Regulatory Approaches to Foster Economic Growth

U.S. House of Representatives
Committee on Appropriations
Subcommittee on Labor, Health and Human Services, Education and Related Agencies

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[*]The views expressed here are my own and not those of the American Action Forum. I thank Sam Batkins for his assistance. All errors remain my own.

Chairman Kingston, Ranking Member DeLauro, and Members of the Subcommittee, thank you for the opportunity to appear today. In this testimony, I would like to make three main points:

- Although the Department of Labor (DOL) is not the most active regulator, it has published 47 economically significant rules during the last ten years, with an estimated cost of $26.5 billion, and approximately 73.9 million paperwork burden hours.
- Legislative provisions to address certain regulations remain one of the few viable options for Congress. The Congressional Review Act (CRA) has been used successfully only once, and there are still regulations that members of both parties oppose.
- Regulatory reform is a local, national, and international priority, as many countries are reforming their administrative procedures. Presidents of both parties have tried to reform the regulatory state, but substantive reform requires input from the legislative branch.

Regulation in Perspective

Policymakers and analysts from across the ideological spectrum concede that they would like to make changes to the regulatory process. Reducing costs and paperwork burdens routinely receives the most legislative attention (Paperwork Reduction Act and the Unfunded Mandates Reform Act for example), and of course, costs do matter.

The American Action Forum (AAF) has compiled and analyzed more than 2,500 regulations, dating back to 1999. During the past four years, we found more than $520 billion in regulatory costs, based on estimates provided by the relevant agencies. During the past ten years, regulators have published more than $721 billion.

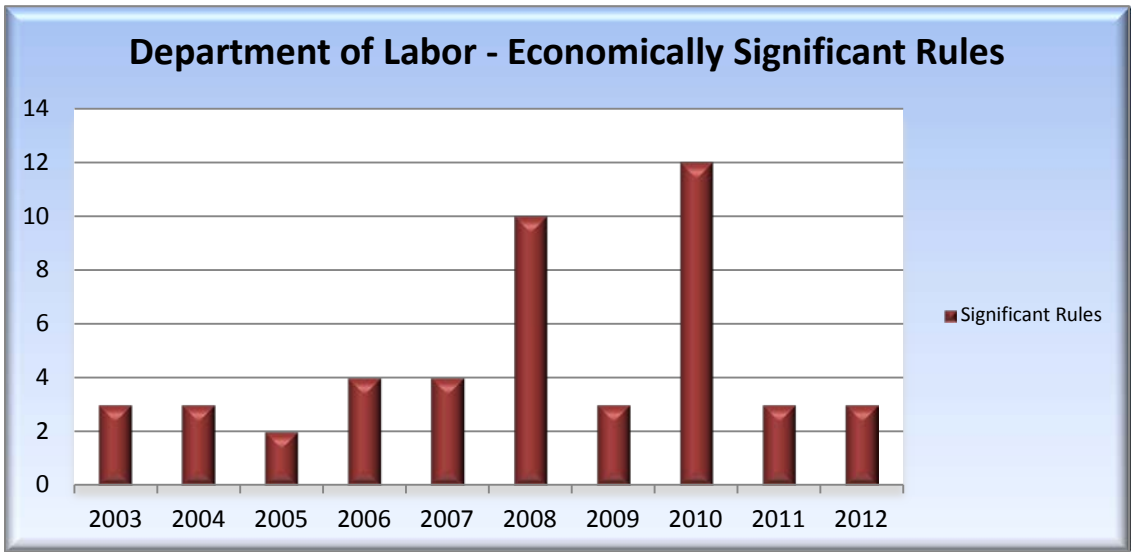
These are not trivial numbers, and they are certainly not without attendant benefits for workers, the environment, and consumers. However, there are countless instances of "significant economic" implications for small businesses attempting to comply with thousands of new rules each year.

Reforming this system is just as important as ensuring the health and safety of Americans. Too often, regulators publish rules and then leave them in place indefinitely, without reviewing their actual merits after implementation. Local governments and our international competitors constantly measure the effectiveness of regulatory programs, and both parties should endeavor to do no less on the federal level.

Labor Regulation

The Department of Labor and the National Labor Relations Board (NLRB) are generally not considered active regulatory agencies, at least as compared to Health and Human Services (HHS) and the Environmental Protection Agency. Currently, DOL has nine regulations under review at the Office of Information and Regulatory Affairs (OIRA), and NLRB, according to a recent court case, "readily acknowledges that it lacks 'roving investigatory powers' and instead traditionally functions as a reactive agency." However, DOL and NLRB can still affect the business environment, and are active players in the regulatory state.

The chart below details the number of economically significant DOL regulations OIRA cleared during the past ten years. The total alone is not spectacular, compared to other agencies, but there were large spikes in 2008 and 2010, years with significant regulatory activity.



President Obama attempted to address regulatory reform in Executive Order 13,563, designed to promote "economic growth, innovation, competitiveness, and job creation." There have been major cost reductions and reforms from some agencies, but the pace has been slow and many agencies have failed to turn their retrospective review plans into concrete regulatory language.

For example, according to AAF records, DOL has published four regulations in the Federal Register pursuant to EO 13,563. Although some costs were reduced, the net effect is actually higher burdens. Compare the four rules designed to improve the regulatory system from DOL during the past three years, with the final rules from the Department: 20. According to its retrospective review plan, DOL outlined 11 possible rules to reform regulations, and many affected businesses would like to see those proposals expedited.[1]

For NLRB, an agency not primarily tasked with regulating, the only evidence of review is the Board's May 23, 2011 letter.[2] The initial plan simply described procedures to allow NLRB "to periodically review its existing significant regulations and determine whether any such regulations should be modified, streamlined, expanded, or repealed." However, according to White House records, the Board has not submitted a final plan, and AAF has not recorded significant regulatory reform measures from NLRB published in the Federal Register.[3]

It is incumbent on the agencies to fulfill the spirit of the President's orders, and presently, the pace of review is slow. Budget and legal concerns certainly weigh on the ability of agencies to

[1] Agency Retrospective Review Plan Reports, available at http://1.usa.gov/YU4Mhn.
[2] National Labor Relations Board, NLRB Preliminary Plan to Review Significant Regulations, available at http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/NationalLaborRelationsBoardPreliminaryRegulatoryReformPlan.pdf.
[3] 21st Century Government: Campaign to Cut Waste, Regulation Reform, available at http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.

review and streamline their existing rules. HHS, for example, has already published billions of dollars in possible burden reductions. The Consumer Financial Protection Bureau (CFPB), while it has added burdens during its existence, recently reduced more than eight million hours of paperwork. Other agencies have taken the lead on reform, and businesses across the country seeking to hire and expand could benefit from more rational labor regulations.

Legislative Provisions to Control New Regulations

Presently, the legislative branch has few options for addressing regulations with which it has serious policy objections. Of the four options for reform: 1) appropriations provisions, 2) the Congressional Review Act, 3) individual legislation, and 4) lobbying OIRA, the appropriations route is the most practical.

The Congressional Review Act has been used successfully only once and is a blunt instrument to confront regulation. If Congress does act, the rule "may not be reissued in substantially the same form," a term that has generated substantial legal debate. If Congress uses the CRA to rescind a rule that is perceived as onerous, could an agency issue an "improved" version of the regulation that generates substantial benefits?

Individual legislation is an unlikely option, namely because few can contemplate a scenario where any president would sign a specific bill to rescind a regulation from his administration. The OIRA review process offers President Obama the ability to delay or "return" certain rules, and it is improbable OIRA would approve a rule, only to have the President rescind it through specific legislation.[4]

Lobbying OIRA exists as an option for Members of Congress and their staff to air concerns about certain regulations directly with White House staff. According to former OIRA Administrator Cass Sunstein, OIRA's doors are always open when a rule is under consideration. However, records reveal few instances when Members of Congress or their staff visited OIRA to discuss a specific regulation.

The only pragmatic option to control situations of regulatory overreach is an annual legislative provision, namely from the Appropriations Committee. These legislative measures have had some limited success in recent years. The evidence on costs reveals, if implemented, Congress could generate significant savings for businesses.

The table below details ten regulations from NLRB and DOL that this subcommittee could address. Combined, these ten regulations have generated more than $10.4 billion in costs, with 41.4 million paperwork burden hours. To put these hours in context, assuming that an average employee worked 2,000 hours a year, it would take 20,700 employees working full-time to comply with one year of these burden hours.

[4] OIRA Return Letters, available at http://reginfo.gov/public/do/eoReturnLetters.

Notable Labor Regulations

Rule	Cost (in millions $)	Paperwork Hours
Notification of Employee Rights	386	12,000,000
Hazard Communication	4,054	11,300,000
Investment Advice-Participants, Beneficiaries	5,100	8,805,000
Reasonable Contract: Section 408(b)(2)	404	4,932,000
Occupational Injury and Illness Prevention	13	3,355,105
Application of FLSA to Domestic Service	27	987,778
Temporary Employment of H-2B Aliens	14	26,151
FMLA Amendments	420	17,892
Persuader "Advice" Proposal	0.8	9,430
Definition of the Term "Fiduciary"	17	N/A
Totals: $10.4 Billion and 41.4 Million Burden Hours		

In addition, agencies themselves provided the cost estimates, and many do not capture the macroeconomic costs and benefits of implementation. For example, the NLRB's union notification requirement did not contain a Regulatory Impact Analysis (RIA), but it did contain an estimate of possible costs, in footnote 212. Obviously, recent court cases have put this rule on the sidelines, but the regulation is a case study on rules with limited regulatory analysis.

One rule on the list above, "Definition of 'Fiduciary,'" reported only $17 million in possible costs, although it is an "economically significant" rule. However, an Oliver Wyman report on the impact of the rule found 7.2 million IRAs could lose investment services, and more than 90 percent of IRA investors would be affected.[5] The broad impact of the rule is likely one reason why DOL informally withdrew the proposal, although it reappeared in the most recent Unified Agenda.

There are other reasons to prefer legislative provisions targeted at certain regulations. From 2002 to 2011, the federal government published more than 38,000 final rules, but Congress did not rescind any through the Congressional Review Act. This fact does not assume Members of Congress agreed with all 38,000 rules, only that there were few legislative vehicles available.

For example, in 2012 the administration published a rule requiring reporting of interest from nonresident aliens. The relatively innocuous-sounding proposal generated intense bipartisan objection. Every member of the Florida delegation, including Representative and current DNC Chair Debbie Wasserman Shultz, wrote the White House objecting to the rule. They wrote, "We ask that you withdraw this proposed regulation and send a clear message to existing and potential depositors that the U.S. encourages such deposits and believes America's best interest is served by maintaining current policy."

Despite the letter and significant bipartisan opposition to the rule, the administration finalized it, and the timeline for Congressional Review Act recourse has lapsed.

[5] Oliver Wyman, Assessment of the impact of the Department of Labor's proposed "fiduciary" definition rule on IRA consumers, available at http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf#page=1&zoom=146,0,797.

Finally, with so many rules issued each year, some regulations become the object of intense "rent seeking." The public policy problem of diffused costs with concentrated benefits is especially pervasive in the regulatory world. The FLSA exemption for domestic service and the recent biomass-based diesel rule are two examples.

The proposed FLSA exemption, the so-called "companionship" rule, would generate significant wage benefits for homecare employees, and some labor unions. SEIU, for example, urged supporters to contact Secretary Hilda Solis to finalize the regulation. These concentrated benefits for some (more than 500,000 SEIU homecare members), lead to diffused costs for many others.

The regulation even conceded it would generate deadweight losses (a rare admission for a RIA) and impose close to a million paperwork burden hours. Perhaps more troubling, the regulation admitted that it could "disemploy" more than 2,700 workers, the very employees the rule was designed to aid.

Concentrated benefits and diffused costs are not limited to the labor sphere alone. In EPA's biomass-based diesel rule, it increased the volume beyond the statutory baseline, leading to environmental "disbenefits" of $53 million, meaning more particulate matter, more sulfur dioxide, and higher levels of nitrogen oxides. The rule will also increase fuel prices by up to $381 million this year, and the overall renewable program will lead to a "$10 per person per year increase in food costs in the U.S." Who benefits? The rule will lead to $1.2 billion in additional revenue for the soybean industry, at the price of more pollution from an Environmental Protection Agency rule.[6]

Surely, many Members of Congress take their oversight role seriously, and using appropriate legislative tools to address burdensome rules should be a first step toward broader regulatory reform.

Economic Implications of Possible Regulation

During the past four years, the cumulative regulatory cost burden has increased by more than $520 billion. Put differently, the regulatory initiatives of the past several years have imposed a nearly half-trillion dollar tax on economic expansion. This has an unambiguously negative impact on economic growth. There are several perspectives from which to view this.

The first is to acknowledge that regulatory initiatives are not born in a vacuum; they instead stem from a desire to seek environmental, financial stability, social welfare, or other policy objectives. From this perspective, the regulatory costs reflect a decision to put these objectives above the goal of more rapid economic growth – a decision that is part of a fair debate over policy priorities.

Second, these regulatory initiatives can have a profound impact on U.S. competitiveness, namely for our manufacturing sector. In a report issued earlier this year, AAF identified at least $359

[6] Miller, Sofie, Crony Environmentalism, *Regulation Magazine* (forthcoming), available at http://www.cato.org/regulation.

billion in regulatory burdens imposed on manufacturers during the last ten years.[7] In addition, there were nearly 100 economically significant regulations issued during that time from EPA, and the Departments of Energy and Labor alone, chief regulators of the manufacturing sector. The recent Unified Agenda offers little hope for relief, as regulators have outlined an additional $9.2 billion in costs for manufacturers.

From another perspective, the regulatory initiative is of a scale comparable to the tax increases in the recently enacted "fiscal cliff". There has been deserved concern over the wisdom of a sharp tax increase in the midst of a recovery that has failed to attain even near-trend economic growth, but advocates have argued that the progressive nature of the tax increases provides income distributional gains that outweigh the negative growth consequences. It is harder to advocate for the regulatory burden that both harms growth and imposes the greatest economic burden on workers.

A Consensus on Reform

Every President since Jimmy Carter has signed an EO promoting fundamental regulatory reform. Perhaps that speaks to every president's unique view of the regulatory state, or that each preceding EO failed to achieve its objective. It is clear that states and other countries are moving forward with ambitious regulatory reform, and the U.S. has every reason to codify the best ideas that promote economic growth and protect Americans.

On the local level, Indiana recently passed legislation to measure costs and benefits of all significant regulations at the time of promulgation (Senate Enrolled Act No. 311).[8] With the exception of independent agencies, the U.S. currently attempts to measure the burdens and benefits of new rules but the Indiana legislation adds an important step: universal retrospective review.

In addition to measuring the possible outcomes of a regulation during promulgation, the Indiana method reviews the effects of a rule three years after implementation, and costs are not the only metric for review. Indiana examines the impact on consumer protection, worker safety, the environment, and business competitiveness. It then compares the benefit-cost analysis from three years of implementation to the original analysis.

Whether the issue is legislation or regulation, measuring the effectiveness of policy should be a hallmark of good governance. We have an informal version of the Indiana legislation in EO 13,563, but codifying these orders and applying them to independent agencies would ensure we are not simply implementing regulation and then ignoring possible adverse consequences.

On the international level, the United Kingdom has led the way on regulatory reform. Implementing its One-In, One-Out system; the government removes a previous regulation whenever it seeks to impose a new rule. To date, this system has saved more than $1.3 billion.

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[7] American Action Forum, The Intersection of Regulation and Manufacturing, available at http://americanactionforum.org/sites/default/files/AAF%20Regulation%20and%20Manufacturing.pdf.

[8] Indiana Senate Enrolled Act No. 311 (2012 Session), available at http://www.in.gov/legislative/bills/2012/SE/SE0311.1.html.

Implementing a true One-In, One-Out system in the U.S. would raise legal and political concerns, but there are more practical options that could control burdens and avoid a complex new system. For example, the federal government currently collects more than 9,100 forms under the Paperwork Reduction Act; combined these forms generate 81.6 billion responses from businesses and individuals, and impose more than 10.2 billion hours of paperwork.[9] To put this paperwork burden in perspective, it would take 5.1 million full-time employees working year-round to comply with the current federal red tape, to say nothing of state and local requirements.

One proposal, which AAF has advanced in the past, would implement a One-In, One-Out system for paperwork: the total number of forms, and the aggregate paperwork burden. Thus, if an agency sought to impose a new collection, it would have to remove an existing collection of an equal or greater burden, or merge requirements to achieve neutral growth.

This proposal has two beneficial aspects: 1) it addresses one of the root causes of many regulatory burdens: paperwork, and 2) does nothing to fundamentally undermine health and safety regulation. Agencies, including DOL, have proven that they can cut paperwork, aiding business. A neutral paperwork budget does not undermine the protections that Congress and agencies have codified in the past. In sum, it imposes few costs for society while truly managing red tape and protecting businesses and individuals from more paperwork.

Conclusion

Our regulatory system generates an incredible amount of new rules each year and Congress has few options to address certain burdensome rules. Using targeted legislative provisions can enhance Congress's oversight authority and reduce the impact of regulations that curtail the incentive to invest and hire.

[9] Office of Information and Regulatory Affairs (OIRA), Inventory of Currently Approved Information Collections, available at http://www.reginfo.gov/public/do/PRAReport?operation=11.