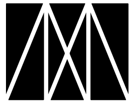

POLICY BRIEF

Regulatory Review Commission + Regulatory Budget = A Diet for Better, More Effective Regulations

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All regulations, however well intended, create unintended consequences. Regulatory accumulation (that is, the buildup of rules over time) leads to slower economic growth and fewer small businesses, and it deepens wealth inequality as the burden of regulatory accumulation is disproportionately borne by low-income households. Furthermore, organizational and political incentives inherent to bureaucracies lead regulators to tirelessly create new rules while paying little attention to past regulations that are outdated, overlapping, or simply ineffective—not to mention that they rarely address the general growing mass of regulations. Addressing this excessive regulatory accumulation by identifying and removing costly regulations as well as limiting regulatory growth to only the most beneficial regulations would be a significant step in managing the social costs of regulations.

Excessive regulatory accumulation has long been a concern of policymakers, and over the past 40 years, many presidents and members of Congress have taken steps to address this issue. The current administration, for example, has issued multiple executive orders describing a new mandate that executive regulatory agencies must identify two regulations for elimination each time they propose a new regulation. Every recent president beginning with Carter issued or reaffirmed executive orders that set requirements for regulatory agencies in an attempt to avoid poorly designed and excessive regulations. Similarly, Congress began taking steps to address overregulation with the Airline Deregulation Act of 1978, the Staggers Rail Act of 1980, and the Motor Carrier Act of 1980. Congress has since introduced many bills designed to combat regulatory accumulation more broadly. Each of these attempts had a laudable goal, but none have had (or would have had, if they had been passed by Congress) the effect of reducing and limiting the long-term accumulation of regulations.

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This is because each attempt focused only on reducing the regulatory code or only on limiting the growth of regulations. However, neither is sufficient on its own if the goal is a long-term reduction in the size of the regulatory code. A crash diet alone is never enough to lose weight if just as quickly old eating habits set back in. Gradual lifestyle changes are also ineffective on their own when a drastic weight reduction is necessary at the outset. Long-term weight loss demands both: diet and discipline. Similarly, in order to reduce the burdens of regulations now and in the future, a proper regime must include both a drastic reduction of the regulatory bloat and a formal mechanism to limit the growth of the regulatory code. One way to accomplish this would be for Congress to combine two promising proposals, each intended to achieve one of these goals: a regulatory review commission—modeled after the Base Realignment and Closure (BRAC) Commission—and a regulatory budget. The former would reduce the regulatory code while the latter would limit its growth. Together, these approaches would give Congress the information, incentives, and capacity to address existing costly regulations and regulatory accumulation more broadly, as well as improve future legislation and control the growth of new regulations. And they will accomplish this without putting Congress in charge of approving, creating, modifying, or eliminating any individual regulations. This policy brief describes the problems associated with regulatory accumulation, then briefly describes these two approaches and how Congress can use them together to take more control over the regulatory process and improve both legislation and regulation.

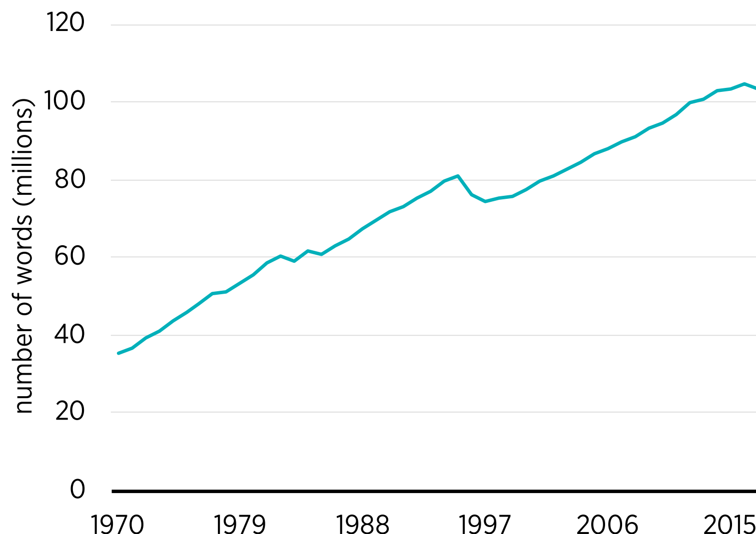
REGULATORY ACCUMULATION: THE EFFECTS AND CAUSES

Why Does Regulatory Accumulation Matter?

At the time of this writing, the *Code of Federal Regulations* (CFR)—the dense legal text containing the existing stock of federal regulations in the United States—stands at more than 100 million words. Reading the current CFR as a full-time job would take the average reader (reading at 300 words per minute) about three years and 107 days to read. The CFR was not always this large. In fact, the CFR is more than 2.5 times the size that it was in 1970, and the growth over the past 50 years has been relatively steady (with the exception of a few very brief reductions in size). Figure 1 shows this growth. The available evidence on state regulations (though it is limited) appears to tell a similar story of steady regulatory growth.

The total cost of these regulations is likely greater than the sum of the projected costs of each regulation analyzed individually. This is because the size of the regulatory code makes compliance quite complex. Few individuals or businesses have the wherewithal to identify and understand all the regulations they must comply with on a daily basis. Furthermore, the rarity of retrospective analysis and modifications to existing regulations means that many regulations are likely to be duplicative, obsolete, or conflicting. Many researchers have examined the effects of this persistent regulatory growth empirically. In a 2016 paper, Bentley Coffey, Patrick McLaughlin, and Pietro Peretto estimated that regulatory growth between 1980 and 2012 reduced GDP growth by about

Figure 1. Number of Words in the *Code of Federal Regulations*, 1970–2016



Source: Patrick A. McLaughlin and Oliver Sherouse, RegData 3.1 Annual (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, accessed October 2019.

0.8 percentage points per year. This means that if the regulatory code had not grown in size after 1980, the 2012 US economy could have been as much as $4 trillion larger.[1]

Beyond the effect of stymieing economic growth, researchers have also shown that regulatory accumulation has disproportionately high costs for low-income households and small businesses.[2] For example, basic necessities such as utilities, food, and healthcare have been subjected to greater regulatory accumulation than most other goods, which raises the prices of these necessities relative to other goods. Since low-income families spend a greater portion of their income on these necessities, the cost of this regulatory accumulation is likely regressive (people with lower incomes spend a greater percentage of their income on regulatory costs).[3] Regulatory accumulation can also contribute to income inequality as wage growth shifts from low-income workers to compliance-related workers such as managers, lawyers, and accountants.[4] Similarly, research shows that regulatory accumulation disproportionately burdens small businesses and that this burden grows at an increasing rate as regulations accumulate (i.e., the negative effect of each new regulation grows larger as the stock of regulations grows larger).[5]

What Causes Regulatory Accumulation?

Congress puts legislation on the fast track when it needs to respond to a crisis, and indeed legislation often addresses existing (or perceived) urgent national problems by delegating authority to experts in regulatory agencies. Congress has limited time to work out the details of regulation, and few (if any) members of Congress have the expertise to design effective regulations in any issue

area. However, Congress has little incentive to modify or undo ineffective legislation for a couple of reasons. First, legislation granting agencies new authority projects the image of legislative action (the public image of doing something), while removing authority lacks that quality. Second, and perhaps more importantly, once regulations are in effect, special interests that benefit from the new rules will form and oppose any attempts to overturn those regulations (this occurs even when the intention was not to benefit any particular group). This is because regulations typically create concentrated benefits, which accrue to a small group of existing or soon-to-be special interests, and dispersed costs, which are often spread out across entire industries or populations. Thus, those protecting individual regulations are often well organized, while those opposing individual regulations are often not.

Furthermore, Congress typically lacks the information necessary to determine whether legislation and the subsequent regulations that legislation authorized were successful. Just as it takes expertise to design regulations and forecast their likely outcomes, it takes expertise to evaluate how effectively a regulation accomplished its goal and identify any unintended consequences that may outweigh the benefits. Without this information, members of Congress are likely to assume that regulations are about as effective as those members expected them to be at the outset. Since members of Congress passed the authorizing legislation, removing or modifying regulatory authority is unlikely unless members of Congress change their minds or are replaced by new members who have different opinions. But even then, those members of Congress (or their replacements) will likely run up against the special interests just discussed.

The incentives at regulatory agencies differ from those in Congress, but they have a similar effect for a number of reasons. First, the incentives within agencies are often based on effectiveness at rulemaking with emphasis on quantity of rules introduced rather than their quality. This leads to more regulations than are optimal and little effort within agencies to review existing regulations.[6] Even setting aside the issue of incentives, agency staff who self-select into a particular agency probably have a skewed vision of the importance of that agency's mission and the necessity of regulatory protections in that agency's area of focus.[7] Many recent presidents have taken steps to address these incentives by writing retrospective review clauses into executive orders. However, these clauses typically contain weak language (to avoid overreaching and being challenged in court) and lead to few actual analyses of existing regulations.

One exception to this rule is the Trump administration's Executive Order 13771, which requires agencies to identify old regulations for elimination when proposing new regulations that meet specific criteria. This executive order led to a sudden shift in agency incentives, but it still misses the mark. First and foremost, the president lacks the power to make changes that are likely to lead to a long-term shift in agency incentives. This is because many regulations are required by legislation, and agencies cannot eliminate these regulations without Congress overriding current statute. Presidential executive orders can also be overturned by a new president, so any incentive

for agencies to review their old regulations created by this executive order will only last as long as the president (current or future) allows. A second reason that this order is unlikely to have major effects on agency incentives is that agencies are only required to offset "significant" regulations.[8] Although these tend to be the largest rules in terms of economic impact, they are only a small subset of all new regulations (about 8 percent of new rules in recent years).[9] Aside from pressures within agencies to adhere to the administration's preferences, there is no new limitation on the majority of agency activity.

Policymakers at the state level have also taken steps to address regulatory accumulation. For example, Virginia passed legislation requiring two agencies—the Department of Criminal Justice Services and the Department of Professional and Occupational Regulation—to reduce discretionary requirements in the regulatory code by 25 percent in the next three years. This legislation also requires all executive agencies subject to the state Administrative Process Act to produce a baseline count of all of their regulations. It remains to be seen whether Virginia will extend the reduction requirements to these other agencies as well, but merely counting up requirements may begin to improve agency culture.[10] Though these efforts are still nascent, it appears Virginia legislators have an eye toward addressing both the size and the growth of the regulatory code. Other states are beginning to enact regulatory reforms as well, though few are as ambitious as Virginia's. In order to have long-term positive effects, these policymakers will need to ensure that any reforms intended to address regulatory accumulation address both the size of the regulatory code and the underlying causes of regulatory growth. The remainder of this paper will present one way for state or federal governments to achieve this.

REDUCING REGULATORY BURDEN WITH A REGULATORY REVIEW COMMISSION

The BRAC Commission

In the late 1980s, Congress created the Base Realignment and Closure (BRAC) Commission to address a problem similar to the problem of special interests described above. As the Cold War drew to a close, the United States had far more military bases than were still necessary, but these bases remained a costly burden, and Congress was facing a deficit crisis.[11] Members of Congress agreed that many of them should be closed, but they were unable to decide which ones. Base closure in a member of Congress's district meant lost jobs and negative effects on the local economy, not to mention an angry constituency. As Jerry Brito explains, "Every base community became an interest group keenly focused on protecting its rents."[12] Congress solved this problem by establishing a BRAC Commission of independent experts that would determine which bases to shut down according to their military value, and Congress agreed to abide by whatever decisions the commission made. The only way Congress could stop the base closures was to pass a joint resolution of disapproval. In fact, this gave members of Congress representing the chosen bases the opportunity to save face with their constituency by proposing, arguing for, and voting for a joint

resolution of disapproval. The results speak for themselves: after no major base closures between 1977 and 1988, the first BRAC Commission led to the closure or realignment of 11 major bases (along with 80 smaller installations).[13]

The Regulatory Review Commission

Similar to the way Congress created the BRAC Commission to address a glut of military bases when special interests opposed the closure of any individual base, Congress could create a Regulatory Review Commission to address a glut of regulations when special interests oppose the elimination of any individual regulation. As we will show, this type of commission will also alleviate agency incentive issues that lead to few eliminations or modifications of existing regulations. Patrick McLaughlin and Richard Williams explain how this might work in great detail.[14] Here, we will restrict ourselves to a broad outline of important principles.

Once Congress passed legislation creating the Regulatory Review Commission, predetermined members of Congress (from both parties) and the president would appoint independent members to the commission. The commission would then determine broad regulatory areas for review (e.g., workplace safety) and create expert committees for each area. The expert committees would evaluate all regulations in their regulatory areas based on standard methods of assessment, focusing on achievement of outcomes, costs incurred, continued necessity of the rule, and costs of modification or elimination (including components of the regulatory process, such as notice and comment, where relevant). The committees should also look for regulations that are duplicative or contradictory.

