Research

Can a Regulatory Budget Trim Red Tape?

SAM BATKINS | AUGUST 19, 2013

Today, regulatory reform advocates are in two camps: those on the center-right who favor more rigorous cost-benefit analyses, and those on the center-left who want fewer restrictions on agency actions and a faster regulatory process. For more than a generation, both sides have been locked in an intractable battle over the regulatory state.

However, there is perhaps one area where both camps can agree: transparency. The right argues that few agencies actually account for the benefits and costs of regulation, and when they do, agencies have the incentive to minimize costs and maximize benefits. The left argues costs are often overstated, and that the rigid calculus of cost-benefit analysis is flawed.

There is no silver bullet that will cause millions of minds to change and forty years of academic literature to disappear. A carefully crafted regulatory budget, however, that publishes a comprehensive accounting of agencies' costs and benefits, and measures regulatory effectiveness, could at least provide the public with an analysis of the nation's priorities and an informed perspective on the overall condition of the regulatory state.

History of Regulatory Budget Ideas

The idea of a regulatory budget, in one form or another, has been around since at least the 1970s. Robert Crandall of the Brookings Institution mentioned a "shadow budget," to parallel the fiscal budget. A year later, Senator Lloyd Bentsen delivered his idea on the Senate floor: "A regulatory budget would put an annual cap on the compliance costs each agency could impose on the private sector through its rules and regulations."

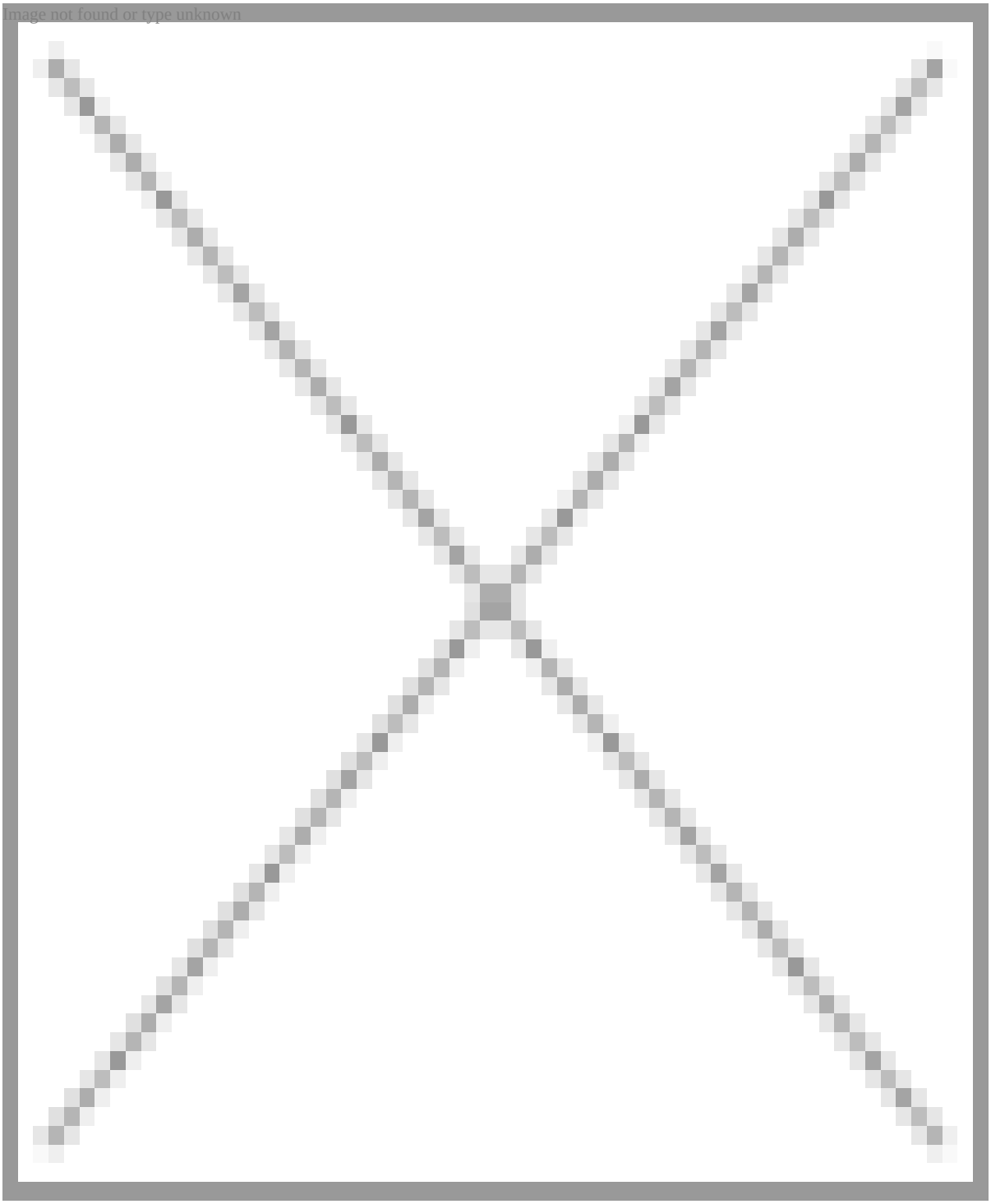
In 1980, just months before he would take the reins at the Office of Information and Regulatory Affairs (OIRA), Christopher DeMuth outlined the possible implementation, and drawbacks, of a budget for regulation. "Each year (or at some longer interval), the federal government would establish an upper limit on the costs of its regulatory activities to the economy and would apportion this sum among the individual regulatory agencies."

