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THE VIEWS OF THE ADMINISTRATION ON REGULATORY REFORM: AN UPDATE

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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THE VIEWS OF THE ADMINISTRATION ON REGULATORY REFORM: AN UPDATE

FRIDAY, JUNE 3, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:32 a.m., in room 2123, Rayburn House Office Building, Hon. Cliff Stearns (chairman of the subcommittee) presiding.

Present: Representatives Stearns, Sullivan, Murphy, Burgess, Blackburn, Bilbray, Scalise, Gardner, Griffith, Barton, DeGette, Green, and Waxman (ex officio).

Staff Present: Carl Anderson, Counsel, Oversight; Ray Baum, Senior Policy Advisor/Director of Coalitions; Anita Bradley, Senior Policy Advisor to Chairman Emeritus; Stacy Cline, Counsel, Oversight; Todd Harrison, Chief Counsel, Oversight and Investigations; Heidi King, Chief Economist; Dave McCarthy, Chief Counsel, Environment and the Economy; Katie Novaria, Legislative Clerk; Andrew Powaleny, Press Assistant; Alan Slobodin, Deputy Chief Counsel, Oversight; Sam Spector, Counsel, Oversight; John Stone, Associate Counsel; Alex Yergin, Legislative Clerk; Kristin Amerling, Minority Chief Counsel and Oversight Staff Director; Phil Barnett, Minority Staff Director; Stacia Cardille, Minority Counsel; Brian Chang, Minority Investigations Staff Director and Senior Policy Advisor; Greg Dotson, Minority Energy and Environment Staff Director; Jocelyn Gutierrez, DOE Detailee; Karen Lightfoot, Minority Communications Director and Senior Policy Advisor; Ali Neubauer, Minority Investigator; Mitch Smiley, Minority Assistant Clerk; and Anne Tindall, Minority Counsel.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning, everybody. And the Subcommittee on Oversight and Investigations will come to order. And I will open with my opening statement.

We convene this hearing of this subcommittee to get an update on how the administration is implementing President Obama's Executive order announced on January 18th, entitled, "Improving Regulation and Regulatory Review." To do so, we welcome back Mr. Cass Sunstein, the head of the Office of Information and Regulatory Affairs, or, as we call it, OIRA, within the Office of Management and Budget.

Mr. Sunstein testified before this committee at our first hearing on January 26th, a week after President Obama signed the order and publicly committed to striking the right balance between regulation and economic growth. Mr. Sunstein agreed to come back in 3 months to discuss how his office has improved the regulatory review system to reduce burdens on the American economy and industry.

President Obama's Executive order affirms that agencies must adopt only those regulatory actions whose benefits justify its cost, that are tailored to impose the least burden on society, that take into account the cost of cumulative regulations, that maximize net benefits, that specify performance objectives, and that evaluate alternatives to direct regulation.

In addition, this new Executive order calls on agencies to review significant regulations that are already in place. Expanding upon this requirement, the President announced in a Wall Street Journal op-ed that this action, "orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive."

Now, this is incredibly important, given that the Federal Register stands at an all-time high of over 81,000 pages. In 2010 alone, Federal agencies added more than 3,500 final rules to the books. I hope that Mr. Sunstein will share with us a number of examples demonstrating how this commitment has been put into action and how agencies will relieve small businesses of expensive and burdensome regulations and promote job growth.

This morning's report of the 9.1 percent unemployment rate, with significantly less job creation in May than in April, adds to the urgency of this task. After all, regulations total $1.75 trillion in annual compliance costs, according to the Small Business Administration. That is greater than the record Federal budget deficit, projected at $1.48 trillion for fiscal year 2011, and greater than annual corporate pre-tax profits, which totaled $1.46 trillion in 2008.

In addition, I hope Mr. Sunstein can also give us a sense of how he is enforcing the other requirement of the Executive order. He is the traffic cop. Enormously expensive regulation has sped through the review process on his watch, with little or no opportunity for meaningful public comment. This leads me to believe that OIRA has either been left out of the process or hasn't been effective.

On May 18th, 120 days after the Executive order was issued, each agency was required to submit to OIRA a draft plan including an initial list of regulations that were identified in their retrospective analysis as candidates for reconsideration or review. Agencies were supposed to consider all of the burdensome regulations identified by the stakeholders in the private sector before submitting their plans.

Now, at our hearing on January 26th, I agreed with Mr. Sunstein when he said that "One idea we have had is that the public has a lot more information than we do about what rules are actually doing on the ground." As I have said before, however, it is important that rhetoric is matched with measurable results.

EPA alone has received approximately 1,500 comments on its rules and regulations. The Chamber of Commerce weighed in on

roughly 20 regulations proposed or finalized over the past 2 years at the Environmental Protection Agency. Yet EPA's plan for regulatory review includes only 2 of the 20 and, in both cases, still fails to address the fundamental complaints made by the industry.

The Environmental Council of the States, a group that represents the secretaries of States' environmental agencies, identified more than 30 groups of regulations for a review. These are not big business leaders; these are the State officials that run almost all of the programs under the Clean Air Act and Clean Water Act and undertake about 90 percent of the enforcement actions.

Unfortunately, after reviewing the plan, it appears as though EPA officials in Washington overwhelmingly disagree with or simply ignore the folks that actually implement the regulations that have been identified as being burdensome. Not only did EPA apparently ignore the stakeholders, but they have also imposed over 900 new regulations on the States since the beginning of this administration.

Mr. Sunstein has spoken repeatedly about the need to create a new regulatory culture across the executive branch, and I think all of us will agree with him. An unprecedented amount of authority has been delegated to the executive agencies in this administration. New regulations affecting many sectors of industry and aspects of all the American life are being promulgated under the same flawed system that produced the regulations identified today. So, hopefully, we can take steps toward changing this culture. And we look forward to Mr. Sunstein's testimony.

[The statement of Mr. Stearns follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS

We convene this hearing of the Subcommittee on Oversight and Investigations to get an update on how the Administration is implementing President Obama's Executive Order, announced on January 18, entitled "Improving Regulation and Regulatory Review." To do so, we welcome back Mr. Cass Sunstein, the head of the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget. Mr. Sunstein testified before the Subcommittee at our first hearing on January 26th-a week after President Obama signed the order and publicly committed to striking the right balance between regulation and economic growth. Mr. Sunstein agreed to come back in three months to discuss how his office has improved the regulatory review system to reduce burdens on the American economy and industry.

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Expanding upon this requirement, President Obama announced in a Wall Street Journal op-ed that this action "orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive." This is incredibly important given that the Federal Register stands at an all-time high of over 81,000 pages. In 2010 alone, federal agencies added more than 3,500 final rules to the books. I hope that Mr. Sunstein will share with us a number of examples demonstrating how this commitment has been put into action and how agencies will relieve small businesses of expensive and burdensome regulations and promote job growth. This morning's report of the 9.1% unemployment rate with significantly less job creation in May than in April adds to the urgency of this task. After all, regulations total $1.75 trillion in annual compliance costs, according to the Small Business Administration. That's greater than the record federal budget deficit- projected at $1.48 trillion for FY 2011-and greater than annual corporate pretax profits, which totaled $1.46 trillion in 2008.

In addition, I hope Mr. Sunstein can also give us a sense of how he is enforcing the other requirements of the Executive Order. He is the traffic cop. Enormously expensive regulations have sped through the review process on his watch with little or no opportunity for meaningful public comment. This leaves me to believe that OIRA has either been left out of the process or has very little teeth.

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EPA alone has received approximately 1,500 comments on its rules and regulations. The Chamber of Commerce weighed in on roughly 20 regulations proposed or finalized over the past 2 years at the Environmental Protection Agency, yet EPA's plan for regulatory review includes only 2 of the 20 and in both cases still fails to address the fundamental complaints made by industry. The Environmental Council of the States, a group that represents the secretaries of state environmental agencies, identified more than 30 groups of regulations for review. These are not big business leaders-these are the state officials that run almost all of the programs under the Clean Air Act and the Clean Water Act and undertake about 90 percent of the enforcement actions. Unfortunately, after reviewing the plan, it appears as though EPA officials in Washington overwhelmingly disagreed with, or ignored, the folks that actually implement the regulations they have identified as burdensome. Not only did EPA apparently ignore the stakeholders, but they have also imposed over 900 new regulations on the states since the beginning of this Administration.

Mr. Sunstein has spoken repeatedly about the need to create a new regulatory culture across the Executive Branch and, again, I agree with him. An unprecedented amount of authority has been delegated to executive agencies in this Administration. New regulations, affecting many sectors of industry and aspects of American life, are being promulgated under the same flawed system that produced the regulations identified today. Hopefully we can take a step towards changing that culture today.

# # #

Mr. STEARNS. And with that, I recognize the ranking member, Ms. DeGette.

OPENING STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Ms. DEGETTE. Thank you very much, Mr. Chairman.

In January of this year, President Obama issued an Executive order directing Federal agencies to develop plans for improving the regulatory system. As part of this order, the President urged agencies to expand opportunities for public participation in the regulatory process and to look for ways to make regulations more efficient and effective.

Mr. Chairman, you will be pleased to know that both sides of the aisle support these goals. This subcommittee has a valuable role to play in reviewing implementation of the order. And I want to also join you in welcoming Mr. Sunstein back today.

The last hearing unfortunately devolved into a picky criticism of individual regulations that individual Members might disagree with. But I think it is worthwhile for this committee to continue to focus on the regulatory reform efforts of the administration and see if we can make real progress.

So I know, Mr. Sunstein, we are taking away, once again, from your efforts to implement this program, but it is important for us to hear it.

Since our first hearing on the Executive order in January, I think, from what I have heard, executive-branch agencies have developed preliminary regulatory review plans that the administration has provided to the subcommittee and posted on White House Web site for public input.

My initial review of the plans reveals a range of efforts to meet the Executive order's core goals: Agencies are streamlining and modernizing reporting requirements to save industry and government time and money. They are more precisely tailoring regulations to save money for regulated industries. They are creating broader opportunities for public participation in the design and implementation of regulations. And they are improving the review process.

So I hope we can hear about some of those things today, but I also hope we can hear about what the administration intends to do next to actually streamline, now that they are taking this input, to streamline and modernize and even eliminate unnecessary regulations.

Having said that, I will say the administration appears to be working very hard to implement regulatory reform. And after hearing the distinguished chairman's opening statement and also the sad unemployment news of this morning, I wish the majority, rather than complaining in vague terms about the regulatory reform efforts and the unemployment rate, would actually sit down with the minority and, with us, together, develop a jobs bill.

We have been talking about this since January. And if we really want to reduce the unemployment rate, then let's stop niggling about the edges. Let's sit down and, together, craft a jobs plan. I think that that would benefit the American public. And if we started now, we might be able to decrease unemployment by the end of the year.

And, with that, Mr. Chairman, I yield back.

[The statement of Ms. DeGette follows:]

PREPARED STATEMENT OF HON. DIANA DEGETTE

In January of this year, President Obama issued an Executive order directing federal agencies to develop plans for improving the regulatory system. As part of the order, the President urged agencies to expand opportunities for public participation in the regulatory process, and to look for ways to make regulations more efficient and effective.

Both sides of the aisle should support these goals. And this Subcommittee has a valuable role to play in reviewing implementation of this Order.

Since the Subcommittee's first hearing on the Executive order in January, executive branch agencies have developed preliminary regulatory review plans that the Administration has provided to the Subcommittee and posted on the White House Web site for public input. An initial review of the plans reveals a range of efforts to meet the Executive Order's core goals:

- Agencies are streamlining and modernizing reporting requirements to save industry and government time and money;
- They are more precisely tailoring regulations to save money for regulated industries;
- They are creating broader opportunities for public participation in the design and implementation of regulations; and
- They are improving the review process.

I look forward to the opportunity today to ask the witnesses questions both about the plan contents and the Administration's next steps in implementing the regulatory review initiative.

I hope both Republican and Democratic members of the Subcommittee will make this morning a productive effort to understand the extent to which agencies have been advancing the Executive order's goals and where there is room for improvement. I also hope we avoid what we saw in the last hearing, where the Subcommittee became a forum for airing member complaints about individual regulations and an assault on the concept of government regulation.

So I want to emphasize one basic point as we begin to discuss the regulatory process today: regulations have both costs and benefits. This may seem obvious, but in the past few months on this Committee much of the rhetoric from the majority omits any recognition of the important role regulations play in advancing our nation's welfare.

For example, over the past few months we have heard repeated Republican claims that the Environmental Protection Agency is strangling economic growth in its efforts to keep our air and water clean and combat the threats posed by climate change. But recent analysis by the Economic Policy Institute concluded that the annual benefits from final rules implemented by EPA in the last two years exceeded costs by as much as $142 billion per year, with a cost-benefit ratio as high as 22 to 1.

Earlier this year, EPA released a peer-reviewed study on the costs and benefits of the Clean Air Act Amendments of 1990 that found benefits to outweigh costs by 25 to 1. Furthermore, it found that in 2010 alone Clean Air Act regulations saved 160,000 lives.

And there are similar examples across the federal government. Food and Drug Administration regulations protect children from the health effects of tobacco and help prevent all of us from exposure to salmonella and other food contaminants. New crib safety rules will prevent parents the agony of discovering their child has been strangled to death by a dangerously constructed crib. And Department of Transportation regulations banning texting by commercial truck and bus drivers will make the nation's highways safer for our families.

Any meaningful discussion of costs of such regulations should include discussion of their benefits. I hope all members of the Committee will promote a balanced discussion of regulatory process as we hear from our witnesses today about the Administration's efforts to promote regulatory efficiency and effectiveness. I am pleased to welcome back to the Subcommittee Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget.

I am also glad the subcommittee will also have the benefit of testimony from experts on a second panel that include David Goldston of the National Resources Defense Council, William Kovacs of the Chamber of Commerce, and James Gattuso of the Heritage Foundation. I look forward to hearing their testimony.

Mr. STEARNS. I thank the gentlelady.

And the gentleman from Texas, Dr. Burgess, is recognized for 3 minutes.

OPENING STATEMENT OF HON. MICHAEL C. BURGESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BURGESS. Thank you, Mr. Chairman.

And, Mr. Sunstein, welcome back to our committee. We welcome you back. We are always glad to see you here. We welcome the changes that are coming from some of the agencies. I do still want to hear more about what the administration is doing, and if they are doing anything, to slow the continual onslaught of regulations that are being promulgated and implemented.

Now, we went down to the White House earlier this week, the Republican conference on one day, the Democratic on another. And the President said to us that he wanted to clear out the regulatory underbrush, so I took that as a positive sign. He said the regulations should not be obscure, they should not be difficult for people to understand.

What is hard to understand is how the administration wants to continue to be anti-employer and, at the same time, be pro-jobs. It just doesn't seem to be working out, as we saw from this morning's employment numbers. And businesses across the country are plagued with uncertainty as to what the new regulations will be and what will be handed down next by Washington.

I understand the use of regulations to ensure safety and to promote the predictability of the market, but you must know that, every day, people come to Washington to tell their Congressman or -woman their fears about the avalanche of regulations that will increase their compliance costs. I hear from business owners talking about regulations coming from HHS, EPA, bank examiners, and more. And, unfortunately, I don't see how this review is actually going to be a deliverable that will help them through the problems that they are having. And I might add, those problems are delivered by the United States Congress.

While some of the regulations may be necessary, I feel that many in Washington don't understand or comprehend the effect that the regulations have on jobs and job creation. It is a simple fact: When compliance costs go up, that cuts into a business' bottom line, and that means jobs are likely to be lost.

I am afraid this review has, for some purpose, perhaps just been for political purposes. I think that this was the reaction of a President who doesn't understand how to create jobs, so this is his attempt to appease business. After all the public relations and the rollout of the review, the higher-ups at the White House will have little interest in continuing the review, particularly after special interest groups and outside groups castigate the White House for reviewing the regulations in the first place.

A specific area of the regulations that are coming out, like the medical loss ratio, rate review, and accountable care organizations—in all cases, the Federal Government has taken something that was working in practice and proven that it can't work in theory.

Now, these pieces would ensure more consumer benefits, lower costs, and encourage care coordination, where patients, doctors, and hospitals work together for patient improvement and financial savings, but because of the way that the regulations have been written, we will still have systems that encourage fraud. Plan solvency will be at risk. There is the ultimate consumer protection. If your plan goes bankrupt, you don't get much health care delivered.

And then accountable care organizations, that is the unicorn that turns out that nobody really—not only nobody really believes it exists, nobody now wants to adopt it, because it is just simply so difficult and so onerous.

So I hope that you folks over at Office of Management and Budget and your counterparts at the Federal Trade Commission will understand this and perhaps allow doctors in this country once again to practice medicine.

I will yield back the balance of my time, Mr. Chairman.

Mr. STEARNS. The gentleman yields back.

And the gentlelady from Tennessee, Ms. Blackburn, is recognized for 1 minute.

Mrs. BLACKBURN. Thank you, Mr. Chairman.

And, Mr. Sunstein, thank you for being with us again.

I think everyone will agree, the number-one issue facing our constituents is jobs. And the greatest obstacle that we are hearing about jobs is regulatory overreach, uncertainty through the regulatory process.

And this is not surprising. When you look at the EPA alone, they have finalized 928 regulations since the start of this administration, with more than 6,000 pages of regulations released last year.

Now, saying you want to get rid of some of these regulations and issuing more is counterproductive to jobs. It is killing the growth of jobs. The figures this morning attest to that.

I would encourage my colleagues to remember, you don't do a jobs bill to create jobs. Washington doesn't create jobs. It is the private sector that creates these jobs. It is our responsibility to create that environment for jobs growth to take place.

And, Mr. Sunstein, I have to tell you, all of the regulations that are coming out of this town are not helping employers. Whether it is health care, whether it is banking, whether it is regulation from the FTC, the FCC, the EPA, this has to stop. We look forward to working with you to get these regulations off the books, not add more.

And I yield back.

Mr. STEARNS. The gentlelady yields back.

The gentleman from Louisiana, Mr. Scalise, is recognized for 1 minute.

Mr. SCALISE. Thank you, Mr. Chairman.

I also want to welcome Mr. Sunstein back. Look forward to hearing your comments. And then we will have a dialogue. I know I have a lot of questions about both specific agencies and challenges as well as kind of a bigger-picture approach, and see how we can get this Executive order properly implemented.

Because one of the concerns I have, as we have, still gotten in over 2½ years into this administration now, we still continue to see slow job growth. Today's number showed a dramatic decline from the numbers that just came out in May, an increase in unemployment yet again.

And, frankly, when I talk to employers, not only throughout southeast Louisiana, but when you talk to industry groups, groups that represent big employers all across the country, one of the very first things they will tell you about the limitation, their inability to create jobs and, in fact, the biggest impediment to job creation is a lot of these regulations that have nothing to do with protecting people, protecting environment. It is about agendas that are driven by bureaucrats in Washington. And that is not how regulations ought to work.

We have pushed legislation through to help create jobs that are just lingering over in the Senate. But in the meantime, you have the ability, you have a task to go out and actually reform this process, but you have the ability to do it. And I hope it is more than window dressing. And I look forward to the conversation.

And I yield back.

Mr. STEARNS. I thank the gentleman.

And the gentleman, the ranking member of the full committee, Mr. Waxman from California, is recognized for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman.

The subcommittee today is returning to the subject of the Executive order on regulatory reform, issued in January by President Obama. And the implementation of this order is overseen by the Office of Information and Regulatory Affairs, or OIRA.

And we are fortunate to have the administrator of OIRA, Cass Sunstein, with us, and I am pleased to welcome him to this hearing. He will be able to tell us about the administration's regulatory review activities that have occurred since our last hearing.

The stated focus of this hearing is to learn more about the agency plans for regulatory reform, which the White House released for public review and comment. But if we are going to have an honest discussion about the costs of regulation, we need to consider all of the relevant facts. We should examine costs and reduce them wherever possible. But we also need to give equal consideration to benefits.

Yesterday, we were supposed to mark up a bill called the TRAIN Act, which calls for an analysis of the cumulative impacts of EPA regulation. The markup was postponed. But the bill illustrates what is wrong with how we have been approaching regulatory reform in this committee with this majority.

The TRAIN Act focuses nearly exclusively on the economic costs. It mandates analyses of the impacts of the regulation on jobs, electricity costs, manufacturing, and trade. That is all appropriate, but it ignores the dangers of unchecked pollution on health, the environment, and global climate change. The one-sided approach is the anthesis of what we should be doing.

And this one-sided approach, I think, was so clearly illustrated by the opening comments of my Republican colleagues. A statement was made that the great obstacle to jobs is regulation. I can't believe that. No economist would suggest that the recession is not the major reason we are having a problem with jobs; that regulatory overreach, as it has been called, is something that is not new, if it exists.

I have heard my colleagues say that the President wants the slow job growth. That is absurd. No President of the United States wants a bad economy for the American people. This President inherited a terrible economy in great part because of the bad judgments and policies of the Bush administration.

We need to look at both sides of the equation when we look at regulations. We need to maximize the benefits while minimizing the costs.

And a good case in point is the Clean Air Act, which, along with health care, has become one of the Republicans' whipping boys. We have considered proposal after proposal to weaken the Clean Air Act on the theory that reducing pollution is a job-killer—reducing pollution is a job-killer.

Well, we shouldn't have to pick between jobs and clean air. That is a false choice. When the committee wrote the Clean Air Act amendments in 1990, we heard horror stories about how the law

would impose ruinous costs on industry; it would lead to widespread unemployment. None of this turned out to be true.

Ranking Member Rush and I asked the EPA to do a balanced analysis of both the costs and the benefits of the Clean Air Act. The results show that the law has been a stunning success. EPA found that implementing the Clean Air Act creates American jobs and bolsters the global competitiveness of American industry, even as it lowers health-care costs and protects American families from birth defects, illnesses, and premature death.

The health benefits of the act are legion. In 1 year, the Clean Air Act prevented 18 million child respiratory illnesses; 850,000 asthma attacks; 674,000 cases of chronic bronchitis; 205,000 premature deaths. The health benefits are projected to reach $2 trillion by 2020. Is that something we should ignore?

The implementation of the act also creates American jobs. The environmental technology industry now generates $300 billion in annual revenues and supports 1.7 million jobs.

I have seen the value of regulation over and over again. Following the collapse of the financial markets in 2008, the economy entered the deepest recession since the Great Depression. Millions of Americans have lost their jobs. The cause of the financial crisis was not regulation; it was the absence of regulation. Our hearings last year showed the Deepwater Horizon oil spill created widespread economic dislocation. This was caused by too little oversight, too little regulation, not too much.

Where we can identify unnecessary regulations, they should be identified and eliminated. But, as this review continues, we should remember that sound regulations are vital in protecting our Nation's economy and wellbeing.

Thank you, Mr. Chairman.

[The statement of Mr. Waxman follows:]

PREPARED STATEMENT OF HON. HENRY A. WAXMAN

Today, the Subcommittee returns to the subject of the Executive order on regulatory reform issued in January by President Obama. The implementation of this order is overseen by the Office of Information and Regulatory Affairs, also known as OIRA ("oh-eye-rah"), and we are fortunate to have OIRA Administrator Cass Sunstein with us today. He will be able to tell us about the Administration's regulatory review activities that have occurred since the Subcommittee took testimony from him in January.

