The Center For
Regulatory Solutions

The Regulated State of the Union

"*The growing dominance of the federal government over the states has obscured more fundamental changes within the federal government itself: It is not just bigger, it is dangerously off kilter. Our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency."* – **George Washington University Law Professor Jonathan Turley, "The Rise of the Fourth Branch of Government," *The Washington Post*, May 24th, 2013**

I. Introduction

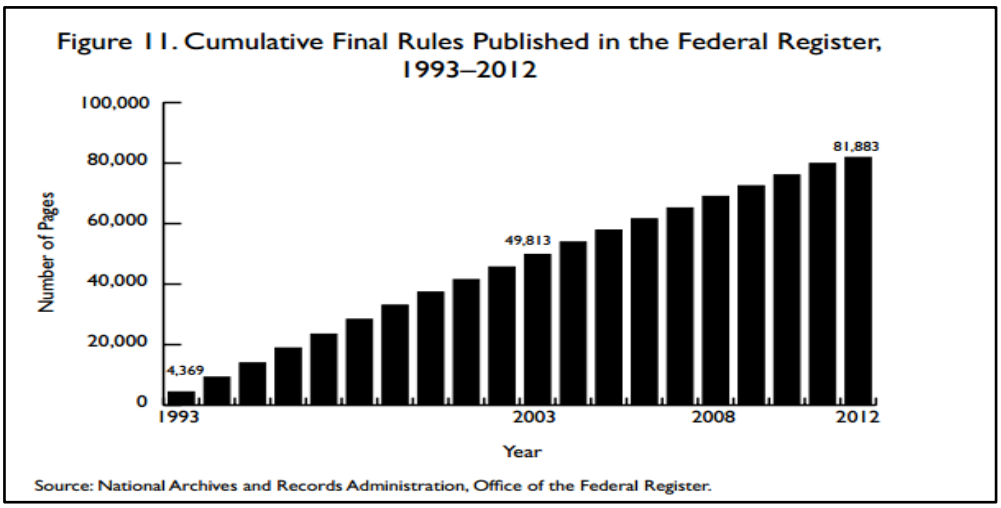
In his 'State of the Union' address, President Obama should speak to the public's concerns about the costs and burdens of overregulation, which prevent small businesses and entrepreneurs from creating new jobs, accessing capital, innovating, and competing in the global marketplace.

These concerns were conveyed in a recent poll conducted for the Center for Regulatory Solutions, which showed that an overwhelming majority of Independents, Democrats, and Republicans think policymakers should address how regulations affect businesses and their ability to create jobs and grow the economy.

Americans want policymakers and elected officials to take action. They believe, as the poll revealed, that regulations "*mostly hurt*" America's economy, competitiveness, workers, and small business owners.

Beyond the impact of excessive regulation, Americans also believe the regulatory process is opaque and unresponsive to their concerns. President Obama made transparency a top priority of his Administration ("My Administration is committed to creating an unprecedented level of openness in Government"), but his record has failed to match his promise. More than two out of three respondents in the poll have it right: *Regulations are crafted "in a closed, secretive process" by "out-of-touch people trying to push a political agenda*."

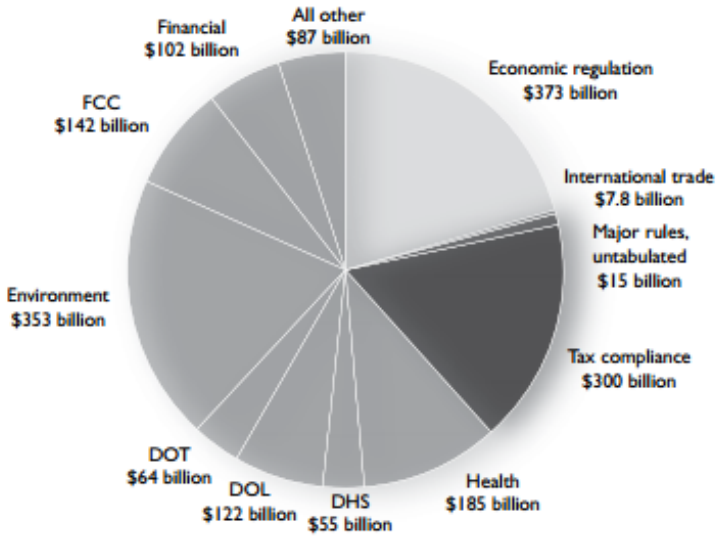
Americans have good reason to be concerned about the impact of regulations on the struggling economy. In the Obama Administration's regulatory agenda, over 4,000 new regulations are in the pipeline, and over 200 of them are "economically significant," meaning that they have an estimated impact on the economy of $100 million or more. Moreover, the Code of Federal Regulations now stands at 174,545 pages (and 238 volumes), compared to 22,877 pages in 1960. For perspective, economic historian Niall Ferguson found that in the past 10 years, "final rules" with the effect of law from administrative agencies have outnumbered laws passed by Congress 223:1.



This flood of rules and mandates comes with costs that diminish entrepreneurship and innovation. Consider: The number of unincorporated self-employed continued to decline in December. From a year earlier, the number of self-employed was down by 383,000. Compared to the high set in December 2006, *the number of unincorporated self-employed has fallen by more than 1.5 million*.

The macro-costs of regulation continue to rise, approaching the taxpayer dollars spent annually in the federal budget. According to Wayne Crews of the Competitive Enterprise Institute, the annual cost of regulation in 2012 reached $1.806 trillion. To put this in perspective, Crews observed that "estimated regulatory compliance costs exceed half the level of fiscal budget outlays, the first time in history we have witnessed this development."

Figure 1. Annual Cost of Federal Regulation 2012, $1.806 Trillion



Source: Wayne Crews, "Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway," Working Paper, Fall 2012 Edition. www.tenthousandcommandments.com.

In this report, the Center for Regulatory Solutions (CRS) provides an overview of its recent survey on regulation. We review the concerns of the American people about overregulation, and the harm they believe it causes to the U.S. economy and our small businesses. These concerns have been validated by non-partisan policy experts, including those with the Brookings Institution, the Administrative Conference of the United States, the World Bank, and even by former members of the Obama Administration.

II. The Poll, the Public, and the Experts

CRS poll: More than half (53%) believe that there are "*too many*" government regulations on businesses, compared to 19% who believe there are "not enough" and 25% who say the amount of regulations is about right. Just over half (51%) think that government regulations on businesses have been *increasing* over the past several years, with 16% believing that regulations have been decreasing and 31% thinking they've stayed about the same.

- Philip Wallach, a fellow in the Governance Studies program at the Brookings Institution, told Bloomberg News in December that 2014 is "***likely to be one of the biggest years for regulation in history…"***

- Heather Zichal, former energy and climate adviser to President Obama, indicated recently that the President would rely on a flood of executive orders to implement policy and regulations for the rest of his second term. "***Whether it's 129, 200, or 72, the number of executive actions is going to be robust***."

CRS Poll: 68% believe regulations are created by "out-of-touch people trying to push a political agenda" rather than by "well-intentioned people trying to address real challenges" (26%).

- According to a report by the Administrative Conference of the United States, an independent federal agency "dedicated to improving the regulatory process," the Obama Administration avoided finalizing controversial regulations to minimize political repercussions before the 2012 Presidential election. In "Improving the Timeliness of OIRA Regulatory Review," the ACUS reported:

  "Several of the senior agency employees indicated that [the Office of Information and Regulatory Affairs] reviews took longer in 2011 and 2012 because of concerns about the agencies issuing costly or controversial rules prior to the November 2012 election. The employees said their agencies were instructed that such rules were not to be issued unless deemed absolutely necessary (e.g., a judicial deadline) or if it could be shown they were not controversial (e.g., clear net benefits). They said those instructions were not in writing, but shortly after their agency's political leaders went to meetings with certain EOP officials, agency staff were told that all sensitive rules would have to be pre-approved by OIRA before being sent to OIRA for review."

CRS Poll: 72% believe that regulations are created "in a closed, secretive process" while just 21% say they are created in an "open, transparent process." Three-in-five (59%) disagree that they could easily find out about what regulations the federal government is considering.

- One example of the secretive nature of rulemakings is the process surrounding the Obama Administration's estimate of the "social cost of carbon," or SCC. This all-important estimate, crafted without public input by an interagency working group, enables EPA to claim (unjustifiably) that the benefits of its greenhouse gas regulations outweigh the costs. The Administration updated its SCC estimate last May and buried it in the technical support document of an obscure DOE efficiency rulemaking. As Susan Dudley, Brian Mannix, and Sofie Miller commented in *Regulation* magazine:

  "President Obama 'committed to creating an unprecedented level of openness in Government' and identified three principles to achieve that commitment: transparency (which 'promotes accountability by providing the public with information about what the Government is doing'), participation (which 'allows members of the public to contribute ideas and expertise'), and collaboration. By releasing the SCC as a final decision in 'technical support document' and incorporating it in a final rulemaking without the opportunity for public comment, <u>many objected that the administration not only disregarded those principles and undermined the president's commitment to open government, but violated the Administrative Procedure Act and established administrative policies</u>." [Emphasis added]

CRS Poll: Solid majorities believe that each of the individual areas listed below are "mostly hurt" rather than "mostly helped" by government regulations on businesses.

- America's economic competitiveness with the world (67% 'mostly hurt')
- Americans "like you" (66%)
- Entrepreneurs and small businesses (66%)
- American workers (66%)
- Employers (64%)
- Consumers (63%)
- American companies' ability to innovate (58%)
- The performance of the stock market (52%)
- The environment (52%)
- The economy (70%)

- According to the World Bank's report, "Doing Business 2014: Understanding Regulations for Small and Medium-Sized Businesses," in the past five years, the U.S. *hasn't taken significant measures to reduce the "complexity and cost of the regulatory process*. The only other countries on that list are Antigua, Barbuda, Bolivia, Eritrea, Iraq, Kiribati and the Federated States of Micronesia. Moreover, *the United States is behind countries like Portugal, Romania, Panama, Hungary and Belarus in measuring how easy it is to start a business*.

- The Index of Economic Freedom, edited by the Heritage Foundation and *The Wall Street Journal*, measures economic freedom in individual countries using ten different factors, including regulatory efficiency and the size of government. When President Obama took office in 2009, the U.S. was ranked the 6th freest economy in the world. *In the 2014 edition of the index, the U.S. fell to 12th place, suffering seven years of continuous decline in the rating. The report says the US is the only country to show such a prolonged decline.*

Heritage-WSJ Index of Economic Freedom

Top 10 Countries

RANK	COUNTRY	OVERALL	CHANGE
1	Hong Kong	90.1	0.8 ^
2	Singapore	89.4	1.4 ^
3	Australia	82.0	-0.6 v
4	Switzerland	81.6	0.6 ^
5	New Zealand	81.2	-0.2 v
6	Canada	80.2	0.8 ^
7	Chile	78.7	-0.3 v
8	Mauritius	76.5	-0.4 v
9	Ireland	76.2	0.5 ^
10	Denmark	76.1	0.0 —

III. Conclusion

In his State of the Union, President Obama could propose concrete measures to alleviate the economic and financial burdens of regulation besetting small businesses. Those burdens and uncertainty are undermining their ability to access and raise capital, create new jobs, and compete in the global marketplace. There are hundreds of measures he could take, including broad-based reforms to fix Obamacare and the regulatory process. Some specific actions he can support to improve transparency and accountability, while at the same time helping to strengthen the environment for economic growth and investment include:

- Revising the Administration's estimate of the social cost of carbon so that it relies on the most rigorous data and methods—including those prescribed by the White House Office of Management and Budget—to calculate regulatory benefits;

- Encouraging the Senate to pass S. 1923 (passed by the House as H.R. 2274, 422 to 0), a bill that would simplify and reduce regulatory costs associated with the sale and purchase of smaller privately held companies; and, in efforts to fix harmful provisions of Dodd-Frank, encourage the Senate to pass H.R. 1105, the Small Business Capital Access and Job Preservation Act (passed by the House, 254-159), which lifts redundant and burdensome regulations on private equity;

- Encouraging the Securities and Exchange Commission to modify proposed investment crowdfunding rules (Title III of the JOBS Act) so they produce a practical and cost-effective way for entrepreneurs to access capital, as intended by Congress;

- Supporting the EPA in reducing the renewable fuel standard. A reduction in the 2014 statutory volumes of renewable fuels will lower food and feed prices and not disrupt business vehicles. The mandate needs to be eliminated altogether.

- Encouraging the FCC and its new Chairman Tom Wheeler to pursue policy principles that shun proscriptive regulation. The Chairman should also move forward with market-driven spectrum auctions. Such actions would accelerate broadband deployment and drive investment in next generation networks, which will help entrepreneurs grow, adopt new technologies and develop their businesses from anywhere.

- Halting EPA's destructive greenhouse regulatory regime under the Clean Air Act to avoid raising electricity costs for all consumers, including small businesses:

- Calling on OSHA to adhere to its statutory obligations and seek small business community input on its proposed crystalline silica rule, which relies on very old data and outreach performed a decade ago.

As he considers policies for the remainder of his second term, President Obama would do well to heed the advice of Sen. Mark Warner (D-Va.): "If Washington expects to partner with the private sector to lead the effort toward economic recovery, we must address the regulatory uncertainty felt by many of our small and large businesses."

The President said a few weeks ago that "I have a pen and a phone," indicating he will circumvent Congress to achieve his goals. We have a different idea: *Work with Congress* to start reversing regulations that are smothering businesses with red tape, stifling innovation and new business formation, and imperiling America's economic standing in the world.

The Center For
Regulatory Solutions

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The Center for Regulatory Solutions is a project of the Small Business & Entrepreneurship Council, a nonprofit, nonpartisan advocacy, research and education organization that works to protect small business and promote entrepreneurship. **www.sbecouncil.org**