systems or scrubbers in the smokestacks of power plants—offer no incentive or ability for companies to find alternative solutions that could achieve the same objective as the required technology.[15] Conversely, incentive-based regulations, such as regulatory systems that create permits that are tradable in a market, or that set a performance standard without specifying a design or technology that must be used to achieve that performance standard, allow regulators to achieve an objective at lower cost. Of course, the fact that a regulatory program contains market-based incentives does not guarantee success in achieving desired outcomes. As one study on the topic of incentive-based regulation puts it, "whether any specific instrument is desirable depends on how it is designed and implemented."[16] Incentive-based regulations as a general rule do less harm to innovation than inflexible, command-and-control regulations, but even the best design cannot entirely mitigate a regulation's consequences on innovation.

A recent study by economist Matt Mitchell (which I have attached) pointed out that regulations are sometimes used to grant privileges to favored companies, primarily by shielding them from competition.[17] As examples, Mitchell notes that 36 states "require government permission to open or expand a health care facility," and that 39 states "require government permission to set up shop as a hair braider." When regulations make it harder for entrepreneurs to establish a particular type of business, incumbents in that line of business can charge higher prices or provide lower-quality products—they have less to fear from competitors because of the shield of regulation. Thus regulations sometimes serve to entrench incumbents and limit competition, to the detriment of economic growth.[18] Protection from competition also serves to limit innovation. One study found that the companies that spent the most resources lobbying Congress and agencies for protective treatment tended to be "larger, older, less diversified, and less profitable" than those companies that did not lobby.[19] Indeed, when there is a possibility of gaining protection from the government through lobbying efforts, some companies will divert scarce resources to doing so—necessarily decreasing the resources those companies can use for research and development, employee training, and other innovations that increase productivity.[20]

F. Functional vs. Nonfunctional Rules

In a study released today, my colleague, Richard Williams, and I propose that regulations can be roughly divided into two categories, "functional" and "nonfunctional."[21] Functional rules address current, significant risks, mitigate some amount of those risks through compliance with the regulations, and do not have significant unintended effects or excessive compliance costs relative to their benefits. Nonfunctional rules are missing one or more of these features. The key to achieving significant amelioration of the problem of regulatory accumulation is first identifying as many nonfunctional rules as possible, and then either eliminating them or changing them so that they become functional.

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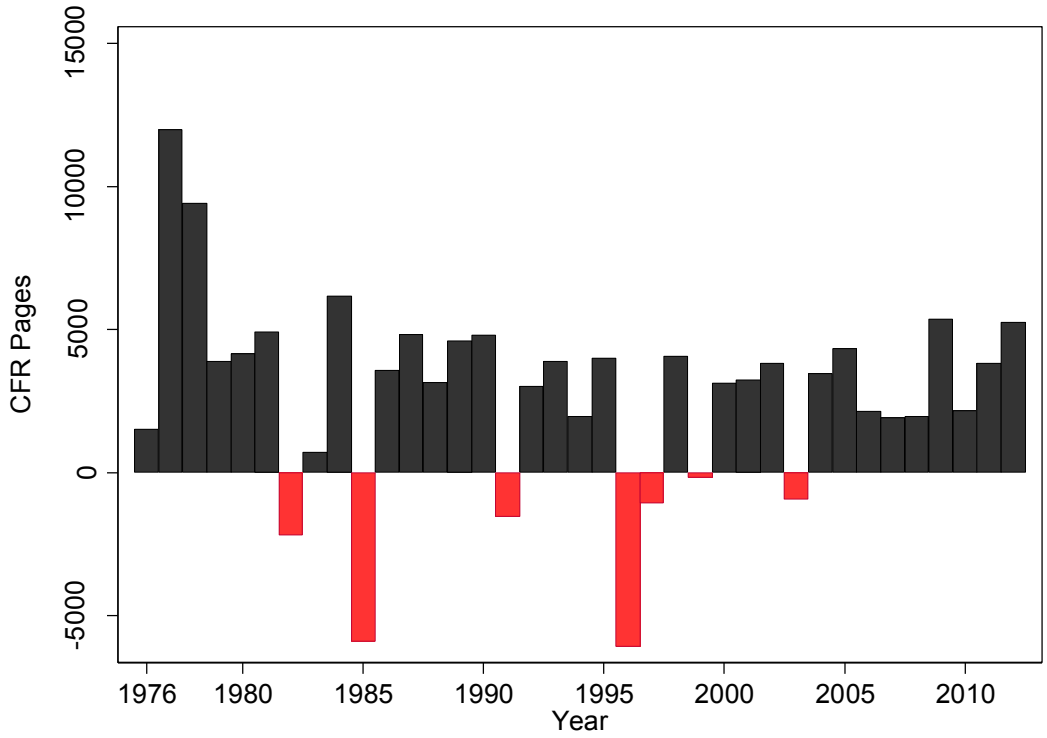
15. Robert Hahn and Robert Stavins, "Incentive-Based Environmental Regulation: A New Era from an Old Idea," *Ecology Law Quarterly* 18 (1991): 1–42.
16. Robert W. Hahn and Robert N. Stavins, "Economic Incentives for Environmental Protection: Integrating Theory and Practice," *American Economic Review* 82, no. 2 (1992): 464–68.
17. Matthew Mitchell, "The Pathology of Privilege: The Economic Consequences of Government Favoritism" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2012).
18. Ibid., 19–21.
19. Stefanie Lenway, Randall Morck, and Bernard Yeung, "Rent Seeking, Protectionism and Innovation in the American Steel Industry," *Economic Journal* 106 (1996): 410.
20. Chung-Lei Yang, "Rent Seeking, Technology Commitment, and Economic Development," *Journal of Institutional and Theoretical Economics* 154, no. 4 (1998): 640–58.
21. Patrick A. McLaughlin and Richard Williams, "The Consequences of Regulatory Accumulation and a Proposed Solution" (Mercatus Working Paper No. 14-03, Mercatus Center at George Mason University, Arlington, VA, 2014).