The stated focus of this hearing is to learn more about the agency plans for regulatory reform that the White House released last week for public review and comment. These plans and other steps the Administration is taking to review regulations certainly merit congressional oversight.

But if we are going to have an honest discussion about the costs of regulations, we need to consider all of the relevant facts. We should examine costs and reduce them wherever possible. But we also need to give equal consideration to benefits.

Yesterday, we were supposed to mark up a bill called the TRAIN Act, which calls for an analysis of the cumulative impacts of EPA regulations. The markup was postponed, but the bill illustrates what's wrong with how we have been approaching regulatory reform in this Committee.

The TRAIN Act focuses nearly exclusively on economic costs. It mandates analyses of the impacts of the regulations on jobs . electricity costs . manufacturing . and trade. But it ignores the dangers of unchecked pollution on health, the environment, and global climate change.

This one-sided approach is the antithesis of what we should be doing. We should be looking at both sides of the equation—costs and benefits—and maximizing the benefits while minimizing the costs.

A good case in point is the Clean Air Act, which along with health care has become the Republicans' favorite bête noire. We have considered proposal after proposal to weaken the Clean Air Act on the theory that reducing pollution is a job killer.

We shouldn't have to pick between jobs and clean air. That's a false choice.

When this Committee wrote the Clean Air Act Amendments of 1990, we heard horror stories about how the law would impose ruinous costs on industry. None of them turned out to be true.

Ranking Member Rush and I asked EPA to do a balanced analysis of both the costs and benefits of the Clean Air Act. The results show that the law has been a stunning success. EPA found that implementing the Clean Air Act "creates American jobs and bolsters the global competitiveness of American industry, even as it lowers healthcare costs and protects American families from birth defects, illnesses, and premature death."

The health benefits of the Act are legion. In one year, the Clean Air Act prevented 18 million child respiratory illnesses, 850,000 asthma attacks, 674,000 cases of chronic bronchitis, and 205,000 premature deaths. The health benefits are projected to reach $2 trillion by 2020.

And the implementation of the Act also creates American jobs. The environmental technology industry now generates $300 billion in annual revenues and supports 1.7 million jobs.

I've seen the value of regulation over and over again during my career. Following the collapse of the financial markets in 2008, the economy entered the deepest recession since the Great Depression and millions of Americans lost their jobs. The cause of the financial crisis was not regulation; it was the absence of regulation. Our hearings last year showed that the Deepwater Horizon oil spill, which created widespread economic dislocation, was caused by too little oversight and regulation—not too much.

That is why it so important that we put aside the partisan anti-regulation rhetoric and look dispassionately at both costs and benefits. Unnecessary regulations should be identified and eliminated, and I am pleased that President Obama has made this a priority. But as this review continues, we must remember that sound regulations are vital in protecting our Nation's economy and well-being.

Mr. STEARNS. I thank the gentleman.

And, with that, we welcome Mr. Cass R. Sunstein, administrator, Office of Information and Regulatory Affairs, before our subcommittee.

And, before we start, let me just make some comments considering your testimony.

You are aware that the committee is holding an investigative hearing and, when doing so, has had the practice of taking testimony under oath. Do you have any objection to testifying under oath?

Mr. SUNSTEIN. No.

Mr. STEARNS. The chair then advises you that, under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony?

Mr. SUNSTEIN. [Nonverbal response.]

Mr. STEARNS. In that case, if you would please rise and raise your right hand, we will swear you in.

[Witness sworn.]

Mr. STEARNS. You are now under oath and subject to the penalties set forth in Title 18, section 1001, of the United States Code.

You may now give a 5-minute summary of your written statement.

TESTIMONY OF THE HON. CASS R. SUNSTEIN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SUNSTEIN. Thank you so much, Mr. Chairman.

And thanks to you and members of the committee, not only for your strong commitment to the reduction of unjustified regulatory burdens, but also for your generosity and kindness to me and my staff over the last months as we try to work together on these issues.

My focus in these opening remarks will be on the process of retrospective review of regulations, the "lookback," as we call it, though I will devote a few words to the effort to control regulatory efforts going forward, something addressed in many of your opening remarks.

In the January 18th Executive order, the President, in the first sentence, referred specifically to two topics that have come up in the last minutes: One is economic growth, and the other is job creation. Those are central factors in the process that he has inaugurated.

For the process going forward—that is, with respect to new rules—I would like to underline four elements of the Executive order.

First, it requires agencies to consider costs and benefits, to ensure that the benefits justify the costs, and to select the least burdensome alternative. Those ideas are central going forward, and they will be followed, to the extent permitted by law.

Second, the Executive order requires unprecedented levels of public participation. It asks agencies, before they issue rules, to engage with State, local, and tribal officials. And there was a reference earlier to costs imposed on State and local government, to affected stakeholders, and to experts in relevant disciplines. What I would like to underline here is the requirement that agencies act even in advance of proposed rulemaking to seek the views of those who are likely to be affected.

Third, the Executive order directs agencies to harmonize, simplify, and coordinate rules, with the specific goal of cost reduction.

Fourth, the Executive order directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public.

Those are directions for all of us, going forward, within the executive branch.

What many of your opening remarks focus on is the lookback process. Last week, in compliance with the Executive order, 30 departments and agencies released their preliminary plans to this subcommittee and the public in an unprecedented process. Some of the steps outlined in these hundreds of pages of plans have already eliminated hundreds of millions of dollars in annual regulatory costs, including, by the way, costs imposed on employers.

Over $1 billion in savings can be expected in the near future. So these are not mere aspirations or plans to plan; these are concrete products that have either been delivered already or that will be delivered in the very near future. Over the coming years, the reforms have the potential to eliminate billions of dollars in regulatory burdens.

Many of the initiatives represent a fundamental rethinking of how things have long been done. We have heard in the last month since the Executive order was written that red tape and paperwork and reporting burdens exert a significant toll on the economy, including on small business. There is an effort throughout the plans to try to reduce those burdens. There is also an effort to rethink rules that require the use of outdated technologies in a way that is consistent with the innovation that is now occurring and may even promote innovation.

Many of the reforms have already saved significant money. The EPA has recently exempted milk and dairy industries from its oil spill rule. There is a long tale there. The punch line of the tale is, over the next decade, the milk and dairy industries will cry not at all over spilled milk and will save over $1 billion in the next decade.

A few additional illustrations: Several of you referred to burdens on employers. We are very alert to that. I am personally very alert to that. Last week, the Occupational Safety and Health Administration announced a final rule that will remove over 1.9 million annual hours of recordkeeping and paperwork burdens. That will save over $40 million in annual costs, and that may be a lowball estimate. In recent discussions with people in the business community, that burden-saving measure was highlighted as an extraordinary step forward.

OSHA also plans to finalize in the near future a proposed rule that is projected to result in over half a billion annualized savings for employers—not $40 million, over half a billion.

To eliminate unjustified economic burdens on railroads, the Department of Transportation is reconsidering a rule that requires railroads to impose certain equipment on—to create certain equipment that is very expensive. This would save, potentially, over a billion dollars in the next 20 years.

These are just illustrations. There was a reference by you, Mr. Chairman, to a cultural change. We are determined to create that cultural change.

While a great deal has been done in a short time, an unprecedented effort, and while substantial savings have already been achieved, the agency plans are preliminary. They are just drafts. They are being offered to you, other Members of Congress, elected representatives at all levels, and the public, emphatically including the business community, for views and perspectives. Suggestions are eagerly welcome. We need your help in order to make these plans as good as possible and to do as much as possible to promote economic growth and job creations. Agencies will be carefully assessing those comments and suggestions before they finalize their plans. And we have a number of weeks, in fact months, in which to do that.

To change the regulatory culture of Washington, we need a constant exploration, not a one-shot endeavor, of what is working and what is not. We need close reference to the evidence and data, and we need very close reference to the views of stakeholders about what is actually happening on the ground. To quote the opening words, we are trying to promote public health and also economic growth and job creations.

I am happy to answer your questions.
[The statement of Mr. Sunstein follows:]

PREPARED TESTIMONY OF
CASS R. SUNSTEIN, ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
BEFORE THE
HOUSE ENERGY AND COMMERCE COMMITTEE
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE
JUNE 3, 2011

Mr. Chairman and Members of the Subcommittee:

I am grateful to have the opportunity to appear before you today to discuss issues relating to regulation and Executive Order 13563, "Improving Regulation and Regulatory Review." I will focus in particular on retrospective review of existing rules.

With Executive Order 13563, issued on January 18, 2011, the President laid the foundations for a regulatory system that is designed to protect public health and welfare while also promoting economic growth, innovation, competitiveness, and job creation. Executive Order 13563 provides a series of directives and requirements. Among other things, and to the extent permitted by law, the Executive Order:

- *Requires agencies to consider costs and benefits, to ensure that the benefits justify the costs, and to select the least burdensome alternatives.* In this regard, the Executive Order places an emphasis on the need to "measure, and seek to improve, the actual results of regulatory requirements."

- *Requires increased public participation.* The order directs agencies to promote an open exchange with State, local, and tribal officials; experts in relevant disciplines; affected stakeholders; and the public in general. Attempting to bring rulemaking into the twenty-first century, it requires use of the Internet to promote such an exchange. It also directs agencies to act, even in advance of rulemaking, to seek the views of those who are likely to be affected.

- *Directs agencies to take steps to harmonize, simplify, and coordinate rules.* The order emphasizes that some sectors and industries face redundant, inconsistent, or overlapping requirements. In order to reduce costs and to promote simplicity, it calls for greater coordination within and across agencies.

- *Directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public.* Such approaches may include, for example, public warnings or provision of information.

As you are aware, the Executive Order also requires a government-wide "lookback" at existing Federal regulations. The requirement of retrospective analysis directs agencies to review their significant rules and to decide, on the basis of that review, which of such rules should be streamlined, reduced, improved, or eliminated. One of the goals of this approach is to eliminate unnecessary regulatory burdens and costs on individuals, businesses both large and small, and State, local, and tribal governments.

Last week, and in compliance with the Executive Order, thirty departments and agencies released their preliminary plans. Some of the steps outlined in the plans have already eliminated hundreds of millions of dollars in annual regulatory costs, and over $1 billion in savings can be expected in the near future. Over the coming years, the reforms have the potential to eliminate billions of dollars in regulatory burdens.

Many of the proposed initiatives represent a fundamental rethinking of how things have long been done – as, for example, with numerous efforts to move from paper to electronic reporting. For both private and public sectors, those efforts can save a great deal of money. Over the next five years, for example, the Department of the Treasury's paperless initiative will save more than $500 million and twelve million pounds of paper. The plans also reflect efforts to rethink regulations that require the use of outdated technologies such as film radiography (which is being phased out at many medical facilities).

Many of the reforms are expected to have a significant economic impact. One example is EPA's decision to exempt milk and milk product containers, piping, and appurtenances from the Spill Prevention Control and Countermeasure requirements. Since the 1970s, milk has been defined as an "oil" (because it contains animal fats) and was therefore subject to rules designed to prevent oil spills. In response to concerns from the agricultural community and the President's directive, EPA recently concluded that the rules placed unjustifiable burdens on dairy farmers -- and exempted them. Over the next decade, the exemption will save the milk and dairy industries, including small businesses in particular, as much as $1.4 billion.

A few additional illustrations:

- Last week, the Occupational Safety and Health Administration (OSHA) announced a final rule that will remove over 1.9 million annual hours of recordkeeping burdens on employers and save more than $40 million in annual costs.

- OSHA also plans to finalize a proposed rule projected to result in an annualized $585 million in estimated savings for employers. This rule would harmonize U.S. hazard classifications and labels with those of a number of other nations by requiring the adoption of standardized terms.

- To eliminate unjustified economic burdens on railroads, the Department of Transportation is reconsidering parts of a rule that requires railroads to install certain equipment on trains. DOT expects initial savings of up to $400 million, with total 20-year savings of up to $1 billion.

- EPA will propose to eliminate the obligation for many states to require air pollution vapor recovery systems at local gas stations, given that modern vehicles already have effective air pollution control technologies. The anticipated annual savings are about $67 million.

- The Department of Commerce, with assistance from the Department of State, is taking a series of steps to eliminate unnecessary barriers to exports, including duplicative and unnecessary regulatory requirements such as licensing restrictions on lower-risk exports. These steps will protect national security while reducing the cumulative burden and uncertainty faced by American companies and their trading partners.

- To reduce administrative burdens and increase certainty, the Department of the Interior, along with the Department of Commerce's National Oceanic and Atmospheric Administration, is reviewing and streamlining outdated regulations under the Endangered Species Act, to simplify descriptions of critical habitat designation and to clarify and expedite procedures for approval of conservation agreements.

- To promote flexibility, the Department of Health and Human Services will be reconsidering burdensome regulatory requirements now placed on hospitals and doctors, to determine whether these requirements are redundant and whether they really benefit patients.

Importantly, agencies are eliminating all these burdens while continuing to protect public health, safety, and the environment—because, as the President said in his January editorial in the *Wall Street Journal*, "We can make our economy stronger and more competitive, while meeting our fundamental responsibilities to one another."

It is important to emphasize that while a great deal has been accomplished in a short time, and substantial savings have already been achieved, the agency plans are preliminary. As such, they are being offered to the public, and to elected representatives at all levels, for their views and perspectives. Suggestions are eagerly welcome. Agencies will be carefully assessing all comments and suggestions before they finalize their plans.

While the current retrospective review is important, Executive Order 13563 reflects a broader ambition. To protect public and private dollars, and our future safety and prosperity, we are seeking to change the regulatory culture of Washington by eliminating unjustified burdens and constantly exploring what is working and what is not, with close reference to evidence and data. Many of the plans emphasize the need for careful empirical investigation of rules, to be undertaken in advance if possible, and retrospectively as well. To quote the opening words of Executive Order 13563, the overall goal of the plans is to "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."

I greatly look forward to working with you in this endeavor. I would be happy to answer your questions.

Mr. STEARNS. Thank you, Mr. Sunstein.

The Oversight and Investigations Committee, before I start, is a little different than some of the other committees. We ask questions that pretty much are asking for "yes" or "no" answers. And sometimes the press would criticize, but we are asking for direct answers. So it is a little bit different. We are trying to seek information. So if we do ask, we would appreciate a direct answer, "yes" or "no."

And so, just to establish the ground rules, we want to make sure that you are the administrator of OIRA and you comply with Executive orders dealing with regulatory reform. That is our understanding. That is correct?

Mr. SUNSTEIN. That would be a "yes."

Mr. STEARNS. OK. And, as the administrator, you have a role in ensuring this very important President Executive order, which is 13563 and 12866. Is that correct?

Mr. SUNSTEIN. Yes.

Mr. STEARNS. You are the man. OK.

Now, when you have a rule and it has an economically significant impact in the economy, wouldn't that particular rule require more attention than one that is not economically significant? I am just trying to——

Mr. SUNSTEIN. Absolutely.

Mr. STEARNS. Absolutely. Because there are huge implications on the impact in the economy with this regulatory framework. And, also, there is risk analysis that should be done and supporting documents. So we agree there.

OIRA officials have repeatedly claimed that, during the Obama administration, regulatory reviews by your office have been shorter than regulatory reviews of previous administrations. And I think that is—is that a fair claim to say what the administration has been touting?

Mr. SUNSTEIN. No.

Mr. STEARNS. No. OK.

While the economic impacts of the rules are much larger than in previous administrations, your staff, I think, has remained—your staff has remained small. I have a graph up here, if it will stop wiggling. It looks like it is wigging quite a bit there.

I am trying to show you two charts. I think we have it there. The first one shows that OIRA is reviewing more large, complex regulation. And the second one shows that the agency spends less time on the review of these regulations.

So this would be contrary to what we just talked about and which you just agreed. So isn't it true that your office's reviews are shorter in duration——

Ms. DEGETTE. Mr. Chairman?

Mr. STEARNS. Yes?

Ms. DEGETTE. Do we have a printed chart we could give to Mr. Sunstein?

Mr. STEARNS. We do. I think we have it printed.

Will the staff give him a chart that is not——

Ms. DEGETTE. Moving.

Mr. STEARNS [continuing]. moving, quivering? OK.

So I guess the question is, isn't it true that your office reviews are shorter in duration than those under previous administrations, based upon that graph?

Mr. SUNSTEIN. Well, I would want to check those numbers. I know——

Mr. STEARNS. OK.

Mr. SUNSTEIN [continuing]. in the first year we were fast. Whether we are as fast in the recent past, I would want to check.

Mr. STEARNS. OK.

Why are so many regulations issued after short OIRA reviews to public comments that they violate the Executive order principles?

Mr. SUNSTEIN. I don't agree with the premise of the question. We have had about the same number of rules as in the first 2 years of the Bush administration. And, actually, 2007, 2008, the Bush administration imposed significantly higher costs than we did in 2009, 2010.

Mr. STEARNS. I have here a study by the Mercatus Center that I will insert into the record.

The study grades the economic analysis in reviews by OIRA. It shows that the quality of analysis declined when the reviews were shortened.

Were you familiar with this?

Mr. SUNSTEIN. I am familiar with that study.

Mr. STEARNS. Do you agree with this study?

Mr. SUNSTEIN. Well, not really. I think the important thing is not how many days on the calendar are spent. The important thing is the degree of attention and care.

And I believe the same study shows no diminution in quality between the Bush administration and the Obama administration, though we are eager to increase the quality and to get it better and better.

Mr. STEARNS. The Executive order that I cited earlier, the 12866, section 6 requires agencies to, quote, "identify for the public in a complete, clear, and simple manner the substantive changes between the drafts submitted to OIRA for review and the actions subsequently announced," end quote, as well as those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

Despite claiming to be the most transparent administration in history, we understand that the position of the administration is that this requirement only applies to the formal regulatory review process. Is that correct?

Mr. SUNSTEIN. I believe that is correct, that we are following the practice of the Bush administration and its predecessor with respect to the interpretation of 12866. There has been continuity across Republican and Democratic administrations. I am not sure exactly what you mean by "informal," but what you said sounded right.

Mr. STEARNS. However, most big rules are submitted to OIRA on an informal basis before the draft rule is officially submitted. With respect to significant rules issued since the passage of the PPACA, would you be willing to provide the changes suggested by OIRA during the informal review process?

Mr. SUNSTEIN. It is actually very rare that a rule is submitted informally. That is not the normal practice. It is extremely unusual. And we don't make—all I would say that happens sometimes is there are interagency discussions about rules pre-submission. And we don't have the authority to make changes in those discussions. But sometimes the agency decides that the discussions are informative and goes—so, in other words, informal review is extremely rare.

What is not extremely rare is their interagency discussions. And there are no changes made, because there is no rule text, typically. There is just discussion of a policy issue.

Mr. STEARNS. You are saying it is rare, but was it done with the health-care policy, PPACA?

Mr. SUNSTEIN. Informal review? No. There are discussions, but not informal—typically, not informal review of rules.

Mr. STEARNS. You are saying it is rare, but you are saying it did occur with the health-care review.

Mr. SUNSTEIN. Well, I would want to go back and see, because my own involvement is standardly during formal review. I would want to go back and see whether——

Mr. STEARNS. Well, obviously, we would probably not agree on that point, because we think there has been a lot in the health-care reform of informal.

Mr. SUNSTEIN. I think there is informal review, which is very rare, where someone sends over a rule and says, what do you think? In the health-care context, HHS and Labor——

Mr. STEARNS. OK. Do you mind, Mr. Sunstein, if you would follow up—because you are saying, yourself, right now you not sure you can remember this correctly—if you would follow up with the data, just to confirm.

Mr. SUNSTEIN. Delighted.

Mr. STEARNS. All right.

With that, my questions are complete, and we recognize the ranking member.

Ms. DEGETTE. Thank you very much, Mr. Chairman.

Mr. Sunstein, it sounds like the definition of "informal review" is a term of art, in your mind, and that what you are meaning is informal review would be if somebody actually sent text over and it was reviewed and sent back, versus general discussions about potential rules and policies. Would that be correct?

Mr. SUNSTEIN. Exactly.

Ms. DEGETTE. Mr. Sunstein, I would like to ask you about the cost of regulations because we keep hearing on the other side of the aisle that the annual cost of Federal regulations is more than $1.75 trillion. And, as I understand it, the basis for that figure is a September 2010 study called the Crain & Crain study, by Nicole and Mark Crain, that stated that the annual cost of Federal regulation totaled approximately $1.75 trillion in 2008.

OMB, though, reached a different conclusion, finding that regulatory costs in 2008 ranged from $62 billion to $73 billion.

So I guess I am wondering, how does OMB calculate its estimate on total regulatory costs?

Mr. SUNSTEIN. Thank you for that, Congresswoman.

What we do is to aggregate the costs of all the rules in a year. And then, over a 10-year period, we can multiply the number of rules issued by the cost that we generate. And then you can have a 10-year aggregate cost as a result.

The study to which you refer, with the 1.75—the extraordinary $1.75 trillion figure, is deeply flawed, as a report by the Congressional Research Service this April suggests. And it has become a bit of an urban legend, the particular number.

We share, definitely, the concern. But one implication of that analysis is the United States would be richer if it adopted regulations more like those of Sweden or Canada, even though both the World Bank and the OECD rate those countries as having more restrictive business environments.

Ms. DEGETTE. Who said that? The Crain & Crain study said that?

Mr. SUNSTEIN. The Crain & Crain study, with the $1.75 trillion. I should say, I respect those authors——

Ms. DEGETTE. So they said that we should have regulations more like Sweden and these other countries?

Mr. SUNSTEIN. No, but——

Ms. DEGETTE. That is the urban myth?

Mr. SUNSTEIN. No, no, it is an implication of their analysis——

Ms. DEGETTE. I see. OK.

Mr. SUNSTEIN [continuing]. That we would be doing better if we had regulations——

Ms. DEGETTE. And the administration does not agree with that, right?

Mr. SUNSTEIN. We do not except that 1.7——

Ms. DEGETTE. OK. And one of the reasons that what the CRS review showed and what others have demonstrated is that the estimate was so high in that study because the authors only utilized the highest cost estimates in their calculations, correct?

Mr. SUNSTEIN. Yes.

Ms. DEGETTE. Now, additionally, what I have heard is that the authors of that Crain & Crain study did not calculate the monetary benefits of regulations where there are benefits. And the OMB found that in 2008 annual benefits of regulation ranged from $153 billion to $806 billion. Is that correct?

Mr. SUNSTEIN. Yes.

Ms. DEGETTE. Now, can you please tell us how regulations could actually benefit Americans and save money?

Mr. SUNSTEIN. OK, there are various different ways.

I referred to the milk rule, which is deregulatory. That can save money.

There is a lot of concern about rising gasoline prices, of course, now. If you have a more fuel-efficient fleet, then consumers can save money. And we recently released a new fuel economy label which clarifies the savings. So, a law, a rule that promotes fuel economy can save consumers a lot of money.

