



Regulatory Governance Brief

Regulatory Governance Briefs

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A Regulatory Budget and a Strategic Regulatory Agenda: Twin Reforms for More Strategic, Integrated and Democratic Regulatory Governance

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Introduction

Approaches to the development of new regulations have been improved in recent years, but they remain weak on addressing three central problems of regulatory governance. First, the overall coordination and integration of the various regulations remains very difficult because there is no strategic cross-governmental regulatory agenda. Second, the full cost of regulations – the aggregated public administrative costs coupled with the much larger “hidden” costs to companies, civil society organizations, and citizens – is not yet transparent to governments and stakeholders. Finally, no mechanism exists to constrain the costs of regulations in an integrated, systematic, and transparent fashion so as to help maximize the benefits of regulation.

The root of these problems, I argue, is the same; despite the recent improvements, the traditional, “atomistic,” regulation-by-regulation approach prevails and mechanisms that would allow for an integrative, government-wide perspective are lacking. Considering the importance of regulation, such a fractured approach provides insufficient democratic understanding, control, and transparency.



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Professor G. Bruce Doern is widely recognized to be one of Canada's leading public policy scholars. The author of over 65 books and numerous articles, his current research interests are centered on four main areas: regulation and regulatory governance; industrial, science and technology and innovation policies and governance; the governance of biotechnology; and energy policy and sustainable development. Professor Doern has been a faculty member at Carleton's School of Public Policy and Administration since 1968 and holds a Chair in Public Policy in the Politics Department at the University of Exeter. In addition, Professor Doern has served as an advisor and consultant to numerous departments and agencies in Canada as well as internationally with agencies such as the OECD.

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What we need are reforms to regulatory governance regarding new regulations that are analogous to the agenda-setting that has for decades been a part of the tax and spending process. This Regulatory Governance Brief examines the value of regulatory budgets and a strategic regulatory agenda in this context.

Definitions

Regulatory Budget: A budget which sets limits on the costs of new regulation on the private sector (businesses, consumers, third sector NGOs and charities) with a view to maximizing the net benefits of regulation by keeping costs under control.

Strategic Regulatory Agenda: An annual or multi-year public statement and debate that sets out strategic priorities for new regulation (new rules) expressed in laws and/or in delegated legislation (that is to say, "the regs").

The concepts of a strategic regulatory agenda and regulatory budget are entwined, as the side-by-side comparison in **Table 1**, below, demonstrates. However, they have different starting points or logic trajectories and they raise different issues about what values might inform them and discipline them.

I will begin by briefly reviewing *regulatory budgets* illustrated by the current activities in the UK, which is the first country to adopt such a reform. I will then describe the concept of a *strategic regulatory agenda* for the Government of Canada that I have developed in detail elsewhere (Doern 2007) and demonstrate first how the two starting logics are different but also how closely entwined the two reforms are. I will conclude that regulatory budgets are not sufficient and, perhaps, not even primary. Instead, the two tools – budget and agenda – are twin missing links in achieving a more democratic and strategic integrated approach to regulatory governance. We need to ask whether one can have a strategic regulatory agenda without a regulatory budget to "discipline" it. We need equally to ask whether one can have a regulatory budget without a very open and public cross-governmental and political strategic agenda to democratize it.



