Regulatory Reform

House Passes Regulatory Reform Package, H.R. 9 Including Requirement That Agencies Must Conduct Cost-Benefit Analysis and Risk Assessment
Senate Likely To Approve Package, but With Changes

Introduction

The House of Representatives recently passed the regulatory reform part of the Contract With America. The Contract promised that the House would vote within the first 100 days of the first session of the 104th Congress on proposals to: (1) impose a moratorium on new regulations, (2) require agencies to use cost-benefit analysis and risk assessment, (3) make it easier for owners of private property to get compensation when the value of their property is reduced by regulation, (4) reform the general procedures agencies must comply with before they promulgate new regulations, and (5) reduce paperwork requirements on the private sector. Originally introduced as H.R. 9, these provisions were eventually considered and passed as five separate bills. The final four bills (all but the Regulatory Transition Act) were then reassembled into H.R. 9, which passed by a vote of 277-141 on March 3.

H.R. 9 now goes to the Senate. The Senate Government Affairs Committee has already held hearings on the Senate versions of some of the bill's provisions. Initiatives such as paperwork reduction enjoy broad support from both parties in the Congress and the Administration and will pass quickly. Other parts of the regulatory reform package are opposed by the Administration, most Democrats, and even some influential Republicans.

House passage provides a good opportunity to examine the current shape of regulatory reform. If all of the House bills eventually become law, they will significantly expand the burden on an agency to justify new regulations in the face of their costs and reasonable alternatives. The changes also would increase the scope for public participation in rulemaking. The reforms potentially could result in more effective, less intrusive regulation.

There is a limit on the ability of regulatory reform to simplify government. Ultimately, regulations are driven by federal legislation. Complex laws often create a host of legal questions about their nature and scope. Regulations that interpret legislative language are necessary to minimize uncertainty about what is required to comply with the law. If agencies are prevented from promulgating regulations to answer legal questions, many disputes will be brought into the court system. This could potentially result in even higher costs for business. On the other hand, the agencies responsible for writing regulations sometimes use the regulations to advance their own policy goals, which in many instances exceed the intent of the original legislation. In the long run, the only way to reduce the need for complex regulation is to simplify or avoid the legislation that introduces federal involvement in the first place. Legislation that relies on a market-based mechanism or on voluntary standards rather than command-and-control policies can frequently succeed in reducing administrative costs in some cases.

This report summarizes each of the major bills comprising the Republicans' regulatory agenda. Each
bill deals with a major substantive area of regulatory reform, and each of these areas will be acted upon in the Senate. Although many of the provisions will be changed in the process, the fact that each of the House bills attracted significant Democratic support indicates the political popularity of reform. Even Democrats who opposed the bills admit that overregulation is a problem in some areas and are proposing reforms of their own. The Administration has also stepped up its efforts to force agencies to conduct internal reviews of the need for existing regulations. Although the Administration opposed a number of the House bills, President Clinton will find it difficult to maintain an image as a reformer if he vetoes them.

The Regulatory Transition Act (H.R. 450)

The Regulatory Transition Act (RTA) passed the House on February 24 by a vote of 276-146. The RTA would impose a moratorium on new regulatory action until the Congress has passed legislation that requires cost-benefit analysis and risk assessment for new regulations. The moratorium would be retroactive, as of November 20, 1994. It would end when legislation is enacted that:

- requires agencies to include cost-benefit analysis as part of any rulemaking. This analysis must include the costs resulting from the loss of property rights; and
- where applicable, requires standardized risk analysis and risk assessment using the best scientific and economic procedures.

The moratorium would automatically expire on December 31, 1995 if the Congress has not acted before then.

