November 2016

Ten Things The Trump Administration Can Do To Ease Small Business Regulatory Burdens, Create Jobs, and Grow the US Economy

By Andrew M. Langer

Though discussed for many years, it is only in the last decade that regulatory impacts have been seen by the mainstream political establishment as a driving factor in the health of the US economy—impacting our jobs, our competitiveness, and a host of other societal concerns (including the vitality of the middle class). These are some of the Institute for Liberty's recommendations on the issue, and we offer them with one important caveat: ***There are no silver bullets when it comes to reducing regulatory costs!*** Regulatory costs have grown steadily since 1970 (though those costs have accelerated since 2007), and while many focus on so-called "major rules" (costing the economy $100 million or more annually), the bulk of regulatory burdens come from the cumulative effect of much-smaller mandates.

Evidence shows that by even making modest changes in regulatory costs, massive economic gains can be had. But regardless of whether these changes are minor or major, regulatory reform will have to be an essential element of the incoming administration's economic policies if they want to jump-start the economy and put Americans back to work.

These recommendations cover a wide range of tools that the incoming administration can utilize to have a fundamental impact on the regulatory state.

1) **Make the Small Business Administration's Office of Advocacy's regulatory analysis operations the centerpiece of their efforts once again.**

   The Office of Advocacy is the only agency charged by statute with the ability to independently review and challenge regulatory decisions of other agencies. Under President Obama, the regulatory review process took a back-stage to the Administration's goal of using the office to do general research on small business and entrepreneurship. By returning the framework of Advocacy to how it was originally envisioned, America's small businesses will again have a powerful voice speaking for it.

   In order to "fix" the regulatory problem, we must understand the scope of that problem. Part of achieving this understanding includes the preparation of the semi-decennial (done every five years) "Impact of Regulation on Small Business" report—a highly-regarded piece of independent research whose conclusions sit as the cornerstone of regulatory assessment. This report will be an essential tool in that regard, and one of the great failings of the Obama Administration was,

knowing that the 2015 report would paint an unflattering picture of a regulatory state out-of-control, never commissioned or completed.

2) **Assess the Comprehensive Impact of Major Rules, Halt the preparation of the OMB's 2016 Report on the Costs and Benefits of Regulation, Revise OMB's 2015 Report.**

Every year, the OMB's Office of Information and Regulatory Affairs produces a 10-year lookback on the costs and benefits of regulation—one which is wholly different from the SBA study, and essential in its own way. While the SBA study is conducted by economists outside of the government, the OMB report is conducted "in-house", utilizing the notice-and-comment processes of the Administrative Procedures Act to solicit for public input

But the new administration has to look at the most recent report, and revise it as well. The 2015 report caps potential regulatory costs at $103 billion. This is unserious, considering that the 2010 Advocacy report on costs had them at $1.75 trillion. Given that the pace of regulation continued steadily from 2005 to 2010 (with a 35% increase in regulatory costs), we estimate current costs of regulation to be somewhere around $2.25 TRILLION.

In terms of economic impact to American small businesses (businesses with 20 employees or less), this is a cost of roughly $14,000 per employee, per year. This means, for a business with an average size of 10 employees, they are facing a federal regulatory burden of approximately $140,000 per year.

3) Have the Office of Information and Regulatory Affairs conduct a comprehensive survey of agency utilization of guidance and interpretation letters as a means of bypassing the mandatory procedures of the Administrative Procedures Act. Assess the added costs these hidden rules impose on the economy.

While the regulatory process under the Administrative Procedures Act is complex and creates a burden of its own, that process exists to protect the rights of millions of Americans who might fall under a particular agency's regulatory framework. But because that process is so burdensome to agencies, requiring not only public input but for an agency to both acknowledge and address the public's legitimate regulatory concerns, many agencies have resorted to the practice of creating guidance documents and regulatory interpretation letters that, while having the same force and effect of regulations, have not been subjected to the rigorous "notice and comment" process of a traditional regulatory rulemaking.