If you have a law that saves lives, that saves money, in the sense that healthier and living people are good for the economy and we value people's health and longevity.

So, in those three different ways, we can have very significant benefits from regulation.

Ms. DEGETTE. So, really, it seems to me—I don't want to be implying either that more regulations would save more money or fewer regulations would cost or save more money. In truth, you have to look at it on a continuum. Sometimes regulations are not cost-effective, and they should either be fixed or repealed. But sometimes regulations protect the public health and actually can save money.

So you have to look at it regulation by regulation, which is what the administration is trying to do. Is that correct?

Mr. SUNSTEIN. Exactly.

Ms. DEGETTE. Thank you.

Thank you very much, Mr. Chairman. I yield back.

Mr. STEARNS. The gentlelady yields back.

Dr. Burgess is recognized for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman.

Mr. Sunstein, are you familiar with the paper from 2003, "Lives, Life-Years, and Willingness to Pay"?

Mr. SUNSTEIN. I have a vague recollection of that paper.

Mr. BURGESS. On page 14 of the paper, this is quoting from the paper, "Under the life-years approach, older people are treated worse for one reason: They are older. This is not an injustice."

So I guess the question here—I mean, some people have described this as sort of a senior death discount. Your office that oversees regulations, will you be doing an analysis of the upcoming Health and Human Services rule for the Independent Payment Advisory Board in light of this philosophy?

Mr. SUNSTEIN. I am a lot older now than the author with my name was, and I am starting to think I am not sure what I think of what that young man wrote.

Things written as an academic are, you know, not a legitimate part of what you do as a government official, part of a team. So I am not focusing on sentences that a young Cass Sunstein wrote years ago. So the answer is "no."

Mr. BURGESS. But, still, it does point out an important philosophical approach. And many of us are concerned about the Independent Payment Advisory Board. Right now, this is the only plan, promulgated by the administration and, therefore, by the Democratic Party, this is the only plan put out there for dealing with the cost increases in the Medicare program over time.

And the difficulty that a lot of—I mean, I was a physician in my former life. One of the difficulties I have with an Independent Payment Advisory Board is, now, for the first time, some central planner, who may be a very benevolent central planner, but a central planner who is pushing data points around on a big spreadsheet in a far-off Washington, D.C., is going to be able to tell me where to get my care, when to get my care, but the most important thing is when I have had enough. And if that is based upon the fact that I am old, and we are dealing with a health-care program that deals with senior citizens, that is a troubling relationship.

But I appreciate your answer, and we will take that at face value and incorporate that into our evaluation of the Independent Payment Advisory Board that the President has popularized as his approach to saving money in Medicare for the future.

Our last hearing, earlier this year—and, again, appreciate you coming back—we talked a little bit about the Texas flexible permitting program, so shifting gears from HHS to EPA. So here is another example of a mandate that is inconsistent with the Executive orders for regulatory efficiency.

The EPA's proposed—their Federal implementation plan for greenhouse gases that would affect the State of Texas, and, to my read, probably exclusively the State of Texas, but a Federal implementation plan that is going to be implemented because Texas did not meet the requirements under a State implementation plan, and so the EPA said it was necessary to step in.

But here is the problem. This is a Wall Street Journal editorial, "EPA's War on Texas," from—I think it was from earlier this year, probably right before you came and testified to us before, that this was the result of an error that escaped the EPA's notice for 18 years—18 years—that the Texas plan did not address all pollutants newly subject to regulation, among them greenhouse gases.

So, somehow, regulators in Texas 18 years ago weren't able to intuit congressional intent or the intent of the courts 18 years in the future. And, as a consequence now, the EPA will come in and regulate at a Federal level all of the power production, electricity production in the State of Texas.

This seems incomprehensible, with the Executive order that we are going to streamline the process.

Mr. SUNSTEIN. OK. Appreciate the question.

And you are exactly right; the Executive order is designed to reduce costs of all rules, including rules that involve greenhouse gasses. That is something we are very focused on.

My understanding of the Texas situation is this: that there was an intervening Supreme Court decision, a badly split Court, but the majority said greenhouse gasses were a pollutant within the meaning of the Clean Air Act.

Mr. BURGESS. No, it said the EPA could regulate. I don't think they said they were a pollutant.

Mr. SUNSTEIN. My recollection is that the Court said greenhouse gasses are a pollutant and the EPA could not conclude that they weren't.

Mr. BURGESS. We are trying to help the EPA with legislation.

Mr. SUNSTEIN. Well, Justice Scalia dissented. It is a very active debate within the Court. And when the Court said that—so it wasn't as if, I hope, the EPA thought that it had been made a mistake for 18 years, but, instead, that it had to do something to allow those permits to be given out in Texas so people could build.

And so it was responding to, my understanding is, a difficult situation caused by the confluence of the Supreme Court decision and the permitting practices——

Mr. BURGESS. It may be a difficult situation, if I may, that they made impossible. Because then they came back and said, "Well, you can't do a State implementation plan. We are going to take that over at the Federal level."

Texas was the only State singled for that. In the Wall Street Journal article that I will submit for the record, they call it "pure political revenge, an effort intimidate other States from joining Texas in lawsuits."

Mr. SUNSTEIN. Well, I will tell you something that nicely connects the enterprise we are now engaged in with your question, which is that we are looking back at regulatory practices. And EPA has one rule, actually, that I hope will benefit Texas that is going to eliminate a redundant regulatory requirement that costs a lot of money. And——

Mr. STEARNS. The gentleman's time has expired.

Mr. SUNSTEIN [continuing]. It is completely fair game to raise that question.

Mr. BURGESS. And, Mr. Chairman, I would like to submit this for the record.

Mr. STEARNS. By unanimous consent, so ordered.

Ms. DEGETTE. No, I would like to review it.

Mr. STEARNS. The ranking member——

Ms. DEGETTE. Mr. Chairman, I would like to review it before it is submitted for the record.

Mr. STEARNS. While we are waiting for her to review it, we will take our next——

Ms. DEGETTE. Let's just start with the next questions.

Mr. STEARNS. Yes, we will start.

The gentleman from California, Mr. Waxman, is recognized for 5 minutes.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. Sunstein, I believe in government because government can help set the rules in place that will make this society of ours and our economy more productive, more competitive, provide for more jobs, and also protect the public health and safety. And that is often exactly what regulations are all about. And sometimes we hear such negative, anti-government, anti-regulation statements that you would wonder what they think would operate in its place except for whatever industry wanted, which may or may not be the best for the economy and for our public.

But I want to focus on what I think you are here to talk about, and that is efforts to ensure that executive-branch agencies employ a transparent regulatory process that produces commonsense, balanced regulations. That should be our goal. And I am pleased that we are going to look at this topic.

In January, President Obama directed executive-branch agencies to undertake a thorough lookback at regulations within their jurisdictions and to examine ways to make those rules more efficient, more effective, more reflective of input from the public at large.

At this point, you have received lookback action plans from 30 departments and agencies; is that right?

Mr. SUNSTEIN. That is correct.

Mr. WAXMAN. Can you tell us a little bit about some of the ideas that have emerged from these department and agency plans?

Mr. SUNSTEIN. Happy to do that.

There has been a lot of discussion in the last decade about conditions of participation from the Department of Health and Human Services, which are conditions imposed on hospitals and doctors, and that a lot of these haven't been rescrutinized in light of what has happened on the ground and possible redundancy and changes in medical practice and hospitals over time. Hospitals are often concerned that the Federal Government is too hard on them, ham-

mering them a little bit with respect to regulatory requirements. And HHS has a very detailed discussion of steps that they are taking to reconsider those requirements.

We have, in the context of hazard communication from the Department of Labor, OSHA in particular, there has been long suggestion from the business community, employers in particular, that these requirements need to be harmonized by what is happening in other nations so that they can do business across international lines and so that things are simpler and less burdensome for them. They have proposed that rule, and their plan says they are going to finalize it in a hurry.

There has been a great deal of discussion about medical devices and innovation in the United States and whether these often small companies which are trying to bring medical devices to market have an adequate process within the FDA or whether it is too bureaucratic and time-consuming and difficult. The FDA has announced a number of initiatives to try to speed up that process, promote competitiveness and innovation. That should save a lot of money.

One thing with potentially a very large payoff involves exports. We know that American companies, often small companies, have the best opportunity to grow if they are able to export. One thing we have heard a great deal from, in the last year and a half, from small business in particular, is that it is too cumbersome and difficult to navigate the system, there are too many restrictions. And we have taken away some of those restrictions, and we are going to take away more. And that should promote economic growth, and not in the long term.

Mr. WAXMAN. So we are hear from many Members who are very frustrated or hearing from their frustrated constituents that a lot of the regulations don't make sense to them. The purpose of the administration's review is to see if they are right and, if they are right, to revise those regulations and bring them up to date and make sure they meet basic common sense and that they try to accomplish both the positive economic goals as well as the protection of the public, which is another side of it.

What happens next in this review process? By the end of the summer, do you expect the agencies to have final regulatory lookback plans in place?

Mr. SUNSTEIN. Late August.

Mr. WAXMAN. And what will happen then?

Mr. SUNSTEIN. My expectation is that we will have in late August three tracks. One track will be things that are completed. And, as I say, we expect a billion dollars in savings to be able to be achieved in the very short term.

Other things that are on fast tracks, in the sense that the rulemaking apparatus has already gotten moving. Maybe there is a proposed rule out there; maybe we can propose it relatively quickly. And that is the second track, which is potentially rapid for many of the rules.

Then there is a third track, where the rulemaking apparatus has to be inaugurated. And my hope is that we will be able to prioritize, with the aid of the views of people on this committee and your constituents and affected stakeholders, and prioritize things

that we will be able to complete in the relatively short term, even though the work is being inaugurated these days and through the summer.

Mr. WAXMAN. Well, it appears to me that the President's regulatory review process holds the promise for creating a more effective, efficient, and responsive Federal Government. I applaud it. And it seems to me something that both sides of the aisle, all reasonable people who want to see government succeed, should welcome. So I certainly want to encourage you in your efforts. And we should be willing, in Congress, to do whatever we need to to help out.

Mr. SUNSTEIN. Thank you so much.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

Mr. Scalise is recognized for 5 minutes.

We have a vote. We have just under 10 minutes. And after Mr. Scalise, we are going to break. I remind all Members, we have a second panel here, and so I encourage all Members to come back.

Mr. Scalise?

Mr. SCALISE. Thank you, Mr. Chairman.

Mr. Sunstein, last time you had testified before our committee, I had asked you about the rule that you imposed, the Deepwater moratorium on drilling. And I think you said that that didn't fall under the purview of the types of rules you would review under the Executive order.

When the rule came out, the scientific experts that the President himself appointed actually disagreed with it. They said it would reduce safety in the gulf. They said it would lead to some of your best rigs and your crew base leaving, leaving the country.

They turned out to be true, unfortunately. We have lost over 13,000 jobs. We have lost about a dozen of those Deepwater rigs to foreign countries. So the scientific experts that the President appointed were actually correct, unfortunately, because those terrible consequences happened, and so we have lost those jobs. Safety was surely not improved.

And yet, under the rule, you are still, I guess, taking the position that that type of rule wouldn't even fall under your purview.

So what I would ask, is the rule maybe not properly drawn if an actual rule that has gone through the process, that cost our country 13,000 jobs and, according to the scientific experts the President appointed, would actually reduce safety, and it still doesn't even fall under your purview, so is that something that you should relook at?

Mr. SUNSTEIN. That is a great question.

Anything that has an adverse job impact we are very focused on. Our domain is the domain of regulatory actions as defined under Executive Order 12866. And, for technical reasons, a moratorium doesn't count as regulatory actions.

Mr. SCALISE. All right, but should the Executive order be updated, amended, revised to take into account those types of rules, as well, since—again, I am talking about a rule that actually cost 13,000 jobs and did nothing to improve safety, and it didn't even fall under your purview.

Mr. SUNSTEIN. It is a legitimate question. And I should say that anything that costs jobs in that domain or any other domain is definitely a legitimate part of the lookback process.

Mr. SCALISE. I know the FCC is one of the entities who said that, even though they don't fall under the purview, they would like to be included. And I think there are some other independent agencies that said that they would voluntarily look to be involved in this.

Have you gotten any requests from the FCC or any of these other independent agencies?

Mr. SUNSTEIN. We have gotten a plan, actually, from the NLRB. So that is significant. It is short plan——

Mr. SCALISE. I heard it was a one-page plan.

Mr. SUNSTEIN. Yes, short——

Mr. SCALISE. So, of all these independent agencies, you have one page to review? Do you just think——

Mr. SUNSTEIN. And we very much hope for more.

Mr. SCALISE [continuing]. This is it?

Mr. SUNSTEIN. We very much hope for more.

Mr. SCALISE. OK. So you haven't gotten anything from FCC? Beyond this one page from NLRB, you haven't gotten anything else?

Mr. SUNSTEIN. You are exactly right. The independent agencies have not delivered plans. But we are hopeful and we are encouraging them to engage in a lookback process.

Mr. SCALISE. I know we had our meeting with the President on Wednesday. I think you were there. One of the questions that was asked to the President was specifically relating to the EPA. And we have had this conversation with the EPA on many of their proposed rules and regulations that have no impact on improving safety. It is much more aligned with a political agenda, ideology, rather than safety. And, in fact, the EPA has almost bragged that they don't have to comply with your rule. We brought this to the President's attention.

Has anything changed in that regard?

Mr. SUNSTEIN. The EPA is very clearly complying with the Executive order. And you have seen both a plan from the EPA, which is detailed—it has 31 suggestions for reforms, and the EPA will be considering what comes in in the next period to add to that 31—and the EPA's recent rules have been detailed in their compliance with the Executive order, including their analysis of what you point to, job impacts.

Mr. SCALISE. Can you give our committee any examples of where you have said "no" to the EPA in any of their rules or regulations? Or the Department of Interior, for that matter?

Mr. SUNSTEIN. The way we work with EPA and Interior is collaborative rather than anything else. And you can see that——

Mr. SCALISE. Well, have you all collaborated in a way where some of their proposals were rolled back?

Mr. SUNSTEIN. You can see that a number of their rules, when they were finalized, were far more modest than when they were proposed.

Mr. SCALISE. Can you send examples to our committee of cases, both the previous proposal and then the rolled-back proposal that

I guess ultimately made its way into—I don't know if it made it all the way to regulation yet or just further in the process.

Mr. SUNSTEIN. We would be delighted to show examples. I know the National Association of Manufacturers particularly applauded the——

Mr. STEARNS. The gentleman's time has expired. And we just want to——

Mr. SCALISE. I appreciate that.

Mr. SUNSTEIN. You don't want to hear what the National Association of Manufacturers applauded?

Mr. STEARNS. Why don't you complete the answer, and then we will call it to a close.

Mr. SUNSTEIN. The EPA's action with respect to the Boiler MACT rule, which included a recent stay and also a scale-back in response to concerns.

Mr. SCALISE. All right. I would appreciate if you could get us all of that information to the committee.

And thanks. I yield back.

Ms. DEGETTE. And, Mr. Chairman, we don't have any objection to Mr. Burgess' article being inserted——

Mr. STEARNS. OK. By unanimous consent, Dr. Burgess' article will be made part of the record.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. And we will reconvene right after the vote.

Thank you for appearing.

[Recess.]

Mr. STEARNS. The Subcommittee on Oversight will reconvene.

And we will recognize for the next series of questions the gentleman from Pennsylvania, Mr. Murphy, recognized for 5 minutes.

Mr. MURPHY. Thank you.

And appreciate your being here today.

I am reflecting back on a quote from Ronald Reagan that says, "It is not my intention to do away with government. It is, rather, to make it work—work with us, not over us, stand by our side, not ride our back. Government can and must provide opportunity, not smother it, foster opportunity and not stifle it." He said that back in 1981, and I would think we would all agree.

And, certainly, I haven't heard anybody from our side of aisle say we don't like regulations. We recognize they do provide a valuable role in health and safety.

But there is some ambiguity added on. When the administration came out with its Executive order in January of this year, it said that regulations should be evaluated by values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Are those measures that you use when reviewing regulations?

Mr. SUNSTEIN. Our principal focus, as the previous sentence of the Executive order emphasizes, is costs and benefits and quantified. So our focus is, how much does this cost, what are the benefits, and monetizable if possible. That is our principal focus.

Mr. MURPHY. With that Executive order, does it is have the authority to overturn laws that Congress passes?

Mr. SUNSTEIN. Absolutely not. And the phrases you pointed to were actually a recognition that, under some laws, like those de-

signed to prevent rape or to prevent discrimination against returning veterans, for example, who are in wheelchairs and can't use bathrooms without assistance—dignity is involved.

Mr. MURPHY. One of the things that we had a hearing on the other day had to do with Yucca Mountain. And the law very clearly states that, when these licenses and other things go forth, action is to be taken. And yet, now we hear a new standard coming out, that we are supposed to look at issues of consensus, social consensus, in those areas.

And yet, what you just said was, you don't have the authority to overturn laws. I am assuming that the Department of Energy is one areas you can have oversight over?

Mr. SUNSTEIN. Yes.

Mr. MURPHY. Do you intend to have any discussion with them with regard to if they decide to ignore the law based upon a new standard that is not even in the law?

Mr. SUNSTEIN. Well, I should say that fidelity to law is our first foundation stone. That is the requirement of everything we do.

We oversee DOE rulemakings. So if there is rulemaking activity in that domain, we would, as a matter of course, engage with them. And if there isn't something as a matter of course we would engage with them on, we would be happy to engage with them.

Mr. MURPHY. I think it is extremely valuable if you could report to this committee on that very specific issue. Because the law is quite clear, but the dance the Department of Energy is doing that is thwarting that law, adding new standards that are not in the law, is also quite clear. And we need to have your response. Will you submit it to me?

Mr. SUNSTEIN. Yes.

Mr. MURPHY. Thank you.

Another issue has to do with impact of the health-care bill on small businesses. According to the administration's own estimates, its regulations are going to force half of all employers, or as many as 80 percent of small businesses, to give up their coverage in the next 2 years. And that is a big concern.

Are you aware of that assessment of the negative impact?

Mr. SUNSTEIN. That particular number I was not aware of, but I certainly know of the general concern.

Mr. MURPHY. And when you look at cost-benefit analysis—and we are seeing numbers grow, in terms of the cost of the health-care bill. And we see estimates that are not 9 million people will lose their benefits, but as many as 30 million, 40 million, 80 million. Even those exceeding what the estimates are that the bill would actually provide health care, an equal or double that amount may lose health care.

And so, along those lines, for PPACA or otherwise, have you been pushed in any way to move rules through quicker, despite information like that?

Mr. SUNSTEIN. No.

Mr. MURPHY. Can you delay finalizing any of the rules based upon how the agencies have handled or incorporated public comment and responses from the business community?

Mr. SUNSTEIN. The basic answer is "yes." And we often engage for lengthy periods with agencies because of those public com-

ments. In fact, I spend a lot of personal time on the Web site known as regulations.gov, studying those comments.

The only qualification, as you suggest, fidelity to law is our first obligation. And if the law requires action or requires action by a date certain, then we have to respect that.

Mr. MURPHY. I know when Republican Members were at the White House this week, the President was asked questions by the EPA and regulations and looking at cost-benefit analysis, that how would we look at that in terms of the impact upon jobs, as well. And he said that, basically, there were mandates and standards of law that we had to adhere to, and if Congress wanted to do something otherwise, we should change those laws. And, certainly, I agree with him, that is, once the law of the land is there.

But the question also becomes of how you act. I mean, you are in a position of considerable authority here. And so, on these areas of delays or pushback, have you ever actually done so, in terms of to any agency? Can you give us an example of how you have pushed back, how you have said, "You need to delay in putting on this regulation until we analyze it or until you have come back with a cost-benefit analysis that is different"?

Mr. SUNSTEIN. Well, what you can see is, over 100 rules have been withdrawn from OIRA review. And, in many cases, the reason for the withdrawal is insufficient engagement with issues of cost and economic impacts. So you can see that.

You can also see that, often, the final rule comes out a lot different from the proposed rule. Often, it is a lot less expensive and less burdensome. And sometimes proposed rules just aren't finalized because there is significant concern from the standpoint you have raised.

And the interagency review, which involves not just the Office of Information and Regulatory Affairs but the Department of Commerce, the Council of Economic Advisors, plays a role.

Mr. MURPHY. But how about pushback on the health-care rules? Have you done any of that?

Mr. SUNSTEIN. Our first obligation, with respect to the health-care rules, is to obey the law. We are in the implementation phase——

Mr. MURPHY. But have you pushed back?

Mr. SUNSTEIN. Well, I wouldn't want to phrase it "push back." I think we work closely with the agencies to make sure that the costs are as low as possible and to make sure that the burdens are reduced.

And you may have noticed with respect to the grandfathering rule, there was an amendment to the rule that responded very concretely to concerns from affected stakeholders about excessive burdens. And there has been a lot that has been done, and we and others have been participating in that, in trying to make sure that the implementation——

Mr. MURPHY. I am not sure I am getting an answer here. Has it happened?

Mr. SUNSTEIN. Well, I wouldn't want to claim personal credit for anything, but what I would say—or blame—but what I would say——

Mr. MURPHY. Let me word it this way. Because employers routinely opt to change carriers but keep the same benefits, in order to cut health care-costs without any change coverage. Now, under the interim final rule, or the grandfathering plans, issued in June of last year, employer plans lost their grandfathered status for changing carriers regardless of whether benefits remained the same.

So do you believe Health and Human Services should have instead proposed a rule open to comments from stakeholders who could have advised HHS of its own flawed decision before the problem began?

Mr. SUNSTEIN. What I would say about that is that the interim final rules receive comments, and HHS should be and is, has been, highly responsive to those comments. In the particular case you give, so responsive as to amend in a hurry the rule to respond to some of the concerns. And we all discussed that.

It is also the case that there were Q&As and guidance clarifications that were very responsive to concerns raised by exactly the people to whom you refer. And that is good government.

Mr. MURPHY. Thank you.

Thank you, Mr. Chairman.

Mr. STEARNS. I see no one on the Democrat side. We will go to the chairman emeritus, Joe Barton from Texas, for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman.

Congressman Burgess was speaking to you about some rules that impact Texas, and I am going to follow up on that but in a little bit different way.

Are you familiar with the PM2.5 and ozone transport rule that EPA is in the process of promulgating to replace the CAIR standards that were ruled not in compliance with the Clean Air Act several years ago?

Mr. SUNSTEIN. Yes, I am.

Mr. BARTON. OK.

Are you aware that, I think just this week or maybe last week, EPA disallowed a Texas State implementation plan and put down some requirements that, if implemented, are probably going to shut down 25 percent of Texas' electricity generation capacity?

Mr. SUNSTEIN. Is this in the Clean Air transport rule draft? Is that——

Mr. BARTON. It is what just came out.

Mr. SUNSTEIN. Yes. That rule is under review at OIRA now. And so my understanding is that nothing has been done along the lines you have just described.

Mr. BARTON. Now, I want to give you an opportunity to demonstrate real accountability.