Table 1: Regulatory Budget and Strategic Regulatory Agenda at a Glance

Key elements	Regulatory Budget	Strategic Regulatory Agenda
Core logic or entry point	Completion of the full and real fiscal budget by bringing regulatory “spending” from current “off budget” status to “in budget” inclusion.	Need to have an explicit strategic and democratic regulatory agenda for priorities on new regulation similar to that which already exists for taxation and spending.
Problem being addressed & hopefully better managed	The “off-budget” status quo treatment of new regulation means that there is a built-in bias to use regulation when other instruments (such as taxation and spending) might be more appropriate and effective. A regulatory budget improves the net benefit of new regulations overall by controlling the costs of regulation.	The status quo policy approach of “one regulation at a time” is inadequate because it means that governments have no regular strategic agenda regarding new regulations in total over a given period.
Core features	<p><i>(2008 British Approach and Proposals)</i></p> <ul style="list-style-type: none"> • Initiative has Prime Ministerial backing but is led by Department of Business Enterprise and Regulatory Reform (BERR); • Will have initial trial run in 2009 (fully operational in 2010); • Cabinet will set regulatory budgets by department; • Costs are the main disciplining feature; • Budget period will be for 3 years; • New regulation will include rules established in statutes and in delegated legislation (“the regs”); • Provision for special treatment of big ticket items such as climate change; • Flexibility built in across and within years; • Provisions to deal with emergencies; • Focus on regulatory costs (direct and indirect) but with recognition of regulatory benefits; • Data and analysis builds on information provided by regulatory impact assessments (RIAs) on each proposed new regulation. 	<p><i>(Doern 2007; Proposals for Government of Canada Regulatory Agenda)</i></p> <ul style="list-style-type: none"> • An annual agenda process for determining cross governmental priorities on new regulation; • Would cover new regulation defined as rules established in statutes and in delegated legislation (“the regs”); • Provisions and exceptions for handling emergencies; • Annual regulatory agenda statement to House of Commons and follow-up debate; • Proposal does not include a regulatory budget <i>per se</i> but suggests need for some disciplining process anchored around costs and benefits and values of a diverse kind as exists in priority-setting on spending.
Problématiques and counterpoints	<ul style="list-style-type: none"> • Business-led cost-focused initiative; • Implies a strategic agenda but says little so far about the larger democratic basis of how the agenda will be set; • Still concerns about robustness of RIAs information as foundation of budget; • Opportunities for “gaming” the new system. 	<ul style="list-style-type: none"> • Does it need a formal regulatory budget as central disciplining feature? • Related issues about ranking risks and risk-benefit opportunities across government; • Are ministers interested in many regulatory issues if they see them as mainly technical and scientific matters; • Status quo system is already complex....don’t make it more complex; • Is Canadian RIAs-based information good enough to help underpin agenda-setting?
Core benefits	<ul style="list-style-type: none"> • Better understanding, control, and transparency of cost so as to maximize net benefits of new regulation. • Provides realistic constraints from a government-wide perspective. 	<ul style="list-style-type: none"> • Better planning, integration, transparency of priorities for new regulation. • Provides democratic direction from a government-wide perspective.



Regulatory Budget

History and Rationale

The idea of a regulatory budget was first advanced in the United States in the late 1970s in work by the US Office of Management and Budget (Tozzi 1979). The idea was obviously regulation-focused but it was also always tied to the ultimate achievement of a full and complete fiscal budget. Hence it begins with the core logic that governments need to deal openly with the true overall “budget.”

Current fiscal budgets include taxing and government spending but not the “spending” which governments mandate and require from private businesses, NGO interests, consumers and citizens through new regulation. This mandated spending remains “off budget.” Governments therefore have a built-in incentive to choose regulation as a policy instrument because the costs of doing so are quite literally “hidden” and are often imposed on private firms and consumers. The government’s own costs to carry out the state’s regulatory responsibilities (its personnel, science and technology needs and administrative costs) are of course captured in regular budgets but not the private sector and citizen or consumer costs.

Despite the pioneering discussions in the late 1970s, a cross-government regulatory budget was never adopted in the US. This was partly because of the lack of information on regulatory costs and a consistent and comprehensive set of cost estimates, partly because of stakeholder concerns that it might favour more or less regulation overall, but also because of a lack of political will that may be particularly hard to secure in a political system with clearly separated powers such as the executive and Congress in the US (Kiewiet 2006; Meyers 1998; Crews 1998, Thompson 1997).

Current Reform Activities in Britain

A regulatory budget has recently been announced by the British Government, the first government to adopt such a major change in regulatory governance (HM Government August 2008). Developed with Prime Ministerial backing and led by the UK Department of Business and Regulatory Reform (BERR), the UK regulatory budget system is being designed for a 2009 start-up trial run, and will be fully operational in 2010 (HM Government 2008). The British Cabinet will set budgets on a departmental basis, but with an eye out for horizontal regulatory budget items such as climate change. The budget period being advocated is three to five years, rather than annual, but with “flexibility to allow for contingencies and flexibility over time and between departments” (HM Government 2008, 10). It is worth noting here that British regular spending budgets already have three year medium term spending plans and allocation processes.

Potential Challenges of the British Pilot Project

Britain’s regulatory budget process is an intriguing step toward a more integrated approach to regulatory planning. It should be recognized, however, that a series of issues can be identified at this stage.