Because such actions aren't considered a part of the rulemaking process, their impacts may not be captured by traditional regulatory assessment tools. Worse, the public has no complete picture of the scope of this practice.

The administration, under the supervision of OIRA, must undertake an immediate survey of agencies to assess how they are utilizing these practices, assess their economic impact, and move to curtail such practices and move them under the lawful regulatory framework.

4) **Have either OIRA or the Office of Advocacy study the lost "opportunity costs" of regulatory burdens.**

Currently, we assess direct regulatory impacts (and some indirect impacts), but this only explores the immediate burdens these businesses face. But since regulations—either in determining business practices, business capital purchases, or the re-dedication of staff time—only assess these particular impacts, a massive portion of the overall picture is lost. Each of these burdens substitutes someone else's priorities for that of the business owner.

These opportunity costs represent a much clearer picture of regulatory costs overall, and are, in fact, incredibly telling with regards to our economic stagnation. In 2013, Dawson and Seater, economists from North Carolina State and Appalachian State respectively, produced seminal examination of these opportunity costs—essentially saying that the current regulatory state represents roughly **$38 TRILLION** in lost opportunity costs—or, as we have concluded, for every dollar in direct regulatory costs, there is a $19 multiplier in lost opportunity costs.[1]

The federal government needs to adopt this kind of assessment in its examination of regulatory costs, and take steps to recognize opportunity costs as it develops new regulations. Over the long term, what this means is that *even modest regulatory reforms could produce massive gains in both economic growth and the creation of jobs!*

5) **Implement an effort to express regulatory burden in the context of "time" (supplementing or substituting such burdens that are currently measured in dollars). Set a regulatory baseline for time burdens, and implement a "no net loss of time" policy for agencies.**

In talking about regulatory burdens, a criticism from the pro-regulation community is the measurement of regulatory costs in dollars—that businesses are more interested in saving money than they are in protecting health or the environment. While this is a false argument, it does create an additional burden when talking about regulatory reform.

But "time" is a finite resource. A business cannot make more of it—and a workers' time is the inherently valuable resource when talking about such burdens. The measurement of a "full time equivalent" worker is 2000 hours per year—so every ten hours of time that a worker spends dealing with a federal mandate is half of 1% of that worker's time per year.

While federal agencies currently are required to measure paperwork burdens (especially when estimating the time it is required for a particular form to be completed), there is legitimate criticism that agencies woefully underestimate such burdens. A comprehensive review must be undertaken to ensure that these measurements are accurate, and then agencies must assess the cumulative amount of time an "average regulated entity" (ARE) spends filling out paperwork—and be responsible for reporting that number to Congress.

[1] "Federal Regulation and Aggregate Economic Growth," John W. Dawson & John J. Seater, January 2013, http://www4.ncsu.edu/~jjseater/regulationandgrowth.pdf

This then sets a baseline for regulatory time burdens, which can serve as the basis for a "no net loss of time" initiative. For every 15 minutes of added burden for an agency ARE, 15 minutes must be subtracted elsewhere. Once we achieve constancy in this measurement, the next step would be for the federal government to begin actually reducing such burdens.

6) **Assess regulatory costs (both time and dollars) for prospective regulatory action for the next 5 years. Using current time and dollar costs as a baseline, announce "regulatory cap", and assess the difference between current costs and that being saved by not adding these additional burdens to the cumulative regulatory costs.**

Once we have determined current annual regulatory costs, including indirect costs, guidance costs, lost opportunity costs, etc, the administration ought to announce that these costs are a "regulatory cap" for the United States—ie, that this is the highest cost the American economy is willing to bear. Using that cap, and pledging that such costs are not going to grow, the Administration can use this cost savings to start determining economic growth.