My understanding is, the office that you hold is the President's direct link to reviewing all the various regulations except those that are specifically exempted by the Executive order. In other words, you are the President's man who makes sure that all these myriad agency regulations do pass some minimum tests for cost-benefit and things like that. And you are supposed to review every significant order, et cetera, et cetera.

I want to read you what the EPA said about this interstate transport decision that they just handed down. It says, "This pro-

posed action is not a significant regulatory action under the terms of Executive Order 12866" La di da di da. "It is, therefore, not subject to review under Executive Order 12866 and 13563."

It is going to shut down 25 percent of the power generation in Texas. That is not significant? Do you consider it significant?

Mr. SUNSTEIN. OK, that—if that has—under our Executive order—now I know what you are talking about.

Under our Executive order, if it has $100 million in annual cost or a significant impact on a sector area, then it counts as significant. So, if you would like, I will definitely look into that.

Mr. BARTON. Now, I want you to do more than definitely look into it. I want you to do something about it. If your agency disagrees with the executive branch regulatory decision, can you stop it?

Mr. SUNSTEIN. If there is a regulatory action, we have the authority to stop it, to the extent consistent with law.

Mr. BARTON. Have you ever exercised that authority?

Mr. SUNSTEIN. Well, we have seen over a hundred withdrawals of rules——

Mr. BARTON. OK.

Mr. SUNSTEIN [continuing]. About 110. And that speaks for itself.

Mr. BARTON. Well, I am going to read you something. Now, this is generated by the State of Texas, so that is the source. It says, "The only way to achieve EPA's contemplated emission reduction mandate by the 2012 compliance date," which is next year, "will, in fact, be to cease operating the affected units for most of the year, leading to the loss of jobs, shutdown of lignite mines, and serious risk to electric reliability."

Now, keep in mind that Texas is in compliance, in terms of the standards. Keep in mind that the regions that are supposedly affected by Texas—St. Louis and, I think, Baton Rouge—have just been declared in compliance. And yet, EPA has come out in the last week and stipulated that, by next year, Texas has to achieve an additional 34 percent reduction in $SO_2$2 emissions.

We have already achieved a 33 percent reduction in the last 10 years. And in the next 6 months, we have to achieve 34 percent more or shut down all these plants. I think that is pretty dadgum significant.

Mr. SUNSTEIN. I think you said one of my favorite words in the English language, which is the word "proposed." This is a proposed rule, correct, not final?

OK, well, from the standpoint of those concerns, that is excellent news. And it has happened in the last few years that something has been proposed and not been deemed significant, and then, as a result of further assessment and public concern, it has been deemed significant at the final stage, and there has been OIRA involvement. So——

Mr. BARTON. My time——

Mr. SUNSTEIN [continuing]. We will definitely take a look at that.

Mr. BARTON. My time has expired, but I am going to work with Chairman Stearns and Ranking Member DeGette and Chairman Upton and Ranking Member Waxman. We are going to follow up on this.

Mr. SUNSTEIN. Great.

Mr. BARTON. And we are going to expect—we are going to work cooperatively with you with you and your staff. But if you really have any authority, now is the time to exercise it.

Mr. SUNSTEIN. Understood.

Mr. BARTON. Thank you.

Mr. STEARNS. I thank the gentleman.

The gentleman, Mr. Sullivan, is recognized for 5 minutes.

Mr. SULLIVAN. Thank you, Mr. Chairman. Thank you for holding this hearing.

And thank you, Mr. Sunstein, for being here.

What is the process for determining whether a regulation is subject to Executive order?

Mr. SUNSTEIN. The basic idea is, is it significant? Meaning, does it have $100 million in annual costs on the economy—or benefit, by the way, and $100 million in impact—then it can be deemed significant. Also, if it affects a sector or an area. So there can be something that falls short of the $100 million threshold that, nonetheless, has an economic effect. Or it can raise novel issues of policy or law.

So the net is wide, but it doesn't include more routine or mechanical or, kind of, daily, mundane things.

Mr. SULLIVAN. Well, I have here, right here, a proposal of disapproval of Oklahoma's implementation plan for regional haze. And I talked to you a little bit before about that before.

EPA proposes to disapprove Oklahoma's plan. They did what they were told to do, and they achieved the goals that were supposed to be achieved, at much less cost. Yet, the Federal Government stepped in and said, no, we want to implement our Federal implementation plan, which has a much more aggressive timeline and will cost ratepayers almost $2 billion.

And what I would like to know is, did OIRA review this proposal?

Mr. SUNSTEIN. A Federal implementation plan, as in Texas, we would review the decision to go forward with that. A disapproval of a State implementation plan isn't a rule, so that we would not review.

Mr. SULLIVAN. You know, I have introduced a bill recently; it is called the TRAIN Act. And I have talked to you a little bit about that. It requires a cumulative analysis of the big regulations that impact America's manufacturing and energy prices to better understand how they will impact international competitiveness and job creation.

Will you and the administration support this?

Mr. SUNSTEIN. There are three words you used—cumulative costs, competitiveness, and job creation—that are very much our focus. They are prominent in the Executive order. And this is something daily we are attending to.

With respect to legislation, my own lane is the narrow one of implementation, and I defer to others on that issue.

Mr. SULLIVAN. And I have talked to the White House, the President about this, too, and they seem supportive. I don't know if they are telling me that just to placate me or anything. They could be.

But, Mr. Sunstein, you are a very intelligent man, there is no question about it. In the administration you are highly regarded.

What you say carries a lot of depth and weight. And will you tell the President that you think he should sign that bill?

Mr. SUNSTEIN. Well, I tend not to tell the President what he should and shouldn't do.

Mr. SULLIVAN. I think he would listen to you, though. He doesn't know all this stuff, like you. And if you come in there, Mr. Sunstein, a guy like you, he is going to say, "Oh, OK, I think we will do it."

Mr. SUNSTEIN. He might have done that when we were colleagues at the University of Chicago. He is kind of President now.

Mr. SULLIVAN. See, you guys go way back. And he is good at some things; you are good at other things. And I think you could be a big impact on him on this.

Mr. SUNSTEIN. Appreciate it.

Mr. SULLIVAN. And I would hope you can.

Because I go around my district, Oklahoma, around the country, and I have never heard people talk about the EPA like they are now. I think people are tuned in that this is costing, and everything that is done is passed down to consumers, the people. It is not on the businesses; they just pass it through. So we have to keep that in mind. And it does affect competitiveness and jobs and our economy.

And, Mr. Sunstein, you have said good things today, and I hope that you will support this, because I think it is something we should do. And I don't think it is too much to ask, to do these cost-benefit analyses on global competitiveness and jobs.

Mr. SUNSTEIN. Appreciate it.

Mr. SULLIVAN. Thank you.

Mr. STEARNS. I thank the gentleman.

The gentlelady from Tennessee, Ms. Blackburn, is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman.

Mr. Sunstein, I think you can tell that we are all hearing from our constituents that they are frustrated with what is coming from this administration.

I started in January doing listening sessions with our employers in our district. They were jobs-related listening sessions. I mentioned that to you the last time we talked. And they are incredibly frustrated with—as one of my constituents said, "You know, we used to get an update on a rule, a periodic, one-page update. Now the regulation comes in reams and reams and reams of paperwork."

And it is such a heavy burden that the jobs numbers today should not surprise you all, because what you are doing isn't working. So this should be instructive to you, and I hope we can work with you on this.

And I know that you all are saying, well, we have draft proposals that are out there, we need input. And what the input that is coming back to you is, you are on the wrong track. So if you are on the wrong track, sir, please advise the administration to change what they are doing.

Now, I know that the Executive order, the 13563 that we are discussing, independent regulatory agencies are not to be subject to the OIRA review. But these agencies are—and I am using your

words—encouraged to do so on a voluntary basis and to perform retrospective analysis of existing rules. And you had hoped that they would do that. Is that correct?

Mr. SUNSTEIN. That is correct.

Mrs. BLACKBURN. OK.

I have a June 1st letter to the editor in the Wall Street Journal where Commissioner Nord from the CPSC notes that, under the Obama administration, CPSC has—and I am quoting her—"ignored the recent direction to look for and eliminate burdensome regulations. We are just too busy putting out new regulations," end quote.

I got to tell you, that is the kind of thing that we are hearing from our employers is frustrating to them.

So let me ask you this. Among the 30 preliminary draft plans that are supplied by the agencies to OIRA by May 18th and released on the White House Web site, did any of them come from the FCC, the FTC, CPSC, FERC, or the NRC?

Mr. SUNSTEIN. No.

Mrs. BLACKBURN. They did not. And, sir, what is going to be your next step to address it?

Mr. SUNSTEIN. Well, I am hopeful, and I have said in writing and I will say right now, that we would very much like the independent agencies to engage in this lookback process.

Mrs. BLACKBURN. OK. I have to tell you, the American people are hopeful for jobs. And you all have dropped the ball. They are getting tired of this.

Mr. SUNSTEIN. Well——

Mrs. BLACKBURN. And they are expecting us to take some action.

Mr. SUNSTEIN. Well, I——

Mrs. BLACKBURN. And what you are doing with sending out all these regulations is wrong. If it is going to have a $100 million impact, we are going to pull it in here. And we are going to hold you all accountable of this, and the American people are going to hold you accountable for this. You have to find a way to get these agencies to get some of this regulation off the book.

Let me ask you about—1½ minutes left—the accountable care organizations. Health care in Tennessee is a very important industrial sector for us. The proposed rule on the accountable care organizations is incomprehensible. It is huge, it is incomprehensible.

There is a group representing some of these organizations, such as the Mayo Clinic, that wrote the administration, saying that more than 90 percent of its members would not participate because the rules—the rules—not the law, the rules—as written, are so onerous that it would be nearly impossible for them to succeed. I am hearing the same thing from my constituent companies.

In addition, the regulations were stated to be overly prescriptive, operationally burdensome, and the incentives are too difficult to achieve to make this voluntary program attractive. One of the major problems seems to be that the medical groups have little experience in managing insurance risk, and the administration blueprint rapidly exposes them to potential financial losses.

What has OIRA's role been in reviewing this rule to date for the accountable care organizations?

Mr. SUNSTEIN. OK. The quote you gave is very reminiscent of some stakeholder response to the meaningful-use rule, which HHS proposed a while back.

Mrs. BLACKBURN. And there are problems with that, too, aren't there, sir?

Mr. SUNSTEIN. As it——

Mrs. BLACKBURN. We are hearing about those problems with the meaningful-use rule.

Mr. SUNSTEIN. And the lookback process can potentially help there.

Mrs. BLACKBURN. Are we going to speed that lookback process up?

Mr. SUNSTEIN. Well, I would love—I would like nothing more——

Mrs. BLACKBURN. How do we help you speed that process up?

Mr. SUNSTEIN. OK. Well, your idea—there are two things.

First, this very hearing and your interest in making sure that what is on the plans and not implemented already or not on a very fast track, that those things are implemented in a hurry or put on a fast track. Your ideas about what should be on the plans that aren't on the plans, very welcome. With respect to the rule you raise, as I said, it is a little pitiful, but it——

Mrs. BLACKBURN. Should we retrieve the rulemaking authority and address it statutorily?

Mr. SUNSTEIN. Well, I wouldn't say that. What I would say is the Administrative Procedure Act has a mechanism and the word "proposed," not just because I am recently married, but also because the fundamentally constructive nature of proposed rules or interim final, where you get a chance for people to fix things, I have heard the concerns to which you point, and our role will be in trying to address those concerns and make——

Mrs. BLACKBURN. Mr. Sunstein, my time has expired. But I would just like to place a motherly reminder: Actions speak louder than words. And the American people have gotten very tired. They are ill and fatigued with the talk.

I yield back.

Mr. STEARNS. I thank the gentlelady.

Mr. Gardner, the gentleman from Colorado, you are recognized for 5 minutes.

Mr. GARDNER. Thank you, Mr. Chairman.

And thank you, Mr. Sunstein, for appearing before the committee today to answer some questions.

Just a couple quick questions. Do you believe that we an overregulation problem in the United States?

Mr. SUNSTEIN. I would say—if it is a "yes" or "no" answer I am pleased to give yes.

Mr. GARDNER. Could you put a price to your own price tag? You said you disagreed with some of the others. Do you have a price tag in mind of that overregulation?

Mr. SUNSTEIN. Well, I don't. But I hope to be able to cut, with the leadership of the relevant agencies, to cut the re-existing costs down very significantly.

Mr. GARDNER. But you don't know what those costs would be right now?

Mr. SUNSTEIN. Well, what we can say is that we have already cut hundreds of millions, and in a very short term we will be able to cut a billion. If we aren't able to cut billions out of this process, that would be a surprise.

Mr. GARDNER. Executive Order 13563 specifies that regulations should promote job creation and that regulations should impose the least burden on society.

When will your office issue guidelines for analyses that will identify whether rules promote job creation or whether they will result in job destruction?

Mr. SUNSTEIN. OK, what we have been doing is working carefully with the agencies in—rather than the guidelines approach, though that is an interesting suggestion, we have been working carefully with agencies when a rule has potential job impacts to make sure that that is addressed fully. And——

Mr. GARDNER. So will you be issuing guidelines, though, for analyses to identify those rules?

Mr. SUNSTEIN. It is an interesting question, whether this should be done via guidelines versus a rule-by-rule basis. And that is one—we have been focusing on the 30 plans in the last months. That is a question——

Mr. GARDNER. So you will not be issuing guidelines on the job creation——

Mr. SUNSTEIN. No, I didn't say that. We are focusing, really laser-like, on job impacts of rules. And you can see, actually, with rules withdrawn or amended in the last months, in part because of concerns about job impacts, some of them very prominent. So this is something we have been doing on a daily basis.

Whether this should be done through guidelines or not, it is an interesting question. It is consistent with the Executive order and also OMB Circular A–4, which has some words on this, to focus on job impacts of rules. Whether guidelines are useful or not, as I say, that is an interesting question and very worth considering.

Mr. GARDNER. And then, so, I mean, under the process that you are considering then, are you going to require methods of analysis that account for both direct and indirect job impacts, or will your office follow EPA's lead—we had testimony here from the assistant administrator of EPA—and ignore the job losses that result from shutting down facilities and increasing energy prices?

Mr. SUNSTEIN. I believe that testimony was focused on a rule issued before the recent Executive order. And, under the recent Executive order, job impacts have been and will continue to be discussed.

Mr. GARDNER. But it also requires a lookback, though, so they should have done a lookback on that.

Mr. SUNSTEIN. Oh, well, if EPA—the rule I think you are referring to is a proposed rule where there is an extensive set of comments, including comments that involve job impacts. And it would be very surprising if those impacts weren't carefully addressed before the rule is issued.

In terms of the lookback process, we are very much concerned with prioritizing the lookback so as to get job growth going.

Mr. GARDNER. And so, there are a number of studies—I have a study right here in my hands here—a number of studies that show

health affects associated with a job loss—health affects and impacts on family, impacts on education.

If a rule is expected to shut down a facility, shut down a business, or reduce employment, don't you think that cost to Americans' health associated with that shutdown should be considered under the Executive order?

Mr. SUNSTEIN. Well, I am aware of that empirical literature. It is an interesting set of findings.

What I would say is that the job impacts of rules definitely should be addressed. Whether health impacts that are a consequence of job impacts should be addressed, it is a little bit of a frontiers question in social science. I know the literature to which you are pointing. And existing OMB documents don't require that, but it is certainly worth thinking about.

Mr. GARDNER. So, right now, you are not taking into account impacts on children or families when they lose a job as a result of a regulation?

Mr. SUNSTEIN. Well, to take account of job impacts, which, as I say, is a central focus of ours, is to consider job impacts on families and children. The word "job impacts," in ordinary language, especially in the current economic environment, even before, the word "job impacts" naturally calls up adverse effects on families and children.

Mr. GARDNER. Are you aware of rules at the Department of Transportation relating to new signage requirements that are costing counties tens of thousands, if not more, dollars each?

Mr. SUNSTEIN. Yes. And I am aware that the Secretary of Transportation is very concerned about that and pulled back on those rules.

Mr. GARDNER. And so, they have pulled back on those rules?

Mr. SUNSTEIN. Absolutely. He personally has been engaged.

Mr. GARDNER. And so that rule is no longer in effect and it has been stopped?

Mr. SUNSTEIN. Well, the rule that was causing the public concern was pulled back, and there is reassessment. And you can be sure that the most vocal and convincing concerns about unjustified costs have been well heard by the Department of Transportation.

Mr. STEARNS. Thank the gentleman. His time has expired.

The gentleman from Virginia, Mr. Griffith, is recognized for 5 minutes.

Mr. GRIFFITH. Mr. Sunstein, Executive Order 13563 states that regulatory actions must be based on the best available science. Your office has primary responsibility for helping the President achieve this objective.

You may be aware that there is a pending science policy decision at the National Toxicology Program that involves the listing status of formaldehyde in an upcoming report on carcinogens. This listing status is very important. It is the basis for regulatory actions that may be taken now or in the future by OSHA, EPA, and other Federal agencies and, additionally, may directly affect marketplace purchasing and legal decisions in the near future.

My understanding is that the studies and data sets that were reviewed by the NTP in its ongoing decision-making process are the same as those used in the draft formaldehyde assessment by the

EPA. As you may know, the National Academy of Sciences recently called that EPA draft assessment into question and raised serious concerns suggesting the draft assessment is in need of substantial revision, at the very best.

I assume you agree the Federal Government must have consistent, clear, and coordinated scientific positions on matters of public health. Considering the inconsistent positions on fundamental science issues between these bodies, can you assure me that you will personally be involved in reviewing this issue and ensuring that any policy decision made by the NTP will reflect the best available in sound science, including recommendations and conclusions of the National Academies?

Also, OIRA, from time to time, has found it useful to engage the National Academy of Sciences to review scientific evidence and provide an independent assessment. Will you engage the Academy on scientific questions at hand in the NTP report prior to its release?

Mr. SUNSTEIN. Thank you for that.

Our domain, our central domain, involves regulation and rulemaking, and the best available science is crucial to that. And we care a lot about the National Academy of Sciences. I work closely with the President's science advisor, John Holdren, and the Office of Science and Technology Policy to make sure the science is right.

On the particular issue you raise, it is not rulemaking in the sense that is our normal domain. But I can promise you this, that in the next 24 hours I will discuss this with John Holdren.

Mr. GRIFFITH. And let me let you know why I am concerned about it. We heard earlier that regulations are good. And they are, in some cases. I am not sure they are always good for jobs, but sometimes they are, sometimes they aren't.

But formaldehyde is of great concern. In Giles County alone, we have an industry there that employs over 600 people. We are also looking at probably an announcement in the next week that we are going to lose some jobs in that same county. The county is 17,000 people. And we are looking, based on regulations, losing—over the course of the next couple of years, we have a good chance of losing, if these regulations go into effect, 700 jobs. And you can do the multipliers on that and then realize that the multiplier is higher in rural areas where the money tends to stay in the community.

When I am talking about the county, we are not talking about one town; we are talking about all the towns add up to 17. So the end of the county that has the 600 jobs based on an industry that uses formaldehyde is extremely significant. And it is not the only county in the Ninth Congressional District of Virginia where jobs can be impacted by these regulations, so I do ask you to look into that.

Let me switch over to another subject of interest in the district, and that is the milk regulations. We do appreciate that the EPA did decide not to regulate. And I assume you stand by your statement in your opening statement, both written and oral, as to that, and I appreciate that.

Let me ask you this. It is also fair to say that those regulations treating milk, because of the animal fats, as an oil never actually went into effect, that they had been—the phrase around here I am learning is, the can had been kicked down the road for some time.

And without the April 12th EPA announcement that they were not going to—that they were going to exempt the milk products that you mentioned in your written statement, without that exemption, they would have been regulated in November of this year. Is that not correct?

Mr. SUNSTEIN. I believe that is mostly correct. My understanding is that the coverage of milk actually was real and in the law; enforcement—and this is a good thing—was not firm. So it was in kind of an enforcement limbo.

Mr. GRIFFITH. Yes, sir. And without the action on April 12th, the enforcement would have begun in November?

Mr. SUNSTEIN. That is correct.

Mr. GRIFFITH. All right. I appreciate that.

And thank you very much and appreciate your work on trying to save jobs. Like so many others, that is a main concern in our district. And we hope that you do have the President's ear and that you can convince him to roll back some of these regulations that have already gone into effect and not propose—or not have them go into effect where they are going to cost jobs, like the milk regulation would have done.

Mr. STEARNS. I thank the gentleman.

The gentleman from Texas, Mr. Green, is recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

And thank you, Mr. Sunstein, for being here. And I would like to talk about the importance of regulations on protecting our economy.

In advance of the hearing, both Chairman Upton and Chairman Stearns stated, "We are pleased the administration is sharing our concerns that burdensome regulations are stifling investment and chasing jobs overseas." I have an industrial base, and I share that concern. Although I am concerned about some of my Republican colleagues believe that all regulations, regardless of the protections they afford, hurt the economy.

And let me give you an example. Years of deregulation brought the markets to the point of collapse in 2008. The Federal Reserve had the authority to stop the lending practices that fueled the subprime mortgage market, but Chairman Greenspan refused to regulate the industry. The Securities and Exchange Commission relaxed its net capital rule in 2004, allowing investment banks to increase their leverage ratios 33:1.

The Treasury Department opposed legislative efforts to require transparency and oversight concerning trading in energy derivatives. The Office of Thrift Supervision and the Comptroller of the Currency prevented States from protecting home buyers from predatory lending. In what was the result, in the fall of 2008, the financial markets in the United States collapsed. This economic crisis created a recession, causing 8 million Americans to lose their jobs and the stock market to lose 50 percent of its value.

I also want to read to you conclusions from the congressional TARP oversight panel. They concluded that, "Had regulators given adequate attention to any one of the three key areas of risk management, transparency, and fairness, we might have averted the worst aspects of the current crisis." Mr. Sunstein, this oversight

panel concluded that lack of regulation was a primary cause of the financial crisis.

My first question is, do you agree with the findings of the TARP oversight panel, and was this a case where the lack of regulation harmed the economy and caused the Nation to lose these millions of jobs?

Mr. SUNSTEIN. I am in general agreement with that.

Mr. GREEN. OK.

In the view of President Obama, any increase of government rules and regulations, do they hurt the economy?

Mr. SUNSTEIN. Depends on the rules and regulations. Some do. Some don't.

Mr. GREEN. Well, and hopefully we learned our lesson, although sometimes we keep having to learn our lesson. We saw during the financial crisis targeted and effective regulations can provide important safeguards for our economy. And we hope we remember that government regulations can play an important role in protecting our country and our citizens.

But also, on the other hand, I see a lot of what I think are really silly regulations come out and think, OK, how did they get to that point? And I tell people, Congress is the only institute known to man that can turn an elephant into a giraffe. Sometimes I think committees coming up with these regulations can do the same thing.

Mr. Chairman, I appreciate the opportunity to ask these questions.

Mr. STEARNS. I thank the gentleman.

And, Mr. Sunstein, we are going to do a second round, so we won't hold you too much longer. I will start out.