The moratorium would prohibit all federal agencies from regulatory rulemaking action that does not fall under an exception in the RTA. This prevents the issuance of any substantive rule, interpretative rule, statement of agency policy, notice of inquiry, advance notice of proposed rulemaking, or notice of proposed rulemaking. Since the moratorium is retroactive, some regulations have already been promulgated. The RTA would suspend the effective dates of these regulations until the moratorium ends. Small businesses (those with no more than 100 employees) would have an additional six months after the moratorium ends before any new regulation becomes effective. All legislative and judicial deadlines for drafting regulations would be extended for five months or until the moratorium ends, whichever is later.

Recognizing that some regulatory action is still desirable, the House included a number of exceptions. Regulations dealing with these areas may go forward during the moratorium. The most important exceptions cover regulations that are limited to:

- an imminent threat to health or safety or other emergency, or for the enforcement of criminal laws;
- repealing, narrowing, or streamlining regulations or otherwise reducing regulatory burdens;
- matters relating to military or foreign affairs functions, statutes implementing international trade agreements, or agency management, personnel, or public property, loans, grants, benefits, or contracts;
- routine administrative functions; and
- interpreting, implementing, or administering the internal revenue laws.

The RTA defines a rule as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” This does not include decisions made on a case-by-case basis. Nor does it include decisions dealing with individual licenses, exemptions, or variances. Finally, it does not include actions needed to allow private markets to operate.

The RTA would require the President to publish a list of all rulemaking and deadlines affected by the moratorium. It does not create a private cause of action, however. Parties affected by regulations that are not on the list could not use the RTA to challenge their application.

The Risk Assessment and Cost-Benefit Act of 1995 (H.R. 1022)

H.R. 1022, the Risk Assessment and Cost-Benefit Act of 1995 (RACBA) contains both of the changes that would be needed to end the regulatory moratorium. The bill passed the House on February 28 by a vote of 286-141. RACBA would require federal agencies to justify all regulations with a cost-benefit analysis. Where applicable, this analysis must include an assessment of the risks the regulation is meant to avoid. H.R. 1022 contains new standards for conducting this risk assessment.

The goals of this proposed legislation are: (1) to force agencies to prioritize their resources and concentrate on the most serious problems first; (2) to make sure that the benefits from new regulations are greater than their costs; (3) to force agencies to consider reasonable alternatives to proposed regulations, including alternatives that rely on market forces; (4) to give the public a better idea of the relative magnitude of some of the environmental and safety risks being addressed; and (5) to ensure that the required analysis is impartial and professional.

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1For a fuller description of the RTA, see Manufacturers Alliance report, Regulatory Reform, LAR-325, March 3, 1995.
According to proponents of the proposed legislation, the federal government has often employed scarce resources to deal with marginal risks to society. Because the mere existence of these risks is viewed as justification for government regulations, the cost of the regulation has often outweighed its benefits. Less costly, more efficient alternatives often were available. Supporters of H.R. 1022 believe that the resources needed to address these problems are not unlimited. Thus, it is necessary to weigh carefully the costs and benefits of alternative regulations in order to address the most important needs in the most effective way.

**Coverage.**—RACBA carves out four exceptions to these new requirements. The Act would not apply to the following actions:

- **Emergencies.** In an emergency situation, the agency may act without following the new requirements. This exception is only temporary, however. Within a reasonable time the agency must comply with the Act.
- **Activities needed to maintain military readiness.**
- **Any food, drug, or product label, if the label is required by law to be approved by a federal agency prior to use.**
- **Approval of state programs by federal agencies.**

**Cost-Benefit Analysis.**—RACBA would require all federal agencies to conduct and make publicly available a cost-benefit analysis for every major rule dealing with human health, safety, or the environment. This requirement would take effect immediately after enactment. As defined in RACBA, a major rule is any regulation that is likely to result in annual increase in federal costs of $25 million or more. It also includes any decision on a proposed or final environmental cleanup plan for a facility if the cost of the cleanup would exceed $5 million. It would not include agency actions to approve individual substances or products.

The cost-benefit analysis would have to include the following elements:

- an identification of reasonable alternative strategies, including strategies that require no government action, are more selective in their application, or that rely on market-based mechanisms.
- an analysis of the incremental costs and incremental benefits, including reductions in risk associated with each alternative. This analysis should quantify as many of the costs and benefits as feasible.