The regulatory budget found its way into legislative language in 1993, with Senator Orrin Hatch's "Regulatory Accountability Act." This proposal essentially mandated that for every new regulatory action, agencies should revoke or revise previous regulations to fully offset the cost of new rules. The United Kingdom adopted this practice recently, saving their nation more than $1.3 billion, according to initial government estimates.

Wayne Crews of the Competitive Enterprise Institute further popularized the idea in the 1990s, noting that the "Contract with America" introduced the idea again in 1994, but it withered behind other legislative priorities.

Form of a Regulatory Budget

Throughout its forty-year existence, scholars and politicians have embraced the theory of a budget for regulation, but its implementation has remained elusive. Here are three steps to establishing a regulatory budget in the U.S. that balance the need for regulatory transparency with the demands for protecting public health and safety.



1. Broad Retrospective Review of Agency Rules with Input from Regulated Industries

This idea already has legal footing in President Obama's 2011 Executive Order (13,563). In addition, later directives and OIRA memos have encouraged agencies to account for cumulative regulatory burdens. The problem, as scholars have noted, is how to construct these cumulative retrospective reviews.

There are more than 174,000 pages in the Code of Federal Regulations (CFR) and every year the Federal Register contains 70,000 to 80,000 additional pages of regulation. The very foundation of a regulatory budget should rest in a full accounting of current regulations.

Ideally, after a retrospective review, each agency would publish an accounting of its current regulations, and their costs and benefits. Cataloguing benefits is somewhat controversial, as they are typically more difficult to quantify and monetize. Nevertheless, for an original retrospective review, the government should understand which regulatory programs are earning the biggest returns for public health, and which are imposing the largest cost burdens.

Acquiring this retrospective information is no easy task. For example, the American Action Forum has spent the last two years tracking more than 2,700 rulemakings, and that is still a fraction of the cumulative regulatory picture. However, here are a few steps to make agency implementation of retrospective reviews feasible:

a. Crowdsourcing:

Agencies will not be able to account for every aspect of direct and indirect costs without the aid of industries they currently regulate. Although there is a strong incentive for these industries to overstate costs, mirroring the requirements of SEC's Regulation S-K is a possible model; S-K generally requires publicly held corporations to estimate their compliance costs.

b. Work with previous cost estimates:

For decades, agencies have filed Regulatory Impact Analyses (RIAs) for major rulemakings. Reviewing all 170,000 pages of the CFR is a nearly impossible task, but comparing previous RIAs with actual costs and benefits should be a start. South Korea has already reviewed more than 11,000 rules, cutting half of them, and reforming 2,400 other regulations. U.S. competitors seem to be able to review their regulatory slate, and as long as agencies and OIRA have the proper time and resources, the U.S. has every reason to emulate international regulatory reform efforts.