I want to go back to the chart that was quivering up there. I think we have given you a copy of that chart. Did you know that that chart came from the Web page reginfo.gov, that is where we got it all?

Mr. SUNSTEIN. I did not, but reginfo.gov is one of my favorite Web pages, and I trust it.

Mr. STEARNS. OK. So, assuming that that information is correct, if you look at the graph again, you will see that the one graph shows the number increasing in number of regulations that have economic significance reviewed by OIRA from 2008, 2009. Do you see that?

Mr. SUNSTEIN. I do.

Mr. STEARNS. And then you would assume—it came from your Web site—that that is accurate?

Mr. SUNSTEIN. I would.

Mr. STEARNS. OK. Then you go to the second graph, and you see that, during the same time, particularly in 2010 and 2009, the average duration for those reviews have gone down. Do you agree with that?

Mr. SUNSTEIN. That looks about right. I wouldn't put a lot of weight on the fact——

Mr. STEARNS. Well, let me just finish.

So you agree that the information came from your Web site, that you approve, it is accurate. You agree that the first graph is correct and the second graph is correct.

So I guess, going back to the first question where you disagreed, I guess you would now agree that the second chart shows you spend less time in review of these regulations and you would have to agree with the chart.

Mr. SUNSTEIN. I will tell what I would want to see before signing off on that. The left-hand chart says, "economically significant rules reviewed by OIRA," and the right-hand chart says, "average duration of OIRA regulatory review." Most of the rules we review are not economically significant.

So what I believe is the case, though I would want to see the chart to make sure, is that in 2010 our average duration for rules in general is pretty close to the predecessor. I believe that is true, but I want to see the chart to make sure.

Mr. STEARNS. Well, I am glad you agree that the charts are accurate. I think you are parsing your words here by saying the actual wording of our titles you might not agree with.

Mr. SUNSTEIN. No, no, it is not semantics. It is that we review mostly significant rules that are not economically significant. So, economically significant are well under 50 percent of the rules we review. So what we would want to compare is the significant rules to the average review time or the economically——

Mr. STEARNS. OK. All right.

Mr. SUNSTEIN. You get the point.

Mr. STEARNS. It sounds like a Chicago professor at law.

I think the point we are trying to make is that, basically, that you have had more economically significant rules in the years from 2008 to 2010, and, at the same time, the actual review and the economic impact has gone down. So that is our point we want to clearly make. And we want you to understand that you might come back with a little different interpretation, but these came from your Web page.

Let me move on to my next set of questions dealing with end-of-life-care rules. During your last appearance before the economy, you testified that the decision to include end-of-life-care rules into a Medicare regulation was inappropriate and that the American people deserve to see the content of the rules before they are finalized. That is what you said.

Do you still agree with that statement?

Mr. SUNSTEIN. Absolutely.

Mr. STEARNS. OK. But are you aware, on March 3rd, 2011, in an appearance before the Subcommittee on Health, Secretary Sebelius freely admitted that she made the decision to publish this regulation without notice or public comment? Were you aware of that?

Mr. SUNSTEIN. I was not aware of that.

Mr. STEARNS. OK, well, that is a fact, that based upon what you said, obviously she did not comply with it.

Have you ever had any discussion with Secretary Sebelius about this admission?

Mr. SUNSTEIN. What I would say is, Secretary Sebelius was very responsive to the concern that this had not been adequately ventilated by the public. And that was promptly corrected on exactly the ground you state, and that was the Secretary's decision.

Mr. STEARNS. Yes. So here we have end-of-life-care rules in Medicare—controversial, to say the least. And she agreed that she had

not even sought public notice. Don't you find that—is the word "preposterous"?

Mr. SUNSTEIN. Well, I think what happened was that, long before anything like that went into effect, the correction was made. And that is a good thing.

Mr. STEARNS. But you agree that she was incorrect by not asking for public comment?

Mr. SUNSTEIN. Well, HHS, I think what they formally said was not that they hadn't asked for public comment, but that it hadn't been adequately ventilated by the public. This is a very——

Mr. STEARNS. Ventilated? Ventilated. OK.

Mr. SUNSTEIN. Ventilated, not in the sense of air, but in the sense of——

Mr. STEARNS. But don't you think those particular rules, end-of-life care, should certainly have asked publically for public comment in a very clear manner, unambiguous, so that the American people have confidence? I mean, that seems to be so basic. Wouldn't you agree?

Mr. SUNSTEIN. Yes. And that is why the Secretary amended the rule.

Mr. STEARNS. Yes.

Was your office ever briefed on the decision to include this regulation?

Mr. SUNSTEIN. We saw the regulation. We were not——

Mr. STEARNS. Just "yes" or "no."

Mr. SUNSTEIN. We were not briefed on that particular issue.

Mr. STEARNS. No. The answer is "no."

Were any materials provided by HHS about this regulation to you?

Mr. SUNSTEIN. The regulation was presented to us.

Mr. STEARNS. Could you please submit those for the record for us?

Mr. SUNSTEIN. The regulation is the same regulation that was published. So you already have it.

Mr. STEARNS. But the materials—the question I had, were any materials provided?

Mr. SUNSTEIN. Independent——

Mr. STEARNS. Not the regulation. We are talking about the materials——

Mr. SUNSTEIN. No, I don't believe any independent materials were provided.

Mr. STEARNS. So there is nothing you could provide.

Mr. SUNSTEIN. I don't believe so.

Mr. STEARNS. Has your office ever been contacted about the possibility of including end-of-life-care rules into future regulation?

Mr. SUNSTEIN. No.

Mr. STEARNS. OK.

And, at this point, do you feel that the analysis for the end-of-life-care rules has been sufficient by the administration and a comment period, that it has been adequate?

Mr. SUNSTEIN. What I understand is that the provision to which you object has been eliminated. And I support the Secretary's decision.

Mr. STEARNS. And so we don't think it will ever come up again, a new rule for the end-of-life care?

Mr. SUNSTEIN. Well, you know, we are in the business of reviewing rules that come before us. I would defer to the Secretary's statement——

Mr. STEARNS. But your understanding is, by her amending and pulling this, that there is not going to be any further end-of-life rules? Or they are going to be amended?

Mr. SUNSTEIN. I would defer to her on any such issues.

Mr. STEARNS. OK.

All right, my time has expired.

I recognize the gentlelady, 5 minutes.

Ms. DEGETTE. Thank you very much, Mr. Chairman.

Mr. Sunstein, in your testimony, you talked about how initiatives described in the preliminary regulatory lookback plans released by Federal departments and agencies can potentially save billions of dollars in the future.

Can you describe some of the steps that agencies have taken that have already led to significant cost savings for individuals and businesses?

Mr. SUNSTEIN. Yes. We have from DHS something that happened in December, which was a reporting requirement imposed on airlines, that is 1.5 million hours. So that 1.5-million-hours burden has just been eliminated already.

I mentioned the EPA milk rule. EPA also exempted biomass from the greenhouse-gas permitting requirement, something that was of great interest to the biomass industry. That is a 3-year exemption, potentially longer. That will have significant economic consequences.

OSHA has proposed and now has announced it will finalize a $500 million burden-reduction initiative. And we have a number of initiatives that actually were announced long before the President's Executive order that promised over 60 million hours in annual burden reduction. And I don't know how much an hour is worth, but even if it is worth relatively little, which I don't believe, that 60 million hours turns into a lot of money.

Ms. DEGETTE. So, as you described in your testimony, now that you have had this comment period and the public process, I think you said now through August the agencies are actually going to be looking at more exact ways that they can cut regulatory burdens and start implementing the plans, I would assume, August, September. Is that correct?

Mr. SUNSTEIN. Exactly.

Ms. DEGETTE. So I hate to do this to you, but I have suggested to Chairman Stearns that we have you come back in the fall, after Labor Day, and talk to us about what progress has been made over the summer. Because just like you, we are very committed to commonsense regulatory reform.

And like I said to you before, at least my view, I have always been a proponent of regulatory reform, but I don't think regulations are—I don't think regulations per se have values attached to them. I don't think that they are inherently good or bad. I think some regulations are helpful, and they can protect the public interest,

and they can save money. And I think some are overly burdensome.

I think that that is the view that you share and the administration shares, too, correct?

Mr. SUNSTEIN. Yes.

Ms. DEGETTE. So if you can come back and let us know what kind of progress you have made, I think that would be helpful. Would you be willing to do something like that?

Mr. SUNSTEIN. I would be delighted.

Ms. DEGETTE. OK.

One of the priorities that the Executive order said is that he wants to tailor—the President wants to tailor regulations to impose the least burden on society. And a lot of our concern, on both sides of the aisle, is the concern about regulatory burdens on small businesses.

So I am wondering if you can talk to me about what you have seen already and what you see coming ahead this summer to reduce regulatory burdens specifically on small businesses.

Mr. SUNSTEIN. OK, great.

On the same day that the President issued the Executive order, he issued a memorandum on small business, protecting small business from unjustified regulation.

And what the memorandum does is two things. First, it reiterates and underlines the requirements of the Regulatory Flexibility Act, an extremely important statute for small business. And, second, it goes further by saying, if an agency is not going to have flexibility for small business, such as a delayed compliance date, a partial or total exemption, simplified reporting requirements, it must specifically explain itself.

Now, we have seen, in the last months, some prominent actions by Cabinet-level departments eliminating burdens for small business—sometimes reporting burdens; sometimes not reporting burdens, sometimes regulatory burdens—and, in two important cases, by pulling rules back so as to engage with the small business community to see if there is a way of doing it that would be minimally burdensome on them.

Ms. DEGETTE. You know, one of the things I noticed—I was thinking about this. When I talk to businesses in my district, small and large, one of the great frustrations is obsolete regulations that have reporting requirements that are based on a lack of technology. And now that technology has moved ahead, they are saying, "Why can't we just report electronically? Why do we have to fill out all these forms too?"

Is the administration doing anything to specifically address those concerns?

Mr. SUNSTEIN. Absolutely. And we have heard the same thing. It sounds more small potatoes than it actually is. Small business says, "We could do it electronically. It would be easy. It would take us a short time. You are having us do all this paperwork, which is a mess for us."

If you look through the plans, you will see numerous initiatives from numerous agencies that say, we are going to go from paper to electronic. And we have a little precedent here—actually, not so little. The Department of Treasury has a paperless initiative that

is going to save $500 million in the next years just by eliminating the use of paper. That is taxpayer dollars. We hope to transfer that to the private sector.

Ms. DEGETTE. Let me just ask you, Mr. Sunstein. If you can get somebody from your staff to send us an e-mail—don't send us a letter——

Mr. SUNSTEIN. Not paper.

Ms. DEGETTE [continuing]. Send us an e-mail listing all of those initiatives so that we can actually know what is going on and communicate that to our constituents.

Mr. SUNSTEIN. Great.

Ms. DEGETTE. Thank you very much for coming back to us.

Mr. STEARNS. The gentlelady's time has expired.

The gentleman from Texas, Dr. Burgess, is recognized for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman.

And thank you again, Mr. Sunstein. We are appreciative of you spending so much time with us today.

You wrote a piece for the Wall Street Journal: "21st-Century Regulation: An Update on the President's Reforms." You talked a little bit about, let's stop crying over spilled milk.

But just to set the record straight, everyone in this town loves to blame all the problems of the world on the previous administration. But sometimes we need to give credit where credit is due to the previous administration. And the spilled-milk rule actually was proposed in the Federal Register January 15th of 2009, which was a few days before the President took the oath of office. Is that correct?

Mr. SUNSTEIN. Yes. And our final rule is much more aggressive in its deregulation than the Bush proposal.

Mr. BURGESS. All right. Well, give the former President credit when we talk about that.

I do have to follow up on some of the ACO questions that Ms. Blackburn asked, because this is—and, Mr. Chairman, if I may, I would ask that today's—in today's Politico, Tevi Troy, a former Deputy Secretary at Health and Human Services, now with the Hudson Institute, senior fellow at the Hudson Institute, said it is time to redraft the rules that cover ACOs.

It gives a very good description. ACO is actually a concept started with the Physician Group Practice Demonstration Project under Secretary Michael Leavitt in the previous administration. ACOs, while perhaps not my individual favorite, may have been a bipartisan approach to bringing down the cost of delivering health care in this country, particularly within the Medicare system. Many clinics across the country had embraced this concept, but they were left with a mishmash of a regulation, that they just threw up their hands and said, "We can't do this; this doesn't work." And yet, it was working in their demonstration projects in Secretary Leavitt's administration.

Now, one of the things Secretary Leavitt found was that they put a 2 percent savings—before the ACO got to participate in any of the shared savings, there was a 2 percent barrier. And under the rule, it is now 2 percent to almost 4 percent.

So what they found under Secretary Leavitt was only 4 out of the 10 practices, as I recall, the Physician Group Practice Demonstration Project data, only 4 were actually able to meet that bar. And now we have, in fact, increased that bar and made it higher. Is that really a positive step in this regulation?

Mr. SUNSTEIN. The rule is proposed, and your comments and those of your staff, as well as those of your constituents, are not just welcome but needed so we get this right.

Mr. BURGESS. But, just to be clear, we have a hard deadline, do we not, in the Patient Protection Affordable Care Act of January 1, 2012? So this rule is going to have to be either revised or reproposed. The clinics are going to have to assimilate this data, digest this data, and decide whether or not they can meet the statutory and the financial requirements, which are significant, all by January 1st, 2012; is that correct?

Mr. SUNSTEIN. If we could in 4 months produce 600 pages of lookback plans with hundreds of rules to be revised, then we can get that done on the schedule.

Mr. BURGESS. You can get it done, but I am talking about Geisinger, I am talking about Mayo Clinic, I am talking about Gundersen Lutheran. Are these organizations going to be able to do the complex financial analysis that is going to be required in order to meet this January 1, 2012, deadline?

Mr. SUNSTEIN. The statutory deadline, yes?

Mr. BURGESS. Yes.

Mr. SUNSTEIN. Well, we are going to do our best we can——

Mr. BURGESS. You told Ms. Blackburn that no more statutory or legislative interference was necessary, but I would submit to you that perhaps we do need to amend this sacred document to allow clinics more time to analyze what you are going to put forward.

Well, what is the minimum financial outlay that a clinic is likely going to have to come up with to institute an accountable care organization, by your reckoning?

Mr. SUNSTEIN. I don't have a figure for that. This is a proposed rule, where all these issues are under discussion.

Mr. BURGESS. Well, the figure that is given is, like, $1.8 million, but the American Hospital Association estimates that it is going to be between $11 million and $25 million. So it is a significant financial investment.

And here is one of the problems with ACOs. I am a doctor. Doctors should be in the driver's seat with ACOs. If they are going to really deliver on the promise—as a patient, I want my doctor to be in charge. I don't want my health plan to be in charge. I don't want the government to be in charge. I don't want the insurance company to be in charge.

But the doctors are in a poor position to be able to manage the financial outlay, because not only do you have to pay the startup costs of all of the things—the ancillary personnel, the electronic health records, and all the things that are required for disease management, care coordination, but you also have to manage against the financial risk of taking on a group of patients who have a set of chronic illnesses, which is ideally what the ACO is going to be managing.

And here is the problem that we have. We are trying to figure out what to do with the sustainable growth rate formula. And many people were thinking an ACO model may be the way we can pivot to a different way of Medicare payment, so we stop paying for stuff and pay for wellness. And you delivered to us a regulation that is so confusing that the people who purport to be able to do this are now shaking their heads and walking away, and we have 6 months to fix the problem.

Mr. SUNSTEIN. Well, I appreciate that. And you are clearly a specialist in this, and we need your help to get it right.

There was a somewhat analogous controversy over an EOC regulation under the Americans with Disabilities Act. The Chamber of Commerce, incidentally, raised many questions about lack of clarity and overreaching. And the first people out of the box to celebrate what the EOC eventually finalized was the Chamber of Commerce.

So our hope is we can fix this.

Mr. BURGESS. I am going to submit a question in writing that deals with the FDA and medical devices, because we have heard a lot of testimony about that in this committee. It is an extremely important issue, the FDA guidance documents that are under development by the agency and how the streamlining process is going to impact those. It is of critical importance, not for our manufacturing in this country, but for America's patients and America's patients in the future.

So thank you.

Mr. SUNSTEIN. Thank you.

Mr. STEARNS. I thank the gentleman.

Mr. Bilbray is recognized for 5 minutes.

Mr. BILBRAY. Thank you, Mr. Chairman.

One of the things that has frustrated me, after 35 years in public life one way or the other, working with regulatory agencies and being in regulatory agencies, is this huge gap between the intention of the legislation and the actual application.

A good example would be, wouldn't you agree that any environmental law that is deemed implemented in a manner that hurts the environment, you know, may not be—obviously, it was not being implemented in the manner that the—with the legislative intent.

In other words, would you agree that no environmental law should hurt the environment?

Mr. SUNSTEIN. Sounds right.

Mr. BILBRAY. I will give you an example of what we have had for a long time in San Diego. The Clean Water Act requires going to secondary activated sludge for sewage treatment. Scripps Institution of Oceanography, Roger Revelle, the father of the greenhouse-gas issue, stood up and demanded that we take a second look at the law.

And as you know, we require that you do environmental assessment. The environmental review said not implementing the law would be the best environmental option. There were negative environmental impacts to habitat, to the ocean introducing chemicals, air pollution. But the bureaucracy still is caught on this issue that don't confuse us with the scientific facts, we have the law and the law says you have got to do this no matter what. And we have been

fighting this battle for 20 years and we still are running into this issue.

Don't you think that the administration has two ways to do this? Either make the call like the judge did—we had to have a judge with the Sierra Club and the county health department suing EPA to force them not put this in. That is an interesting coalition there. Remember, the county environmental health is run by five Republicans. Either accept that or come back and ask us to change this law to allow the item to be done. How would you propose we handle that kind of conflict?

Mr. SUNSTEIN. Well, I don't know the particular controversy, though I know some of the names there. The first obligation of the executive branch is to follow the law. So it is profoundly to be hoped that following the law is environmentally desirable and, by and large, that is the case. The Clean Air Act as noted previously——

Mr. BILBRAY. It is the Clean Water Act.

Mr. SUNSTEIN. The Clean Air Act is the one that there is good data on overwhelming health benefits. But there is some good data on the benefits on the Clean Water Act also. So we have to follow the law. There may be no choice. It may not be available for the executive branch to say we are not going to implement the law and go to Congress.

Mr. BILBRAY. OK. Let me interrupt right there, I served 6 years on the Air Resources Board and 10 years on Air District. The success of the Clean Air Act was quantified. You actually know, you spend this much money, you reduce this many metric tons, you save this many lives per million; right?

Mr. SUNSTEIN. Yes.

Mr. BILBRAY. The Clean Water Act does not do that. It predated the Clean Air Act and it is not sophisticated enough. When you bring that up, wouldn't you admit that maybe we ought to be sitting down and talking about quantifying the Clean Water Act because the Clean Water Act originally really was an Act to allow pollutants. I mean, Chicago dumping into a river that went into the Ohio and dumped—and polluting everybody's water all the way down to New Orleans rather than clean up their mess and from what they historically did.

Mr. SUNSTEIN. OIRA's role is a narrow one of implementing what you have told us to do. I would not want to comment just in my little domain on what you should do tomorrow. But I would say that the Executive order makes a strong plea for quantification of costs and benefits and that would certainly apply to the Clean Water Act.

Mr. BILBRAY. OK. Let me shift over. Is there anything in the Endangered Species Act that requires 4 or 5 to one mitigation for disturbing habitat?

Mr. SUNSTEIN. I don't believe so.

Mr. BILBRAY. No, there is not. Is there anything in the Endangered Species Act that requires that when you go in to clean out a flood control channel to you to go back and mitigate every few years, you have to remitigate for that again, even though you had originally mitigated.

Mr. SUNSTEIN. I am pleased to say that I am confident that there is nothing like that in the Act. But I just note that the Department of the Interior in its lookback plan has referred specifically to streamlining the requirements under the Endangered Species Act and taking another look at that.

Mr. BILBRAY. Let me tell you something. I have run into that where it is not only an impact on the local government and local communities, but it has actually displaced public space, park land, because you have agents under fish and game, and Fish and Wildlife screaming bloody murder that we have to get our pound of flesh from you, four on one, to make up for somebody else's problems. And I don't know, do you know anywhere in the Endangered Species Act that allows agencies to make a permitee mitigate for other people's violations?

Mr. SUNSTEIN. The way I would phrase it, it is a pretty short statute and I would say it does not require what you particularly described. I think it is authorized, the Secretary of Interior has a lot of authority under some broad terms. So I believe it is not required, but it is authorized.

Mr. BILBRAY. Mr. Chairman, I think that the one thing that was in the rulemaking where so many of these things were done, by in the rulemaking process, that was never included in the legislation that was passed by the representatives of the people of the United States. And I think this is one thing that Republicans and Democrats ought to be able to work at, getting the Act back to where it was meant to. Make sure the Clean Water Act is cleaning up and helping the environment, not just fulfilling a bureaucratic agenda and hurting it. That the Clean Air Act is being implementing to where it is helping public health and not just running up costs. I hope both sides could work on this and I appreciate your testimony today.

Mr. STEARNS. I thank the gentleman. The gentleman from Virginia is recognized for 5 minutes.

Mr. GRIFFITH. Thank you, and I do thank you for spending time here and I appreciate what you are doing. We have to roll back some of these regulations that are killing jobs, and it really does not matter to me who gets the credit as long as we get the job done.

In my earlier questioning, and you were very kind to say that you would look into it in regard to the national toxicology program related to formaldehyde, that affects hundreds of jobs on the northern end of the district, and affecting thousands of jobs across the Nation, and particularly some well needed jobs in the southern end of my district—my district is about the size of the State of New Jersey—is styrene. Interestingly, the science is similar and it is believed that there may be the national toxicology program may be labeling that as a reasonably anticipated carcinogen, although there is huge debate on that. Most of the science indicates that it is not a problem. So if you could add that to the list, I would greatly appreciate it, looking at that.

We actually, it is interesting because my predecessor and Congressman Shadegg wrote a letter last year that detailed some questions, and I will be happy to give you a copy if you would like. And I followed up along with Congressman Donnelly this year saying do

you have an answer to these questions? Because the main thrust of those questions were we have all of these jobs that are going to be impacted, and yet the science does not seem to back up the ruling. So I do ask you to take a look at that.

Also related to jobs, obviously I come from a coal district and I know that the rest of the committee members are surprised it took me this long to get to coal. But I do come from a coal district and as we heard today there are a lot of regulations out there. And I really wish we could quantify, as Congressman Bilbray was just saying, because we all want clean water and we all want clean air and we all want jobs. And what you have to do, as you know, is a balance to see whether or not you are getting a bang for your buck. And my opinion, everybody on this committee knows is that a lot of the regulations proposed and the newer regulations related to the mining of coal have very little positive impact on the environment. I won't say they don't have any, but they have very little at the cost of huge amounts of jobs and huge usage of coal in the district and in this Nation.