- a statement placing the relevant risks of each alternative in context. This statement would include a comparison to other risks routinely encountered by the general public. The agency may consider relevant distinctions among the risks, such as whether they are voluntary and/or preventable. Many of the risks addressed by regulations are considered to be relatively minor, such as one death in 10,000. Exposure may be far less of a risk to human health than many routine activities such as smoking or crossing the street. Studies show that individuals are far more willing to live with risks they can control than those that are imposed on them by others, however.
- an analysis of the impact on small businesses, net employment, and on the cumulative financial burdens of compliance.

The agency must make a specific determination that:

- the cost-benefit analysis is based on objective and unbiased scientific and economic evaluations of all significant and relevant information.
- the incremental risk reduction will be likely to justify, and be reasonably related to, the incremental costs to all parties.
- alternative regulations were found to be either (1) less cost-effective at achieving a substantially equivalent reduction in risk, or (2) less flexible in allowing state and local governments and private entities to achieve the objectives of the regulation.

These certifications must be supported by substantial evidence on the rulemaking record.

**Risk Assessment.**—Many regulations dealing with public health, safety, and the environment attempt to limit and control risks of various types. Any cost-benefit analysis in these areas requires competent risk assessment. Title I of RACBA would impose general requirements for conducting such a study. Unlike the cost-benefit analysis, risk assessment would apply only to agencies specifically designated in the statute or later by the Administration. These agencies include the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and the Food and Drug Administration.

The new requirements would apply to all risk assessments and risk characterizations that are used as part of the administrative record for, among other things:

- any proposed or final major rule, including the cost-benefit study required for such a rule.
- any proposed or final environmental cleanup plan for a facility or any general guidelines for issuing such plans. This includes corrective action under the Solid Waste Disposal Act and removal or

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2In order to qualify as an emergency, a situation must involve an immediate and extraordinary threat of death, serious illness, or severe injury to humans, or substantial endangerment to private property or the environment.
remedial actions under the Comprehensive Environmental Response, Compensation, and Liability Act.

- any report to the Congress.
- any regulatory action to place a substance on an official list of carcinogens or hazardous substances.
- any general guidance or policy statement regarding risk assessment or risk characterization.
- any environmental restriction on the citing or operation of a facility other than discharge permits under the Clean Water Act.

Beginning 18 months after enactment, all significant risk assessments and risk characterizations would have to comply with the new requirements in RACBA. Risk characterizations attempt to measure the risk humans or the environment will be exposed to. RACBA would require these characterizations to contain the following requirements:

- a description of the population or natural resources subject to exposure. This description should include both a best estimate, together with an indication of the reasonable degree of uncertainty, and an indication of any highly sensitive populations.
- an explanation of the method of exposure to the risk used in the risk assessment, together with an estimate of both the size of the population exposed and the probability of exposure.
- a comparison of the risk with other risks routinely encountered by the general public. This comparison should consider the voluntary nature and the preventability of the risk.
- a statement of any substitution risk to human health. This is the risk that would be imposed by alternative regulations that the agency might impose in place of the chosen framework.
- summaries of risk assessments provided by public commenters.

A risk assessment attempts to predict how the anticipated exposure will affect human health or the environment. RACBA would require any assessment to include:

- For discussions of human health, an analysis of the laboratory and epidemiological data on the correlation between the risks identified in the risk characterization and the impact on human health. The analysis would have to address conflicts in the data and the relevance of animal research to human effects.
- A justification of any significant assumptions, inferences, or models used. This justification should discuss possible alternatives and the basis for the agency's choice. The agency should also identify any policy or value judgments used in its determinations.

RACBA tries to make risk characterization and risk assessment a major part of regulatory practice. It would call for a series of reports on the best methods of conducting risk analysis, common guidance to agencies, and areas of further research and training for identifying, measuring, and evaluating various types of risk and for increasing the efficiency with which the federal government uses scarce resources to address the most important risks first.