For example, if the Bush Administration had announced following the 2005 Advocacy report on the Costs of Regulation that they were capping regulatory costs at $1.1 trillion, and put into place restrictions on regulatory growth that would have prevented the regulatory state from growing to $1.75 trillion in 2010, the economy would have saved $650 billion.Even if half that savings had been used to create jobs, using the average wage for those 5 years of $40,555, the economy would have created approximated ***eight million*** new, full-time jobs![2]

7) **Establish a commission on implementing comparative risk assessment as a regulatory determination tool.**

The primary tool that regulatory experts use to assess regulatory impacts is "cost-benefit analysis" (CBA). The problem with CBA is that it only tells you if something is the fiscally-prudent thing to do (ie, do the benefits outweigh the costs?). CBA doesn't assess potential unintended consequences, nor does it allow you to compare and contrast decisions against alternatives.

Comparative risk assessment (CRA) is a tool that can help policymakers prioritize regulatory decisions by painting a more accurate and multi-dimensional picture of how such decisions are implemented in the real world, and what follows from that implementation.

---

[2] "The Impact of Regulatory Costs on Small Firms, 2005 Report," W. Mark Crain, https://ldr.lafayette.edu/bitstream/handle/10385/981/Crain-ImpactofRegulatoryCosts-2005.pdf?sequence=1
"The Impact of Regulatory Costs on Small Firms, 2010 Report," Nicole V. Crain & W. Mark Crain, https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Summary).pdf
National Average Wage Index, Social Security Administration, https://www.ssa.gov/oact/cola/AWI.html

For example, a company wants to site a petrochemical refinery in a particular community. Current assessment tools would look the environmental impacts, occupational and safety impacts, etc. But comparative risk assessment would also look at the impacts of what happens if that plant ***isn't*** sited in that community—and the impact of that community from the lost jobs (things like the impact of wages on nutrition, impact of employment on access to better health care, etc). By looking at the permitting in one way, activists can claim that health risks will increase for a population. But looking at the permitting through the lens of comparative risk assessment, others can demonstrate how the health for a population can improve.

Regulations cannot be created in a vacuum—we have to be able to prioritize regulatory decisionmaking. CRA is an essential tool in that regard**.** The incoming administration should establish an inter-agency commission to develop an administration-wide policy on CRA. Such a commission's initial effort would be aimed at developing guidance for regulatory agencies in assessing comparative risk, which would serve to assist agencies in setting regulatory priorities moving forward. Following that task, the commission would be responsible for examining risk in regulatory areas that exist between agencies.

8) Give more resources to the Office of the National Ombudsman for Small Business, and the Ombudsman's office. Use the Ombudsman and the Regulatory Fairness Board process to highlight stories of agency abuses, and as a tool in pushing the need for regulatory reform. Use the ONO as the centerpiece for getting to change their regulatory approaches from adversarial to cooperative.

The Office of the National Ombudsman for Small Business (ONO) is an unsung hero for American small businesses, with tremendous potential for being used as a tool for regulatory reform. Currently, the ONO acts as sort-of "inspector general" writ-large. If you are a small business, and you believe an agency is being abusive towards you, you can complain to the ONO and they will help investigate your complaint and find an equitable solution for you. Through their Regulatory Fairness board process, they hold hearings around the nation, and serve to act as an essential defender of these businesses.

The problem, of course, is that few Americans are aware of this resource, and as a result it goes underutilized. The new administration must highlight the work of the ONO, and make it a centerpiece of efforts to change the tone and tenor of the relationship between regulated entities and their regulators. Moreover, in terms of identifying rules and offices ripe for regulatory reform, this office is on the front-lines in hearing from aggrieved small businesses.

Finally, as part of the administration's efforts to transform the regulatory state, there has to be a return to the principles of cooperation between agencies and the regulated community. *Compliance* should be the ultimate goal of agencies (not enforcement actions or prosecutions, as has been the case for the last 8 years). One of the best examples of this was the OSHA Consultation program (or OSHCON), in which OSHA would work with businesses to come into compliance, certify them, and then the businesses could use the OSHCON certification to get reduced workman's compensation rates from their insurance providers. It was a win for OSHA in that the businesses would be in compliance, it was a win for workers as deficient safety issues would be corrected, and it was a win for businesses in that their insurance rates would drop.

These programs must be reinvigorated and expanded across agencies, and the ONO would be a perfect office to spearhead this effort. The ONO could cheerlead with agencies like OSHA, MSHA, EPA etc, and become a coordinator and clearing house for policy implementation.