Crucially, there are issues regarding defining what regulation is (statutes, delegated law or “the regs”, guidelines and codes or standards). The British choice to date includes the first two of these but not guidelines and codes or standards (HM Government 2008, 26).

Issues arise also regarding whether regulatory budgets should be set for families of regulations within departments and also whether particular “big ticket items” such as climate change should have earmarked budgets or be left out of a given budget period as a result of their inherent complexity, comprehensiveness, or uncertainty. The British Government has indicated that climate change for these reasons of perceived impracticality or degree of difficulty will be left out of the initial regulatory budget.

Decisions about which agency will scrutinize the regulatory budgets also need to be resolved. Any scrutinizing body will need to anticipate and manage the kinds of departmental and regulatory body gaming, not to mention gaming by private sector regulated interests that will undoubtedly accompany the adoption of such a system. For example gaming may occur if departments attempt to label proposed new rules as “guidelines” and hence fall outside the budget disciplines.

The UK consultation document indicates that the system of regulatory budgets would include “all the costs associated with regulation that have an impact on a business or third sector organization” (HM Government 2008, 11). Rules governing public service provision (internal regulation), however, will not be included. Boundary and scope choices also centre on the coverage of regulations originating in the EU (these will be included), the geographic scope on so-called reserved matters involving devolved governments in Scotland and Wales, and whether economic or independent regulators will be included (the consultation document suggests that they should not be included).

With respect to methodologies regarding regulatory budgets, the issues centre on approaches for assessing costs and of course the availability and transparency of cost data and cost estimates. Choices about relevant costs include full economic costs, gross costs or net of benefits, and other more specific technical issues. The consultation document proposes that “regulatory budgets take account of direct and indirect costs as well as benefits, including possible unintended effects, and across all sectors of the economy” (HM Government 2008, 37). It proposes that regulatory budgets be “set on gross cost estimates of regulation, that is to say, estimated benefits will not be netted off from gross estimates for the purpose of setting budgets” (HM Government 2008, 38).

Since the proposed UK system is for new regulations, costs have to be based on cost estimates or cost-benefit estimates. Information from regulatory impact assessments (RIAs) will provide an underpinning here but UK authorities are aware of the need for improvement in this domain, hence the call for further discussion and development of methodologies as the regulatory budget becomes operational and real experience can be gained. While regulatory costs are the focus of the UK regulatory budget “disciplining” system, the documents also refer throughout to the benefits of regulation as new rules seek to deal with risks and provide benefits to social and economic interests.

The UK documents and consultations to date have not dealt much with how the actual strategic agenda-setting needed for such a regulatory budget will work. This is a significant weakness and thus the democratic logic of strategic agenda-setting needs separate treatment.

Strategic Regulatory Agenda

Concept and Rationale: A Proposal for Canada

In a study published in 2007, I argued that Canada should develop a “strategic regulatory agenda,” that is to say, an annual or multi-year public statement and debate that sets out strategic priorities for new rules and regulation (Doern 2007). A strategic agenda also implies that many other possible new rules will not be proceeded within the given time period, save for new rules needed to deal with major emergencies. Its starting point or logic turns on the democratic need for openly debated strategic priorities. Such an agenda would bring regulatory governance closer to that which already exists for taxing and spending where explicit agendas are developed and debated in annual or multi-year budgetary processes.

At present, governments do not develop or announce such explicit strategic regulatory agendas and as a result, at least a third of what governments do (in the sense of taxes, spending, and regulation being three of the core realms and instruments of governing) is quite literally rudderless. At present, regulatory policy is governed by approaches intended to deal with “one new regulatory change at a time” rather than with how to set priorities regarding the whole array of new regulatory proposals queuing up for approval across the government.

The current regulatory policy does require departments and regulatory bodies to consider alternative instruments such as taxing and spending and then, if new regulation is deemed necessary, to have that individual regulatory proposal subject to RIAs to ensure that regulatory benefits exceed costs.

Governments also have developed policies that have variously promoted deregulation, the reduction of the paper burden on business, and also increased regulatory consultation (Radaelli and DeFrancesco 2007; and Doern and Johnson 2006). But they have not developed, published and debated explicit annual or multi-year strategic regulatory priority-setting agendas.