**Enforcement.**—RACBA would give federal judges jurisdiction to review the agency's compliance with the requirements for cost-benefit analysis and risk assessment when reviewing the legality of a rule covered by RACBA. The Administrative Procedures Act (APA) already gives private parties standing to challenge federal regulations if the agency did not follow federal guidelines in drafting them. Since the RACBA requires broad agency certifications that must be supported by substantial evidence, parties may use the lack of substantial evidence to challenge the enforcement of a regulation. Regulations would also be unlawful if they did not substantially comply with the requirements for risk assessment and risk characterization.

**Peer Review.**—RACBA also would require each federal agency to develop a program for independent and external peer review. The program would include representative and balanced panels of experts. Experts could not be excluded from serving on a panel merely because they represent entities with a potential interest in the outcome of agency regulation, provided the interest is fully disclosed and the rule affects more than one entity.

Any risk assessment or cost analysis used to support a rule that is likely to result in annual costs of $100 million or more would have to undergo peer review. Peer review could also occur for any risk or cost assessment that is likely to have a significant impact on public policy decisions. The peer review would address the scientific and economic merit of data and methods used in the agency analysis. Both the peer review study and an agency response would be part of the administrative record.

**The Regulatory Reform and Relief Act (H.R. 926)**

The Regulatory Reform and Relief Act (RRRA) passed the House on March 1 by a vote of 415-15. The RRRA would make three changes to current regulatory law. First, it amends the APA to require a regulatory impact analysis for all rules having an impact of $50 million or more. Second, it strengthens the scope of judicial review of regulations. Finally, it creates a role for the Small Business Administration (SBA) in reviewing potential regulations.
Additional Regulatory Requirements.—The APA lays out the legal requirements federal agencies must meet before promulgating regulations. Failure to comply with the APA is often cited in court decisions striking down federal regulations. The RRRA would apply only to major rules for which rulemaking was begun after enactment. For the purposes of the RRRA, a major rule includes any rule that would:

- have an annual effect on the economy of $50 million or more;
- involve a major increase in costs or prices in the private or public sector; or
- have significant, adverse effects on competition, employment, investment, productivity, or innovation.

Current law requires an agency to issue a general notice of proposed rulemaking. Although agencies can escape this requirement in certain circumstances, for the most part they adhere to it. By the time it issues a proposed rule, however, the agency has already made several determinations. This limits the impact public comments can have. The RRRA would require that for each major rule, the agency must issue an advance notice of proposed rulemaking at least 90 days prior to issuing a proposed rule. This advance notice would have to include “to the extent possible” a description of the necessity and legal authority for the rule and an analysis of alternative approaches.

The RRRA would also require agencies to conduct a regulatory impact analysis at both the proposed and final rulemaking stages. Rulemaking at the final stage would have to include a summary of the analysis together with a clear delineation of all changes from the preliminary analysis. Agencies would also be required to keep a written record of all outside contacts concerning a major rulemaking. The record of nongovernment contacts would have to be available to the public.

The agency would have to conduct a public hearing on a proposed rule if requested by more than 100 individuals. This number of requests would also require the agency to provide a 30-day extension for public comments on a proposed rule, delaying any final action on the rule.

The regulatory impact analysis would have to address a number of substantive issues. The public is then free to comment on or challenge the agency’s findings on these issues. The agency must also address these comments in its final rulemaking. Every regulatory impact analysis must contain the following information:

- a description of the potential benefits of the rule, including benefits that cannot be quantified and an identification of those likely to receive the benefits;
- an explanation of the necessity, legal authority, and reasonableness of the regulation and a description of the condition that the rule is to address;
- a description of the rule’s potential costs, including any adverse effects that cannot be quantified in monetary terms, together with an identification of the entities likely to bear them;
- an analysis of alternative approaches, including market-based solutions, and the reasons why the agency chose not to adopt them. The agency must show that its solution represents the least costly approach;
- an analysis and justification of any conflict with or duplication of other rules;
- a statement of whether the rule will require on-site inspections, will require private record-keeping, or will require individuals to obtain a license or permit; and
- an estimate of what it will cost the agency to implement and enforce the rule.