Figure 4. Pages Added to or Subtracted from the Code of Federal Regulations, 1976–2012



2. "SEARCHING": HOW TO IDENTIFY NONFUNCTIONAL REGULATIONS

The need to eliminate or modify nonfunctional regulations from the accumulated stock has been widely recognized by members of Congress and every president since Carter.[22] In his 2011 State of the Union Address, for example, President Obama noted, "There are twelve different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there is my favorite example: the Interior Department is in charge of salmon while they are in fresh water, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated when they are smoked."[23]

Executive branch attempts to examine and revise or eliminate existing nonfunctional regulations have primarily relied on executive orders for review of the need for regulations, rather than creating a streamlined and evidence-based, analytical process that could accomplish large-scale reform. In the study I coauthored with Richard Williams (which I have attached), we examine previous efforts at regulatory cleanup led by every president since Reagan and conclude that these episodes yielded only marginal improvements at best. Most notably, none of these efforts resulted in either substantial reductions relative to the total size of the *Code of Federal Regulations* or sustained changes in the rate of adding new regulations to the *Code of Federal Regulations*.[24]

Figure 4 shows just how little the regulatory process has changed, despite these presidential efforts. Since 1975, the *Code of Federal Regulations* (CFR) has expanded in 30 of 37 years. In those 30 expansionary years, 117,294 pages were added to the CFR. In contrast, in the seven contractive years, 17,871 pages were subtracted from the

22. Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform" (Policy Memo, Progressive Policy Institute, Washington, DC, May 2013), 3–4, http://www.progressivepolicy.org/2013/05/regulatory-improvement-commission-a-politically-viable-approach-to-u-s-regulatory-reform/.
23. Barack Obama, "Remarks by the President in State of Union Address," Jan. 25, 2011, Washington, DC (White House, Office of the Press Secretary), http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.
24. McLaughlin and Williams, "Consequences of Regulatory Accumulation."

CFR—for net growth of nearly 100,000 pages. Previous efforts to eliminate obsolete regulations have removed only very small percentages of existing regulations from the books.

A significant problem presidents have been unable to overcome is the identification of rules to target for cleanup. Each of the executive branch efforts we examine in our study relied at least partially on regulatory agencies to identify potential target rules. However, as we wrote in our study,

> Agencies often lack the information necessary to decide which regulations are obsolete, and they also lack the incentives to produce the necessary information. It's hard to imagine how any attempt to eliminate nonfunctional regulations—not just the latest attempt—could be successful without enough information to decide whether a regulation is nonfunctional in the first place.
>
> A recent study demonstrates this. . . . [Economist Randall] Lutter thoroughly examines the results of the efforts of four agencies—EPA, FDA, the National Highway Traffic Safety Administration, and the Securities and Exchange Commission—in response to President Obama's retrospective review directives contained in Executive Orders 13563 and 13579. Although Executive Order 13563 specifically stipulates that the regulatory system "must measure, and seek to improve, the actual results of regulatory requirements," Lutter finds little evidence of progress toward improving measurement (analysis) of actual results. Indeed, Lutter finds that very few retrospective analyses of existing regulations performed by these agencies even provide sufficient information to evaluate whether the benefits of continuing those regulations exceed their ongoing costs. This is the information problem for regulatory reform and the first obstacle. Agencies are not currently required by statute to analyze their existing regulations to determine ongoing costs and benefits or, more simply, even whether the regulations are effective.
>
> Ideally, whether a rule or a regulatory program should be continued, modified, or eliminated would rely on research to indicate whether a systemic problem still exists; whether the rule continues to produce benefits exceeding costs; whether there are unintended consequences, such as countervailing risks, that have not been accounted for; whether additional regulations in the area (e.g., food safety) are likely to produce benefits exceeding costs; whether states and localities (or markets or courts) might be better able to address the problems; and whether the program continues to be a high federal priority. However, agencies tend to expend their resources not on researching these questions but on producing new rules that expand their budgets and control over their portion of the economy. Researching existing rules is not likely to ever be high on their agendas.[25]

Similarly, individuals in agencies have little incentive to provide information that would lead to a rule's elimination or the choice not to produce a rule.[26] In general, employees—including economists—are professionally rewarded for being part of teams that create new regulations or expand existing regulatory programs.[27] Conversely, employees are rarely rewarded for deciding that a regulation should not be created. This is unfortunate, because specialists in agencies are likely to have some relevant information about which rules are nonfunctional.

In our study, we also examine other government reform efforts that have successfully overcome similar identification problems, such as the Base Realignment and Closure (BRAC) process:

> In 1988, Congress created the Base Realignment and Closure (BRAC) Commission to address an impasse: nearly everyone agreed that toward the end of the Cold War, many military bases were no longer necessary,

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25. Ibid., referring to Randall Lutter, "The Role of Retrospective Analysis and Review in Regulatory Policy" (Mercatus Working Paper No. 12-14, Mercatus Center at George Mason University, Arlington, VA, April 2012).
26. McLaughlin and Williams, "Consequences of Regulatory Accumulation."
27. Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (Working Paper No. 08-15, Mercatus Center at George Mason University, Arlington, VA, July 2008), http://mercatus.org/sites/default/files/publication/WP0815_Regulatory%20Economists.pdf. Williams quotes one economist as saying, "Success is putting out 10 regulations a year and bigger regulations are bigger successes."

but no one could agree on which specific base(s) to close. This was because each base had a literal constituency and "designated champion" in Congress—the member from the base's congressional district. Congress created the BRAC Commission and its process to overcome pork-barrel politics (which effectively would have prevented any bases from being closed) by requiring members to agree to abide by the recommendations of an independent commission—the BRAC Commission. The commission—composed of independent experts—was given a mission of assessing military bases primarily according to their military value, and, in conjunction with the Department of Defense, submitting a list of bases to Congress that would be recommended for closure or realignment based on their military value. As legal scholar Jerry Brito put it, "A clear mission (identify bases to be cut) along with guiding criteria (military need) positioned the commission to make empirically defensible choices."[28]

In hindsight, it sounds pretty simple. When everyone agreed that some bases needed to be eliminated, but no one could agree on which one, Congress created an independent commission and gave it a set of criteria with which to judge all bases' usefulness. By putting the task of identification in the hands of independent arbiters, special-interest influence and parochialism were significantly reduced.

For similar reasons, we concluded that the identification of nonfunctional rules should be performed by an independent group—one with no reason to be interested in preserving certain rules or eliminating others, but instead with incentive to use a predetermined methodology to assess each rule according to guiding criteria.

3. "CUTTING": HOW TO ELIMINATE OR MODIFY NONFUNCTIONAL RULES ONCE THEY ARE IDENTIFIED

Even if everyone can agree that regulatory accumulation has led to some nonfunctional rules harming the economy, and even if some of those nonfunctional rules could be identified, it is another step entirely to eliminate or modify them.

There will be resistance when it comes to the cutting stage of regulatory cleanup. Inevitably, there are winners and losers when regulations are created, regardless of the net economic effect of the rules. When a rule or set of rules is considered for elimination, those groups that benefited from the rule can be expected to coalesce and vociferously protest. Of course, eliminating regulations won't be harmless to some of these groups, but the net effect will be positive. Some groups will have disproportionate influence. As a result, if members of Congress are given the option to consider which regulations to eliminate on a one-by-one basis, individual members who have constituencies or backers that benefit substantially from the regulation will fight to keep that regulation intact.

This is why it is necessary to consider a group of nonfunctional regulations at one time, similar to the approach that was successfully used in the BRAC process. The BRAC Commission would group all bases identified for closure under uniform criteria into a single list, with the default being elimination unless the entire list was disapproved by Congress. The only way Congress could stop the closure of all bases on the list was to pass a resolution of disapproval.[29] Similar to military bases, regulations' costs are widely dispersed across the population while their benefits are concentrated in narrow groups. This situation can lead to calls for a specific regulation to be preserved because its benefits accrue disproportionately to certain constituencies. To overcome this, the set of regulations considered for elimination or modification should be large and broad enough for the total economic gains from their repeal to outweigh the protests of the narrow groups that benefit from preserving specific rules.

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28. McLaughlin and Williams, "Consequences of Regulatory Accumulation," quoting Jerry Brito, "Running for Cover: the BRAC Commission as a Model for Federal Spending Reform," *Georgetown Journal of Law & Public Policy* 9, no. 1 (2011): 12.
29. Ibid.

4. THE SCRUB ACT AND CHARACTERISTICS OF SUCCESSFUL REFORM

In our study, Richard Williams and I identified 11 characteristics of successful reform, derived from lessons learned by studying the BRAC process, regulatory reform in other countries, and previous attempts at retrospective review in the United States. Some of these have already been discussed, but I list them below for the purposes of assessing the SCRUB Act with respect to each of these.

1. Before any specific regulations, agencies, or subject areas are broached, Congress must agree on the general principle that we need to eliminate or modify nonfunctional rules. Passage of the SCRUB Act or similar legislation that focuses on cleaning up regulatory accumulation would satisfy this characteristic.

2. The process should entail independent assessment of whether regulations are nonfunctional. The SCRUB Act creates a commission with the authority to hire analysts and experts necessary for such an assessment and to collect essential information for those purposes.

The SCRUB sets forth criteria for regulatory assessment that are not very different from how we define "nonfunctional" rules in our research. To be classified as functional in our paper, a rule must

1. address a current risk,
2. address a significant risk,
3. not result in ongoing costs (including unintended consequences) that more than offset the ongoing benefits of the rule, and
4. not interfere with or duplicate other rules.

While it is wise to build-in flexibility for the commission to devise new criteria in response to future lessons learned, it is equally important that any commission be required to publicly disclose its complete assessment criteria and take public comment on them.

3. The process should ensure there is no special treatment of any group or stakeholder. The act allows any entity to propose a rule or set of rules for consideration, which may help prevent special treatment.

4. The analysis must be broad enough to identify potentially duplicative regulations. Duplication and redundancy across agencies may be a large source of nonfunctional rules. For example, multiple agencies through different regulations may address food safety. In light of this source of nonfunctional rules, analysis that is focused on individual rules or the rules of a single agency may not capture factors (e.g., conflicts, duplication) that indicate certain rules are in fact nonfunctional.

5. The process should use a standard method of assessment that is difficult to subvert. The commission is required to specify a methodology for assessment. Doing so publicly and prior to beginning assessment will help achieve a transparent, objective end product.

6. Whatever the procedure for assessment, assessments of specific regulations or regulatory programs should focus on whether and how they lead to the outcomes desired. The SCRUB Act lists, as one of the criteria for assessment, "Whether the rule or set of rules is ineffective at achieving the rule or set's purpose." To meet our criteria, this phrase should mean achieving desired *outcomes*, as opposed to producing *outputs*. A rule may lead to an increase in an output, such as increased safety inspections, but that does not guarantee that there has been an increase in the outcome, safety.

7. Regulatory agencies should be recognized as another important stakeholder, with incentives to keep and increase regulation. The act calls for the commission to produce information independently of agencies on the costs of existing rules. Any new rules would have cost estimates produced by agencies. If agencies have incentive to increase regulation, they may avoid disclosing costs in order to be able to eliminate fewer of the targeted rules.

One means of reducing such avoidance may be to utilize both independent peer review and OIRA certification in assessing agency cost estimates.

8. The list of regulations targeted for elimination or modification should be long enough to overcome the concentrated benefits/dispersed costs problem. The act charges the commission to categorize rules identified for elimination or modification into one of two categories: rules for immediate repeal or amendment, and rules that go in the CUT-GO bank. Based on the number of regulations currently in place, a three-year period may not be sufficient for the commission to complete an assessment of all regulations, but it could certainly cover a substantial number of rules in that period. Whether the number of rules is enough to overcome the concentrated-benefits/dispersed-costs problem also depends on the how nonfunctional rules are distributed into the two categories. If only a relatively small number of rules are placed in the category of rules for immediate repeal or modification, there may be more resistance to allowing those changes to take place.

However, this will not affect the CUT-GO bank. Rules placed in this category circumvent the concentrated-benefits/dispersed-costs problem because they only require an agency to make a new rule in order to eliminate one or more of the nonfunctional rules in the CUT-GO bank.

9. Modifications to regulations should be limited. Only improvement from design standards to performance standards or other cost-reducing/innovation-inducing improvements should be suggested. The act includes provisions to promote modifications that are focused on cost reductions and generating innovation.

10. Congressional action—such as a joint resolution of disapproval—should be required in order to stop the recommendations, as opposed to a vote to enact or not enact. The act provides for congressional action on rules for immediate repeal and in certain cases involving the CUT-GO bank. This approach has several positive attributes. The rules classified for immediate repeal or modification would likely represent the low-hanging fruit—the obviously obsolete, duplicative, or ineffective rules. It makes sense to get rid of these as fast as possible. In addition, the CUT-GO bank would create the added benefit of forcing agencies to prioritize and economize in rulemaking.

11. The review process should repeat indefinitely. The act provides for a dissolution of the commission by a specific date. Given the likelihood that the commission cannot evaluate all regulations in a three-year period, it may be worthwhile to extend the life of the commission until all regulations are evaluated at least once. I would further recommend that the commission continue on an ongoing basis. The regulatory process will lead to regulatory accumulation again. This commission could balance out the tendency to accumulate regulations with a deliberate and streamlined process for eliminating nonfunctional regulations if and when they appear.

CONCLUSIONS

Regulatory accumulation in the United States, with its adverse impact on economic growth, is now a widely recognized problem. The problem has not been meaningfully addressed despite the efforts of several administrations.

One reason it has been hard to address regulatory accumulation is the difficulty of identifying nonfunctional rules—rules that are obsolete, unnecessary, duplicative, or otherwise undesirable. An independent group or commission seems required to successfully identify nonfunctional rules.

Another obstacle to addressing regulatory accumulation is the difficulty of cutting nonfunctional regulations, even if a list of nonfunctional regulations existed. The BRAC process overcame similar difficulties by requiring Congress to accept the recommendations of the BRAC Commission for *all* bases on the commission's list, unless Congress passed a joint resolution of disapproval. Similarly, a regulatory cleanup of accumulated regulations should require action on a long and broad list of nonfunctional regulations, with a joint resolution of disapproval required to stop action on the commission's recommendations.

The SCRUB Act has several characteristics that make it more likely to succeed where previous attempts have failed. First, it appoints an independent commission to identify nonfunctional rules. Second, it requires the commission to categorize all nonfunctional rules into one of two groups: those to be considered for immediate

repeal or amendment, and those to be considered for CUT-GO procedures. If enough rules are placed in the first category, the concentrated-benefits/dispersed-costs problem may be overcome. Third, the act requires that the commission establish a methodology prior to beginning the assessment of rules, thereby minimizing opportunities for the assessment to be subverted by special interests. Fourth, the act establishes criteria that the commission would use to identify nonfunctional rules, and these criteria are primarily based on fundamental problem-solving and economic thinking.

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