And one of the things that I think is interesting, and this applies to both the styrene and formaldehyde. These products are going to be made, the question is are they made here. Now, if they are causing people cancer, obviously we have to put a stop to it. If some other country wants cancer, that is fine. But the bottom line is when you talk about coal and you talk about some of the things, and one of the things I found interesting we had some testimony here that we actually may be creating a worse problem with coal by shipping the jobs overseas. We are still using the products. They are still coming back here. They are being made in China and Kazakhstan, and India, and you name it. Places that I didn't know about when I was in high school, and now are on the map and they are competitors of ours. And we are shipping our coal over there and they are shipping their air pollution back to us, because as you know, it only takes a few days, 10 days according to a NASA study, to get the air to go from the Gobi desert to the eastern shore of Virginia. And as a result of that, I am concerned that not only are we getting a small bang for our buck on the regulations that are proposed and that are coming out and that have some that are already implemented, but we are actually increasing the air pollution in the United States by shipping these jobs off to countries where they don't have even the reasonable regulations that I think everybody would agree the Clean Air Act did bring us in its early days. So I think we have to be very, very careful with what we are doing.

And we are using the Clean Water Act to actually, I think, in my opinion and some others who testified here, inadvertently with good intentions to dirty our air. Thank you, and I yield back my time.

Mr. STEARNS. Mr. Bilbray, you have a point of order?

Mr. BILBRAY. I just want to point out that I agree with you about the fact that we are here to implement the law and sometimes there is problems. And God knows, at Air Resources Board, I didn't want to touch colognes and hair sprays or consumer products. You start messing with a lady's Chanel No. 9, you get into real problems. But in Arizona—the U.S. versus Arizona, just filed last year, this administration claims in that, that the executive branch has

the ability to pick and choose which laws it wants to enforce. And I would ask you to take a look at that file because to me it was extraordinary, but that is the position of this administration. That the executive has the right to choose when not to enforce the law. And they have got that on record.

So if it can be applied to the issue of immigration, my question is why wouldn't it be applicable to these other regulatory groups? And I leave that with you just to take a look at it and see how that position may affect your latitude and straightening out some of this problem. And I yield back.

Mr. STEARNS. The gentleman yields back. Does the gentlewoman ranking member have any concluding comments? I am going to let you go. I just have one comment. You previously testified that you disagreed with the Crane report that stated that the current regulations are costing American businesses $1.7 trillion. Are you aware that the Crane report was a report commissioned by Obama administration's Small Business Administration in 2009?

Mr. SUNSTEIN. Yes. What I would say is I wouldn't say I disagree, I would say—I hope this is not a subtle difference—I don't agree. I don't think it has been supported, that number hasn't been supported.

Mr. STEARNS. Well, I think your answer would be that you do not agree with the Crane report.

Mr. SUNSTEIN. Yes, the number, I don't believe, has a solid foundation.

Mr. STEARNS. I just want to put on the record that you disagree with the Crane report?

Mr. SUNSTEIN. Yes, I disagree with the analysis in the Crane report.

Mr. STEARNS. All right. Thank you, Mr. Sunstein. I think you have won the prize here for forbearance here today. Thank you very much and we will welcome the second panel.

I'm going to ask unanimous consent—Dr. Burgess asked that Tevi Troy's opinion in Politico be put in part of the record. Without objection, so ordered.

[The information appears at the conclusion of the record.]

Mr. STEARNS. We will have you gentlemen sit down at your convenience, and I am going to point out who they are before I swear them in. Mr. James Gattuso is a senior research fellow at the Heritage Foundation; Mr. Williams Kovacs is a senior Vice President, U.S. Chamber of Commerce. And Mr. David Goldston is Director of Government Affairs at the National Resources Defense Council.

And with that, gentlemen, you are aware that the committee is holding an investigative hearing and in doing so we have always had the practice of taking testimony under oath. Do you have any objection to taking testimony under oath? No? The chair then advises you that under the rules of the House and rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today? No? In that case, please rise and I will swear you in.

[Witnesses sworn.]

Mr. STEARNS. You are now under oath and subject to the penalties set forth in title XVIII, Section 1001 of the United States Code. If you would give a 5 minutes summary of your written

statement, we would appreciate it. Mr. Kovacs, we will start with you.

TESTIMONY OF WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, U.S. CHAMBER OF COMMERCE; JAMES GATTUSO, SENIOR RESEARCH FELLOW, THE HERITAGE FOUNDATION; AND DAVID GOLDSTON, DIRECTOR OF GOVERNMENT AFFAIRS, NATURAL RESOURCES DEFENSE COUNCIL

TESTIMONY OF WILLIAM L. KOVACS

Mr. KOVACS. Thank you, Mr. Chairman and ranking member. I appreciate being invited here to discuss Executive Order 13563 which calls on agencies to eliminate duplicative outdated and unnecessary rules. This is certainly a very positive first step. And we have said that many times. I would like to bring to your attention the fact that Congress first mandated this in 1980 in the Regulatory Flexibility Act, and it has been a struggle to get it implemented. So it is a good start.

Now, having said that, one of the concerns and we hope that the OIRA moves forward with it, we have got a long way to go. If we are going to deal with the jobs issue we have to look the at economically significant regulations which have been defined by the administrator, permit streamlining, which really creates jobs, and frankly, we have to begin looking at the standards for quick review. They have a lot of implications as to how the regulatory process works.

And as we are talking about jobs, I want to highlight one point that I have in the testimony and that is, some of the agencies, like the Environmental Protection Agency have, in each one of the environmental statutes, a congressional mandate to do a continuing jobs analysis. That is Section 321(a) of the Clean Air Act, and that goes through the rest. And, to my knowledge, that has never been done and it has been on the books for decades.

The regulatory process has been growing for years. This is not new. Since 1976, we have 170,000 new regulations. But—and the Chamber has always said we need a lot of these regulations. Some of these are just business practices. So when we go into the regulatory process, we have to go into it in a way in which we understand what it is that we are trying to do.

The concern on our part seems to be the fact that the economically significant regulations have increased dramatically; from 2005 to the present they have gone from 137 a year to 224. These are significant because they do impact large parts of society and many industries.

So when we take a step back, how did we get here? Congress has been addressing this issue to try to bring it to some control since 1946. I mean, this is 65 years of Congress doing this. You enacted the Administrative Procedure Act, and at that time, it was to bring the public in and it was to have a discussion of what the regulatory process is all about and to get the kind of comments, a lot of which frankly you are getting here today. But several things happened on the way to getting here today.

The first is Congress actually began to pass very, very broad and vague laws and you asked the agencies and administrative bodies

to begin filling in the blanks and the agencies were very glad to fill in the blanks. Then in the 1970s, you had the courts in the Chevron decision for the first time award deference to the agencies. So two things were going on simultaneously. One is Congress was giving the agencies a lot of discretion over the vague laws and the courts were giving them deference.

That literally tipped the scales as to how the regulatory process worked and from that point forward, Congress has struggled to get it back and it has been unable to. Just to go over it, and it's all in my testimony, but since 1980, Congress has enacted the Regulatory Flexibility Act, Unfunded Mandates, Information Quality, Data Access, Paper Reduction, Jobs Analysis provisions, and we could go on. And each one of these, the Congress has struggled to get control over this and it has been unable to. A few suggestions that we have, not that any one of them should take preference over any other one, but there are some, and we ought to look at this.

And one is, if you are going to focus on the regulatory process, you need to focus on those few hundred regulations that really make a difference. You have so many things in place. You have cost benefits, you have jobs analysis, least restrictive alternatives. You have that. We've got to find a way to make them work. And I think you can make them work quicker in the 200 large regulations than the 4,000 other regulations that occur.

You have got the REINS Act before Congress, certainly would put Congress in the driver's seat and should be considered. You could require economically significant rules for the agencies to actually have a higher standard of review. For example, all regulations right now, the smallest of them and the most minimal and the largest, are all subject to what—court review for what we call arbitrary and capricious, which means if the agency can find anything in the record—if the court can find anything in the record that the agency supports, the agency wins. That really has tipped playing field because the agency can always put something in the record. You might want to consider giving that a higher standard of review. Maybe for the 200 economically significant regulations you put—you have a formal rulemaking.

You could also up, since the courts give deference, you could require all regulations to be subject to substantial evidence. You could put judicial review on many of the regulatory statutes that you have already enacted. That way the public can help you implement the regulatory process.

And then finally in the final analysis—I always hate recommending anything to Congress, but the Constitution does give you sole legislative power. And I think at this point in time, that legislative power, because of the regulatory process, is shared. Thank you.

[The prepared statement of Mr. Kovacs follows:]

"The Views of the Administration on Regulatory Reform: An Update"
Summary of Testimony of William L. Kovacs, U.S. Chamber of Commerce

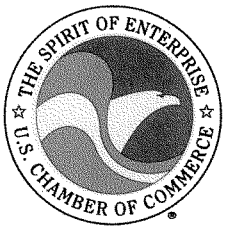
1. Executive Order 13563, which calls on agencies to eliminate duplicative, outdated or unnecessary rules, is a positive first step, and it now appears that even the President is committed to addressing the regulatory state. Congress should not let this opportunity pass. But achieving real reform will require more aggressive action.

2. The Administrative Procedure Act (APA), enacted in 1946, requires agencies to regulate openly, with notice to and comment from the public, and subject to judicial review. Over time, the APA's procedural protections grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress's general abdication of its oversight authority combined to limit the operational checks on agencies' regulatory power. As a result, federal agencies can now use the "legislate by regulation" and possess legislative power nearly equal to Congress.

3. There have been roughly 170,000 regulations issued since the mid-1970s. The vast majority of these "keep the lights on" and need not be disturbed, save for periodic reviews along the lines of OIRA's current look-back initiative—for which the Administration should be commended, as this is the first time since look-backs were mandated by Congress in 1980 that a President has actually conducted one. However, the problem seems to be that, despite a relatively stable number of new general regulations issued annually, the number of *economically significant* regulations—*i.e.*, those costing the regulated community more than $100 million—has increased substantially. These huge, complex, costly rulemakings should be the focus of any oversight, and the Administration's look-back plan fails in this respect.

4. Congress has tried over the years to enact safeguards against the type of one-sided, economically-tone-deaf regulations that are now being issued. It put into place laws like the Regulatory Flexibility Act, the Information Quality Act, the Unfunded Mandates Reform Act, and job impact evaluation requirements like Section 321 of the Clean Air Act. However, agencies have become so skilled at their own regulatory procedures that they routinely ignore these requirements or find ways to legally circumvent them. The most recent example is "Sue and Settle Rulemaking," responsible for over 30 of EPA's economically significant rules. Sue and Settle Rulemakings occur when EPA initiates a rulemaking to settle a lawsuit by an environmental group. When questioned about the scope or rationale for the rulemaking by Congress, EPA simply explains that it is bound by a court order to move forward with the regulation. What is missing from the story, however, is the fact that EPA would not be bound by the court order if it simply chose to defend the case.

5. Congress can restore balance to the regulatory process by taking such steps as: passing the "Regulations from the Executive In Need of Scrutiny (REINS) Act;" requiring a formal rulemaking process for "super-major" rules; using the OSHA hybrid rulemaking model to give interested parties a chance to question agencies about proposed rules; requiring agencies to meet a "substantial evidence" standard for economically significant rules, rules containing novel concepts of law, and significant guidance; and providing private rights of action for persons affected by agency non-compliance with existing statutory safeguards such as the Information Quality Act.



Statement of the U.S. Chamber of Commerce

ON: THE VIEWS OF THE ADMINISTRATION ON REGULATORY REFORM: AN UPDATE

TO: HOUSE COMMITTEE ON ENERGY AND COMMERCE, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

BY: WILLIAM L. KOVACS
SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY AND REGULATORY AFFAIRS

DATE: JUNE 3, 2011

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

BEFORE THE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE U.S. HOUSE OF REPRESENTATIVES

"The Views of the Administration on Regulatory Reform: An Update"

Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

June 3, 2011

Good morning, Chairman Stearns, Ranking Member DeGette, and members of the Subcommittee on Investigations and Oversight. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss how the Office of Information and Regulatory Affairs (OIRA) is implementing Executive Order 13563 on regulatory reform. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today.

On January 18, 2011, President Obama issued Executive Order 13563, with the goal of improving regulation and regulatory review. OIRA then commenced a four-month review designed to identify existing regulations "that are out-of-date, unnecessary, excessively burdensome, or in conflict with other rules." The results of this look-back were released last week, and it appears the Administration has made some commonsense recommendations that will save businesses some time, money, headaches, and resources. The Chamber applauds the President and OIRA for taking an important first step to address the bloated regulatory state. However, as my testimony will show, this first step is not nearly enough.

The very first sentence of Article I of the U.S. Constitution reads: "All legislative powers herein granted shall be vested in a Congress of the United States." As any elementary school student knows, the Congress makes the nation's laws, and the Executive Branch carries them out. Over time, however, this separation of powers has eroded to such an extent that federal agencies can now use the regulatory process to "legislate by regulation" and possess legislative power nearly equal to that of Congress.

Regulations are a necessary part of a complex society. But an unbalanced regulatory process has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation, and to erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government. Therefore, the Chamber supports efforts to reform the regulatory process and make it more effective and accountable to the American people. My testimony will analyze what the Chamber

believes are the true causes of the regulatory problem, evaluate the response to date, and propose substantive measures to restore proper checks and balances between the Legislative and Executive Branches of our government.

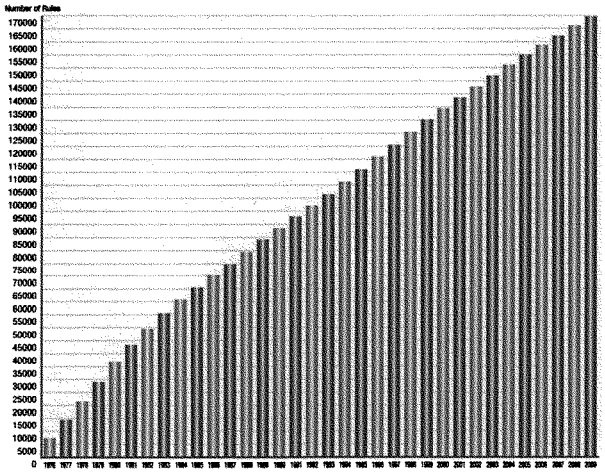
I. Overview of Regulatory Reform

A. Number and Scope of Regulations

The U.S. Small Business Administration estimates that the overall cost of regulations to the United States is as high as $1.75 trillion annually.[1] Regulations cost $8,086 per employee annually and impose an average of $10,585 on small businesses.[2] This almost equals the amount of taxes collected by the federal government: FY2009 gross individual income tax collections (before refunds) were $1.18 trillion, gross corporate income tax collections were $225.5 billion, gross employment tax collections were $858.2 billion, and combined excise, gift and estate tax collections were $71.3 billion.

This $1.75 trillion regulatory cost is the result of the accretion of roughly 170,000 individual regulations over the past four decades:

Cumulative Number of Rules 1976–2009

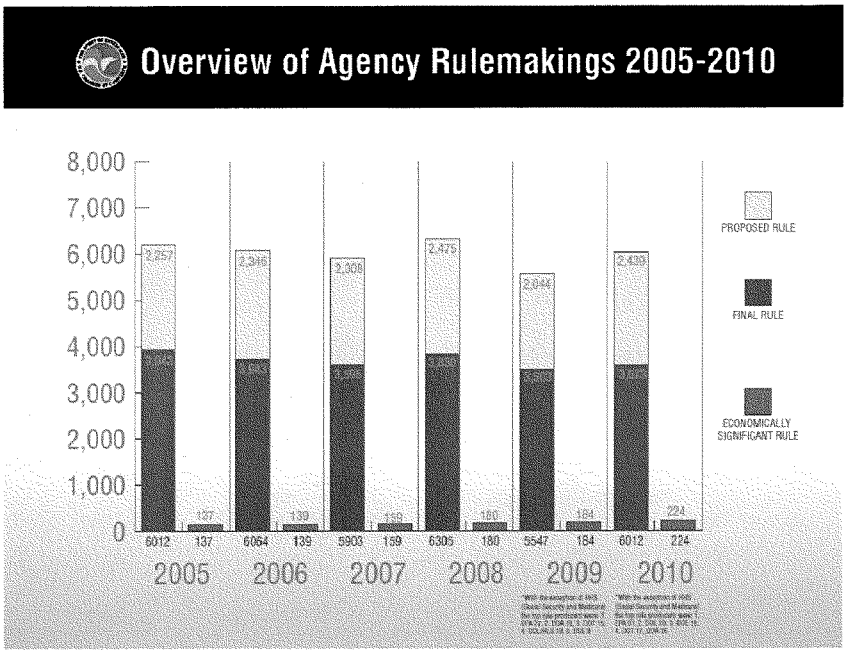


Year	Final Rules	Cumulative Final Rules
1976	7,401	7,401
1977	7,031	14,432
1978	7,001	21,433
1979	7,611	29,044
1980	7,745	36,789
1981	6,481	43,270
1982	6,288	49,558
1983	6,049	55,607
1984	5,154	60,761
1985	4,843	65,604
1986	4,589	70,193
1987	4,581	74,774
1988	4,697	79,471
1989	4,714	84,185
1990	4,334	88,519
1991	4,416	92,935
1992	4,155	97,090
1993	4,369	101,459
1994	4,867	106,326
1995	4,713	111,039
1996	4,937	115,976
1997	4,584	120,560
1998	4,899	125,459
1999	4,684	130,143
2000	4,313	134,456
2001	4,132	138,588
2002	4,167	142,755
2003	4,148	146,903
2004	4,101	151,004
2005	3,943	154,947
2006	3,718	158,665
2007	3,595	162,260
2008	3,830	166,090
2009	3,503	169,593

Compilation of numbers of regulations in (Ten Thousand Commandments) by Wayne Crews. Based on National Archives and Records Administration, Office of the Federal Register. Chart illustrating the growth of federal regulations was prepared by the U.S. Chamber of Commerce.

[1] "The Impact of Regulatory Costs on Small Firms," Nicole V. Crain and W. Mark Crain, analysis performed for the Small Business Administration Office of Advocacy, September 2010, *available at* http://archive.sba.gov/advo/research/rs371tot.pdf.
[2] *Id.*

The Chamber believes the sheer number of regulations, though staggering, is not necessarily the problem that calls most for immediate attention, nor is it the reason why bipartisan concerns about the integrity of the regulatory process have intensified in recent years. Rather, the key problem is that the number of *economically significant* regulations—*i.e.*, those costing the businesses, consumers and the economy more than $100 million—has increased substantially. As the chart below shows, the number of economically significant rules issued each year has increased more than 60 percent over the past five years, from 137 to 224:



Nowhere is this problem more pronounced than at the Environmental Protection Agency (EPA). EPA has garnered significant attention in recent years by issuing a series of one-sided, politically-charged regulations that are intended to take the place of legislation that cannot achieve a consensus in the Congress. From greenhouse gases to Clean Water Act jurisdiction to chemical regulation, EPA has not been shy about using regulations to impose broad mandates and restrictions so controversial that they could not pass even the heavily-Democratic 111th Congress.

As the chart below shows, the reasons for economically significant rulemakings vary from agency to agency:

Economically Significant Rules 1997–2010

Agency	Economically Significant Total Rules 1997-2010	Spending Rules (1)	Commerce Rules (2)	Commerce Rules Judicial Deadline (3)	Commerce Rules/ Statutory Deadline (4)
Agriculture	85	51	34	0	9
HHS	187	122	65	0	16
Interior	22	1	21	0	0
Labor	33	5	28	0	5
EPA	75	0	75	36	15

1. "Spending" rules involve the exercise of spending authority (e.g. Medicare reimbursement, disaster relief, grants).
2. "Commerce" rules directly regulate commerce or behavior (e.g. emissions limits, food safety standards).
3. "Commerce Rules/Judicial Deadline" are rules OIRA notes as subject to a specific judicial action-forcing deadline.
4. "Commerce Rules/Statutory Deadline" are rules OIRA notes as subject to a specific statutory action-forcing deadline.

OIRA website: www.reginfo.gov

EPA appears to be an outlier among the five agencies surveyed above: more than any other agency, EPA is "forced" to act, either by court order or statutory requirement. Most troubling is that EPA is the only agency that initiates rulemakings (36 by the Chamber's count) by what is commonly referred to as "Sue and Settle Rulemaking."

Sue and Settle Rulemakings occur when EPA initiates a rulemaking to settle a lawsuit by an environmental group. When questioned about the scope or rationale for the rulemaking by Congress, EPA simply explains that it is bound by a court order to move forward with the regulation. What is missing from the story, however, is the fact that EPA would not be bound by the court order if it simply chose to litigate. In recent years, Sue and Settle Rulemaking has resulted in several of the most controversial major rulemakings out of EPA in recent years, including: New Source Performance Standards (NSPS) for greenhouse gas emissions from electric utilities and refineries; numeric nutrient criteria for the State of Florida; revisions to the Definition of Solid Waste under RCRA; NESHAP for cement kilns; Clean Water Act guidance for mountaintop removal mining permits; the California Waiver; the Stream Buffer Zone Rule; multi-industry Clean Air Act Section 112 air toxics rules; Ozone NAAQS reconsideration; Clean Air Act regulations on oil and gas drilling operations; and EPA's proposal to regulate

greenhouse gases under the Clean Water Act. Because Sue and Settle Rulemakings occur as a result of EPA's settlement with an environmental group, the terms of the settlement are often one-sided and give little consideration to the industry sector(s) that will be covered by the new regulations.

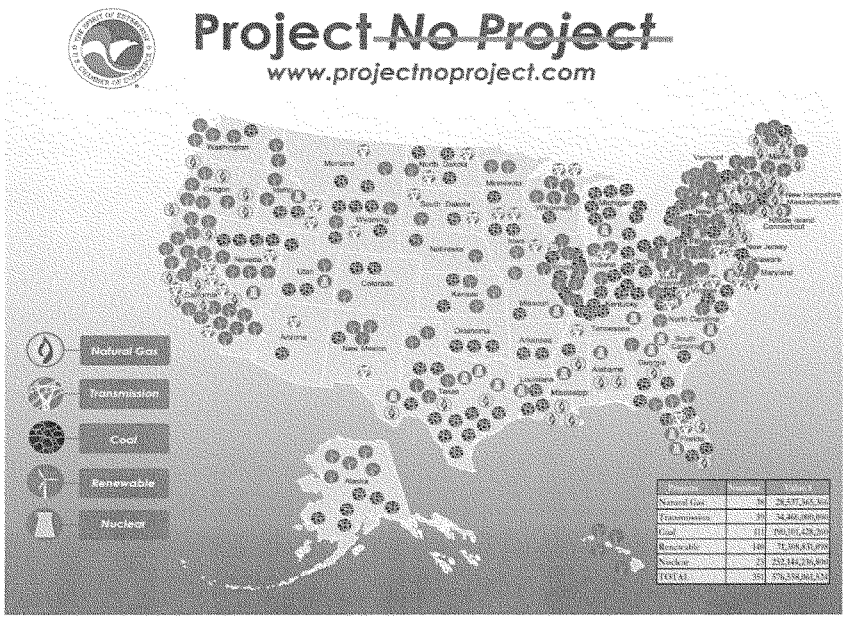
B. How Regulations Stop Progress

The cumulative impact of regulatory action can be overwhelming: agencies literally have the power to decide the fate of firms and entire industries. This recently happened for two power plants: Portland Gas & Electric's Boardman coal-fired power plant in Oregon, and Exelon Corporation's Oyster Creek Nuclear Generating Station in New Jersey. In both cases, the utility was forced to choose between installing several hundred million dollars' worth of pollution controls to comply with EPA regulations (regional haze at Boardman, cooling water intake structures at Oyster Creek), or simply shut down early. In both cases, the utility chose to shut down. This is a highly disturbing trend, and one that will only continue in 2011 with the issuance of even more major rules.

In addition, the onslaught of new requirements is giving "Not In My Back Yard" (NIMBY) activists even more tools to stop economic development. The Chamber's *Project No Project* Web site chronicles 351 state-level projects in 49 states that have been stopped, stalled, or outright killed due to NIMBY activism, a broken permitting process and a system that allows limitless challenges by opponents of development. Results of the assessment are compiled at http://www.projectnoproject.com, which serves as a web-based project inventory. The purpose of the *Project No Project* initiative is to enable the Chamber to understand potential impacts of serious project impediments on our nation's economic development prospects.

The Chamber commissioned a first-of-its kind economic study to examine the lost economic value and jobs foregone by not building these 351 projects. The study, *Progress Denied: The Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*, produced by Steve Pociask of TeleNomic Research, LLC and Joseph P. Fuhr, Jr. of Widener University, found that *successful construction of the 351 projects identified in the Project No Project inventory could produce a $1.1 trillion short-term boost to the economy and create 1.9 million jobs annually*. Moreover, these facilities, once constructed, continue to generate jobs, because they operate for years or even decades. Based on their analysis, Pociask and Fuhr estimate that, in aggregate, each year the operation of these projects could generate $145 billion in economic benefits and involve 791,000 jobs. While it is unreasonable to think that all 351 projects would be constructed, even a subset of the projects would yield major value. For instance, Pociask and Fuhr estimate that the construction of only the largest project in each state would generate $449 billion in economic value and 572,000 annual jobs.

The chart below illustrates the diversity of the energy projects impacted by a broken regulatory process. *Project No Project* proves the saying that it is just as hard to site a wind farm in the U.S. as it is a coal-fired power plant.



The best way to fix the project-level regulatory impediments that developers face is to fix the federal regulatory process that places these tools into NIMBY toolbelts. And that begins by requiring agencies to follow the laws that require them to consider jobs and economic impacts of their regulations.

C. Many Statutory Safeguards to Limit Bad Regulation are Not Used by Agencies

The Congress has long recognized the challenges posed by the power of Executive Branch agencies. Therefore, it has repeatedly attempted to create statutory safeguards to ensure the regulatory state is transparent and accountable, and to ensure agency power is properly cabined within appropriate constitutional and statutory limits. For example, in 1946 Congress enacted the Administrative Procedure Act (APA) requiring agencies to regulate openly and with notice to and comment from the public, and subject to judicial review. Over time, the procedural protections in the APA grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress's

general abdication of its oversight authority combined to severely limit the operational checks on the regulatory power of federal agencies.

By the late 1970s, it had become clear that the delegation of congressional authority to the agencies to "fill in the legislative blanks," the lack of congressional oversight over the agencies, and judicial deference were fundamentally altering the traditional balance between the legislative and executive branches of government. Thus, in 1980 Congress began enacting laws to restore the balance and to check executive power.

One of those laws, the Regulatory Flexibility Act, required agencies to periodically review rules "to determine whether such rules should be continued without change, or should be amended or rescinded" in order to minimize any significant economic activity of the rules upon a substantial number of small businesses.[3] However, six administrations and almost 30 years passed before this provision of law was implemented by the Executive Branch. President Obama and Administrator Sunstein of the Office of Information and Regulatory Affairs should be applauded for finally implementing this measure.

Congress has repeatedly attempted over the years to rein in the Executive Branch agencies but it would be an understatement to assert nothing has worked. Agencies are just too skilled at manipulating the regulatory system. Some of the laws passed by Congress in an attempt to bring transparency and accountability to the process include:

i. The Unfunded Mandates Reform Act of 1995 (UMRA)[4]

UMRA was designed to restrain the imposition of unfunded federal mandates on state, local, and tribal governments and the private sector, primarily by providing more information and focusing more attention on potential federal mandates in legislation and regulations. Before promulgating a final rule, UMRA requires agencies to undertake a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including costs and benefits and future compliance costs, and estimates of the effect of the rule on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and services (if and to the extent that the agency determines accurate estimates are feasible). For rules of over $100 million in economic impact, UMRA requires the agency to identify and consider a "reasonable number" of regulatory alternatives from which the agency shall select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. Alternatively, the head of the agency must publish with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the rule's objectives was not chosen.

A May 2004 GAO Report states, "[t]here is some evidence that the information provided under UMRA and the spotlight that information places on potential mandates

[3] 5 U.S.C. §§ 601-612 (1980).
[4] 2 U.S.C. §§ 658 and 1511, *et seq.*

may have helped to discourage or limit federal mandates. CBO's annual reports indicate that, at least with regard to the legislative process, UMRA sometimes does have such an indirect preventive effect."[5] However, agencies proved adept at manipulating the process to avoid UMRA's requirements and in the absence of substantive judicial review persons affected by agency action lack any means to hold agencies to account for UMRA violations. According to GAO:

> There are multiple ways that both statutes and final rules containing what affected parties perceive as 'unfunded mandates' can be enacted or published without being identified as federal mandates with costs or expenditures at or above the thresholds established in UMRA. Our review demonstrated that many statutes and final rules with potentially significant financial effects on nonfederal parties were enacted or published without being identified as federal mandates at or above UMRA's thresholds. Further, if judged solely by their financial consequences for nonfederal parties, there was little difference between some of these statutes and rules and the ones that had been identified as federal mandates with costs or expenditures exceeding UMRA's thresholds.[6]

Notwithstanding the many sound provisions of UMRA, there is no right to judicial review; therefore, the statute's requirements cannot be enforced.

ii. The Information Quality Act (IQA)[7]

The IQA was designed to impose greater transparency and improve the quality of agency information, especially with respect to non-regulatory information disseminated by administrative agencies with respect to scientific and statistical matters. It requires:

- Compliance with OMB's information quality guidelines that mandate transparency, full disclosure of all data and reports used to justify or formulate an agency position on a given topic, and full disclosure of all uncertainties or error sources so that a member of the public may evaluate and reproduce the results of an agency analysis or study.
- Use of the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices and data collected by accepted methods or best available methods.
- For claims, statements or policies regarding human health or environmental risks, the agency must specify (1) each population addressed by any estimate of public health effects; (2) the expected risk or central estimate of risk for the specific populations; (3) each appropriate upper-bound or lower-bound estimate of risk; (4) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and

[5] General Accountability Office, "Unfunded Mandates: Analysis of Reform Act Coverage," GAO-04-637 (May 2004).
[6] *Id.*
[7] 44 U.S.C. §§ 3504(d)(1), 3516.

(5) peer-reviewed studies that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.

- A procedure to allow affected persons to "seek and obtain" correction or disclosure of information that fails OMB information quality requirements.

The IQA's drafters intended agency actions under the IQA to be subject to normative APA judicial review, and at least two Courts of Appeal have indicated APA review is available for persons aggrieved by IQA violations. However, the bureaucracy has taken the position that there is no judicial review or remedy for IQA violations and one Court of Appeals has adopted this view. In other words, the federal government and one Circuit hold Congress passed IQA without creating any rights for persons harmed by agency violations of its provisions. Consequently, agencies fail to fully comply.

iii. The Paperwork Reduction Act of 1995 (PRA)[8]

The PRA was enacted to minimize compliance burdens and to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society." It requires agencies to: (1) minimize compliance burdens and consult with members of the public and affected agencies concerning each proposed collection of information; (2) solicit comment to evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (3) look back and evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; and (4) take steps to enhance the quality, utility, and clarity of the information to be collected and increase program efficiency and effectiveness.

However, a 2005 GAO report concluded a new approach was needed to reduce the burden imposed by the bureaucracy on the public.[9] GAO noted a general lack of agency compliance, stating: "The additional comment period added in 1995 appears to have had limited effectiveness in obtaining the views of the public, and agencies are not directly consulting with affected parties as the act requires. Many factors have contributed to the current state of agency review processes, including lack of management support, weaknesses in OMB guidance, and insufficient agency attention to the requirements of the PRA and related guidance. Until these factors are addressed, OMB, federal agencies, and the public lack adequate assurance that government information collections are necessary and that they appropriately balance the resulting burden with the benefits of using the information collected."

iv. Job Loss Analysis Provisions

Almost every major environmental law contains a provision similar to Section 321(a) of the Clean Air Act, which requires EPA to perform a continuing study of

[8] 44 U.S.C. § 3501 *et seq.*

[9] General Accountability Office, "Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public," GAO-05-424 (May 2005).

the effect of its regulations on employment or the threat of job loss.[10] Yet EPA rarely, if ever, performs such a study. In the case of greenhouse gas regulations, EPA has consistently refused to perform a Section 321 analysis, even in the face of massive Congressional scrutiny and warnings that the regulations will impact jobs.

D. The Administration's Response To Date

Executive Order 13563 was a positive first step in addressing the regulatory problem. However, the look-back conducted by OIRA is something it should have been doing all along: as previously stated, Congress required periodic regulatory look-backs from federal agencies when it enacted Section 610 of the Regulatory Flexibility Act in 1980. And in the case of EPA, its look-back does little to nothing in the way of addressing the bulk of rulemakings of significant concern to the Chamber and its members.

In just the past two years, the Chamber's members have sought our assistance to convince EPA to either withdraw or limit the economic impact of the following rules and guidance documents:

Boiler MACT	Endangerment	Ozone NAAQS	Transport Rule
Coal Ash	Auto GHG Rule	Tailoring Rule	CWA Jurisdiction
Numeric Nutrients	Texas Air Permits	Lead Paint	Cement MACT
Utility MACT	Spruce Mine Veto	PM NAAQS	GHG NSPS
Chesapeake Bay	Johnson Memo	California Waiver	NSR Aggregation
HD/MD Truck GHG Rule	Cooling Water Intake Structures	RCRA Definition of Solid Waste	GHG Regulation under CWA

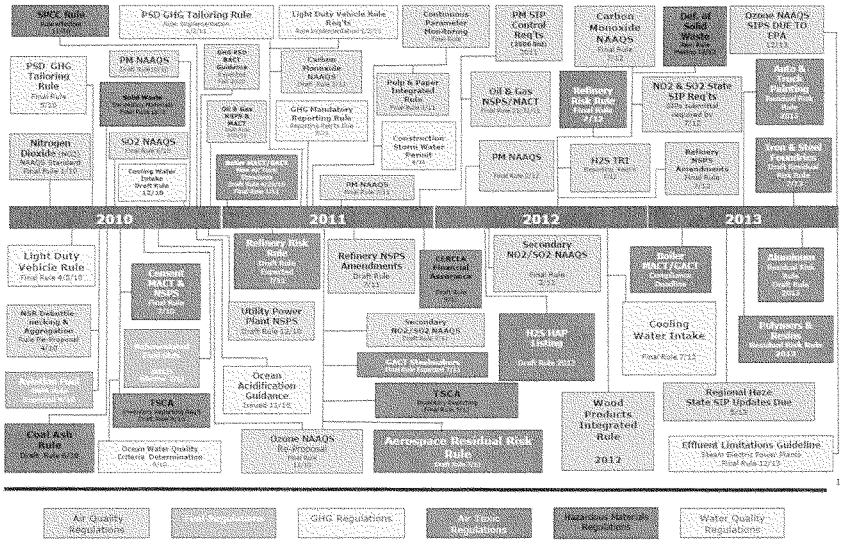
The costs to industry in these rulemakings are steep, and in virtually each case EPA has not adequately performed statutorily-required analyses of job impacts, economic impacts, small business impacts, and other burdens. Yet EPA's look-back plan identifies only two of these rules—the lead paint rule and vehicle greenhouse gas regulations—and in both cases still fails to address the fundamental complaints made by industry.

What industry needed EPA to do under Executive Order 13563 was take a hard look at the 24 rules listed above and consider their actual impact. This includes statutorily-mandated job loss analyses that EPA has never completed, and economic impact analyses performed as the law requires. It includes compliance with the RFA, IQA, PRA and UMRA. EPA's look-back report does not even ponder the reasons why the agency failed to comply with these laws when promulgating the bulk of the 24 laws listed above, nor does it state whether the agency will comply with these laws going forward. It only provides procedures for long-term reviews of regulations that are in

[10] 42 U.S.C. § 7621. The provision can also be found in the Clean Water Act (33 U.S.C. § 1367), Solid Waste Disposal Act (42 U.S.C. § 6971), Toxic Substances Control Act (15 U.S.C. § 2623), Powerplant and Industrial Fuel Use Act (42 U.S.C. § 8453), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610).

place, perhaps meaning that the only time we will truly learn the economic impact of EPA's regulations is after they have been in effect for many years.

Moreover, the 24 rules listed above are just a small subset of the much larger number of regulations coming out of EPA over the next few years that will impact the Chamber's members. Those are contained in the chart below:



There must be a balance between environmental protection and economic security. EPA talks repeatedly of trying to maintain this balance; however, all the evidence points to the opposite. The only way to rein EPA in is to make wholesale changes to the regulatory process.

II. <u>How to Fix the Regulatory Process</u>

A. Focus on Economically Significant Regulations

Executive Order 13563, which calls on agencies to eliminate duplicative, outdated or unnecessary rules, is a positive first step, and it now appears that even our President is committed to addressing the regulatory state. Congress should not let this opportunity pass. But achieving real reform will require Congress and the President to move beyond redundant, nonsensical regulations. To make a real impact, Congress should focus on economically significant rules and significant guidance documents. These rules and guidance documents have historically been defined as those likely to result in an annual effect on the economy of over $100 million; lead to a major increase in costs or prices; raise

novel policy or legal issues; or have significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises. These are also the rules and guidance most likely to raise compelling federalism and constitutional separation of powers concerns. As the chart on the Overview of Agency Rulemakings 2005-2010 illustrates these economically significant regulations only comprise four percent of agency regulations but they are both the vast majority of economic impact, job destruction and are the rules that put the agencies into the legislative process.

B. Raise the Bar!

Currently, the same standard of review applies to both general regulations and economically significant regulations. However, given the size and scope of economically significant regulations, not to mention the need for public participation, the informal notice-and-comment rulemaking procedure simply does not work. It allows agencies to ignore the built-in statutory checks and balances and there is a lack of accountability because the courts provide substantial deference to the agencies. The Chamber recommends the following measures to restore balance to the regulatory process:

- The REINS Act. The Chamber supports H.R. 10 and S. 299, the "Regulations from the Executive In Need of Scrutiny (REINS) Act." The REINS Act requires both houses of Congress to affirmatively approve, and the president to sign, any new "major rule"—i.e., a rule with a projected impact to the economy of over $100 million—before it could become effective. The Chamber believes the REINS Act is an effective regulatory reform, which would improve Congressional oversight, increase the quality of agency rulemakings, and better ensure all branches of the Federal government are accountable. It restores to Congress the duty and obligation to make balancing decisions with respect to regulations. This is what the Constitution provides, and this is how the system ought to work.

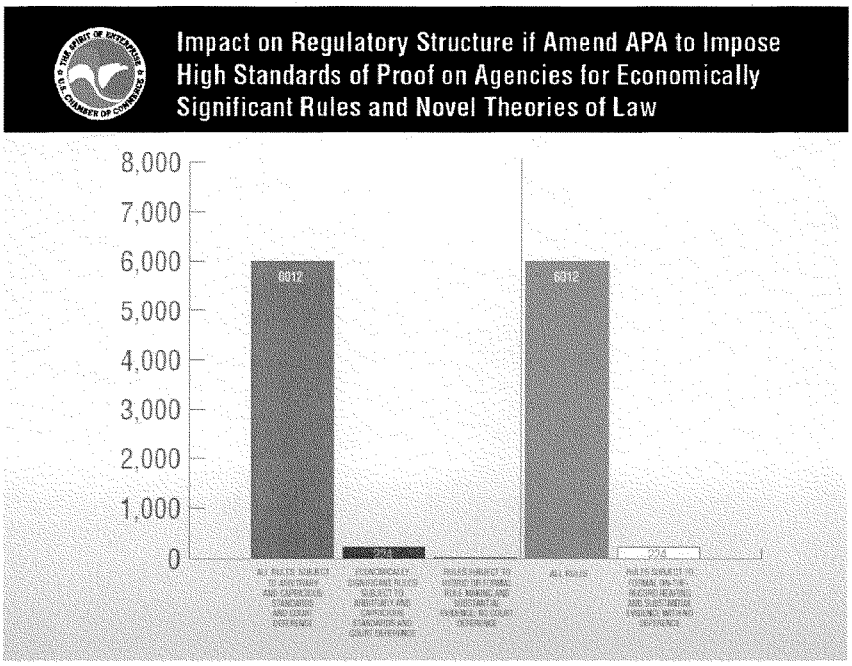
- Require Formal Rulemaking for the "Super Rules". Formal rulemaking under the APA means a quasi-judicial hearing with testimony under oath, depositions and cross-examination. The agency, as the rule's proponent, carries the burden of proof by substantial evidence. "Substantial evidence" is enough relevant evidence for a reasonable person to conclude the record is adequate to support the proposed agency action. This is a more demanding test than the traditional "arbitrary and capricious" standard applied by courts to rules promulgated by informal rulemaking. The Chamber believes formal rulemaking is appropriate for the small category of "super rules" with significant economic impact and societal impact.

- Use the OSHA Hybrid Rulemaking Model to Give Interested Parties a Chance to Question Agencies about Proposed Rules. The APA generally provides for notice and comment ("informal") or adjudicatory ("formal") rulemaking. However, Congress created a unique "hybrid" rulemaking model for OSHA, allowing the agency to propose rules and standards via notice and comment but requiring an

informal hearing with cross-examination of the agency at a stakeholder's request. The Chamber believes extending the OSHA hybrid approach to all major rules and guidance will promote transparency and promote regulatory quality by ensuring more rigorous internal and external review of agency actions.

- Require Agencies to Meet the "Substantial Evidence" Test for Economically Significant Rules, Rules Containing Novel Concepts and Significant Guidance. Currently, a party challenging a rule promulgated by informal rulemaking must demonstrate in court that the agency's actions are contrary to law or "arbitrary and capricious." Courts substantially defer to agencies under this test. The substantial evidence test obligates courts to take a harder look at agency findings. Among other things, we believe a harder look by the courts will force agencies to more carefully review major rules or guidance before they are proposed for public comment and should improve regulatory quality. Therefore, the Chamber believes that the APA and/or the Regulatory Flexibility Act should be amended by extending the substantial evidence test to all major rules and guidance.

  Opponents of regulatory reform will claim that a substantial evidence test for economically significant rules and significant guidance will impose too high a burden on agencies. However, as the chart below demonstrates, it will only impact a very small portion—roughly 4 percent—of all regulations:



- Enforce provisions of existing environmental laws requiring EPA to consider jobs and economic impact. Section 312 of the Clean Air Act (42 U.S.C. § 7612) requires EPA to conduct a cost-benefit analysis for most major air rules. Section 317 (42 U.S.C. § 7617) requires economic impact assessments for most major air rules. And Section 321 (42 U.S.C. § 7621) requires the Administrator to do a continuing study of the effect of its regulations on employment or the threat of job loss. Identical provisions to Section 321 exist in most other environmental statutes, such as the Clean Water Act, Toxic Substances Control Act, the Solid Waste Disposal Act, and CERCLA. Yet EPA either flat-out ignores these requirements (as it did with Section 321 and its GHG rules), or it does such a poor job with the economic assessment and the underlying data that the result is misleading, usually overstating benefits and understating costs. The Chamber recommends requiring EPA to conduct these statutorily-required analyses for all major regulations. Moreover, the Chamber recommends preempting all EPA regulations issued in 2009 and 2010 that did not adequately comply with Sections 312, 317 and 321.

- Amend the Regulatory Flexibility Act to Require Cost-Benefit Estimates and Science Reviews by an Independent Third Party not Agency Staff. Many current laws and Executive Orders already require agencies to conduct cost-benefit estimates and science reviews. However, these estimates and reviews likely would be more accurate and more credible if conducted by an independent third party and not agency staff. Requiring cost-benefit estimates and science reviews to be conducted entirely by an independent third party would be an important check and balance on agency power and improve regulatory quality.

- Amend the Regulatory Flexibility Act to Consider "Indirect" Impacts. The Regulatory Flexibility Act requires agencies to determine if a rule will have a "significant economic impact on a substantial number of small entities." If so, then the agency must explain why it has chosen this rule over other options. Due to a court decision, only the direct impact of a rule (i.e., cost of compliance) need be assessed. However, indirect costs such as litigation and enforcement risk and lost business opportunities ought to be accounted for as well. Therefore, the Chamber proposes amending the Act to include indirect impacts.

- Codify Executive Order 12866 including Guidance Documents. President Clinton issued E.O. 12866 requiring agencies considering new rules to identify and assess alternative forms of regulation, adopt the least burdensome regulatory alternative, use the best reasonably obtainable science, and highlight economic impact concerns, among other things, and then to submit major rules to OMB's Office of Information and Regulatory Affairs (OIRA) for review. OIRA, in turn, was authorized to return regulatory proposals that failed to comply with the E.O. to the relevant agency for revision. President Bush amended E.O. 12866 to include guidance documents, to require best estimates of cumulative regulatory costs and benefits, and to require identification of market failures. President Obama repealed the Bush amendments. However, the Chamber believes E.O. 12866,

ideally including the Bush amendments, ought to be codified with a private right of action for persons affected by agency or OIRA non-compliance.

- Clarify that Information Quality Act Violations are Judicially Reviewable. The Information Quality Act requires agencies to disseminate information using sound scientific and statistical methods and to utilize the most current and high quality information. If agency rules are to successfully and efficiently manage a complex society these rules should be based on the most solid foundation of data, science, and statistics. Unfortunately, agencies take the position that IQA violations are not judicially reviewable. This undermines IQA's effectiveness and is contrary to controlling APA norms and original Congressional intent. The Chamber believes Congress should follow the recent appellate decisions and confirm that IQA violations are judicially reviewable and that IQA quality standards apply to all studies, statistics, and other information used to support promulgation of rules and guidance.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. STEARNS. I thank the gentleman.

Mr. Gattuso, welcome. Your opening statement.