c. Find an independent arbiter of costs and benefits:

If there has been one sticking point in the debate over a regulatory budget, it is the issue of who ought to control the process. Agencies will want to understate costs; business will seek to overstate them, and the White House will want to manage the process to protect its own policy objectives. One option, which several former OIRA Administrators have floated, would establish a separate, independent agency for regulatory analysis. These functions could be vested in an expanded CBO; a more novel idea would take economists from agencies themselves and house them in a new department, ideally, divorced from political pressure.

Political independence is important because several Inspectors General reports have detailed how policy teams routinely pressure economic analysts at agencies to tweak cost-benefit analyses. If politics corrupts the very process of retrospective review, it will not succeed.

2. Emulating the United Kingdom's One-in, One-Out Approach to New Regulations

In the United Kingdom, "for any direct net cost imposed on business and civil society organizations (IN), departments must identify and remove existing regulations with an equivalent value (OUT)." Senator Mark Warner (VA) floated the idea in a *Washington Post* op-ed, but he has yet to introduce any legislative language. Implementing a one-in, one-out approach in the U.S. is obviously fraught with political and legal obstacles.

For instance, if a one-in, one-out system applies toward Dodd-Frank implementation, what does an agency rescind? Does the agency remove Securities Act rules or Sarbanes-Oxley regulations? Any new regulatory budget would of course have to substantially amend the Administrative Procedure Act (APA). This would require not only a presidential directive, but also an act of Congress to amend the generations-old APA.

There are ways to implement this one-in, one-out system within a regulatory budget that actually resembles a fiscal budget. Agencies could begin to think about budgeting in terms of baskets, or mandatory and discretionary controls. One of the biggest obstacles to regulatory budgeting is new statutory and judicial deadlines imposed on regulators. For example, Dodd-Frank imposes some 400 new regulations.

Statutory and judicial directives represent mandatory regulations. In the current Unified Agenda, roughly 14 percent of all scheduled rulemakings were imposed by courts or Congress. This might beg for reform of consent decrees and the delegation of powers, but statutory measures nevertheless represent policy choices by an elected branch of government. Thus, under a regulatory budget, Congress can expand agency rulemaking discretion by exempting a certain mandatory subset of regulations from a one-in, one-out system.

All other regulations, outside of this broad 14 percent exemption, would receive scrutiny under a regulatory budget. Agencies need not rescind a regulation every time they seek to impose a new rule; incorporating new requirements into existing programs could also satisfy the requirement, provided the agency's cumulative cost budget does not rise.

Another alternative to a strict, one-in, one-out system for agencies would provide them with credits for avoiding prescriptive federal policy. Discussion of reform has focused solely on restraining prescriptive regulation (conservative) versus allowing it to proceed expeditiously (progressive). However, agencies routinely, although some better than others, evaluate regulatory alternatives that do not demand a certain federal standard. Thus, if an agency proceeds with a regulatory alternative that avoids prescriptive rules, their action should be exempt from the one-in, one-out system.

3. Reforming Past Regulatory Reform

-Progressives rightly point out that regulators have plenty of their own red tape requirements. From the APA, to the Unfunded Mandates Reform Act, to countless executive orders on regulatory reform, there are redundancies in the current administrative process. Any new reform proposal ought to examine the process and seek to integrate new requirements into the existing system.

With implementation of a regulatory budget, a modest proposal would: 1) consolidate Executive Order 13,132 (possible federalism implications), the Unfunded Mandates Reform Act (UMRA), and the Regulatory Flexibility Act (RFA), and 2) streamline executive orders 13,045 (environmental risks), 12,630 (property rights), and 13,211 (energy supply) within the current lodestar orders 12,866 and 13,563.

Order 13,132 (possible federalism implications) somewhat duplicates the work of UMRA; the RFA and UMRA seek to protect states and private entities. These could be integrated to broadly analyze the regulatory impact on states and private entities, eliminating Order 13,132 in the process.

Finally, the current orders on cost-benefit analysis (12,866 and 13,563) could be strengthened by integrating the requirements of Orders 13,045 (environment), 12,630 (property rights), and 13,211 (energy supply). A comprehensive analysis of a pending regulation should already include those important issue areas.

Initial Implementation: A Paperwork Budget

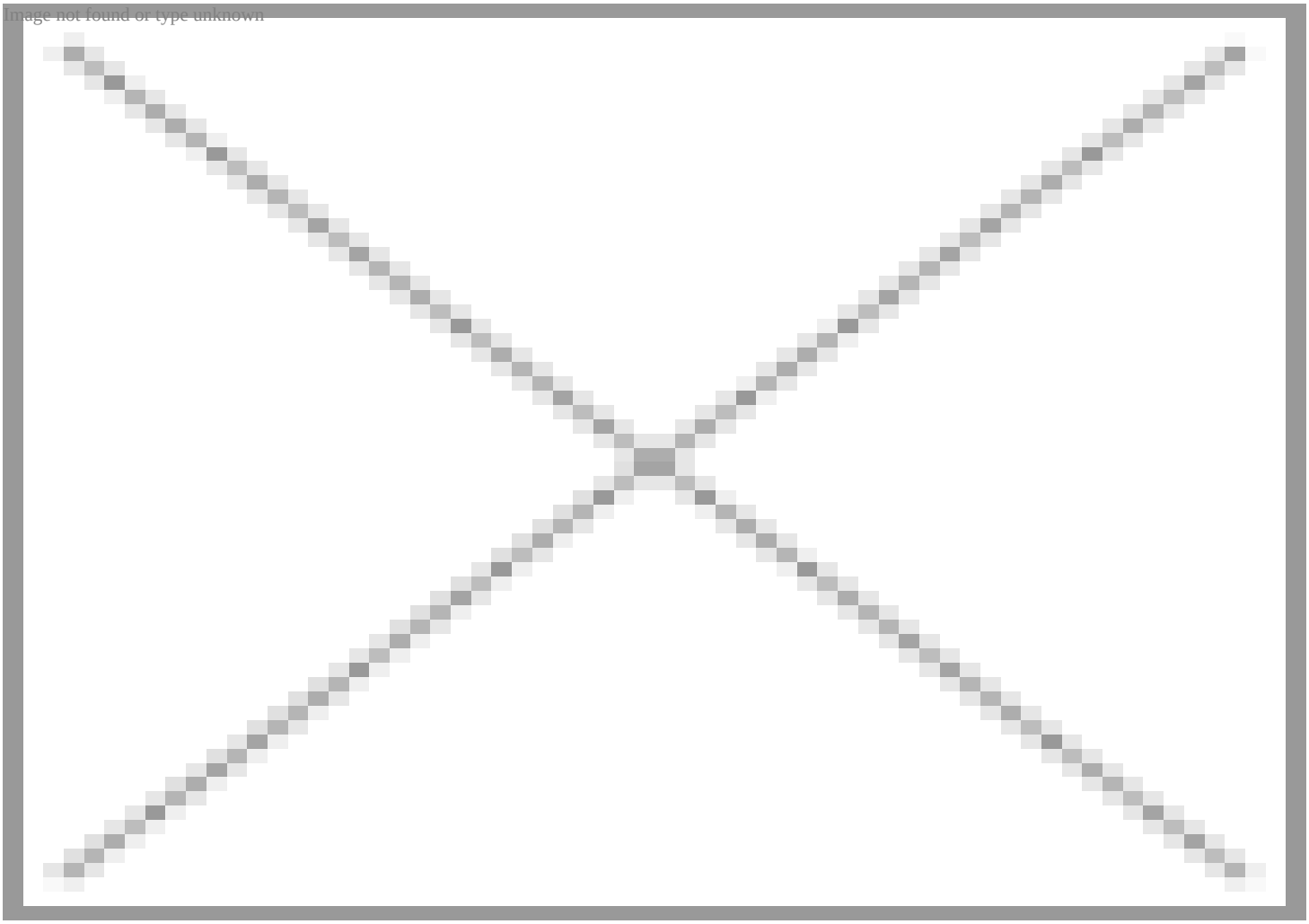
As noted, the implementation of a regulatory budget for all costs and benefits faces substantial procedural, legal, and political hurdles. However, initial implementation could take place in an area left unexplored by previous budget ideas: paperwork. According to OIRA, the federal government collects more than 9,000 required forms, imposing 10.3 billion hours of paperwork. Americans recognize much of this paperwork burden from income tax forms. Leaving the entire Department of Treasury aside, Americans still labor under 2.5 billion hours of paperwork.

The first step toward a regulatory budget could take place with a paperwork budget, a strict one-in, one-out system for OMB Control Numbers (the actual forms) and the overall paperwork burden. Phase one of a neutral paperwork budget would direct all agencies, including independent agencies, to refrain from requesting new OMB Control Numbers or raising their aggregate number of paperwork hours.

For example, the Department of Treasury would be limited to its current regulatory slate of 1,281 control numbers and 7.8 billion hours of paperwork. To request a new burden, Treasury would have to either eliminate an existing collection or consolidate new collections to yield neutral growth in the number of forms and the department’s aggregate hourly burden.

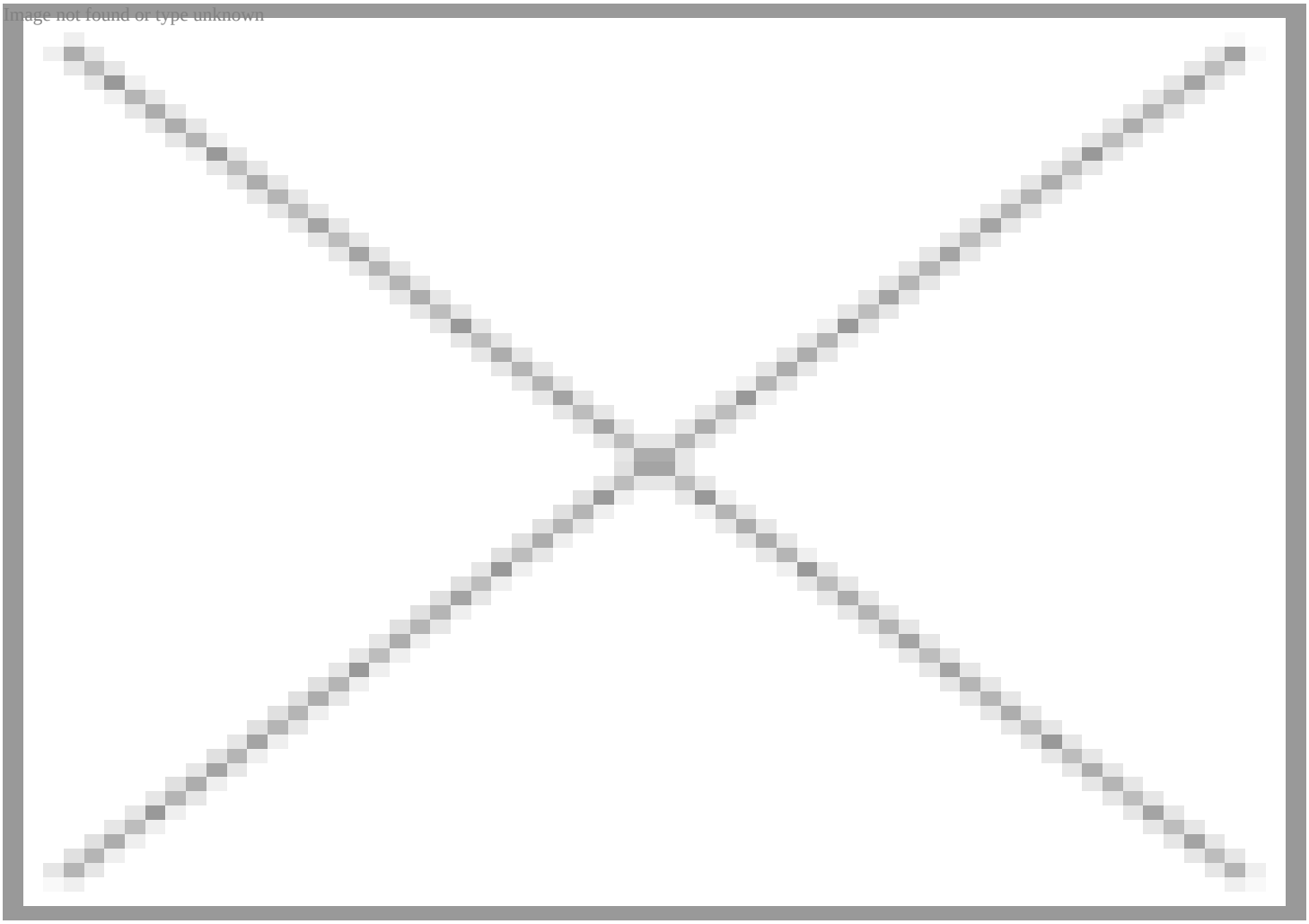
The example below, from the Department of Health and Human Services (HHS), details how explosive paperwork growth has been recently.

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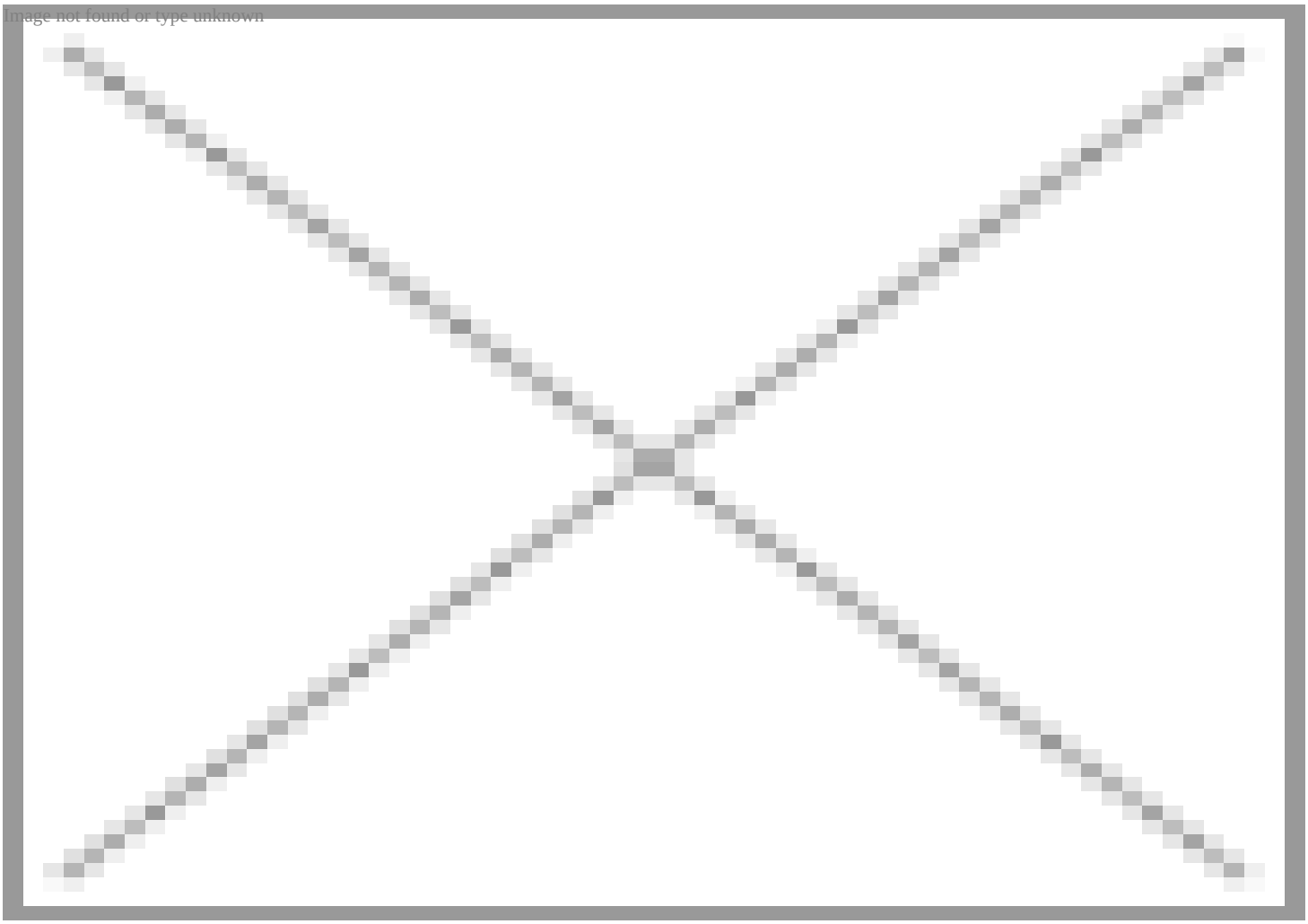
However, the good news for individuals and businesses is that some agencies have actually lowered their paperwork burdens. The Consumer Financial Protection Bureau, which continues to grow as it implements Dodd-Frank, recently combined paperwork collections to save 8.4 million hours of paperwork. The Department of Labor has also trimmed red tape without significantly endangering public health or safety.