The RRRA would give the Director of the Office of Management and Budget (OMB) the authority to review the regulatory impact analysis before it is published. The Director is likely to delegate this authority to OMB’s Office of Information and Regulatory Analysis. OMB can comment on any rulemaking and force consultations with the agency concerning an impact analysis, delaying the process for up to 90 days.

There are several exemptions to the requirement for a regulatory impact analysis. An analysis is not required in the case of:

- a response to an immediately impending and extraordinary situation or an event reasonably expected to cause death, serious illness or injury, or substantial endangerment to private property or the environment;
- a rule for which following the additional requirements would conflict with a statutory or judicial deadline;
- rules dealing with monetary policy or the safety and soundness of financial institutions;
- rules limited to the interpretation or implementation of internal revenue laws;
- rules imposing trade sanctions against nations engaging in illegal trade activities against the United States; or
- any other class of regulations exempted by the Director of OMB.

The RRRA seeks to increase the authority of the SBA as a protector of small businesses. The Chief Counsel for Advocacy within the SBA would have the power to review and comment on major proposed rules and initial regulatory impact analyses except those dealing with the safety and soundness of financial institutions. The bill also states the sense of the
Congress that the Chief Counsel for Advocacy should be permitted to appear as *amicus curiae* in any judicial case reviewing regulation.

**Judicial Review.**—The RRRA also would strengthen the provisions for judicial review of the regulatory process. Current law requires agencies to conduct a regulatory flexibility analysis that analyzes the impact of the rule on small businesses. Agency compliance with the requirements for this analysis is not subject to judicial review. The RRRA would change this to allow judicial review under some circumstances.

The bill would give any small business that is adversely affected by a final rule the right to challenge the rule in court. If an agency certified that the final rule did not require a regulatory flexibility analysis because it would not have a significant economic impact on a substantial number of small entities, the court may order an analysis, but only if it finds that the decision was arbitrary, capricious, or an abuse of the agency’s discretion. If an agency did not conduct a flexibility analysis, the court may order improvements in it if the court finds that the agency did not follow the proper procedure. The court could enforce compliance by staying the final rule.

**The Private Property Protection Act (H.R. 925)**

The Private Property Protection Act (PPPA) passed the House on March 3 by a vote of 277-148. The Act seeks to strengthen the protection of private property by making it easier for property owners to get compensation if federal regulations reduce the value of their property.

The PPPA includes a general statement of policy that federal agencies should never use their authority to limit the use of privately owned property so as to diminish its value. The bill would require a federal agency to compensate a landowner whenever a regulation limited the use of any portion of his land if the limitation reduces the value of that portion by 20 percent or more. Thus a diminution of 19 percent would not be compensable but a diminution of 20 percent would entitle an owner to full compensation. The agency then receives a permanent easement to the property. This easement is not tied to the regulation. If the regulation was later modified, the individual property owner would still be bound by the stricter standard unless he refunded the agency’s compensation. The requirement applies to individual portions of land. A rule could benefit an owner’s property as a whole, but if it strongly restricted the use of a single portion, compensation could still be required. Finally, if the diminution in value is greater than 50 percent, the landowner can require the agency to purchase the land from him at its fair market value.

The PPPA only applies to agency action under certain federal statutes. These include the Water Pollution Control Act, the Endangered Species Act, and the Food Security Act. The Act does not require compensation if:

* the agency action is needed to prevent a hazard to public health or safety or damage to other specific property; or
* the restriction placed on the land is already prohibited by nuisance law or a local zoning ordinance.

The bill lays out procedures for making a claim for compensation. Landowners may appeal to either binding arbitration or a civil suit to enforce the law on unwilling agencies.

**The Paperwork Reduction Act (H.R. 830)**

The Paperwork Reduction Act (PRA) passed the House on February 22 by a vote of 418-0, with six members voting present. A similar bill (S. 244) passed the Senate on March 9 by a vote of 99-0. The bill now goes to a conference committee where the differences will be worked out. The PRA rewrites the law on coordination of federal information policy. The main needs with regard to information policy are: (1) to minimize the cost of obtaining information by eliminating duplicative or unimportant reporting requirements; (2) to ensure that the federal government collects accurate and useful data in an efficient manner; and (3) to increase the coordination among the different federal agencies.

The PRA reaffirms the role of the OMB as the central agency for coordinating the gathering and dissemination of information by federal agencies. The bill reauthorizes the Office of Information and Regulatory Affairs within OMB as the unit with primary responsibility for this coordination.

The PRA establishes a goal for reducing the burden of collecting information by at least 10 percent each year (the goal in the Senate bill is 5 percent). This reduction is just a goal, however. The bill does not contain effective measures to ensure that it is achieved. The previous revision of the law, in 1986, had imposed a goal of achieving 5 percent reduction in the paperwork burden each year. That goal had little practical effect.

The bill would revise the law to place the primary burden for reducing paperwork on the individual agency, rather than on OMB. Agencies would have to develop comprehensive plans to guide their information activities and to make the information they do gather more accessible to the general public.

The PRA would also reverse the U.S. Supreme Court’s decision in *Dole v. United Steelworkers of America* by extending OMB’s authority to review
information requests to information required to be given to third parties. That case held that OMB did not have authority to review and approve an agency rule that required companies to divulge information to third parties (in this case their workers). Under the PRA, these requirements would need prior approval by OMB. Independent regulatory bodies could, however, overrule OMB's requirements by a majority vote of their governing board.

**Likely Impact on the Business Community**

In spite of the harsh language that has accompanied the debate on some of these reforms, their impact would be relatively modest. This is partly due to changes made during committee markups and floor debate. One indication of the fact that these bills would not gut the regulatory process is the large degree of Democratic support each of them received. Even the most controversial bill received the support of over 20 percent of the Democrats. The Senate is likely to further reduce the scope of these reforms when it considers them.

The reforms would place a larger burden on regulatory agencies to justify their actions. For the most part, these new requirements apply only to significant regulations and do not affect the many routine rules that agencies process daily. For rules that impose a major cost on the private sector, it does not seem unreasonable to require that agencies give adequate notice to the public, consider simpler, less costly alternatives, and show that the benefits will exceed the costs. The fact that this is sometimes done under current law is not a good argument against a requirement that it always be done. Although extra analysis may involve higher administrative costs, at least in the short run, the reduced regulatory burden should justify them. The most immediate impact on agencies is likely to be the need for people with a better understanding of the science and of industry practices as opposed to general drafting skills.

The legislation would increase the potential role of the business community in drafting new regulations. Better regulators are unlikely to emerge unless the community takes advantage of this role, however. The new reforms would give opponents of particular regulations greater opportunities to delay their effectiveness through court challenges. But this tactic can at best delay rules, not defeat them. The reforms do not automatically ensure better rulemaking. They do, however, create an opportunity for greater public participation including earlier notice, the ability to suggest alternatives, and the ability to provide opposing scientific evidence. The reforms would force agencies to respond to alternatives. This does not ensure that better alternatives will be forthcoming. In the past, businesses have not always participated in the early stages of rulemaking. When they have participated, their involvement was often limited to opposing agency initiatives rather than developing alternatives or data of their own. If the business community wants better regulations, it will have to take advantage of the opportunities created by these bills and participate more fully in the regulatory process. By developing better scientific analyses and suggesting more sensible alternatives, businesses can reduce regulatory burdens while working toward a cleaner environment, safer workplaces, and improved consumer products.

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