The Center For
Regulatory Solutions

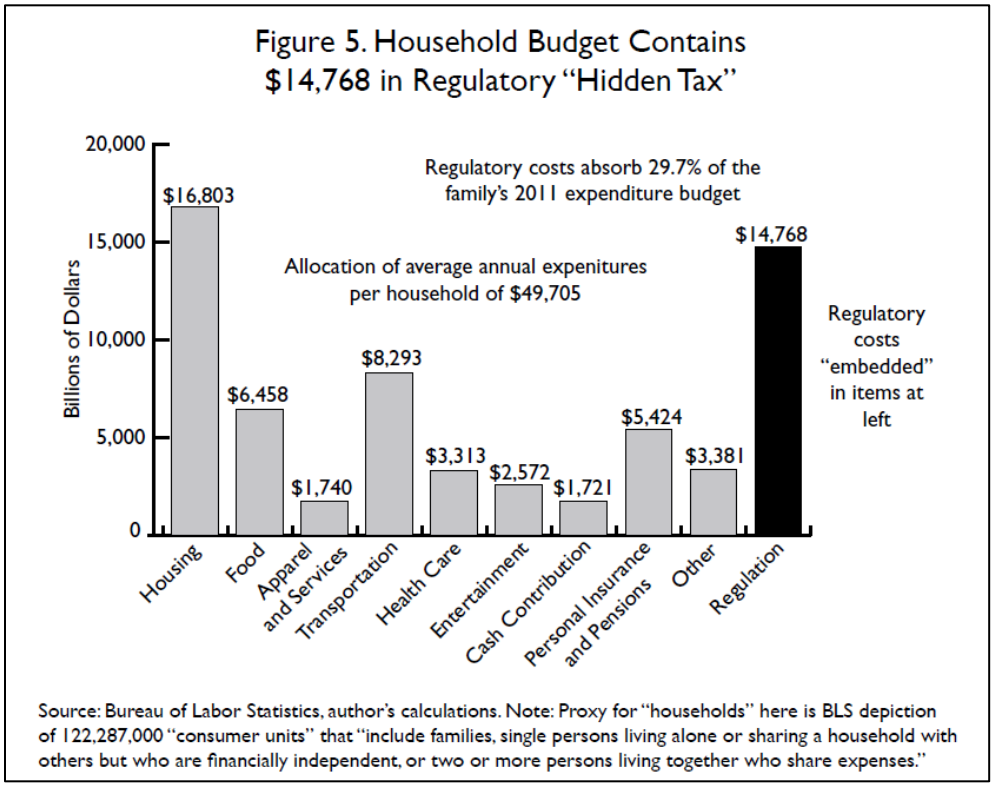
Regulating the Regulators: Enforcing Accountability in the Rulemaking Process

CRS White Paper Highlights Solution to Lessen Regulatory Burdens

The House of Representatives today will vote on H.R. 2122, the Regulatory Accountability Act (RAA). Accountability is needed now: There are over 4,000 rules in the regulatory pipeline. For small businesses and their workers, already burdened with the existing morass of federal rules and red tape, this is not good news.

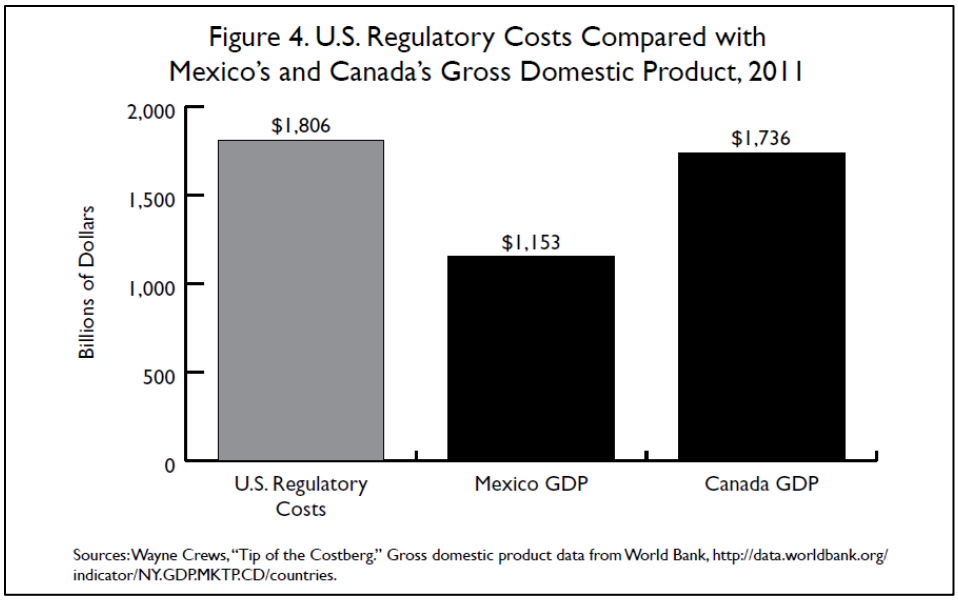
The Small Business Administration found that, for firms with fewer than 20 employees, regulatory compliance costs exceed $10,000 per employee. Expect those costs to go higher—and the economy, jobs, innovation, and the economic competitiveness of small firms and entrepreneurs to suffer—unless Senate Majority Leader Harry Reid (D-Nev.) and President Obama act with the House to make H.R. 2122 the law of the land.

According to Clyde Wayne Crews, Jr., author of the indispensable manual "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State," federal regulations now cost the economy $1.806 trillion annually. Crews found that "estimated regulatory compliance costs exceed half the level of fiscal budget outlays, the first time in history we have witnessed this development." For more granularity, consider that U.S. households, according to Crews, "'pay' $14,768 annually in regulatory hidden tax, 'absorbing' 23 percent of the average income of $63,685."



Source: Bureau of Labor Statistics, author's calculations. Note: Proxy for "households" here is BLS depiction of 122,287,000 "consumer units" that "include families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share expenses."

Whether you measure regulatory overreach by compliance costs or number of pages in the federal register (78,961 pages in 2012, compared to 4,369 in 1993), it's well past time to force regulators to consider the costs they impose on workers, and to require that the public has more opportunities to question the legal, technical, and scientific foundations of federal rules.



The APA and the RAA

The current regulatory burden is, according to the House Judiciary Committee, "largely the fruit of inadequate administrative law." Look no further than the Administrative Procedure Act (APA), dubbed the "constitution" of agency rulemaking. It's noteworthy that the APA hasn't been meaningfully amended since it became law in 1946.

Given the sheer volume of federal regulations, and the vast administrative bureaucracy that writes and enforces them, the APA is simply unsuited to the task of bringing accountability to rulemaking. House Judiciary Committee Chairman Bob Goodlatte (R-Va.) has suggested that the APA is not just outdated, or simply flawed, but that it actually "encourages regulatory overreach and excessive regulatory costs." As he explained in a hearing last year, the APA "places only a handful of light restrictions on the federal rulemaking process." What's more, Chairman Goodlate observed:

> *The APA does not require agencies to identify the costs of their regulations before they impose them. It does not require agencies to consider reasonable, lower-cost alternatives. The APA does not even require agencies to rely on the best reasonably obtainable evidence.*

No wonder, then, that agencies produce rules under Dodd-Frank, the Affordable Care Act, and the Clean Air Act that are not only costly, but confusing, contradictory, and in some cases completely ineffective.

The list of irrational rulemakings is endless. Chairman Goodlatte introduced H.R. 2122 last year to try and stop to them. According to the Judiciary Committee, the RAA:

- Requires agencies to choose the lowest cost rulemaking alternative that meets statutory objectives (while permitting costlier rules when needed to protect public health, safety, or welfare, if the added benefits justify the added costs)

- Improves agency fact-gathering, fact-finding and identification of regulatory alternatives

- Requires agencies to use the best reasonably obtainable science

- Provides on-the-record but streamlined administrative hearings in the highest-impact rulemakings—those that impose $1 billion or more in annual costs—so interested parties can subject critical evidence to cross-examination

- Requires advance notice of proposed major rulemakings to increase public input before costly agency positions are proposed and entrenched

- Fortifies judicial review of new agency regulations

As in our previous white paper, "Sue-and-Settle: Regulation without Representation," we examined specific rulemakings that could have been improved—i.e., promulgated with lower costs, using sound science and valid data, and ensuring greater public participation—had H.R. 2122 been passed by the Senate and signed into law by President Obama. Here are some examples:

The Volcker Rule: Finalized last December, the Volcker rule, named for former Federal Reserve Chairman Paul Volcker, prohibits banks from engaging in "proprietary trading," in an attempt to separate such trading for customers and shareholders. As economist Ray Keating of the Small Business and Entrepreneurship Council has written, the Volcker rule was "silly from the start…if one understands markets and the reality that shareholders only benefit in the end when the firm serves consumers well, how can various types of trading really be disentangled?"

- **Defect**: Despite the far-reaching, negative impacts of this rule, the Securities and Exchange Commission and four other agencies involved in writing it failed to conduct an economic analysis of the rule's cost. According to a dissent issued by SEC Commissioner Michael Piwowar on December 10, 2013:

  "The Rulemaking Agencies failed both at the proposing and adopting stages to prepare an economic or other regulatory analysis of the Volcker Rule. *As a result, we do not know what the rule's economic impact will be or whether other alternatives might have accomplished the goals of the rulemaking at a lower cost and with less disruption to the capital markets. This is simply irresponsible*…In fact, we should be all the more careful given that the Volcker Rule undoubtedly will have wide-ranging effects on the economy." [Emphasis added]

FCC Net Neutrality Rule: Consumers were spared when the DC Circuit in January vacated the FCC's controversial "net neutrality rule," which would have imposed a stranglehold over the Internet, stifling innovation and entrepreneurship. Harold Furchtgott-Roth, a former FCC Commissioner, described net neutrality this way:

> *For the better part of the decade, "network neutrality" has been the cause celebre of a small but vocal group of academics and consumer advocates. Bad things will happen on the Internet, or so the advocates claimed, unless the federal government steps into regulate information management on the internet. The FCC was only too eager to oblige.*

> *There was just one glaring factual problem: there was no visible harm on the Internet of the sort that the network neutrality rules were intended to cure. Consumers were not being injured in ways that the American public would rally around.*

But the DC Circuit's decision, issued on January 14, did not chasten FCC Chairman Tom Wheeler, who vowed last week to plow ahead with another iteration of net neutrality.

- **Defect**: One wonders if the FCC will plow ahead without conducting an economic analysis of its new rule, just as it did the first time around. As Furchtgott-Roth explained in testimony before the Judiciary Committee in 2011:

> *"Late last year, the FCC adopted new rules for network neutrality. The FCC provided no meaningful assessment of costs and benefits in the final rules, nor specific consideration of alternative forms of regulation including no regulation. The FCC has not helped its cause by failing to provide at various stages of the regulatory process clear statements about the assessment of benefits and costs of its network neutrality rules. Had the Commission presented to the public such an assessment of the costs and benefits of these rules, and had the Commission accepted and incorporated comments on such an assessment, the Commission would today be in a much stronger position to defend those rules."*

EPA's Utility MACT rule: In 2011, EPA promulgated the Utility MACT rule (also known as Mercury Air Toxics Standards, or MATS) for coal-fired power plants, one of the costliest rules in the agency's history. According to the American Coalition for Clean Coal Electricity, Utility MACT "requires existing and new coal-fired electric generating units to install emission controls for hazardous air pollutants by 2015, with limited time extensions available." NERA conducted an economic analysis and projected the cost of Utility MACT to be $10.4 billion in 2015. NERA also found *total compliance costs* of $94.8 billion; peak year job losses of 180,000 to 215,000 in 2015; and up to 23,000 megawatts of coal plant retirements by 2015.

- **Defect**: In its cost-benefit analysis of the rule, EPA found that the benefits from reducing mercury emissions—the stated purpose of the rule—fell in the range of ***$500,000 to a maximum* of *$6.1 million***. All this, again, for a rule that will cost nearly, at least by EPA's estimates, ***$11 billion annually***.

  So EPA pulled a regulatory rabbit out of a hat. It decided to include the "co-benefits" that result from reducing particulate matter (PM), the small particles that release into the ambient air from fossil-fuel combustion. Yet EPA regulates PM under several other provisions in the Clean Air Act, so it effectively double counted the PM benefits. Jeff Holmstead, former Assistant Administrator of EPA's Office of Air and Radiation, and now a partner at Bracewell and Giuliani, neatly summed up EPA's regulatory legerdemain in testimony before the Judiciary Committee in 2011:

> *Although mercury is the Agency's legal justification for the Utility MACT, EPA argues that it must also regulate non-mercury HAPs such as certain metals (e.g. nickel, selenium, etc.) emitted in trace amounts and acid gases (e.g. hydrogen chloride and hydrogen fluoride) that, according to EPA, do not pose a meaningful risk to public health. While some health risks from emissions of non-mercury HAPs are discussed in the proposed rule and the CBA (presumably implying health benefits from reducing such emissions), EPA does not make any attempt to evaluate the benefits that will be achieved by reducing these emissions. What is discussed at some length is that control technologies for non-mercury HAPs*

included in the proposed MACT standard result in reductions of emissions of PM2.5 and SO2. In fact, EPA's analysis admits that virtually all (i.e. 99+ percent) of the estimated $42 to $130 billion in annual benefits are due to reductions in PM 2.5.

Nowhere does EPA explain whether there is a less costly way to achieve these benefits, which is puzzling because Congress has created a whole separate program to regulate PM2.5 – and it is very different from the MACT approach that EPA is now proposing. Although EPA is aggressively implementing the program that Congress created to regulate PM2.5, this program is much more flexible than the MACT program and would be a much more cost-effective way of regulating PM2.5 from power plants.

Conclusion

After the House considers H.R. 2122, Senate Majority Leader Harry Reid (D-NV) should immediately call it up for a vote in the Senate. Of course we're not holding our breath. But thousands of small businesses and their employees, suffering under mountains of red tape and reduced opportunities to grow and expand their operations because of crushing regulatory compliance costs, deserve a vote.