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Ideally, the federal government would also set an aggregate paperwork limit of approximately 9 billion hours. This would guarantee a cut in red tape for businesses and individuals, and because Treasury consumes a substantial majority of all paperwork requirements, fundamental tax reform could easily shave hundreds of millions of hours.

The goal of reducing total paperwork hours is achievable. As the chart below displays, the government has made reductions in the past.



If the paperwork budget did result in some savings, for example, 100 million hours in its first year, it would generate incredible savings over time. Assuming an hour of regulatory paperwork is worth $31.23, the median wage for a regulatory compliance officer, a 100 million hour reduction would save $3.1 billion.

A neutral paperwork budget offers perhaps the easiest bipartisan path forward. It helps small businesses and individuals the most, and it does not fundamentally alter environmental or worker protections. The law that allows agencies to keep track of these hours, the Paperwork Reduction Act, has obviously not lived up to its name. Installing a paperwork budget could reduce red tape without substantively altering regulatory programs, all while aiding the transition to a full regulatory budget.

Policy Benefits

The biggest policy benefit of a cumulative regulatory budget is transparency. This openness is not beneficial for its own sake, but because it would also align U.S. regulatory efforts with our overseas competitors. For example, Portugal has introduced its “Simplex Test,” modeled after similar systems for regulatory analysis in Belgium and the United Kingdom. The Simplex Test asks agencies to identify administrative burdens, assess costs, and evaluate possible consolidation.

These are the hallmarks of an effective regulatory budget, and adopting a transformative system would not be radical, it would merely place the U.S. in line with other OECD nations.

Instituting a budget also attempts to bridge the partisan divide on regulation. Progressives and conservatives want, or should want, to know what costs and benefits a regulatory program generates. It is not enough to pass a law or a regulation and assume it will work as designed. Policymakers must acknowledge certain unintended consequences and seek to study those results after implementation. A regulatory budget allows agencies to review past costs and benefits and ways to incorporate new measures into an existing regulatory program.

Finally, necessary exemptions in a regulatory budget allow Congress to control major policy choices. If Congress and the President agree that a market failure should result in changes to a regulatory budget, agencies have the freedom to regulate through an explicit legislative grant. However, a regulatory budget would preclude new administrations, and particularly lame duck administrations, from codifying as many of their policy objectives as possible.

CONCLUSION

Regulatory reform is just as contentious as the daily policy debates in the U.S. "More regulation vs. less regulation," should give way to a discussion about a better way to regulate. Few seek to abolish the Code of Federal Regulation, but all policy scholars should want a system that promotes transparency, predictability, and flexibility. If countries across the world can adopt a sensible approach to regulation, the U.S. should move forward with a system that promotes economic growth, and protects public health and safety.