The committees would recommend that each rule be kept, eliminated, or modified. If a rule is to be modified, the relevant committee would provide an explanation of why and how the rule needs to be modified, including specific parameters for the regulatory agency. For example, a committee may specify that "this regulation should be restricted to businesses of a minimum size to be determined by the agency, but of a size no smaller than 500 employees." Congress may also include a requirement that the final list meet some threshold, such as eliminating the administrative burden by at least 20 percent or reducing regulatory restrictions by one-third. This type of requirement would create an incentive for the committees to prioritize regulations with the highest net costs or the most restrictions, thus helping to alleviate many of the growing problems of regulatory accumulation. It also would allow Congress to determine the minimum degree to which regulatory accumulation needs to be reduced.

After a predetermined period of time, the commission would present a list to Congress of rules to be eliminated or modified. This list should be long and broad enough to overcome special-interest or constituency issues. Congress must then accept all recommendations given by the commission or reject them all by a joint resolution of disapproval. If no resolution were passed, then the

regulations identified for elimination would be removed from the CFR, and those identified for modification would be sent to the respective agencies so that they could proceed through the normal regulatory process to modify the regulations. During the regulatory process, the agency could determine that modification will not be effective and choose instead to eliminate a regulation. However, the agency would not be able to leave the current regulation in place if the commission recommended modification. This approach would take the responsibility of reviewing and eliminating ineffective, outdated, or overly burdensome regulations out of the hands of those who designed the regulations, and it would reduce the special-interest politics that often hinder the ability of Congress to eliminate specific regulations or programs.

Curbing Regulatory Growth with Regulatory Budgeting

While the Regulatory Review Commission may be effective in shrinking regulatory bloat, it would do little to control the pace at which new regulations are introduced. So far, there has been little change to the incentives of Congress to legislate and of agencies to regulate, and one should not expect regulatory growth to wane. Something is needed to keep the regulatory code from ballooning back to its previous size. One way that Congress can limit regulatory growth is through a regulatory budget. This section will briefly summarize two types of regulatory budgeting that could be adopted to limit regulatory growth: legislative impact accounting (LIA) and a regulatory requirements budget.[15] However, as Patrick McLaughlin describes in his 2016 testimony before the House Committee on the Budget, regulatory budgets can come in various forms and contain a mix of different elements.[16]

LIA would help give Congress the information and incentives to address regulatory growth. Using a process similar to the current budget process in Congress, LIA would create a feedback loop that gives Congress information about the costs of legislation and direct control over the costs of new regulations. Through LIA, Congress would set budgets for changes in regulatory agency costs (i.e., new costs of regulations minus cost savings from eliminations and modifications). For each new piece of proposed legislation, a bipartisan body either independent of Congress or housed within Congress (similar to the Congressional Budget Office) would produce a prospective analysis of the expected costs and benefits of the legislation, called a legislative impact assessment. Congress would need to provide sufficient clarity in the proposed legislation for the bipartisan body to be able to produce a realistic estimate that is of use to Congress. As this process iterates, both Congress and those producing the assessments should learn what is necessary to improve the quality of these assessments.

Once the assessment is complete, it would be presented to Congress before Congress voted on the bill. For each bill that was passed, prospective and retrospective analyses of the subsequent regulations would be produced, made public, and passed back to Congress to update prospective legislative impact assessments (it would be best if the retrospective analyses were produced by a body

independent of the regulating agency). Congress would then adjust agency cost budgets based on new information regarding the costs and benefits of the legislation and the subsequent regulations. This would allow Congress to make informed decisions about how much agencies should or should not be regulating based on the successes and failures of past regulations. It also would give Congress useful information that would allow it to eliminate or modify ineffective legislation and to design more effective legislation in the future by learning from its successes and failures.

The second approach mentioned, that of budgeting regulatory requirements, is modeled after a budget implemented in British Columbia in the early early years of the 21st century. In 2001, the British Columbia government set a target to reduce by one-third its total number of "regulatory requirements," which it defined as "an action or step that must be taken, or piece of information that must be provided in accordance with government legislation, regulation, policy or forms, in order to access services, carry out business or pursue legislated privileges."[17] Following its successful reduction in regulatory requirements, the government made consistent commitments to maintain its new level of regulations through a one-in, one-out regulatory requirement budget.