9) Make a legislative push for the regulatory impact determinations of the Office of Advocacy to be given statutory deference in legal challenges to agency rules, on a par with the "Chevron Deference" standard created by the courts.

As the only office within the federal government with statutory authority to voice concerns with the regulatory decisions of other agencies (Advocacy need not submit its analyses and comments to the Office of Management and Budget for approval, and can therefore independently disagree with agencies like the EPA, Labor, etc), Advocacy provides an immensely important independent voice within the federal government.

Unfortunately, agencies are under no obligation to listen to Advocacy, and unlike citizens whose comment-raised concerns might be ignored, Advocacy cannot challenge final rules in court.[3] And while other parties may cite Advocacy's comments in a challenge, the court need not lend any particular weight to what Advocacy has to say. Under the current standard known as "Chevron Deference," weight is given to a particular agency in how they interpret the law in crafting regulations. So, for instance, if an agency says that a sandy ditch is a "navigable waterway" for the purposes of regulation under the Clean Water Act, a court gives that interpretation deference.

In order to protect small business, Congress ought to pass legislation directing the courts to give weight and deference to the analyses of the Office of Advocacy in challenges to new rules.

10) Make passage of the REINS act a White House Legislative Priority.

While the bulk of regulatory impacts come from the cumulative effect of thousands of pages of small rules, federal agencies can and do tackle what are called "major rules" (rules with an impact of $100 million or more). Obviously, such major rules have a tremendous impact on regulatory costs—and given that these agencies are supposed to be interpreting the laws passed by Congress, Congress has an essential role to play.

One role is, of course, the Congressional Review Act, which allows for a challenge to a new regulation be brought to Congress for its approval or disapproval. The problem, of course, is that this requires an affirmative act on the part of someone to bring the proposal to Congress for its review.

[3] Under the Administrative Procedures Act, agencies are obliged to respond to all substantive comments raised in a rulemaking process—either demonstrating how they adopted these changes into the final rule or adequately answering why such concerns were ignored. If this doesn't happen, then such commenters have grounds to challenge the rule in federal court. In order to have "standing" to challenge these rules, a party ***must*** have submitted comments during the rulemaking process.

The REINS act would make congressional approval of all major rules automatic, without the need for someone to bring an official challenge. This would re-engage Congress in the process, and help restore the balance between the executive and legislative branches of government.

BONUS: Creation of the Business Compliance One-Stop (BCOS)

One of the thorniest issues facing small business owners is determining what their obligations are under the law—what laws apply to them, how they comply with them, how they file paperwork, etc. During the George W. Bush administration, as the executive branch was working on Regulations.gov (a website dedicated to invigorating public participation in the regulatory process), there was some talk about creating a comprehensive compliance website.

There is no reason why, in 2016, an American small business cannot visit a centralized federal website, enter in a few key pieces of information, and receive a comprehensive list of rules it must be in compliance with, simple guidance as to how to comply, online access to all associated paperwork (with assistance in how to fill that paperwork out), and the ability to file that paperwork online.

Many agencies are doing some form of this already. But with, potentially, hundreds of federal agencies and offices (nobody actually can agree on just how many there are![4]), ferreting out obligations is a time-consuming process (again, the most-important resource of a small business is ***time***).

We recommend the resurrection of the Business Compliance One-Stop effort—an interagency system under the guidance of the Office of Information and Regulatory Affairs. The goal is to work with all agencies, so that a business owner can visit the website, type in key identifiers (type of business, number of employees, zip code), and BCOS will give them the information they need. It should also have the option of a business-owner creating an account, so that he or she can keep track of the information that is necessary, asked for, in the process of being filed, filed, etc).

Note, this ***has*** to be done within the federal government. Because of the complexities therein, no for-profit entity is going to have access to all of the necessary regulatory information across agency borders, nor is there going to be the ability to get the information cooperation of these agencies (and an added benefit of this process is that it will help identify when agencies are asking for duplicative information, yet another regulatory cost).

[4] https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist