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THE CONSEQUENCES OF REGULATORY ACCUMULATION AND A PROPOSED SOLUTION

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Abstract

The American regulatory system has no working, systematic process for reviewing regulations for obsolescence or poor performance. Over time, this has facilitated the accumulation a vast stock of regulations. Regulatory accumulation can negatively affect GDP growth, labor productivity, innovation, and safety—perhaps explaining why every president since Jimmy Carter has recognized it as a problem. We examine previous, presidentially led efforts to initiate a review of existing regulations in the United States, and show that these efforts have not materially altered the stock of regulations. In contrast, we examine other, successful government reform efforts in order to identify their characteristics. After outlining the obstacles to regulatory cleanup that previous efforts in the United States failed to address, we suggest a process that could be adopted in order to eliminate or modify obsolete or otherwise undesirable regulations. Finally, we evaluate our proposal alongside other recent proposals with regard to how well they overcome the previously identified obstacles to regulatory review and cleanup.

JEL codes: H1, H23, K23, L51, J810

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The Consequences of Regulatory Accumulation and a Proposed Solution

Patrick A. McLaughlin and Richard Williams

1. Introduction

While every American president for the past 30 years has embraced the notion of performing economic analysis on new regulations before their implementation, no president has successfully reexamined the enormous stock of previously existing regulations that he inherited nor materially altered the growth of the stock of regulations. Yet this stock of federal regulations in the United States is enormous and growing. In 2012, the Code of Federal Regulations—the series of books that contain all the currently applicable federal regulations—comprised over 170,000 pages of dense legal text. Importantly, as the quantity and scope of regulations grow, so does the degree to which they can negatively affect people and the economy.

The buildup of regulations is a consequence of a reactive regulatory system. As economists Michael Mandel and Diana Carew recently wrote, "The political system, understandably, reacts to major events—new technologies, corporate accounting scandals, environmental discoveries, or reports of tainted food or faulty products." 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 U.S. industry of regulatory accumulation actually compounds on itself for every additional regulation added to the pile."[1]

[1] 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/.

The existing regulatory system requires that executive branch agencies "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[2] Unfortunately, this requirement only involves prospective analysis, and not retrospective analysis. As a former chief economist of the Council of Economic Advisers put it, "The single greatest problem with the current system is that most regulations are subject to cost-benefit analysis only in advance of their implementation."[3] While prospective analysis can certainly help avoid some regulatory pitfalls, only in hindsight can an analysis determine whether the benefits that a rule was intended to achieve are actually being realized and whether those benefits do indeed justify the costs of the rule.

The need to eliminate or modify some regulations from the accumulated stock has been widely recognized by members of Congress and every president since Carter.[4] 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."[5] Nonetheless, executive branch attempts to examine and revise or eliminate existing 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. Economist Randall Lutter terms retrospective *review* an "administrative process" that uses the Administrative Procedure Act to

[2] Executive Order 12866, 58 Fed. Reg. 51734 (1993).
[3] Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in *New Perspectives on Regulation*, ed. David Moss and John Cisternino (Cambridge, MA: Tobin Project, 2009), 113.
[4] Mandel and Carew, "Regulatory Improvement Commission."
[5] Barack Obama, "Remarks by the President in State of Union Address," January 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.

ultimately revise or eliminate rules.[6] He differentiates that from retrospective *analysis*, which uses economics and science to "assess the benefits and costs of existing regulations relative to a hypothetical scenario without such regulations." To date, there has been neither large-scale retrospective analysis nor the creation of a process that would eliminate failing regulations.[7] Congress recognized the problem in 2000, passing the Regulatory Right-to-Know law that asks OMB to recommend areas for reform, including information on the effects of federal rules and paperwork "in the aggregate, by agency and agency program, and by major rule."[8] Despite this effort, regulations continue to accumulate, and the ability of presidential administrations to clean up obsolete or otherwise undesirable regulations appears rather limited.

Most efforts at regulatory cleanup have relied on the agencies that originally created the rules and have no incentive or inclination to remove them. In fact, even if agencies were to attempt to eliminate or modify rules in bulk, they must do so through the informal rulemaking process established by the Administrative Procedure Act. Doing so would, of course, attract comments from special interest groups that may have vested interests in preserving existing rules, making their modification or elimination that much more difficult. Furthermore, retrospective review without congressional authority is limited: even if they were so inclined, agencies can only remove those rules that were allowed, but not required, by statute.

This paper outlines why a congressional regulatory reform effort to eliminate obsolete, inefficient, or ineffective regulations, which we later describe as "nonfunctional" rules, is necessary and develops some recommendations on how to do that. Several attempts at

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[6] 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), 6, http://mercatus.org/sites/default/files/Lutter_Retrospective_v1-2.pdf.
[7] Ibid., 7.
[8] Regulatory Right-to-Know Act, 31 U.S.C. § 1105 (2000).

eliminating or modifying government programs are evaluated, including relatively unsuccessful attempts at regulatory cleanup as well as largely successful attempts at eliminating waste and obsolescence, such as the Base Realignment and Closure Commissions. Based on these reviews, the key obstacles that a successful attempt at regulatory cleanup must overcome are explained. Recommendations designed to overcome these obstacles are given in the last section, which details our proposal to create a Regulatory Review Commission. This independent commission would be tasked with assessing the effectiveness of existing regulations and recommending changes to or repeals of regulations to Congress, with the objective of achieving a reduction of regulations equal to or greater than some predetermined, quantitative threshold.

To streamline this process and eliminate the possibility of pork-barrel politics, our recommendation stipulates that Congress can only halt the recommendations of the commission from going into effect with a joint resolution of disapproval of the entire package. In sum, a commission identifies rules or programs for elimination or modification, and Congress is given only the possibility of doing nothing—implying acceptance—or producing a joint resolution of disapproval, without amendments. This waters down the influence of special interest groups by eliminating Congress's ability to "cherry pick."[9]

The remainder of this paper proceeds as follows. In section 2, we review evidence of the problems caused by regulatory accumulation. Section 3 reviews previous efforts to address regulatory accumulation in the United States and other, more successful efforts at serious government reform in the United States and elsewhere. Section 4 discusses lessons learned from those efforts and develops a framework for evaluating proposals for regulatory cleanup based on

[9] By "cherry pick" we mean the ability of members to choose certain regulations or programs to keep that are in their best interests, such as programs that benefit their constituents, and accept the recommendations to eliminate other regulations.

those lessons. Section 5 focuses on our recommendations on how to create a streamlined process for eliminating obsolete or otherwise undesirable regulations. Section 6 evaluates our proposal within the context of the framework developed in section 3, alongside five other bills that were proposed in the 112th or 113th Congresses that also address the topic of regulatory cleanup. Section 7 concludes.

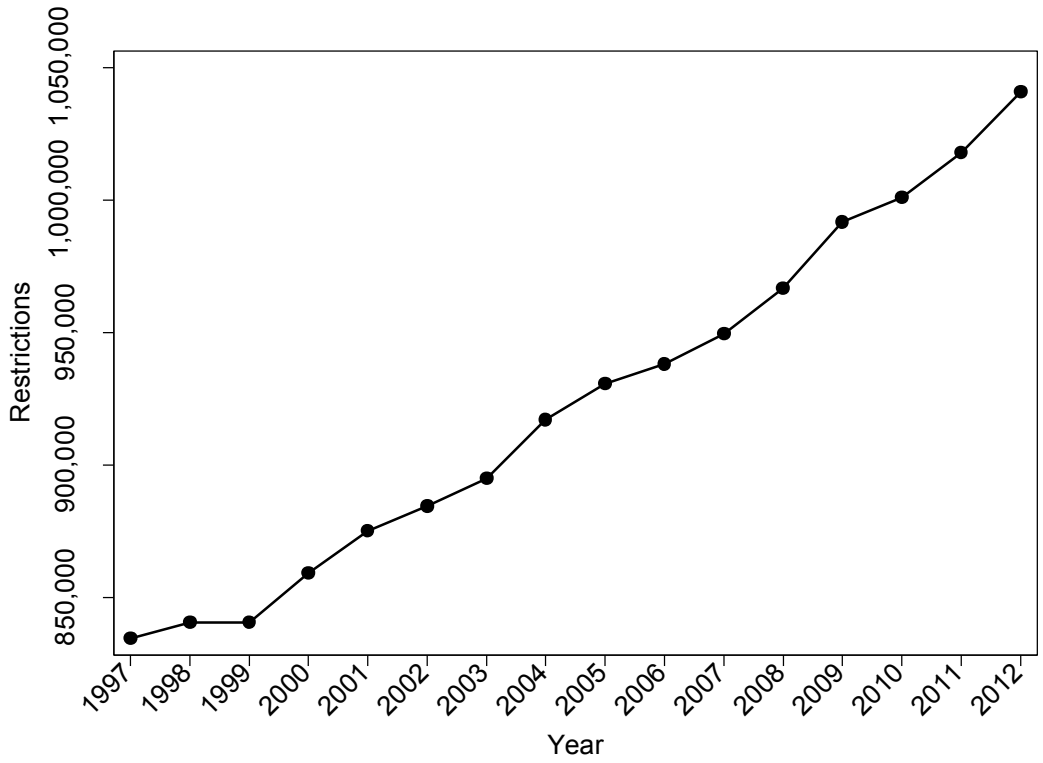
2. The Problems of Regulatory Accumulation

By all measures, regulation has been increasing for several decades. Figure 1 shows the growth of federal regulations from 1997 to 2012, as measured by counting the number of restricting words, such as "shall," "must," or "required" (hereafter called "restrictions"), that are printed in the *Code of Federal Regulations* each year.[10] The total number of restrictions in federal regulations has grown from about 835,000 in 1997 to over 1 million by 2010. That averages out to nearly 12,000 new restrictions created each year.

Large-scale retrospective analysis, coupled with a streamlined mechanism for eliminating obsolete or otherwise undesirable regulations, can dramatically improve economic performance. Additionally, and in a way that is most likely related, regulatory cleanup may positively affect international competitiveness, entrepreneurship, and safety. The existing stock of regulations is so large that any regulatory reform effort that focuses only on new regulations while ignoring the accumulated stock, as several executive orders, guidance memos, acts of Congress, and bills currently under consideration do, is bound to miss significant opportunities to improve the US economy via regulatory cleanup.

[10] Omar Al-Ubaydli and Patrick A. McLaughlin, "RegData: The Industry-Specific Regulatory Constraint Database (IRCD)" (Mercatus Working Paper No. 12-20, Mercatus Center at George Mason University, Arlington, VA, July 2012), http://mercatus.org/publication/industry-specific-regulatory-constraint-database-ircd.

Figure 1. Federal Regulation Restrictions, 1997–2012



2.1. Regulation and Economic Performance

A recent study by economists John W. Dawson and John J. Seater found that between 1949 and 2005 the accumulation of federal regulations slowed economic growth by an average of 2 percent per year.[11] Dawson and Seater's study is groundbreaking in that they use the page count of the *Code of Federal Regulations* as a measure for regulatory growth, allowing them to consider all federal regulations over a long period of time, instead of a specific group or type of regulations over a short timeframe. However, it is not an outlier. Several earlier studies using broad indexes, such as those produced by the World Bank and OECD, have permitted cross-country comparisons of the effects of certain types of regulations, such as barriers to entry. These

[11] John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* 18 (2013): 137–77.

earlier studies also reveal the negative impacts regulation can have on economic growth. One widely cited example is "Regulation and Growth" by Simeon Djankov and his colleagues, which finds that a country's improvement from the first to the fourth quartile of business regulations, as measured by the World Bank's Doing Business index, implies a 2.3 percentage point increase in annual GDP growth.[12]

Another study published by the World Bank finds that, holding a country's level of governance (a measure of how effectively a country is governed) equal to the world median, a one standard deviation increase in regulatory burdens as measured by the study's synthetic regulatory index (comprising separate indexes, including those developed by the World Bank, KPMG, the PRS Group, the Fraser Institute, and the Heritage Foundation) leads to a 0.3 percentage point decrease in GDP per capita.[13] Economists Gorgens et al. (2003) find that a heavily regulated economy will likely have economic growth lower on average by 2 to 3 percentage points versus less regulated economies.[14] They use the Fraser Institute's Economic Freedom Index as their measure of regulatory burden.