It must be stressed that a strategic regulatory agenda would not solve all coordination problems, any more than tax and spending coordination problems are fully solved by the annual tax and spending agenda and related budgetary processes. Some of these kinds of coordination problems undoubtedly require action at other middle and micro levels of agency action or actions among agencies and stakeholders. But an agenda would be more strategic in addressing regulatory priorities in an integrated way to better manage the complexity of regulation and to ensure that new regulations respond to economic and technological changes and to democratic preferences and views of risk and risk-benefit opportunities.



Features

As noted above, a more complete transparent and strategic regulatory agenda process would be one which set, announced and debated federal regulatory priorities. It would require several features, some of which would be similar to features of the tax and spending agendas, and others which would be different because regulation itself is different. These features are:

1. A process whereby all proposed new regulations from across federal departments and agencies would be aggregated annually and priorities determined at the Cabinet level.
2. A determination of what would be included as proposed new “regulations”; (both new laws and new delegated law...the regs...would need to be included).
3. A provision and processes for handling contingencies and emergencies requiring new regulations (as exists for the tax and spending processes).
4. An appreciation of the many possible criteria that might legitimately be used to distinguish high-priority from low-priority new regulations.
5. An annual ministerial “regulatory agenda statement” and debate in the House of Commons.
6. A consideration of whether such an agenda process should be a separate, stand-alone one, or one that is appended to the existing tax or spending agenda process to avoid duplication in matters such as stakeholder consultation or for other reasons (my preference is for a stand-alone separate process, at least initially).

Process

The arguments that will be mounted as to why a given new regulatory proposal should be ranked high and proceed to adoption will undoubtedly reflect the same diversity of rationales, values and ideas as arguments for new tax and spending proposals. The Minister of Finance and the Prime Minister control tax priority-setting whereas new spending—though tightly controlled by a few ministers—involves a formal and informal bidding process by all ministers. The bidding process is partly controlled by a view about total costs and overall fiscal policy but the spending/tax agenda is also influenced by multiple other political, social and economic values in any given time period.

Proposals for new regulations would undoubtedly come from many ministers as well. The rationales and criteria would include risk assessments and regulatory costs of diverse kinds, and levels of real and perceived severity. There would also, in any given year, be criteria related to electoral promises, international obligations, regional pressures, and numerous health, safety, environmental and sustainable development benefits and values.





In a complex Cabinet of more than 30 ministers representing a federation, the criteria for pride of place on the regulatory agenda will be as diverse as they are for spending and taxation. Agenda-setting is inevitably a mixture of political and economic rationality, but also of tactical and opportunistic behaviour by political and economic players inside and outside of government to take advantage of windows of opportunity.

Conclusions

This brief review has examined the concepts and promise of a regulatory budget and a strategic regulatory agenda. They are the twin missing links in achieving a more strategic, integrated and democratic approach to regulatory governance. We have seen that the two are closely linked but also that they have separate or different starting points or logic trajectories and thus they raise different issues about what values might inform and discipline them.

For the regulatory budget as revealed by the British developments, there will be concerns about the degree to which the regulatory budget is a business-led cost-focused initiative. The British developments to date have implied the need for a strategic regulatory agenda but they have been quite silent about exactly how an agenda will be forged on a cross-governmental basis. They also raise concerns about the robustness of the RIAs information that would underpin the regulatory budget. And they raise concerns about what kinds of gaming will go on and be triggered by these new processes and rules about rule making.

For the proposed strategic regulatory agenda in the Canadian case, there are also questions inherent in its starting logic. One question certainly is whether it requires a formal regulatory budget as a central disciplining feature of such an agenda. Linked issues about the ranking of risks and risk-benefit opportunities are also a part of strategic regulatory agenda development (and also of a regulatory budget). One needs to ask as well whether ministers as politicians are fully interested in regulatory matters or whether they see them as mainly technical and scientific matters. There will also be interests and institutions that simply argue that the current regulatory system is already complex and hence new complexities should not be introduced. Canada's RIAs capacities may also not be robust enough to help underpin an agenda.

Overall, under both logics of reform, contending democratic values and issues will be raised but there will also be a broader debate about the larger scope and nature of rule making and its political-economic and social consequences. Experience, ultimately, will demonstrate how the twin reforms can be best used to address three central problems in regulatory governance: the lack of overall strategic integration, coordination and priority-setting; a lack of understanding and transparency of hidden costs; and the lack of constraints on costs from a government-wide perspective so as to maximize the net benefits of new regulation. Each of these reforms to regulatory governance has advantages but they also raise problématiques and counterpoints that need debate and discussion.





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