This regulatory reduction and subsequent regulatory budget helped British Columbia transition from the slowest-growing provincial economy in Canada to one of the fastest.[18] Moreover, it did so while preserving its high level of safety and environmental quality outcomes.[19] One of the likely reasons for the success of this regulatory reform effort is the use of a concrete and comprehensive definition of regulatory requirement. Not only did this include all requirements in regulations, but it included requirements in other locations such as legislation and interpretive policies. Similarly, the simplicity of counting requirements as opposed to estimating and balancing costs may have contributed to the degree of success in British Columbia. These basic elements of clarity, simplicity, and comprehensiveness may serve as a useful foundation for developing an effective regulatory budget.

CONCLUSION

Regulatory accumulation has substantial negative effects on the economy, on businesses, and on individuals. In many cases, those least equipped to deal with these burdens bear the greatest costs. Unfortunately, reversing the growth of regulatory accumulation and avoiding a quick return to a massive regulatory code is not as easy as flipping a switch. Both Congress and regulatory agencies face incentives that drive regulatory accumulation. Nevertheless, there is a path forward that will allow Congress to take the reins and get the regulatory code back on track; and it does so without putting Congress in charge of creating, modifying, or eliminating any regulations itself. By combining a Regulatory Review Commission and regulatory budgeting, Congress can reduce the existing burden of regulations and control the growth of new regulations. A return to a slim body often requires dropping the excess weight and making long-term lifestyle changes to keep it off. Likewise, health in America's regulatory apparatus will be brought about by trimming down the regulatory code and by disciplining the process by which new rules can be added.

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NOTES

1. Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, "The Cumulative Cost of Regulations" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2016).
2. For a summary of the studies highlighting these effects, see Dustin Chambers et al., "The Effect of Regulation on Low-Income Households" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, 2019).
3. Dustin Chambers, Courtney A. Collins, and Alan Krause, "How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulations," *Public Choice* 180, no. 1-2 (2019): 57–90.
4. James B. Bailey, Diana W. Thomas, and Joseph R. Anderson, "Regressive Effects of Regulation on Wages," *Public Choice* 180, no. 1-2 (2018): 91–103; Sean E. Mulholland, "Stratification by Regulation: Are Bootleggers and Baptists Biased?," *Public Choice* 180, no. 1-2 (2018): 105–30.
5. Dustin Chambers, Patrick A. McLaughlin, and Tyler Richards, "Regulation, Entrepreneurship, and Firm Size" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2018).
6. William A. Niskanen Jr., *Bureaucracy and Representative Government* (Piscataway, NJ: Transaction Publishers, 1971); Michael Mandel and Diana G. Carew, *Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform* (Washington, DC: Progressive Policy Institute, May 2013), 3–4.
7. Christopher DeMuth, "Can the Administrative State be Tamed?," *Journal of Legal Analysis* 8, no. 1 (2016): 121–90.
8. "Significant" regulations are those expected to have an impact of $100 million or more in a single year, raise novel legal issues, materially affect the government's budget, or create inconsistencies with regulations or other actions from other agencies.
9. James Broughel and Laura Jones, "Effective Regulatory Reform: What the United States Can Learn from British Columbia" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2018), 5–6.
10. James Broughel, "The Mighty Waves of Regulatory Reform: Regulatory Budgets and the Future of Cost-Benefit Analysis" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, June 2019).
11. Jerry Brito, "Running for Cover: The BRAC Commission as a Model for Federal Spending Reform," *Georgetown Journal of Law & Public Policy* 9, no. 131 (2011): 131–56.

12. Brito, "Running for Cover," 137.
13. Brito, 139.
14. Patrick A. McLaughlin and Richard Williams, "The Consequences of Regulatory Accumulation and a Proposed Solution" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, February 2014).
15. More detailed explanations of these types of regulatory budgets can be found in Jason J. Fichtner, Patrick A. McLaughlin, and Adam N. Michel, "Legislative Impact Accounting: Incorporating Prospective and Retrospective Review into a Regulatory Budget," *Public Budgeting and Finance* 38, no. 2 (2017): 40–60; Broughel and Jones, "Effective Regulatory Reform."
16. Patrick A. McLaughlin, "Regulatory Budgeting as a Solution to the Accumulation of Regulatory Errors" (Testimony before the House Committee on the Budget, Mercatus Center at George Mason University, Arlington, VA, July 7, 2016).
17. British Columbia Ministry of Small Business and Red Tape Reduction, *Regulatory Reform Policy*, June 2016.
18. James Broughel, "Can the United States Replicate the British Columbia Growth Model?," Mercatus Center at George Mason University, May 25, 2017.
19. Broughel and Jones, "Effective Regulatory Reform," 10.