The negative economic effects of widespread regulation are also revealed by the positive effect that large-scale deregulatory efforts across developed countries historically have had on investment and economic growth. For example, Alberto Alesina and his colleagues find that deregulation in the United Kingdom's transportation and communications sectors during the mid-1980s led to an increase in the investment rate of about 3 percentage points.[15] They find that

[12] Simeon Djankov, Caralee McLiesh, and Rita Maria Ramalho, "Regulation and Growth," *Economics Letters* 92, no. 3 (2006): 400.
[13] Norman V. Loayza et al., "The Impact of Regulation on Growth and Informality: Cross-Country Evidence" (World Bank Policy Research Working Paper No. 3623, 2005), 8.
[14] Tue Gorgens, Martin Paldam, and Allan Würtz, "How Does Public Regulation Affect Growth?" (Working Paper No. 2003-14, University of Aarhus, 2003), 15.
[15] Alberto Alesina et al., "Regulation and Investment," *Journal of the European Economic Association* 3, no. 4 (2005): 810.

when the United States and the United Kingdom liberalized product markets in the late 1970s and early 1980s, both nations realized significant surges in investment as a share of capital stock—from 3.7 percent in 1975 to 8.15 percent in 1998. On the other hand, during that same time, investment rates in continental European countries where large-scale deregulatory reforms were not implemented—such as Italy, France, and Germany—decreased 5 percentage points.

A large number of rules also make it difficult to start new businesses, likely contributing to the drag on economic growth discussed above. According to *Forbes*, entrepreneurs start about 540,000 new US companies every month.[16] An extensive body of literature has documented a negative effect of regulation on entrepreneurship, and one likely reason may be the sheer difficulty of sorting through over 1 million federal requirements, in addition to all of the state and local (and possibly international) regulations to begin a business.[17]

Finally, the growing stock of regulations in the United States is one issue that has contributed to this country being increasingly disadvantaged in international competiveness. The United States has slipped to tenth place from fourth (1995) in Heritage's 2013 Index of Economic Freedom.[18] The Fraser Institute's Economic Freedom of the World index shows an even more precipitous decline for the United States, falling from third best in its ranking for the regulation category in 2001 to seventeenth in 2011.[19] This decline is partially driven by the

[16] Cheryl Conner, "Who's Starting America's New Businesses? And Why?" *Forbes.com*, July 22, 2012, http://www.forbes.com/sites/cherylsnappconner/2012/07/22/whos-starting-americas-new-businesses-and-why/.
[17] See, for example, Bruce Benson, "Opportunities Forgone: The Unmeasurable Costs of Regulation," *Journal of Private Enterprise* 19, no. 2 (2004): 1–25; Leora Klapper, Luc Laeven, and Raghuram Rajan, "Entry regulation as a barrier to entrepreneurship," *Journal of Financial Economics* 82, no. 3 (2006): 591–629; Stefano Scarpetta et al., "The Role of Policy and Institutions for Productivity and Firm Dynamics: Evidence from Micro and Industry Data" (Working Paper No. 329, OECD Economics Department, 2002); and Kristina Nyström, "The Institutions of Economic Freedom and Entrepreneurship: Evidence from Panel Data," *Public Choice* 136, no. 3–4 (2008): 269–82.
[18] "2014 Index of Economic Freedom," Heritage Foundation, accessed Jan. 27, 2014, http://www.heritage.org/index/.
[19] James Gwartney, Robert Lawson, and Joshua Hall, "2012 Economic Freedom Dataset," published in *Economic Freedom of the World*: *2012 Annual Report*, Economic Freedom Network, 2012, http://www.freetheworld.com/countrydata.php?country=C135.

failure to improve the regulatory system and clean up obsolete and inefficient regulations, and it has contributed to the United States' overall ranking in economic freedom decreasing from third best in 1980 to nineteenth in 2010.

2.2. Regulation, Health, and Safety

In traditional models, many government interventions consist of addressing risks to reduce overall risk profiles. That is, risks are discovered, and, in response, governments pass laws and regulations to address those risks. But is it true that overall risk is diminished as a result of these interventions? In theory, a primary goal of many government interventions—especially environmental, health, and safety regulation—is to reduce overall risk profiles. However, a regulatory system that facilitates the accumulation of risk regulations contains a self-defeating characteristic: the proliferation of static regulatory requirements that may inhibit risk managers from dynamically responding to more pressing and relevant risk issues. To effectively address both large and small risks, as well as new and existing risks, requires constant readjustment of priorities by those who must actually manage risk reduction (as opposed to social decision-makers). Currently, a lack of risk information associated with regulations and legal constraints prevents prioritization of risks. Nevertheless, like all resources, risk management resources are constrained. With a resource constraint, as more regulations are added to the mix, fewer resources can be devoted to managing each risk.

We start with the premise that regulations can be roughly divided into two categories, what we will call "functional" and "nonfunctional." Those that are functional 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. Those that are nonfunctional are missing one or more of these features. There are a number of ways in which rules can be nonfunctional.

Nonfunctional rules. To be categorized as functional, a rule must address current and significant risks (or, more generally, problems). Rules may not do that if they are outdated, but it may also be the case that they never actually did. It is also possible that the regulations addressing particular risk issues have worked and the risks have been reduced to safe (*de minimis*) levels.[20] In other cases, the rules may be addressing significant risks but not actually mitigating those risks. Again, it may be the case that they did mitigate the risk at some point but do not now. Table 1 below shows our proposed first test for whether a rule is functional or nonfunctional.

Table 1. The First Test for Functionality of a Rule

	Significant risk	**Nonsignificant risk**
Current risk	Functional	Nonfunctional
Noncurrent risk	Nonfunctional	Nonfunctional

However, even if a rule qualifies as functional in the first test, a second wave of tests may still find it nonfunctional. These tests include the weighing of unintended consequences, including risk-risk tradeoffs; the duplication of and possible interference with other rules; and a current benefit-cost analysis.

First in that wave of secondary tests is the weighing of unintended consequences. Some existing rules have unintended harmful consequences that may more than offset the direct benefits of the rules. These consequences may not have manifested themselves immediately after

[20] It may be that even though risks are reduced to *de minimis* levels, further enforcement is needed if it is found that market mechanisms have not supplied sufficient incentives to stay at those risk levels.

the rule's promulgation, but may have grown apparent over time. In some cases, these unintended consequences should have been foreseeable but were not analyzed.[21] If these unintended consequences, such as risk-risk tradeoffs, are severe enough to offset the benefits of the primary risk being reduced, then the rule is nonfunctional. A risk-risk issue arises as an attempt to reduce one risk increases other risks.[22]

All activities that humans engage in, and all substances humans are exposed to, create some risk, however small. This is the lesson from the founding principle of toxicology: "All things are poison, and nothing is without poison; only the dose permits something not to be poisonous."[23] This statement has been generalized to mean "the dose makes the poison." This is true of both (1) exposure to substances (chemicals, microbial agents, radiation and physical hazards) and (2) activities (work, play). Given that every substance and activity creates risk, every attempt to exchange one activity for another or substitute one substance for another has the possibility of increasing countervailing risks. Because there is often tremendous uncertainty regarding both risk decreases caused, for example, by regulation and increases in countervailing risks, there will often be uncertainty about whether overall risk has increased.

Second, rules may directly reduce safety if they interfere with other rules. This is the result of adding more safety rules that eventually begin to interfere with the ability to consider other safety issues, possibly leading to less overall safety. The assumption that more rules equals more safety was referred to as a *linear assumption* by sociologist Elizabeth Nichols

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[21] Sherzod Abdukadirov, "The Unintended Consequences of Safety Regulation" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, June 4, 2013), http://mercatus.org/sites/default/files /Abdukadirov_UnintendedConsequences_v1.pdf.
[22] For a discussion of countervailing risks, see John D. Graham and Jonathan Baert Wiener, *Risk vs. Risk: Tradeoffs in Protecting Health and the Environment* (Cambridge, MA: Harvard University Press, 1997).
[23] B. Madea, F. Mußhoff, and G. Berghaus, *Verkehrsmedizin: Fahreignung, Fahrsicherheit, Unfallrekonstruktion* (Cologne: Deutscher Ärzte-Verlag, 2007), 435.

and political scientist Aaron Wildavsky.[24] They noted, "Adding new safety devices and procedures is no guarantee of increased safety. Operational safety is not merely additive or linear but highly conditional and contingent. Unforeseen interactions may foil the purpose of the new addition. That is, new dangers can arise from the added safety effort itself."[25] For example, the worst nuclear accident to date at the time they wrote the article, the Chernobyl nuclear power accident, was at least in part the result of adding more safety checks while the plant was online. It was a safety test that caused the actual accident. They noted that similar problems were found at the Three Mile Island nuclear facility. These types of countervailing risks are most likely to occur with design rules, where regulators try to anticipate every possible contingency in complex systems by requiring compliance with detailed instructions. As the number of rules increases, the likelihood of rules interfering with each other increases. Even if they do not directly cause interference, it may also useful to classify rules that are duplicative as nonfunctional, in order to at least reduce the cost of learning about two regulations instead of one.

Finally, more generally, the benefits of complying with existing rules may no longer be worth the cost. In all of the above cases, this general condition would be necessary to make the rule nonfunctional. OMB has stated, "The only way we know to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs."[26]

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[24] Elizabeth Nichols and Aaron Wildavsky, "Does Adding Safety Devices Increase Safety in Nuclear Power Plants?," in *Searching for Safety*, by Aaron Wildavsky (Social Philosophy and Policy Center, Transactions Publishing, 1988), 128.
[25] Ibid., 139.
[26] Office of Management and Budget, Report to Congress on the Costs and Benefits of Federal Regulations, 1997.

Reasons for nonfunctional rules. Rules may be nonfunctional because they are obsolete. The United States began creating regulations 140 years ago and, as most observers have noted, we rarely remove them from the books. In many cases, the problems they address no longer exist. For example, the Food and Drug Administration has been creating rules since its inception in 1906. Food production, packaging, and distribution have changed a great deal in the last 100 years, but most of the original rules are still on the books. For example, there is still a regulation on FDA's books that governs the width of strings in canned string beans.[27]

In addition, some rules were created using faulty or misleading information that caused regulatory decision-makers to make choices that they would not have made with better information. For example, EPA states in its policy guidance that "EPA's policy is that risk assessments should not knowingly underestimate or grossly overestimate risks. . . ."[28] If EPA were to objectively estimate risks, it would not knowingly under- *or* overestimate risks. To emphasize underestimating risks leads to conservative estimates of risk (overestimates). One problem with conservatively estimating risks is that there is no way for decision-makers to know how conservative the risk estimate is. But no matter how conservative the estimate is, when risks are conservatively estimated, risk managers will believe that their regulations address larger risks than they actually do. The same thing would be true if the existing risk estimate were objectively estimated as a "most likely" risk, where the baseline risk is a central estimate but the amount of risk the regulation is expected to reduce is overestimated. Over time, as agencies continue to regulate to ever lower levels of risk, conservative regulations piled on top of other conservative regulations lead to vastly overregulated compounds, which are likely to be nonfunctional to a degree that is not known.

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[27] 21 C.F.R. 155.120 (2013).

[28] US Environmental Protection Agency, Office of the Science Advisor, "An Examination of EPA Risk Assessment Principles and Practices," Staff Paper (EPA/100/B-04/001), 2004, at 13, available at http://www.epa.gov/osa/pdfs /ratf-final.pdf.

Risk managers can also create nonfunctional rules if they choose to be excessively precautionary in their selection of a regulatory option. Over time, if the regulations are not revisited, the rules may prove to be excessively conservative (costs are too high relative to the benefits), which creates the same problem with conservative analysis, leading to the same result. Of course, many older rules were created with no analysis, which could also cause this problem.

Finally, an extensive literature indicates that rules can be created for political reasons to reward special constituencies. In these cases, rules are promulgated to satisfy special interests and benefit politicians and bureaucrats, without any particular concern about whether they will solve problems.[29] Those seeking these rules could range from firms that will financially benefit from raising rivals' costs[30] or receiving subsidies to special-interest activists who want rules to limit choices even when the rules themselves are nonfunctional. Whether the problem begins with the enacting legislation or special influence on the agency creating regulations, many of these rules will not be functional.

Nonfunctional rules can decrease safety. Given that there are both resource constraints and nonfunctional rules, regulatory accumulation will reduce overall safety if risk managers cannot or are not allowed to prioritize rules. Risk managers—either individuals or actual managers in a firm—are faced with a mix of hazards that are older and static as well as risks that new and rapidly changing. To see this, imagine that all risks currently being managed require

[29] The special-interest capture theory of regulation was first formally intimated by Stigler, but has been repeatedly corroborated in the 35 years since Stigler's seminal paper was published. See, for example, Simeon Djankov et al., "The Regulation of Entry," *Quarterly Journal of Economics* 117, no. 1 (2002): 1–37, which examines the regulation of entry of start-up firms across 85 countries and finds "the evidence is inconsistent with the public interest theories of regulation, but supports the public choice view that entry regulation benefits politicians and bureaucrats" because they receive the support of those industries that are protected with regulation.

[30] Steven C. Salop and D. T. Scheefman, "Raising Rivals' Costs," *American Economic Review* 73, no. 2 (1983): 267–71.

100 percent of resources allocated to risk management, such as time, attention, and capital, to manage. Furthermore, imagine that these risks are addressed by regulation via 10 rules. Compliance with these rules produces a benefit of $10, with 10 units of resources used, and each unit of resources costs $1. Thus, each rule has $1 devoted to managing it. Add a nonfunctional rule to be managed and, if all rules are utilizing equal resources (because risk overseers cannot prioritize rules), then each rule will only have about 0.91 units of resources devoted to it.[31] Resources devoted to the nonfunctional rule are just wasted, but there are now fewer resources devoted to actual risks, diminishing overall safety.

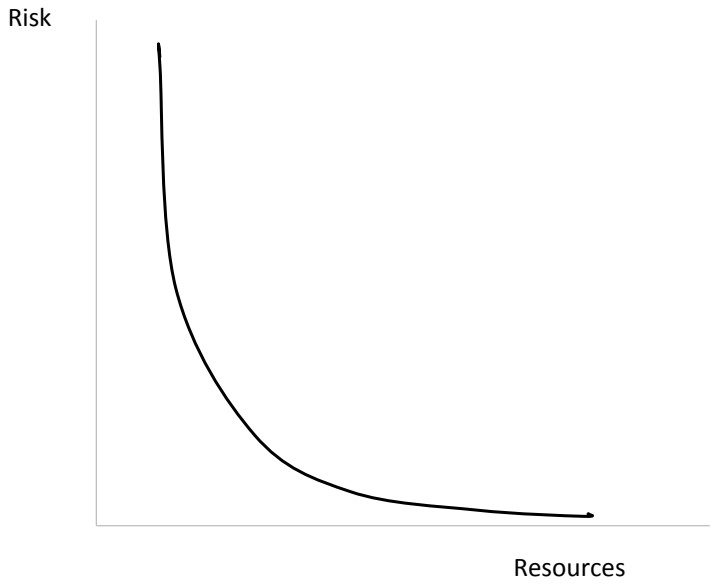
As with most activities, individuals and firms (i.e., risk managers) likely receive diminishing marginal returns to increases in resources devoted to reducing a given risk, as shown in figure 2 below. Figure 2 ranks risk reduction activities along the horizontal axis according to their marginal benefits per unit of resources devoted to compliance, with the activities with the greatest marginal benefit on the left.

As more resources are devoted (horizontal axis) to risk reduction, for example, by complying with a rule or a requirement within a rule, risk (vertical axis) is reduced, albeit with diminishing marginal effectiveness. As an example of this, take a common food safety requirement that firms monitor critical control points within the production process. The rules requiring this typically require a hazard analysis, establishment of critical points where hazards may enter or be controlled, monitoring critical limits at the critical control points, and remedial action when a critical limit has been established. A small amount of resources may just be a manager telling an employee to quickly go through the plant and establish a few critical control points, critical limits,

[31] This simple example assumes no opportunity to reduce profits, cut wages, or increase prices to as to add more resources. Certainly in the long run these options may exist, but there may be frictional forces in the short run that force these kinds of trade-offs.

and plans to remedy deviations. More resources might be employed to do a thorough scientific hazard analysis to ensure all the right critical control points are discovered. More analysis might look at what the critical limits must be and more resources could go into intensive monitoring. The plan could be even further enhanced and management resources brought to bear on when a production line should be stopped due to a critical limit violation. Further, there could be a plan to continually revise the entire plan based on feedback. Up to a point, more resources will decrease risk, but at some point the reduction in risk achieved per dollar of additional resources devoted to it will decrease. Eventually, the costs will outweigh the benefits.

Figure 2. Diminishing Returns to Resources Devoted to a Given Risk



In sum, as regulatory requirements increase, and some requirements are nonfunctional, fewer resources can be expended on those that are functional, leading to an overall safety decrease, at least in the short run. Firms may not know which regulatory requirements are functional and which are not. In fact, without a comprehensive and systematic analysis, it is

doubtful that anyone knows, which may contribute to the lack of progress that has been observed with past retrospective review efforts (as discussed elsewhere in this paper). In addition, even if they did know, as OMB has pointed out, equal effort must be applied to all regulations, whether functional or nonfunctional: "Some regulations are critically important (such as safety criteria for airlines or nuclear power plants); some are relatively trivial (such as setting the times that a draw bridge may be raised or lowered). But each has the force and effect of law and each must be taken seriously."[32] Separately or together, this means that firm managers cannot prioritize risks so as to control "worst things first."[33] Thus, when nonfunctional regulations are enforced, they will crowd out compliance with functional regulations.

The second activity crowded out by compliance with nonfunctional rules is private efforts to reduce risks. Firm managers have numerous incentives to address risks. For some risks facing workers, the possibility of tort liability provides some incentives for managers to exercise due diligence with respect to workplace safety. For consumer products, where legitimate negative externalities at some time in the past caused harm to third parties, the growth of interest in these externalities coupled with Internet monitoring and transmission of problems means that managers must also exercise due diligence to protect their brand names, as well as to prevent costly recalls and possible court cases.[34]

For consumers, paying higher prices for products as firms pass on costs may crowd out more efficient, private risk expenditures. For example, consumers who desire to move to safer neighborhoods, drive safer cars (even if all are regulated), or install smoke detectors (even when not

[32] Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulations*, 1997, 2, http://www.whitehouse.gov/omb/inforeg/chap1.aspx.
[33] Adam Finkel and Dominic Golding, eds., *Worst Things First: The Debate over Risk-Based National Environmental Priorities* (Washington: Resources for the Future, 1994).
[34] Richard Williams, "A New Role for the FDA in Food Safety" (Mercatus Working Paper No. 10-69, Mercatus Center at George Mason University, Arlington, VA, November 2010).

required) in their houses can make these expenditures on a discretionary basis only after spending resources complying with regulations (usually in form of higher-priced products).[35] All these risks are generally greater than, for example, those risks addressed by EPA rules concerned with reducing the lifetime exposure to certain chemicals. Left with their own resources, consumers would be able to choose to reduce more risk per dollar spent on risk-reduction than many government regulations can.[36] As we get more rules that are less and less efficient on a dollar-per-unit risk-reduced price, these crowding-out effects are more likely to be exacerbated and lead to decreased safety.

Perhaps more importantly though, regulations tend to be static[37] and managers must deal with dynamic risks. As the technology changes, new risks emerge. Regulations take years to develop and are often dated by the time they are created.[38] Dealing with nonfunctional and static regulations crowds out scarce resources that could be devoted to newer, emerging risks. These risks could come from new technologies, new production methods, new products, or new sources of labor.

For firms, increasingly complex and detailed rules build a rigid structure that is not flexible enough to innovate in the face of new threats. These rules present opportunity risks by removing the choices to continually improve or develop resiliency. As Wildavsky notes, safety lies in trial

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[35] Diana Thomas, "The Regressive Effects of Regulation: Who Bears the Cost?" (Research Summary, Mercatus Center at George Mason University, Arlington, VA, February 2013). See also Ralph L. Keeney, "Personal Decisions Are the Leading Cause of Death," *Operations Research* 56, no. 6 (November–December 2008): 1335–47.

[36] See, for example, Aaron Wildavsky, *Searching for Safety* (Piscataway, NJ: Transaction Publishers, 1988); Randall Lutter and John F. Morrall III, "Health-Health Analysis: A New Way to Evaluate Health and Safety Regulation," *Journal of Risk and Uncertainty* 8, no. 1 (1994); Ralph. L. Keeney, "Mortality Risks Induced by Economic Expenditures," *Risk Analysis* 1990; Ralph L. Keeney, "Mortality Risks Induced by the Costs of Regulations," *Journal of Risk and Uncertainty* 8, no. 1 (1994); Jackie Teague, Don Anderson, and Fred Kuchler, "Health Transfers: An Application of Health-Health Analysis to Assess Food Safety Regulations," *Risk* 10 (1999); and Diana Thomas, "Regressive Effects of Regulation" (Mercatus Working Paper No. 12-35, Mercatus Center at George Mason University, Arlington, VA, November 2012).

[37] The term "static" here means addressing risks that are relatively unchanging over time, but it is also true that the regulations addressing those risks are static in the sense that they are rarely modified.

[38] "The Costs of Regulatory Delay," Center for Progressive Reform, accessed January 27, 2014, http://www .progressivereform.org/regdelay.cfm.

and error, a search process over time, not rigidity.[39] For managers and workers in firms to be entrepreneurial when facing and solving new threats, they must "own the problems." Industrial psychologists Andrew Hale and David Borys have extensively investigated this phenomenon of rule ownership and note that "problems must have an owner if they are to be solved, and a too-large set of rules undermines companies' sense of ownership of the risks inherent in their processes."[40] For firms that are closest to the problems and should be able to see problems as they emerge, rather than taking ownership of the solutions, they end up simply following (government) rules. Alternatively, when the quantity of rules to follow reaches the point of information overload, some managers and workers may just ignore the rules until cited by inspectors. In other words, private innovative solutions are crowded out.[41] A study of mine safety rules in New South Wales reached a similar conclusion about the effect of too many rules and concluded,

> (a) Management and regulators should not continue to produce more and more rules and regulations to cover every aspect of mining. Miners will not read nor comprehend to this level of detail.
> (b) Detailed prescriptive regulations, detailed safe work procedures, and voluminous safety management plans will not 'connect' to the miner. The aim should be to operate with a framework of fewer rules but of the highest quality.[42]

Finally, compliance with nonfunctional regulations may crowd out efforts to ensure resilience—that, if risks are realized, there will be ways to minimize and quickly address the consequences. For example, food safety problems with pathogens are never likely to be eliminated given the prevalence of pathogens in the environment. But systems that can quickly respond and target and stop outbreaks may reduce illnesses much faster (and also provide

[39] Wildavsky, *Searching for Safety*, 207.
[40] Andrew Hale, David Borys, and Mark Adams, "Regulatory Overload: A Behavioral Analysis of Regulatory Compliance" (Mercatus Working Paper No. 11-47, Mercatus Center at George Mason University, Arlington, VA, November 2011), 31.
[41] Israel Kirzner, "Competition, Regulation, and the Market Process; An 'Austrian' Perspective," Cato Institute, 1982, http://www.cato.org/sites/cato.org/files/pubs/pdf/pa018.pdf.
[42] David Laurence, "Safety Rules and Regulations on Mine Sites—The Problem and a Solution," *Journal of Safety Research* 36 (2005): 49.

incentives to not have the problem in the first place), compared to increasing preventive controls. Resilience may come from modifying existing rules or putting systems in place to respond rapidly to problems. Either requires resources and can be a valid response to different kinds of risks. Most of our regulatory system is based on *ex ante* anticipation, which would be preferred for those risks that are fairly stable and predictable. But if there is uncertainty about where problems may emerge, so-called black swans,[43] resiliency may be the better strategy.

As rules accumulate, some proportion of them is likely to be, or to become, nonfunctional. As individuals and firms must continue to comply with rules that are nonfunctional, more effective risk-reducing activity may be crowded out, decreasing overall safety.

3. Previous Efforts at Regulatory Cleanup and Similar Large-Scale Reforms

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

3.1. Previous Efforts to Reexamine Existing Regulations in the United States

Policymakers have long recognized the need to formalize the process of regulation creation, and over the decades that have passed since the Administrative Procedure Act, reforms to the process have been undertaken. Despite these reforms, numerous problems remain. For example, it may be that many of the more than 1 million restrictions in the *Code of Federal Regulations* are

[43] See, for example, Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (New York: Random House, 2008).

outdated, duplicative, inefficient, or ineffective (i.e., continuing compliance is expected to have costs exceeding benefits) based on one or more of the reasons given above. Note that even new regulations may fall into these categories. It is perhaps for these reasons that each of the past five administrations from Reagan forward (as well as Congress) has made some explicit attempt to weed out nonfunctioning regulations.

The need to reduce the existing regulatory burden is not new. This section details efforts to modify or eliminate nonfunctioning regulations that were undertaken by each of the past five presidents. 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*. Nonetheless, there does appear to be a presidential consensus on the benefits of regulatory reform, as the next section explains.

"Reduce the burdens of existing and future regulations" —President Reagan. One of President Reagan's first actions after his election was to issue Executive Order 12291 in 1981, which, in addition to creating OIRA and requiring centralized review of major rules and their economic analyses, required agencies to review their existing major rules. Generally speaking, this requirement of review of existing rules was interpreted to mean that agencies should determine which regulations could be withdrawn or scaled back.[44]

President Reagan created the Presidential Task Force on Regulatory Relief, which was led by then-Vice President George H. W. Bush, to oversee the regulatory review process. This review may have been partly responsible for the diminutions in pages in the CFR in 1982 and 1985 shown in figures 3 and 4.

[44] OMB, *Report to Congress on the Costs and Benefits of Federal Regulations*, 1997, http://georgewbush-white house.archives.gov/omb/inforeg/chap1.html#trbrp.

Figure 3. Total Pages in the *Code of Federal Regulations*, Number of Pages Added or Subtracted Each Year, and Percentage Changes from Previous Year, 1975–2012

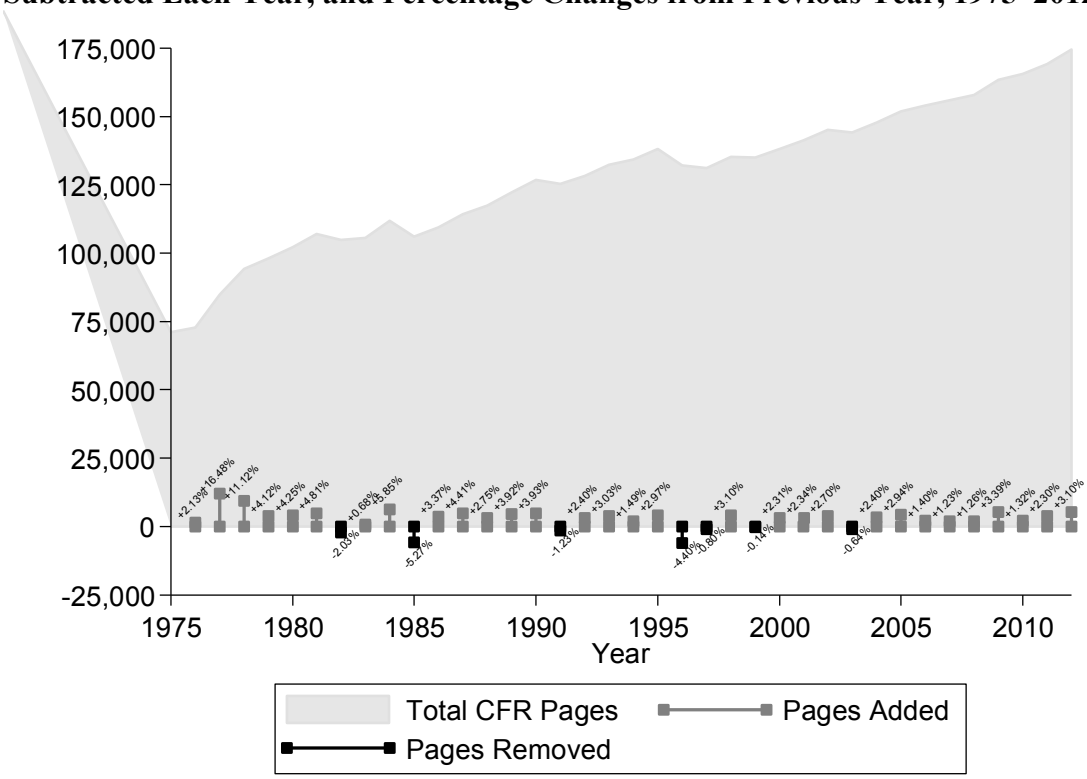
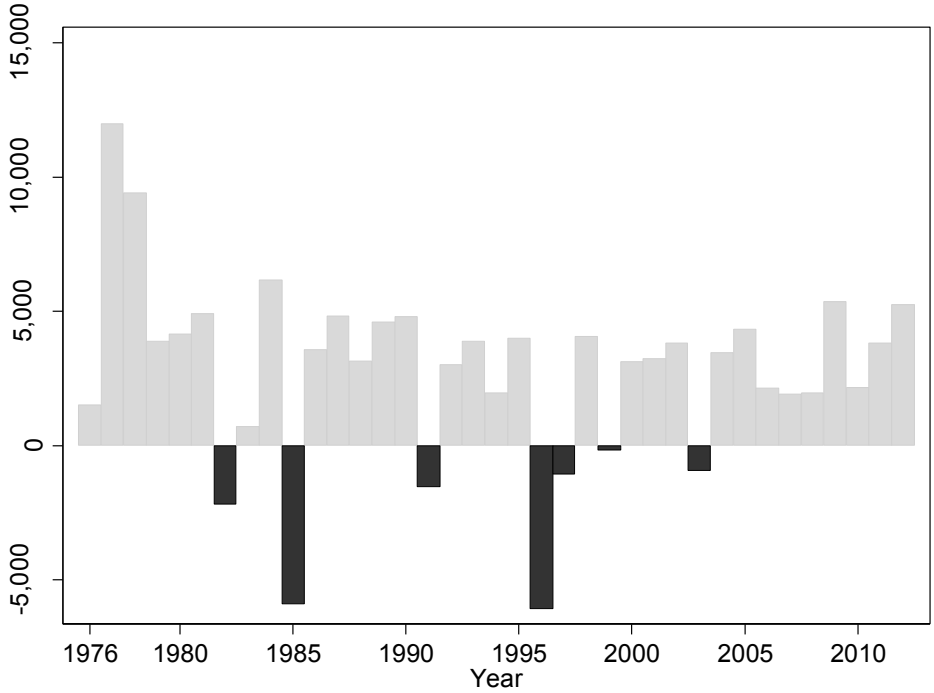


Figure 4. Pages Added to or Subtracted from the *Code of Federal Regulations*, 1976–2012



However, simultaneous deregulatory efforts that originated in the Carter administration and came through Congress in the form of the Airline Deregulation Act of 1978, the Staggers Rail Act of 1980, and the Motor Carrier Act of 1980 also led to substantial reductions in the number of pages in the CFR. For example, because of the Airline Deregulation Act, the Civil Aeronautics Board was completely abolished, but that was not completed until 1985 when the last vestiges of the Civil Aeronautics Board were either eliminated from the CFR altogether or transferred to the Office of the Secretary of the Department of Transportation. The elimination of the Civil Aeronautics Board's pages from the CFR is at least partially responsible for the decrease in pages seen in 1985 in figure 3.

During President Reagan's term the Regulatory Flexibility Act of 1980 was enacted. Section 610 of that act requires periodic agency reviews of rules:

> which will have a significant economic impact on a substantial number of small entities anytime with 10 years of promulgation . . . to determine . . . whether such regulations should be continued as written or should be amended or rescinded consistent with the stated objectives of applicable statues, to minimize their impact on small entities.[45]

However, this law only requires review of rules affecting small entities in a significant way and has had very little impact on the totality of rulemaking, as will be seen below.

Figure 4 shows that in two of the eight Reagan years, the total number of pages in the CFR diminished. In 1982, pages decreased by 2 percent relative to the year before, and in 1985, by 5.3 percent. Even if these diminutions are fully attributed to the Presidential Task Force rather than any of the transportation deregulatory acts of Congress, they do not seem to have done much to stem the overall growth of regulations under his administration. During the Reagan years, 23,047 pages were added to the CFR, while 8,066 were subtracted, for a net gain of 14,981 pages.

[45] The Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164 (1980).

"Provide regulatory relief" —President George H. W. Bush. Subsequently, President George H. W. Bush appointed Vice President Dan Quayle to head another task force, called the Competitiveness Council. Created in 1990, the Competitiveness Council's mission was "to provide regulatory relief."[46] The efforts of this council may have led to the slight subtraction of pages from the CFR seen in figures 3 and 4 in 1991. However, in percentage terms as shown in figure 3, the only decrease in total CFR pages that occurred during the George H. W. Bush years amounted to a decrease of just 1.2 percent in 1991.[47] Overall, the George H. W. Bush years saw 11,700 pages added to the CFR and 1,562 taken away, for a net gain of 10,138 pages.

"Cut obsolete regulations" —President Clinton. In 1993, President Bill Clinton and Vice President Al Gore created a task force consisting of about 250 career civil servants called the National Performance Review (later renamed the National Partnership for Reinventing Government). This task force had a broad mission of creating a government that "works better, costs less, and gets results Americans care about."[48] Beginning in February 1995, the task force was instructed to help 65 regulatory agencies to "cut obsolete regulations, [and] reward results, not red tape," among other directives.[49] Notably, the efforts of this task force and the cooperating agencies led to the elimination of 16,000 pages of regulation from the *Code of Federal Regulations*.[50] Indeed, this effort appears to have caused one of the few substantive reductions in

[46] Office of Management and Budget, "Draft Report to Congress on the Costs and Benefits of Federal Regulations," 62 Fed. Reg. 140 (July 22, 1997), 39356, http://www.gpo.gov/fdsys/pkg/FR-1997-07-22/pdf/97-19082.pdf.
[47] 1,562 pages removed from a stock of 126,892 pages in 1990: −1,562/126,892 = −1.231%.
[48] Bob Stone, "Creating 'Reinvention University,'" *Public Manager* 27, no. 1 (1998): 47.
[49] National Partnership for Reinventing Government, "History of the National Partnership for Reinventing Government—Implementing Recommendations—1994," accessed January 29, 2014, http://govinfo.library.unt.edu/npr/whoweare/historypart3.html#governing.
[50] Ibid.

the total number of pages published in the *Code of Federal Regulations*, as figure 4 shows. However, despite the relative success of the National Partnership, the Clinton years saw a net increase of 9,053 pages added to the CFR. Additionally, President Clinton issued Executive Order 12866 in the same spirit as Reagan's Executive Order 12291. Executive Order 12866 also formalized the regulatory analysis process that agencies must perform when creating new, significant regulations, including requirements to consider several alternatives and to assess their costs and benefits. Section 5 of Executive Order 12866 required agencies to submit to OIRA a program to periodically review existing significant regulations to determine whether they should be "modified or eliminated."[51]

Regulatory reform and burden reduction under President George W. Bush. President George W. Bush also attempted to eliminate obsolete regulations, or at least announced efforts to do so. In 2001 and 2002 OIRA, under the leadership of John Graham, launched a public nomination process for eliminating or modifying existing rules.[52] One of the major sets of regulations eliminated were those protecting consumers from deceptive airline ticketing information.[53] Another episode of interest during the George W. Bush years was the administration's attempt to slow or stop midnight regulations, a surge in rulemaking during the lame-duck period of an outgoing administration.[54] Despite the administration's efforts, rulemaking during the final year of the administration still surged, and rules produced during

[51] Executive Order 12866, 58 Fed. Reg. 190 (Oct. 4, 1993), http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
[52] John D. Graham, Paul R. Noe, and Elizabeth L. Branch, "Managing the Regulatory State: The Experience of the Bush Administration," *Fordham Urban Law Journal* 33, no. 4 (2005): 121.
[53] Ibid., 122.
[54] Susan E. Dudley, "Regulatory Activity in the Bush Administration at the Stroke of Midnight," *Engage* 12, no. 2 (2009).

the midnight period were accompanied by lower-quality regulatory analysis.[55] This demonstrates the degree to which a president appears to have limited ability to control the regulatory output of agencies. All told, the George W. Bush years witnessed a net increase of 25,284 CFR pages.

"Retrospective analysis" under President Obama. Executive Order 13563, issued by President Barack Obama in January 2011, ordered executive branch agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[56] Furthermore, the agencies were ordered to place these retrospective analyses online "whenever possible," and to submit plans to the Office of Information and Regulatory Affairs that would detail the agencies' plans for periodic review of existing significant regulation. The goal was similar to that expressed in previous administrations: to "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make . . . regulatory program[s] more effective or less burdensome in achieving the regulatory objectives."[57]

Regardless of whether this attempt at retrospective review achieves any degree of success (see discussion below), it is unlikely to affect independent agencies. Executive Order 13579, issued in July 2011, was directed at independent agencies and repeated the retrospective analysis

[55] Patrick A. McLaughlin, "The Consequences of Midnight Regulations and Other Surges in Regulatory Activity," *Public Choice* 147 (2011); Patrick A. McLaughlin and Jerry Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration," *Administrative Law Review* 63 SE (2011).
[56] Executive Order 13563, 76 Fed. Reg. 14, Sec. 6. (Jan. 21, 2011), 3822, http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
[57] Ibid.

and review language of Executive Order 13563, except that the word "shall" was replaced with the word "should."[58]

Neither effort appears to have done much to slow the accrual of pages in the CFR despite a concerted effort to do so.[59] Over the first three years of President Obama's first term, 11,212 pages were added to the CFR.

3.2. Successful Reforms of Problems Similar to Regulatory Accumulation

Some reform programs have successfully eliminated significant governmental waste and obsolescence. One successful government reform program that overcame obstacles similar to those faced in regulatory reform was the removal and realignment of military bases under the Base Realignment and Closure Act.

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, 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.[60] 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

[58] Executive Order 13579. This language is significant because an executive order has the force and effect of law on regulatory agencies so that use of the word "shall" becomes a suggestion rather than an order.
[59] White House, "Campaign to Cut Waste," accessed February 6, 2014, http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.
[60] 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).

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."[61]

Once the BRAC Commission's recommendations were made, Congress's ability to stop those bases' closure or realignment was limited to a joint resolution of disapproval. Barring that, the recommendations of the commission would be implemented. Additionally, BRAC changed the burden of proof. Before the creation of the BRAC Commission, those who wished to close bases had to prove that those bases were unnecessary. The BRAC Act instead placed the burden on those who sought to keep a base open.[62] As a result, the first BRAC Commission recommended 11 major bases for closure. In comparison, no bases were successfully closed between 1977 and 1988.

Another successful program may be even more relevant to the topic of eliminating or modifying nonfunctional regulations: the Administrative Burden Reduction Programme in the Netherlands. In 2003, the Dutch set for themselves a specific goal of reducing regulatory costs by 25 percent, called the Administrative Burden Reduction Programme (the Dutch Programme).[63] The Dutch Programme required all regulatory ministries—analogous although not identical to agencies in the United States—to measure the cost of their regulations using the Standard Cost Model. Economist Joshua Hall explains,

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[61] Ibid., 12.
[62] Ibid., citing Charlotte Twight, "Department of Defense Attempts to Close Military Bases: The Political Economy of Congressional Resistance," in *Arms, Politics, and the Economy: Historical and Contemporary Perspectives*, ed. Robert Higgs (New York: Holmes & Meier, 1990), 264.
[63] "International Standard Cost Model Manual," International SCM Network to reduce administrative burdens, October 2005, http://www.oecd.org/regreform/regulatory-policy/34227698.pdf.

> The Standard Cost Model (SCM) was developed in the Netherlands as a consistent methodology for measuring administrative costs and burdens resulting from business regulations in both ex ante and ex post situations. The model is designed to break down administrative burdens and costs to businesses, ensuring that even obligations not imposed by regulation (for example, voluntary information obligations) are measured, allowing for a complete overview of all information obligations (IOs) and simplifying the identification of unnecessary regulation. The SCM strictly measures costs to businesses; it does not consider whether the regulations from which the costs stem are "reasonable."[64]

This simple model does not identify or quantify the entire burden of a regulation, but because it is simple and replicable, all agencies were able to evaluate their regulations in a manner that allowed consistent comparison. Furthermore, this simplicity helped avoid subversion. It is hard to claim someone incorrectly calculated administrative costs when the methodology is clear and when a newly created, independent monitoring agency is overseeing the evaluations. Thus, although the Standard Cost Model does not pretend to assess the total cost, including opportunity cost, of a given regulation, it does represent a simple and transparent way to consistently measure some costs of regulations. Once all the ministries had assessed the costs of their regulations according to the Standard Cost Model, the next task was to eliminate 25 percent of those costs by 2007.

Importantly, the Dutch Programme established an independent monitoring agency to monitor each ministry's measurement and reduction processes.[65] This independent agency helped ensure the integrity of each ministry's assessments as well as prod the ministries to complete the reduction of 25 percent of administrative burden by 2007. Another office was created within the Ministry of Finance "to manage the political side of organizing the process between the various ministries and to overcome political obstacles."[66]

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[64] Joshua Hall and Michael Williams, "A Process for Cleaning Up Federal Regulations: Insights from BRAC and the Dutch Administrative Burden Reduction Programme" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, December 20, 2012), 7–8, http://mercatus.org/sites/default/files/Hall_BRAC_final.pdf.
[65] Ibid., 7.
[66] Ibid.

Both the BRAC Commission and the Dutch Programme shared some characteristics that offer insights into attempted retrospective review schemes. First, each created an independent body to help accomplish the task. Second, each assigned a clear mission to the independent bodies. For the BRAC Commission, the mission was to identify bases for realignment or closure according to military value. For the Dutch Programme, the mission was to have ministries assess the costs of their regulations using the Standard Cost Model, and then facilitate the elimination of 25 percent of the costs of those regulations in each ministry.

In contrast to the relative success of the BRAC process and the Dutch Programme, none of the attempts to eliminate obsolete regulations by executive order produced results similar in magnitude to those of the BRAC Commission or the Dutch Programme. Some of these efforts were composed of individuals who were arguably independent of the agencies themselves, but notably none of them gave these individuals the power to actually bypass agency input into the decision on whether to eliminate the targeted regulations. The analogy to the BRAC process is strong: in the BRAC process, individual legislators had incentive to fight to save individual bases when it served their interest. In previous attempts to eliminate obsolete regulations, individual agencies had similar incentive to protect individual regulations from elimination. The first BRAC commission circumvented congressional members' ability to protect individual bases by only giving Congress input at the final stage in the form of a joint disapproval. Executive Order 13563, as an example in counterpoint, relied on the agencies themselves not only to produce the information used to identify target regulations but also to decide whether to eliminate or otherwise modify the targeted regulations.

4. Lessons from Previous Successes and Failures

Why did the BRAC Commission and the Dutch Programme succeed while attempts to eliminate obsolete regulations in the United States have largely failed? Perhaps inadvertently or perhaps by design, the BRAC Commission and the Dutch Programme built in devices such as independent commissions and an expedited legislative process that overcame some of the main obstacles to government reform. We explain some of the primary obstacles below, and point out how the BRAC Commission and Dutch Programme overcame them.

Obstacle 1

Decision-makers need adequate information to determine which regulations are obsolete, but agencies lack incentives to produce this information.

One of the reasons for the failure of previous attempts to eliminate obsolete regulations is information. Simply put, 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. In the study mentioned earlier, 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.[67] Although Executive Order 13563 specifically stipulates that the regulatory system "must

[67] Lutter, "Role of Retrospective Analysis."

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 indicating 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.[68] Researching existing rules is not likely to ever be high on their agendas.

The BRAC Commission's and the Dutch Programme's Solutions to Obstacle 1

Both the BRAC Commission and the Dutch Programme utilized information from the agency closest to the programs being evaluated. In the case of BRAC, the Department of Defense (DOD)

[68] William A. Niskannen, "Bureaucracy," in *The Elgar Companion to Public Choice*, ed. William F. Shughart and Laura Razzolini (Northhampton, ME: Edward Elgar, 2001).

had incentive to provide the most accurate information because elimination of inefficiency would permit DOD to execute its mission better. For the Dutch Programme, agencies did not necessarily have incentive to provide the most accurate information (as they wished to protect, not eliminate rules), but they were given little choice. The Standard Cost Model is simple and transparent enough that any misinformation would presumably be easily sighted.

Obstacle 2

Agencies are stakeholders with respect to their own regulations.

Even if agencies had the necessary information available to them, they have little incentive to modify or eliminate existing rules. Agencies often spend many years developing rules, and asking agencies to eliminate their own rules can be comparable to asking them to admit failure. Further, even if the public desired that some regulations be eliminated, agencies' preferences may deviate from those preferences. This is analogous to what industrial organization and financial economists refer to as the principal-agent problem.[69] In this case, government agencies are the agents, and private individuals are the principals.[70] When the incentives of agents do not align with those of the principals, suboptimal outcomes tend to ensue. In the case of government agencies, agencies have incentive to grow, regardless of whether that growth would be optimal for individuals. There are many theories about why bureaucracies grow, such as the desire to maximize their discretionary budgets.[71] Over time, these theories have been supplemented with literature describing bureaucratic desires such as "influence on

[69] See Michael Jensen and William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure," *Journal of Financial Economics* 3 no. 4 (1976): 305–60.
[70] It is also true that agencies are agents for Congress, the principals.
[71] Niskannen, "Bureaucracy," 269.

public policy, power or simply utility."[72] Agencies' budgets expand if their regulatory programs expand, so those agents' incentives may lead them to pursue a different course than the one preferred by their principals.

The BRAC Commission's and the Dutch Programme's Solutions to Obstacle 2

The BRAC Commission was not directly faced with a principal-agent problem. The DOD actually desired to close military bases that had little military value so that it could reallocate scarce resources and personnel to locations of greater military value.

The Dutch Programme, on the other hand, tackled this problem head-on by requiring that all agencies meet a quantified target—a reduction of costs by 25 percent.

Obstacle 3

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.

This obstacle is a corollary of the previous principal-agent problem and is a reflection of how agencies tend to reward their employees.[73] In general, employees—including economists—are professionally rewarded for being part of teams that create new regulations or expand

[72] Ronald Wintrobe, "Modern Bureaucratic Theory," in *Perspectives on Public Choice*, ed. Dennis C. Mueller (Cambridge: Cambridge University Press, 1997), 431.

[73] Trying to produce evidence to get rid of regulations would be viewed in agencies as different from providing evidence to support a regulation. It would be viewed as if it came from someone outside the agency. As one coauthor of this paper has described his experience as an agency economist, "If your views are not mainstream, you are saying something different that is not going to be welcomed. . . . It is an oppressive atmosphere." 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.

existing regulatory programs.[74] 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. However, no one has yet discovered how to change the incentives of individuals in agencies so that they have a reason to provide accurate information and have no fear of retaliation should that information indicate that growth in the number or scope of the agency's regulations is not optimal.

The BRAC Commission's and the Dutch Programme's Solutions to Obstacle 3

The BRAC Commission embraced independence as the solution to obstacle 3. The independent commission exists for only a finite period, and its mission is clear. This independence limits the degree to which others can create incentive for commissioners to deviate from their mission.

The Dutch Programme had two components that address obstacle 3. First, the Dutch Programme adopted a clear and transparent model that agencies had to use to provide information about rules' costs. This limited economists to either providing cost information or to providing nothing at all. Second, in order to ensure that all agencies provided cost information (rather than nothing at all), the Dutch Programme created an independent agency to oversee the application of the Standard Cost Model in all the agencies.

Obstacle 4

Decision criteria for classifying regulations as nonfunctional can be subverted if they are not clear and objective.

[74] Williams quotes one economist as saying, "Success is putting out 10 regulations a year and bigger regulations are bigger successes." Ibid.

Before the creation of the BRAC Commission, attempts at the base closures were hampered by congressional members' ability to subvert one of the several criteria considered by Congress before the BRAC Act created the BRAC Commission.[75] As Representative Richard Armey put it in 1988,

> An environmental impact statement can take as long as two years and cost over $1 million to complete. Once completed, any congressman or well-organized citizens' group can take the military to court and insist that it be redone to consider some previously unnoticed aspect. After that, the second statement can be found wanting, and a third can be ordered. By this time, several years after the base closing was first announced (a move that by itself has already hurt the local economy), the local citizenry and members of Congress are thoroughly aroused, and the political pressures to cancel the closing order are all but insurmountable.

The base closure process and its consideration of complex and subjective criteria, at least before the 1988 BRAC Act, made it easy for any legislator to stop a military base from closing. As a result, each member of Congress possessed a *de facto* veto on any single base's closure.

Similarly, any analysis—even quantitative analyses—can be subverted. For example, an agency might produce a regulatory impact analysis that purports to show that a regulation's anticipated benefits outweigh its costs, whereas an independent analysis would show the opposite. Of course, the agency has incentive to show that, and it is difficult for a nonexpert to tell whether the regulatory impact analysis is objective and thorough. It is possible for the agency to subvert regulatory impact analyses to serve the agency's purposes, such as to expand its budget.

The BRAC Commission's and the Dutch Programme's Solutions to Obstacle 4

One characteristic shared by the BRAC Act and the Dutch Programme is that they both set out simple criteria by which to judge whether to keep military bases and regulations, respectively.

[75] Jerry Brito, "A Spending Commission Modeled on BRAC" (Mercatus Research Summary, Mercatus Center at George Mason University, Arlington, VA, Jan. 19, 2010), http://mercatus.org/sites/default/files/Brito-BRAC-Research-Summary.pdf.

Importantly, the simplicity, clarity, and objectivity of these criteria minimized subversion of the reform efforts by individuals, agencies, or special interest groups. The vaguer the criteria, the easier it would be for an individual, agency, or special interest group to manipulate them into serving its purposes, rather than objectively analyzing relevant data.

Obstacle 5

Individual regulations can cause concentrated benefits and dispersed costs.

All regulatory programs originate in Congress, whether by the organic statute that created an agency and an agency mission, or a statute that attempts to specifically elicit regulatory intervention from agencies. All the same dynamics that lead to congressional pork in legislation can apply to regulation. 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. In other words, Congress must overcome the public choice problem of concentrated benefits and dispersed costs in order to agree to eliminate regulations.

The BRAC Commission's and the Dutch Programme's Solutions to Obstacle 5

The BRAC process overcame obstacle 5 by grouping all bases considered to be candidates for closure into a single list. Congress was provided this list from the BRAC Commission, and Congress by default was assumed to approve the list. The only way Congress could stop the closure of all bases on the list was to pass a majority vote of disapproval. For regulations, this means that groups of regulations that are sent to Congress must not be able to be stopped by oversight committees that govern those regulations.

Despite the success of the first BRAC Commission, some worried that even this independent commission was not devoid of political influence—especially in subsequent rounds. Brian T. Kehl surmised that logrolling and special interests played a role in the removal of certain bases from the closure list after the list was leaked to the *New York Times* a week before its official submittal from DOD to the commission in 1993. In the interim, three bases in California were removed from the list, leading Kehl to conclude, "The special interests of California and its Congressional delegation were undoubtedly successful at bringing pressure to bear on the Pentagon."[76] Furthermore, as Jerry Brito points out,

> No member of the relevant defense committees has ever had a base closed in their districts. In 1991, DoD recommended 31 major bases for closure. The BRAC commission removed four from this list, three of which were represented on the Senate Armed Services Committees. In 1993, of the nine bases removed from the list, only one was not represented on the Senate Armed Services Committee or the Senate Defense Appropriations Committee. Certainly one obstacle to reforming or removing regulations will be the committees themselves. Although regulations generally don't favor one state or region over another, Committee program chairs may not wish to decrease the regulations in their particular area of oversight.[77]

The Dutch Programme did not explicitly address obstacle 5. However, a quantified threshold is analogous to creating a list of bases that is adequately long to ensure no particular special interest group can stop the entire scheme, so long as the threshold is high enough. Additionally, it appears that the Dutch Programme accepted that horse-trading and logrolling would likely occur—even if 25 percent had to be cut, a savvy politician might try to make sure those cuts would only affect other constituencies—and created an separate agency "to manage

[76] Brian T. Kehl, "The Pentagon vs. Congress: The Political Economy of Military Base Closures during BRAC" (PhD dissertation, George Mason University, 2003), 40, http://handle.dtic.mil/100.2/ADA416525.
[77] In contrast, however, a recent study found no evidence of political influence in the 2005 round of the BRAC closures. Scott A Beaulier, Joshua C. Hall, and Allen K. Lynch, "The Impact of Political Factors on Military Base Closures," *Journal of Economic Policy Reform* 14, no. 4 (2011): 333–42. Nonetheless, the point remains that even so-called independent commissions may be subject to political influence.

the political side of organizing the process between the various ministries and to overcome political obstacles."[78]

Obstacle 6

Removing regulation requires congressional consent.

Ultimately, it is acts of Congress that direct agencies to create regulations. Even if agencies were to identify nonfunctional regulations that they want to eliminate or modify because of, for example, obsolescence, statutes might not allow the agencies to make the changes. Thus, any reform will require congressional consent before beginning the exercise. Otherwise, the authors of certain statutes may become defensive when agencies point out that regulations stemming from those statutes are no longer necessary or are even counterproductive.

The BRAC Commission's and the Dutch Programme's Solutions to Obstacle 6

The problem of base realignment and closure was similar in that prior to the BRAC Commission's creation, congressional approval was required before a base could be closed. This problem was overcome by the obtainment of congressional approval to close or realign all bases on the list proffered by the BRAC Commission, without amendment.

The Dutch Programme appears to have succeeded in overcoming obstacle 6 largely through a commitment of all major political parties of Parliament to reduce business costs.[79] Given this commitment, Parliament would facilitate the reductions, rather than hinder them.

[78] Hall and Williams, "Process for Cleaning Up Federal Regulations," 2012, 7.
[79] World Bank Group, *Review of the Dutch Administrative Burden Reduction Programme*, 2007, http://www.doing business.org/~/media/FPDKM/Doing%20Business/Documents/Special-Reports/DB-Dutch-Admin.pdf.

Obstacle 7

The creation of the list of target regulations can be subject to logrolling and special interests' influence.

Reform efforts to roll back regulations are generally not successful at including those people who are typically most harmed by existing regulations. Regulations cause consumers to pay higher prices for goods, but consumers are rarely represented in an organized fashion in these efforts. Additionally, small firms are at a competitive disadvantage in knowing about, understanding, and complying with high fixed-cost rules.[80] Finally, potential entrepreneurs face higher barriers to entry as a result of regulatory accumulation. Groups that generally promoted the regulations to begin with tend to be the only active players in a program to eliminate them. Those that benefit from regulations include large firms that often lobby for new regulations in order to put their smaller competitors at a disadvantage, as well as the agencies that created the rules in the first place. In addition, activists who generally favor regulation associated with their particular social agenda do not typically account for the effects of the mass of rules or their unintended consequences.

The Small Business Regulatory Enforcement and Fairness Act, which was designed to give teeth to the Regulatory Flexibility Act, passed the Senate by a vote of 98 to 0. This shows that many in Congress understand that small businesses need protection as most are not engaged in the regulatory processes and are often the target of their larger competitors. Moreover, potential start-up competitors, not yet being in the industry, can be harmed by a surplus of rules that make it harder to start a business. So the three groups most affected by excess rules—

[80] High fixed-cost rules are those that impose "fixed costs," such as pieces of equipment, as opposed to costs that vary with the size of what is being produced, like labor.

consumers, small businesses, and potential entrepreneurs—are typically not engaged in demanding fewer, more efficient rules.

The BRAC Commission's and the Dutch Programme's Solutions to Obstacle 7

It is actually not clear that either the BRAC Commission or the Dutch Programme successfully dealt with obstacle 7. It is possible that special interests affected which regulations were eliminated or modified in the Dutch Programme. In fact, businesses were overtly included and consulted from the beginning of the Programme's implementation.[81] Of course, consulting businesses does not necessarily indicate special interests' influence, and under the right leadership, business input can help identify obsolete or otherwise undesirable regulations.

5. Recommendations

In order to successfully undertake retrospective review, we must chart a different path than that of the last 30 years. The primary lesson of previous attempts at retrospective review is that assessment and decision-making authority should generally be removed from agencies and the Administrative Procedure Act. Because of the technical nature of regulations, however, recommendations must come from people who have expertise in the field and with the nature of regulations. Because of the political problems, the experts must be independent of political influences.

Below, we outline several characteristics of successful reform. Many of these are derived directly from lessons learned by studying the BRAC process, the Dutch Programme, and previous attempts at retrospective review in the United States.

[81] World Bank Group, *Dutch Administrative Burden Reduction Programme*, 2007, 5, stating that businesses were permanently represented on the independent monitoring agency and that staff from enterprises were sent on 1- to 2-year short-term assignments to work for the agency in charge of overcoming political obstacles.

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. The mention of specific regulations, agencies, or subject areas will put too many members on the defensive.
2. **The process should entail independent assessment of whether regulations are nonfunctional.** This likely requires analysts and others who are experts in the areas being addressed and giving them sufficient time and information/data.[82]
3. **The process should ensure there is no special treatment of any group or stakeholder.** Stakeholder input can help the assessment of regulations, but it should not be the only source of information. Consumers and small businesses may be underrepresented in comments/stakeholder input. The process should explicitly direct an assessment to consider how underrepresented stakeholders are affected by the regulations.
4. **The unit of analysis must be broad enough to identify potentially duplicative regulations.** If only one rule or one agency is examined, the process might miss duplication caused by another rule or agency. Instead, subjects such as air quality, automobile safety, food safety, or workplace safety should be examined: e.g., the Occupational Health and Safety Administration makes workplace safety rules, but so does the Federal Railroad Administration. They may or may not overlap.
5. **The process should use a standard method of assessment that is difficult to subvert.** The criteria of assessment and the sources of information for determining which regulations are nonfunctional must be established first. Failure to establish these criteria is an invitation for politics and logrolling. Even with explicitly determined criteria, the

[82] Experts may include economists who are experts in efficiency (benefit-cost analysis), subject matter experts, and legal experts.

analysis can be subverted. Even "independent commissioners" can be influenced—they are political appointees, after all. In light of this, it is important to adopt a simple and transparent procedure for assessment because that will minimize opportunities for subversion.

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.** Unless regulations are associated with outcomes (as opposed to outputs), it is difficult to assess whether they are successful.[83]
7. **Regulatory agencies should be recognized as another important stakeholder**, **with incentives to keep and increase regulation.** Agency information is useful, just like industry and consumer information. However, agencies are likely to provide information that serves their own interests of maintaining their stock of existing regulations. Agency deference should be eliminated in the process of assessing regulations.
8. **The list of regulations for elimination or modification should be long enough to overcome the public choice problem.** If $1 billion is saved by eliminating or modifying some small set of regulations, but one member is losing benefits to his district/state of $100 million, it's easy for that member to oppose cutting those regulations. But if $100 billion is saved, and many states/districts are also losing $100 million, any individual member has less incentive to oppose the entire set of recommended changes. In order to ensure that the set of regulations considered is large and broad enough, we recommend including a quantifiable threshold—e.g., 25 percent—as the minimum that must be eliminated or modified for each subject area.

[83] A good discussion of this point can be found in Jerry Ellig, Maurice McTigue, and Henry Wray, *Government Performance and Results: an Evaluation of GPRA's First Decade* (Boca Raton, FL: CRC Press, 2011).

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.** Agencies already have mandates to protect health, safety, the environment, etc. (i.e., to achieve benefits), and these mandates are executed under the Administrative Procedure Act.
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.** BRAC did this, and that allows members to complain, fight, or save face publicly, while privately supporting the recommendation.
11. **The review process should repeat indefinitely.** The limited successes seen in previous efforts such as the National Partnership were followed by a reversion to the long-term trend of regulatory growth. If agencies' missions will always entail creating more regulations, then a counterbalancing cleanup process should also be in place.

5.1. A Model Regulatory Review Commission

To achieve the goal of eliminating or modifying nonfunctional regulations or regulatory programs that are redundant, inefficient, or obsolete, we propose the creation of a Regulatory Review Commission. First, however, Congress would need to pass a Regulatory Review Act. This act would accomplish three things:

1. formally recognize that both the economy and safety could improve substantially from eliminating nonfunctional regulations;
2. create the Regulatory Review Commission, an independent commission that would be charged with identifying regulations to eliminate, modify, or consolidate; and

3. bind Congress to accepting the recommendations of the Regulatory Review Commission, unless a bicameral resolution of disapproval is passed.

The details of the Regulatory Review Act would primarily lay out how the Regulatory Review Commission is structured and how the commissions fit into the process of regulatory review. We describe our proposed process below, which attempts to incorporate the key lessons outlined above.

5.2. Structure of the Commission

The Regulatory Review Commission would be given a narrow mission of identifying nonfunctional regulations. The commission would identify those regulations using a predetermined evaluation method, such as the Standard Cost Model or another simple, transparent model for evaluating the regulation. In addition to evaluating each regulation according to a predetermined model, the commission would have a mission to identify duplicative regulations.

We suggest that the commission be appointed for a limited time (e.g., five years) and that there be seven members. For example, the commission might include two commissioners selected by the Senate majority leader, two by the House majority leader, one by the Senate minority leader, and one by the House minority leader—the president would select the final commissioner, who would also serve as the chair.

Upon its creation and the appointment of its members, the commission would be responsible for dividing up regulatory programs into manageable areas for review. The areas to be reviewed would address a particular outcome of concern. All regulatory text produced across all agencies that attempts to bring about a common outcome would be considered part of a single area of review. Outcomes of concern would be defined by the commission, but an

example of a regulatory program might be all regulatory text that attempts to reduce the risk of premature cancer in humans caused by the respiration of airborne contaminants. This would include, therefore, some regulations promulgated by EPA under the Clean Air Act, but it may also include regulations from DOT, FDA, and other agencies. Another outcome of concern could be "food safety." The commission would then oversee a review of all federal food safety regulatory programs, including those from USDA, FDA, EPA, and Commerce. The commission would initially choose, for example, four of these outcomes for review. The outcomes chosen could be based on solving the most pressing problems first, including factors such as likely total ongoing costs of the programs; possibility for replacing design with performance rules; absence of benefits, particularly compared to ongoing costs; or effects on domestic or international competition.

Once the four areas for review are chosen, the commission would oversee the creation of corresponding expert committees—one for each area of review. These committees would consist of experts in the area of review, including primarily scientists, risk assessors, and economists who are experts in the area, but also including experts in the agencies that write regulations likely to be reviewed by the committee. To extend our example, suppose the commission chose the following four areas of review: air quality, food safety, automobile safety, and workplace safety (note: these areas are merely examples of areas for review and not necessarily the areas the commission should choose). The commission would assemble committees of experts in those four areas, and the committees would hold public hearings, seek advice from OIRA and the relevant agencies and stakeholders, commission research, and gather information to make recommendations for regulatory programs and individual regulations. The recommendations for changes would be limited to elimination, consolidation, or modification

from a design standard to a performance standard or other cost-reducing modification. The committees would not be permitted to recommend an increase in the stringency or number of regulations, as that mission is already well served by the missions of agencies and the Administrative Procedure Act.

One thing common to successful committees is that they have clear, quantitative goals. In this case, the goal should be defined in the context of whatever model of assessment is adopted. The Dutch Programme, for example, adopted a quantitative goal of eliminating 25 percent of administrative burden in each agency. Without a clear quantitative goal—a minimum threshold that must be achieved—the commission would likely have minimal impact. In the context of committees and areas of review, the quantitative goal would need to relate to the specific area rather than a specific agency. For example, if the area of review is food safety, the committee responsible for food safety would need to identify food safety regulations that could be eliminated—perhaps because they are duplicative, because they do not contribute to the outcomes desired, or because there are better methods now available to achieve the desired outcome. If the threshold chosen is 25 percent, and the model of assessment is the Standard Cost Model, then the committee would produce a list of regulations to eliminate, modify, or consolidate such that the administrative burden caused by all food safety regulations is reduced by 25 percent.

The committees would make regular reports to the commission, which, in turn, would report to the appropriate committees in the House and Senate and to the president. These reports could explain, for example:

1. The outcomes being considered for categorization of regulatory units.
2. The definitions of regulatory units.

3. The definitions of regulatory programs.
4. The assessments of regulations according to the chosen model.
5. Lists of potentially redundant regulations identified so far (i.e., regulatory units that attempt to achieve the same outcome).

Near the end of the term of the commission, the commission would produce a report of regulations and programs to be modified, consolidated with other regulations, or eliminated. Where necessary, the recommendation would include modification or elimination of enabling legislation.

As with the BRAC structure, the recommendations in the report would be considered acceptable unless Congress passed a joint resolution to reject it. An acceptable report would go to the president for signature.

This process would be repeated for a different set of areas of review after the first commission's cycle had ended. Eventually, areas of review would be repeated.

6. A Comparison of Regulatory Review Bills Produced in the 112th and 113th Congresses and Our Proposed Regulatory Review Commission

Above, we listed primary obstacles behind the ongoing inability of the federal government to implement a process for regulatory cleanup. In this section, we evaluate bills from the 112th and 113th Congresses that address the phenomenon of regulatory accumulation with respect to how successful they might be in overcoming these obstacles, alongside our own proposed regulatory review commission.

6.1. A Brief Review of Seven Bills Addressing Regulatory Accumulation (See Appendix for a Summary Table)

S 1390: "Regulatory Improvement Act of 2013"

The Regulatory Improvement Act of 2013 proposes the creation of a Regulatory Improvement Commission. This independent commission would be charged with reviewing existing regulations and developing recommendations for these regulations' modification, consolidation, or repeal, for the purpose of reducing compliance costs, encouraging growth and innovation, and improving competitiveness. A press release related to the bill states that the proposal "employs a balanced approach to evaluating existing regulations—one that involves identifying regulations that are not essential to broad priorities like the environment, public health, and safety, but instead are outdated, duplicative, or inefficient."[84]

Strengths:

- creates an independent commission to decide which rules to change or eliminate, thereby avoiding some incentive-related obstacles
- requires of Congress only an up-or-down vote on the commission's recommendations, with no amendments allowed
- the commission's recommendations would cover a single sector area to examine, which would allow examination of duplication across agencies
- the commission's guidelines—to reduce compliance costs, encourage growth and innovation, and improve competitiveness—for selecting regulations to alter are broad enough to allow serious reform

[84] Office of Senator Angus King, "Senators King & Blunt Introduce Legislation to Review and Streamline Regulations and Stimulate Economic Growth," news release, July 30, 2013, http://www.king.senate.gov/newsroom/press-releases/senators-king-and-blunt-introduce-legislation-to-review-and-streamline-regulations-and-stimulate-economic-growth.

Weaknesses:

- limits the regulations that the commission can consider to only regulations that were finalized more than 10 years before the commission is established and that have not been amended after being finalized
- relies on public comments to provide suggestions for the sector to focus on; past experience suggests that the primary groups that comment are those that benefit from regulations
- unclear what model, if any, the commission will use to identify regulations for change or elimination
- no mechanism for further reform after the commission is done with proposing changes to one sector area
- the commission would have to be recreated by Congress in order to address any other sector areas; the bill does not propose a repeated commission or a new agency
- limits which regulatory programs can be considered

HR 214: "Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011"

This bill would create a Congressional Office of Regulatory Analysis (CORA) to analyze new rules and would set up a sunset review provision for existing regulations.

Strengths:

- CORA would be a step toward independent Benefit-Cost Analysis (CBA)[85] of proposed rules and would require a more independent CBA to be provided to Congress for all proposed major rules
- sunset review groups rules by subject area across agencies to look for duplication
- places all significant rules under sunset review at once, overcoming public choice problem
- creates new position/officer in each agency who is responsible for review, which may help align incentives away from subversion

Weaknesses:

- initial review by CORA applies only to major rules
- CORA has no enforcement mechanism—it's just information for Congress
- CORA could be more useful if it performed CBA on legislation before its creation
- sunset review applies only to major rules and rules suggested for review (by the public or Congress)
- leaves sunset review in the hands of the agencies using same criteria as APA rulemaking procedures
- other rules may be suggested for initial and sunset review by members or the public, which may allow subversion by special interests
- unclear where resources for agency-led review would come from, but could not be accomplished with existing resources

[85] Benefit-cost analysis is a decision-making aid that uses a systematic way to examine a problem and assess the benefits and costs of multiple possible ways to solve the problem.

- unclear how OIRA could afford resources for this (OIRA would provide input into CORA's activities), especially for grouping rules or programs
- unclear whether non-significant rules can be considered in a group (for duplication, etc.)
- exemptions of independent federal bank regulatory agencies will prevent identification of duplication (especially in Dodd-Frank)
- judicial review is not changed from status quo, which means continued deference to agencies on their statutory interpretations

HR 309: "Regulatory Sunset and Review Act of 2013"

This bill would require sunset review of major rules and rules suggested for review by the public or Congress. Its test appears mostly identical to that of the sunset review section of HR 214 above.

Strengths:

- sunset review groups rules by subject area across agencies to look for duplication
- places all sign rules under sunset review at once, overcoming public choice problem
- creates new position/officer in each agency who is responsible for review, which may help align incentives away from subversion
- requires legislative recommendations if statutes prevent changes to rules

Weaknesses:

- leaves sunset review in the hands of the agencies using same criteria as APA rulemaking procedures, with same standards—but given current incentives, it is unlikely that anything would change
- other rules may be suggested for initial and sunset review by members or the public, which may allow subversion by special interests

- unclear where resources for agency-led review would come from, but could not be accomplished with existing resources
- unclear how OIRA could afford resources for this, especially for grouping
- unclear whether rulemakings to revise, consolidate, or eliminate rules can be conducted jointly or have to be done one at a time (i.e., for each CFR Part individually or for all in a group at once)
- unclear whether nonsignificant rules can be considered in a group (for duplication, etc.)
- exemptions of independent federal bank regulatory agencies will prevent identification of duplication (especially in Dodd-Frank)
- judicial review is not changed from status quo, which means agency deference

HR 3181: "Stop the Regulation Invasion Please Act of 2011"

This bill proposes a moratorium and perhaps a repeal of all regulations created since October 1, 1991.

Strengths:

- blanket repeal of all rules unless the rule can be defended
- flips the burden of proof, requiring agencies to defend the continued existence of rules

Weaknesses:

- no treatment for rules as groups that work together
- requires CBA from OMB within 90 days; likely only to get a repeat of RIAs and attempts to justify rules' existence
- exemptions and exceptions are so broad and vague that all of Dodd-Frank could continue to be implemented

HR 3392: "Regulatory Review Act of 2011"

This bill proposes periodic review of major rules—every 10 years.

Strengths:

- review of all major rules, without exemption
- requirement to analyze all viable alternatives, including repeal
- determinations of keep, amend, or repeal by agencies are to be based on CBA; required to pick most cost-effective option of accomplishing rule objective
- requires judicial review of determination by agency, which will limit agency ability to subvert analysis

Weaknesses:

- doesn't clearly define rules or allow rules to be analyzed as groups
- CBA still in agency hands, although judicial review helps
- review wouldn't be triggered until 10 years after enactment
- unclear where agency resources or OIRA resources for review would come from for their part in directing this
- unclear who defines "objective" of rule; probably the agency, which will be key to subversion

HR 6333: "Sunset Act of 2012"

This bill would require congressional approval to create any new rule. It also requires annual review of rules currently in effect.

Strengths:

- requires Congress to be responsible for its own actions (indirectly) by requiring approval for rule creation or approval for existing rule continuation
- default is that a rule cannot be created or continued without joint resolution of approval, putting burden of proof on agencies
- specifically prevents reissuance of the same rule if one is disapproved or discontinued
- limits ability of Congress to amend or debate approvals

Weaknesses:

- relies on information (CBAs) provided by agencies
- agency analysis/info is not subject to judicial review
- despite attempts to limit debate and amendments to joint resolutions of approval, there will likely be ample room for individual members to hold up individual rules—allowing special interests and pork-barrel politics in

Conclusion

Despite broad and bipartisan recognition that the accumulation of regulations in the United States likely has significant negative economic and possible risk consequences, the problem continues to grow. Every attempt by presidents to direct agencies to review their own regulations in order to eliminate nonfunctional regulations has yielded poor results. This likely stems from fundamental misalignment of incentives: agencies, despite direction from the president, have incentives to maintain and grow their regulations in order to maximize their budgets. In turn, in order to retain regulations that would be eliminated otherwise, agencies may either hide or fail to produce information that would help identify obsolete regulations in the first place. This paper

examined these and several other obstacles that must be overcome before retrospective review and elimination of nonfunctional regulations can be accomplished in the United States.

In contrast to the repeated failures of the United States to clean up regulations, the Dutch Administrative Burden Reduction Programme successfully eliminated 25 percent of the administrative costs imposed by regulations. We examined the Dutch Programme and another innovative program—the BRAC Commission in the United States—as models for how to overcome some of the obstacles heretofore preventing the cleanup of the stock of regulations in the United States.

The primary characteristics of the BRAC Commission's effort that overcame the obstacles to government reform were the following:

1. The BRAC Act set up an independent commission.
2. The commission was given a mission with clearly defined criteria.
3. Congress's ability to disapprove was limited to a joint resolution of disapproval. Barring that, the recommendations of the commission would be implemented.

Similarly, the Dutch Programme has some characteristics that helped overcome some of the obstacles preventing regulatory reform in the United States:

1. The Programme established an independent monitoring agency to monitor each agency's measurement and reduction processes.[86]
2. Agencies were given a clearly defined mission: eliminate 25 percent of administrative costs that stem from regulations by 2007.
3. The criteria used to evaluate regulations' administrative costs were also clear, simple, and transparent: the Standard Cost Model.

[86] Hall and Williams, "Process for Cleaning Up Federal Regulations," 7.

Based on our examination of the obstacles to successful regulatory cleanup and the models of successful government reform, we recommend the creation of an independent Regulatory Review Commission. The commission would be charged with evaluating regulations that cover predetermined, outcome-related topics, such as clean air or food safety, according to a simple and transparent model, such as the Standard Cost Model. The commission would have to suggest changes that would achieve some quantifiable threshold, such as a reduction of 25 percent of administrative burden. These changes would be presented to Congress, and by default the changes would become law unless Congress passed a joint resolution of disapproval. Finally, this process would be repeated for other outcome-related topics on an ongoing basis. After all, there is a process for creating regulations that continues in perpetuity, so it makes sense to have a corollary process for eliminating regulations that are no longer useful.

Appendix: Evaluating Regulatory Reform Proposals with Respect to the Obstacles to Regulatory Cleanup

Table 2 briefly assesses whether and how each of the bills and proposals discussed above addresses the obstacles to regulatory cleanup. For brevity, we have included a rating system that conveys to the reader our opinion about whether the proposal would help overcome the obstacle, maintain the status quo, or, in some cases, exacerbate the problem described by the obstacle.

Table 2. How Do the Bills Deal with the Obstacles to Regulatory Cleanup?

−1 = exacerbates problem described by the obstacle, **0** = maintains status quo,
+1 = may make marginal improvements, **+2** = likely to help overcome the obstacle

Obstacles	HR 309: Reg Sunset and Review Act	HR 3392: Reg Review Act	HR 214: CORA Creation and Sunset and Review Act	HR 3181: STRIP Act	HR 6333: Sunset Act	S 1309: Regulatory Improvement Act	Regulatory Review Commission (our proposal)
Decision-makers lack information to determine which regulations to eliminate or change	**+1** Little change with this bill—the information would still come from agencies, although the creation of a regulatory review officer in agencies may help improve the quality of agency-provided info.	**+2** Agencies would perform CBA on major regulations every 10 years, creating new info on reg performance. Agency info would be subject to judicial review, which should improve info quality.	**+1** CORA would provide new information to Congress on costs and benefits of proposed major rules. Presumably Congress could use that info to stop a rule under the CRA. There's little change in sunset review—the information would still come from agencies, although the creation of a regulatory review officer in agencies may help improve agency-provided info.	**0** CBA info to come from OMB (maybe OIRA?) within 90 days of act. Info is likely to be a repeat of agency analysis—meaning no new info.	**0** Congress might get more info because agencies have to prove that a rule needs to be made. Info still comes from agencies and is not subject to judicial review, so quality is questionable.	**+2** The independent commission established by this act would be tasked with gathering and producing information, including quantitative metrics, to determine which regulations to eliminate or change.	**+2** Similar to the RIA, the independent commission established in our proposal would be tasked with gathering and producing information, including quantitative metrics, to determine which regulations to eliminate or change.

Obstacles	HR 309: Reg Sunset and Review Act	HR 3392: Reg Review Act	HR 214: CORA Creation and Sunset and Review Act	HR 3181: STRIP Act	HR 6333: Sunset Act	S 1309: Regulatory Improvement Act	Regulatory Review Commission (our proposal)
Agencies are stakeholders with different objectives than citizens (recognizing the principal-agent problem)	**0** Unclear. Although the bill centralizes regulatory review under a Regulatory Review Officer, this person may not be inclined to reduce regulations within his or her own agency.	**0** No change with this bill—agency objectives aren't changed.	**+1** CORA objectives would be to provide info, but then Congress would have to act on it. This may lessen principle-agent problem perhaps, but only for new regs. For sunset review, creation of a regulatory review officer in agencies may change objectives somewhat, although it's not explicit.	**0** No change.	**0** No change.	**+2** The act seems to treat agencies as information providers, similar to other possible information providers, such as citizens, trade associations, and businesses.	**+2** Similar to the RIA, our proposal would treat agencies as information providers, similar to other possible information providers, such as citizens, trade associations, and businesses.
Agencies lack incentive to provide information on regulations; agency regulators rewarded for expanding regulations	**0** Creation of a regulatory review officer in agencies may change incentives somewhat, although it's not explicit. There's likely minimal change on info from agencies unless incentives change.	**+2** Agency info would be subject to judicial review, which should improve info quality. Agencies would still be rewarded for expanding regs, however.	**+1** CORA, if successfully independent, would have incentive to provide high-quality CBA info on new regs. For sunset review of old regs, creation of a regulatory review officer in agencies may change incentives somewhat, although it's not explicit. There's likely minimal change on info from agencies.	**0** Slight change with this act, perhaps because agencies must prove need for rules to Congress. Agencies would still be rewarded for expanding regs, however.	**0** Slight change with this act, perhaps because agencies must prove need for rules to Congress. Agencies would still be rewarded for expanding regs, however.	**0** While agencies would be required to provide information upon request to the commission, agency incentives do not change. Agencies would still be rewarded for expanding regs, however.	**0** Similar to the RIA, while agencies would be required to provide information upon request to the commission, agency incentives do not change. Agencies would still be rewarded for expanding regs, however.

Obstacles	HR 309: Reg Sunset and Review Act	HR 3392: Reg Review Act	HR 214: CORA Creation and Sunset and Review Act	HR 3181: STRIP Act	HR 6333: Sunset Act	S 1309: Regulatory Improvement Act	Regulatory Review Commission (our proposal)
Decision criteria can be subverted	**0** Agency remains responsible for producing its own CBA, which can be bent to its objectives. No judicial review to limit this or other independent review.	**+2** Agency CBA procedure would be to analyze alternatives and pick the best option. Judicial review applies, which limits ability to subvert analysis.	**0** Agency remains responsible for producing its own CBA, which can be bent to its objectives. No judicial review to limit this or other independent review.	**0** Unclear. It appears that OMB would be required to perform its own CBA, which could be subverted by executive branch.	**0** Agency remains responsible for producing its own CBA, which can be bent to its objectives. No judicial review to limit this or other independent review.	**+1** Act is similar to BRAC, except the proposal does not specify that simple and predetermined metrics or methodologies would necessarily follow. The independent commission would be given the mission of examining the effectiveness of regulations using "quantitative metrics, testimony from industry and agency experts, and research . . ." This limits how much the criteria can be subverted but does not eliminate the possibility.	**+2** Commission is similar to BRAC. Independent commission would be given the mission of examining the effectiveness of regulations using quantitative metrics, using a pre-established and simple methodology. The commission would also be required to address enough regulations to achieve some minimum reduction threshold (e.g., 25% reduction in compliance costs).
Public choice problem of "concentrated benefits and dispersed costs"	**+1** Act places all significant rules under review at once. Changes and elimination appear to require individual rulemakings, which could bring a return to the status quo.	**+2** Act requires review of all rules after 10 years have passed, without exemptions.	**−1** CORA exacerbates this problem. However, for sunset review, it places all significant rules under review at once. Changes and elimination appear to require individual rulemakings, which could bring a return to the status quo.	**+1** Act repeals all rules unless the rule can be defended. Act flips the burden of proof, requiring agencies to defend the continued existence of rules. Some members may dedicate themselves to defense of individual rules.	**−1** Each rule must be approved—making this problem worse.	**+2** Act would send all proposed changes and repeals to Congress for a simple up-or-down vote. However, it could be more effective if it followed the BRAC example and required a vote of disapproval to stop the proposed changes.	**+2** Commission would send all proposed changes and repeals to Congress, following the BRAC example and requiring a vote of disapproval to stop the proposed changes.

Obstacles	HR 309: Reg Sunset and Review Act	HR 3392: Reg Review Act	HR 214: CORA Creation and Sunset and Review Act	HR 3181: STRIP Act	HR 6333: Sunset Act	S 1309: Regulatory Improvement Act	Regulatory Review Commission (our proposal)
Statutes may make it difficult for agencies to eliminate regulations	**0** Unclear. It appears a decision to eliminate a rule could still be countered by statutory requirements.	**0** Unclear.	**+2** Act explicitly states that if legislation stops a change or elimination, the agency should recommend changes to the legislation.	**0** Unclear.	**+1** Act requires congressional approval for new rules or continuation of existing rules, so presumably Congress could simultaneously change statutes, if necessary.	**0** It is unclear what agencies would do when required by the commission to eliminate an ineffective regulation that was required by another act of Congress. Would they just recreate the rule?	**0** It is unclear what agencies would do when required by the commission to eliminate an ineffective regulation that was required by another act of Congress. Would they just recreate the rule?
Horse-trading/ logrolling and special interests' influence may occur, regardless of decision criteria	**+1** Decision rule for review is "major," which limits the possibility of horse-trading. However, provisions for the public or Congress to recommend regs for review could exacerbate the problem.	**+1** Regulatory review is required for all major rules, without exemptions. Influence could happen in agency CBA.	**0** CORA review of new, major rules may be more independent and less susceptible to influence initially, but closeness to Congress may lead to horse-trading/congressional influence. For sunset review, decision rule for review is "major," which limits the possibility of horse-trading. However, provisions for the public or Congress to recommend regs for review could exacerbate the problem.	**0** OMB would produce CBAs; act may be highly susceptible to special interests or executive influence unless specifically walled off.	**0** Despite attempts to limit debate and amendments to joint resolutions of approval, there will likely be ample room for individual members to hold up individual rules—allowing special interests and pork-barrel politics in.	**+2** The independence of the commission coupled with only an up-or-down vote, without amendments, on the complete package of proposed changes or repeals minimizes this possibility, unless special interests can influence individual commissioners.	**+2** The independence of the commission coupled with the default acceptance of the committee's recommendations, without amendments, on the complete package of proposed changes or repeals minimizes this possibility, unless special interests can influence individual commissioners.