TESTIMONY OF JAMES GATTUSO

Mr. GATTUSO. Thank you, Chairman Stearns, Ranking Member DeGette, and members of the subcommittee, thank you for the opportunity to testify today on this important issue. Four months ago the President issued an Executive order instructing all executive branch agencies to submit plans for reviewing regulations on their books. Last week, and again this morning, OIRA Administrator Sunstein reported on the initial progress of that review at the various agencies. His report was encouraging as agencies have identified a substantial number of obsolete and unnecessarily costly regulations. At the same time the reforms proposed so far constitute only a very small step towards the rollback of red tape that the American economy needs. Much more substantial reform is required.

This is not a new issue. The burden of regulation has been steadily increasing over the past three decades through Republican as well as Democratic administrations. During the present administration, however, the rate of increase has reached unprecedented levels. According to figures compiled by the Heritage Foundation based on data provided by the Government Accountability Office, Federal agencies promulgated an unprecedented 43 major regulations during fiscal 2010 alone, imposing annual costs as calculated by the agencies themselves of at least $28 billion. During the same period, only a handful of major rulemakings were completed which reduced burdens for the total calculated savings of about $1.5 billion.

It is in this context that President Obama launched his regulatory review initiative. To address the issue, the President promised a governmentwide review of rules which was a welcomed step. But the requirement that the agencies submit plans for a regulatory review of agency regulations, however, is not a new or groundbreaking idea. In fact, agencies have been required to prepare such plans since 1993, under President Clinton's Executive order on regulatory review. There is little evidence that such plans have had any impact.

Moreover, the Obama initiative was hardly government-wide. It excluded independent agencies such as the Federal Communications Commission, the Securities and Exchange Commission, and the new Consumer Financial Protection Bureau. In so doing, the President excludes from scrutiny many of the largest producers of red tape. And I do understand that OIRA invited independent agencies to submit plans on their own, and apparently they almost uniformly declined to do so.

There is precedent on this. And prior reviews of regulations by administrations, notably in the 1991 review by the Bush administration, it was made clear to independent agencies that they should participate and they did. Frankly, the President, who has his appointees serving in independent agencies, can persuade them to participate if he expresses his desires strongly enough. I don't think that was done in this case.

Now despite the limitations the initiative has as reported by OIRA Administrator Sunstein, has some meaningful results. Overall, the executive branch agencies identified over 100 possible rule changes for the reported potential savings in the short term of about $1 billion. For an administration that up to now has reduced regulation on virtually nothing, this agenda is significant. As encouraging as that is the administration's explicit acknowledgment that regulations have costs and that regulators must make time in their day to review the restrictions and mandates they have imposed to determine if they are actually necessary and effective.

Still, it is too soon for Americans to breathe a collective sigh of regulatory relief. Many of the steps last week are the low hanging fruit of regulatory excesses which should have been plucked long ago. For instance, the rule describing milk as a potentially dangerous oil has been in place since the 1970s and the request to eliminate dairy from the regulations have been submitted to the EPA as early as 2007. The fact that it took 4 years to accomplish this is less a notable achievement than a sign of a broken regulatory system.

Many more actions are merely suggestions for change at a later date. Of the 31 reforms identified in the EPA's regulatory plan, nearly half are termed longer term actions that officials have simply marked for a closer look at some time in the future. Moreover, these proposed regulatory rollbacks are far exceeded by the new regulations which have been, or will be promulgated. Thus, while the $1 billion in claimed savings from the actions identified by the administration is significant, it is swamped by the nearly dozen new rules costing more than $1 billion each which have been adopted in the last 2 years.

In other words, the savings expected in this initiative in the near term has been counteracted 11 times over by new regulations that have been adopted. And there are more in the pipeline.

Until this torrent of new regulation is stopped or at least narrowed, net regulatory burdens will continue to increase.

Let me finish by saying that help is needed from Congress as well. I have my written testimony of recommendations for reforms that can and should be taken legislatively, including establishing a sunset date for Federal regulations, creating a Congressional Office of Regulatory Analysis to provide Congress with its own capability to analyze and review regulations and requiring congressional approval of major regulations that place new burdens on the private sector. Thank you for your time.

[The prepared statement of Mr. Gattuso follows:]

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CONGRESSIONAL TESTIMONY

The Views of the Administration on Regulatory Reform: An Update

Testimony before the
Committee on Energy and Commerce,
Subcommittee on Oversight and Investigations
United States House of Representatives

Friday, June 3, 2011

James Gattuso
Senior Research Fellow in Regulatory Policy
The Heritage Foundation

Chairman Stearns, Ranking Member DeGette, and members of the Subcommittee, thank you for the opportunity to testify today on this important topic.

My name is James Gattuso. I am a Senior Research Fellow in Regulatory Policy at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Four months ago, the President issued an Executive Order instructing all executive branch agencies to submit plans for reviewing regulations on their books, a process aimed at identifying outdated and unnecessary rules. Last week, OIRA Administrator Cass Sunstein reported on the initial progress of that review at the various agencies. His report was encouraging, as agencies have identified a substantial number of obsolete and unnecessarily costly regulations. The Administration, and Administrator Sunstein, should be commended for their efforts.

At the same time, the reforms proposed so far constitute only a very small step toward the roll back of red tape that the American economy needs. Much more substantial reform is required.

This is not a new issue. The burden of regulation has been steadily increasing over the past three decades, through Republican as well as Democratic administrations. During the present Administration, however, the rate of increase has reached unprecedented levels. According to figures compiled by The Heritage Foundation, based on data provided by the Government Accountability Office, federal agencies promulgated an unprecedented 43 major

regulations in FY 2010 alone, imposing annual costs – as calculated by the regulating agencies themselves – of at least $28 billion dollars[1].

Fifteen of the 43 major rules issued during the fiscal year involved financial regulation. Another five stem from the Patient Protection and Affordable Care Act adopted by Congress in early 2010. Ten others came from the Environmental Protection Agency, including the first mandatory reporting of "greenhouse gas" emissions and new automotive fuel economy standards (adopted jointly with the National Highway Traffic Safety Administration).

During the same period, only three major rulemakings were completed which reduced burdens, with a total calculated savings of about $1.5 billion. While steps to reduce burdens are, unfortunately, almost always outnumbered by those that impose new burdens, this was lower than the historical average.

It is in this context that President Obama launched his regulatory review initiative. In a *Wall Street Journal* opinion piece, the President acknowledged the problems of overregulation, noting that sometimes "rules have gotten out of balance, placing unreasonable burdens on business—burdens that have had a chilling effect on growth and jobs." While stressing that he would not back away from regulating where necessary, he stated that "we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb."

To address the issue, the President promised a "government-wide review" of rules. This was a welcome step, although the actual executive order was short on details. Rather than require agencies to take

[1] James L. Gattuso, Diane Katz and Stephen A. Keen, "Red Tape Rising: Obama's Torrent of New Regulation," Heritage Foundation Backgrounder No. 2482, Oct. 26, 2010.

specific steps to modify or eliminate problematic rules, it simply required agencies to create a process for doing so. This was hardly new or groundbreaking. In fact, agencies have been required to prepare such plans since 1993, under President Clinton's executive order on regulatory review. There is little evidence that such plans have had any impact.

Moreover, the Obama initiative was hardly "government-wide." It excluded independent agencies such as the Federal Communications Commission, the Securities and Exchange Commission, and the new Consumer Financial Protection Bureau. In so doing, the President excluded from scrutiny many of the largest producers of red tape.

Despite these limitations, the initiative has, as reported by OIRA Administrator Sunstein, had some meaningful results. Although not specifically required to do so, many agencies identified specific regulatory changes to be made. Among these:

- Modification of an EPA rule that defined milk as an "oil", thus requiring milk spillages at dairies to be treated as hazardous oil spills. Exempting milk from the rule will save dairies some $1.4 billion over the next ten years.
- Elimination of an EPA requirement that gas stations maintain gas vapor recovery systems, a requirement which is redundant with air pollution controls required on cars today. Estimated savings: $67 million per year.
- Modification of Department of Transportation requirements that railroads maintain automated anti-collision systems to areas where it is actually needed. Savings: up to $400 million in upfront costs.

- Elimination of some 1.9 million hours of Occupational Safety and Health Administration paperwork saving businesses some $40 million annually.
- Harmonization of OSHA hazard classification and labels with requirements in other countries, saving businesses some $585 million per year.

Overall, executive branch agencies identified over a hundred possible rule changes, with potential savings in the billions. According to OIRA, possible reforms identified by EPA, DOT and DOL alone promise over $1 billion in savings.

For an Administration that up until now had reduced regulation on virtually nothing, this agenda is significant. As encouraging is the Administration's explicit acknowledgment that regulations have costs, and that regulators must make time in their day to review the restrictions and mandates they have imposed, to determine if they are actually necessary and effective.

This fact may seem obvious, but it is not universally recognized. Some, for instance, have criticized the review process, expressing concern that efforts to eliminate unnecessary and ineffective rules will drain resources from efforts to write new rules. In other words, regulators can't be bothered to examine whether the rules they have imposed make sense, because they need to focus on writing even more rules. The Obama Administration seems to have rejected these voices for ever more regulation.

Still, it is too soon for Americans to breathe a collective sigh of regulatory relief. Many of the steps announced last week are the low hanging fruit of regulatory excesses which should have been plucked long

ago. For instance, the rules defining milk as a potentially dangerous oil had been in place since the 1970s, and a request to eliminate dairies from the regulations had been submitted to EPA as early as 2007. The fact that it took four years to accomplish is less a notable achievement than a sign of our broken regulatory system. Similarly, the problems with the anti-collision systems mandated by DOT have long been known. In fact, DOT was sued more than a year ago by the railroad industry over the issue. DOT only committed to reforming the mandates last March, as part of a settlement of that lawsuit.

Many more actions are merely suggestions for change at a later date. For instance, only two rule changes have actually been finalized by the EPA. Of the 31 other reforms identified in the EPA's plan, sixteen are "early actions" that may lead to regulatory change in the near future, and 15 are "longer-term actions" that officials have simply marked for a closer look.

Moreover, these proposed regulatory rollbacks are far exceeded by new regulations which have been or will be promulgated. Thus, while the $1 billion in estimated savings from EPA, Transportation and Labor is significant, nearly a dozen new rules costing more than $1 billion each have been adopted in the last two years, swamping the savings identified in the review initiative. And more are in the pipeline. Until the torrent of new regulations is stopped, or at least narrowed, net regulatory burdens will continue to increase.

Help is needed from Congress as well. There are several steps that legislators can take to improve retrospective review of rules, and to ensure that new rules are necessary and effective. Among these:

1. Establish a sunset date for federal regulations. Even the best plans for periodic review of rules will fall short if there is no consequence for an agency that fails to adequately scrutinize the

regulations it has imposed. The natural bureaucratic tendency is to leave old rules in place, even if they have outlived their usefulness. To ensure that substantive review occurs, regulations should automatically expire if not explicitly reaffirmed by the agency. This re-affirmation would be subject to the normal appeals process in the courts for new rules, to ensure that the renewal is not arbitrary or capricious.

2. Create a Congressional Office of Regulatory Analysis. Congress needs the capability to review existing and proposed rules independently, without reliance on OMB or the agencies. A Congressional Office of Regulatory Analysis, modeled on the Congressional Budget Office, would provide an important backstop to, and check on, the executive branch's regulatory policy.

Such an office would also help Congress better evaluate the regulatory consequences of legislation it enacts. While it is easy to blame regulators for rulemaking excess, much of the problem stems from overly expansive or badly defined statutes. A congressional office to review such legislation before adoption would help address the problem.

3. Require congressional approval of major regulations that place new burdens on the private sector. Under the 1996 Congressional Review Act, Congress has the means to veto new regulations from agencies. To date, however, that authority has been used successfully only once. Under legislation introduced in the House by Congressman Geoff Davis (H.R. 10) and in the Senate by Senator Rand Paul (S. 299), the review process would be strengthened by requiring congressional approval before any major regulation takes effect. Such a system would ensure a congressional check on regulators, as well as ensure the accountability of Congress itself.

The results so far from the President's regulatory initiative are encouraging. The Administration – and especially OIRA – deserves credit for undertaking a review of federal rules, and identifying regulations that are costly and unnecessary. Yet these are only small and tentative steps on a very long road.

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Mr. STEARNS. I thank the gentleman.

Mr. Goldston, welcome for your 5 minutes.

TESTIMONY OF DAVID GOLDSTON

Mr. GOLDSTON. Thank you, Mr. Chairman, and thank you, Ranking Member DeGette and members of the subcommittee for having me here today. What I'm going to try to do is run quickly through 14 points to summarize some of the points in my testimony and issues that have come up this morning. First is regulation are needed to safeguard the public. Neither individual action nor the marketplace can yield such public good as clean air and clean water.

Second, repeated studies have concluded that the cumulative benefits of U.S. regulations outstrip the costs.

Third studies have generally found that the impact of regulation on jobs is neutral to slightly positive. The phrase "job-killing regulation" may come trippingly off the tongue, but one gets tripped up looking for the data to back it up. And this doesn't even account for the indirect benefits of regulation such as a stable banking system or a trusted system for reviewing drugs.

Fourth, studies have found that estimates of what a regulation will cost tend to exceed the actual cost of implementing a regulation often by a large factor. This is because the estimates cannot account well for technological change and they are based on information from parties with an interest in producing higher estimates.

Fifth, the Congressional Research Service has found that the number of major regulations has not been increasing wildly and the CRS count of major regulations differs from the count in the Chamber of Commerce's testimony. There may be a difference in definition there perhaps.

Sixth, looking on the basis of all that, while any governmental activity like any other human activity can be improved, there is no indication of any fundamental problem with the U.S. regulatory system.

Seventh, the Obama administration lookback is a reasonable effort to improve safeguards and we look forward to reviewing the Agency's more detailed proposals when they come out in August.

Eighth, industry's focus on criticizing future rules can be seen in part as a tacit acknowledgement that past rules did not turn out to be as problematic at they had predicted.

Ninth, contrary to some of the claims the Chamber of Commerce makes in the testimony, EPA does not simply cave when lawsuits are filed and sue-and-settle narrative is faulty.

Ten, proposals to upend the current regulatory system should be opposed. They run counter to historical experience, to public opinion, and to the public interest. Measures like the REINS Act, which are tantamount to dismantling the current system of public protection should be opposed with particular vigor.

Eleven, proposals like REINS are designed to bias the regulatory process hopelessly in industry's favor by changing procedures. This is probably because the industry knows the public would not propose changes in the underlying laws that the regulations are designed to enforce.

Twelfth, in the end, even industry would be harmed by some of these proposals because the system would lead to far less predictability than we have today.

Thirteen, regulations by providing clear rules of the road helps produce a functioning marketplace and economic prosperity.

And last, in conclusion, Congress should not be accepting claims of regulatory harms at face value and should not make radical changes to the regulatory system which has safeguarded the public at a reasonable cost. Thank you.

[The prepared statement of Mr. Goldston follows:]

David Goldston
Director of Government Affairs
Natural Resources Defense Council

Testimony before the House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations

June 3, 2011

Mr. Chairman, Ranking Member DeGette and Members of the Subcommittee,

Thank you for inviting me to appear before you today. The title of this hearing appropriately calls for a "balanced approach" to regulation. But very little balance can be found in many of the intemperate statements one hears in Washington today on this subject. And too often calls to "improve" the regulatory system are merely cover for seeking to dismantle it.

In such a contentious environment, it pays to remember why we need public safeguards to begin with. As experience has repeatedly shown, the marketplace alone cannot produce clean air or clean water, guarantee the safety of our food or medicines, or of consumer products, cannot improve worker safety, or ensure the integrity and stability of our financial system. The market is not designed to accomplish these vital public goals. They can be achieved only through public action, which is to say through safeguards enforced by the government. Such "rules of the road" not only protect the public, but they provide certainty and a fair playing field for industry. These rules are no more a violation of the notion of "free enterprise" than having a police force is a violation of the notion of a "free country."

That's why once rules have been in place for a time, they tend either to be taken for granted, or celebrated as "progress" that was made by society as a whole. Companies tout how much cleaner and safer their products are; everyone appreciates how much cleaner the nation's air and water are compared to the mid-twentieth century.

But pretty much each step of that progress that is now so universally acclaimed was fraught with controversy. The same kind of fears that we hear expressed today – about job losses, about high costs, about cures that are worse than the disease – those same fears were raised about all the safeguards that we now take for granted. And there is no more reason to excessively credit such fears now than there was then. Whenever industry is asked what safeguards pose the greatest threat to their interests, they seem to answer "the next one." But this is a perverse kind of future orientation that merely confirms that experience has not borne out past claims.

Still, looking back at what's already on the books can do little harm and perhaps some good if it is done in a fair-minded way and does not prevent making further progress. NRDC is still examining the results of the Obama Administration's regulatory "look-back," but it seems, on the whole, to be a genuine effort to update regulatory approaches and to squeeze out unnecessary expenditures. Agencies were allowed to rely on their expertise and technical knowledge rather than being told to reach pre-ordained political conclusions.

This approach is a far cry from some current proposals before the Congress to upend the way the nation has long gone about developing public safeguards.

Of particular concern is the REINS Act (H.R. 10), which would block any major safeguard from moving forward unless Congress approved it within 60 legislative days. All an industry would have to do to derail a safeguard is to convince a bare majority in one House of Congress to vote against it. There is then nothing the other body could do to resurrect the safeguard. And the Administration's role – under any President – would be limited, in effect, to advising the Congress on what a detailed regulation should say.

The REINS Act is a summary rejection of the hard-earned knowledge that led to the creation of agencies and of a century of bipartisan experience. The Act radically repositions Congress, the most political branch of government, as the place to make ultimate decisions that involve detailed technical matters. Congress should, through law, be making the basic political and policy decisions about what kinds of activities need to be regulated – those that affect air and water quality, for example – and on the criteria for regulating them. And Congress already has the authority and processes to review agency decisions. But the REINS Act goes far beyond that to make Congress the arbiter of each and every regulatory call in an effort to shut down the system.

Instead of tearing down a system that has repeatedly provided proven benefits to the public – cleaner air and water, better health, safer food – we ought to be talking about how to strengthen it. We ought to be sure that agencies have the staff and resources they need to continue to protect the public as well in the future as they have in the past. That has been a path not only to better health and safety, but to greater prosperity.

Thank you.

Mr. STEARNS. I thank you, gentlemen. I will start with my questions. Mr. Kovacs, do the amount of current regulations impede the ability of businesses to hire new workers to create jobs? We just saw that the unemployment has raised, has gotten higher.

Mr. KOVACS. Within our testimony, we have a discussion of what we call Project, No Project, which is what we——

Mr. STEARNS. What we do in this committee is usually ask for a yes or no if possible. Can you say yes?

Mr. KOVACS. Yes.

Mr. STEARNS. OK. Is that some part of the problem with the current high rate of unemployment which is approaching 9.1 percent is that your feeling is due to regulation? I know we had Mr. Waxman saying he believes in regulation and so forth. But in your opinion it contributed to the unemployment?

Mr. KOVACS. I am not—the answer is I am not an economist. Yes, but look at our Project, No Project study, because I think that gives you the kind of answers you need.

Mr. STEARNS. That study will give more definitized information?

Mr. KOVACS. Yes.

Mr. STEARNS. And the name of that study is?

Mr. KOVACS. It is Project, No Project.

Mr. STEARNS. OK. I think both you indicated, and I think the third gentleman did too, the idea of these independent agencies, and I think all of us are concerned. Don't independent agencies that issue regulations also contribute significantly to the total burden on the economy? The independent? Isn't that true? I will ask each of you. Mr. Kovacs?

Mr. KOVACS. Yes.

Mr. STEARNS. Mr. Gattuso.

Mr. GATTUSO. Yes.

Mr. STEARNS. Mr. Goldston, is that true that the regulations from the independent agencies contribute to the burden on the economy?

Mr. GOLDSTON. They contribute regulations, certainly.

Mr. STEARNS. You don't think they affect the—OK. All right. Were you surprised that of the 30 preliminary draft plans released by the White House on May 26, there were none from the independent regulatory agencies under this committee's jurisdiction such as the Federal Communications Commission, the Federal Trade Commission, the Nuclear Regulatory Commission, the Consumer Products Safety Commission, and the Federal Energy Regulatory Commission?

Mr. KOVACS. No, I was not surprised.

Mr. STEARNS. Mr. Gattuso?

Mr. GATTUSO. I was surprised there was not at least one or two.

Mr. STEARNS. Mr. Goldston?

Mr. GOLDSTON. I am not sure I had an opinion on that. There is the constitutional issue about whether they can be required to do it. There is no reason that they couldn't obviously choose to submit plans.

Mr. STEARNS. Do you think there is anything more that OIRA could have done to encourage independent regulatory agencies to sort of voluntarily submit retrospective analyses of their existing rules as set out in the President's Executive order? Mr. Kovacs?

Mr. KOVACS. No, the President suggested it and they decided not to do it.

Mr. STEARNS. Mr. Gattuso?

Mr. GATTUSO. As I said in my testimony, I think the President can make clear when his request is very serious and when it is for show. I think he could have done more.

Mr. STEARNS. Mr. Goldston?

Mr. GOLDSTON. I have no expertise on that, but I imagine they could have done more.

Mr. STEARNS. I think, Mr. Gattuso, you indicated it is too soon to breathe early a sigh of relief with President Obama's January 2011 Wall Street Journal op-ed, where he termed "rules have gotten out of bounds placing unreasonable burdens on businesses, burdens that have had a chilling effect on the growth and jobs."

Do you think after that particular op-ed, that an Executive Order 13653, we're any closer to achieving what Mr. Sunstein has cited as has aim of nurturing, "a consistent culture of retrospective review and analysis throughout the executive branch"?

Mr. KOVACS. I think we are closer, but we are dealing with a few micro millimeters perhaps moving forward.

Mr. STEARNS. Micro millimeters? OK. Mr. Kovacs, do you think Congress should mandate a law that all agencies should conduct periodic retrospective reviews?

Mr. KOVACS. I think you already had in 1980 with the Regulatory Flexibility Act, Section 610.

Mr. STEARNS. So it is not being implemented?

Mr. KOVACS. That is correct.

Mr. STEARNS. You agree that we should—that the Agency should have a retrospective mandate to look at the regulatory environment in their department.

Mr. KOVACS. Yes.

Mr. STEARNS. And you agree also?

Mr. GATTUSO. Definitely.

Mr. STEARNS. Mr. Goldston?

Mr. GOLDSTON. There is no harm in retrospective reviews if they don't become the whole sum and substance of what agencies are doing. Many statues require regulations to be updated periodically, which, in effect, means that the previous reg is being looked at.

Mr. STEARNS. You agree, Mr. Kovacs, as I understand your testimony, you believe there are two distinct categories of regulation, and the primary focus of oversight by Congress and the administration should be those regulations that are economically significant. In your view, what would be the most effective way to address this?

Mr. KOVACS. There are several ways. One is that they have a higher standard of review within the courts. For example, when a court reviews a regulation, they treat—they treat their review the same as if it is greenhouse gases or if it is training for an employee. And what needs to occur, because when the courts gave deference to the agencies they literally tipped the balance in favor of the agencies and against Congress. And the way to address that would be to require the Agency on those major rules to go through a higher standard of review, which would be a formal on-the-record hearing or something like OSHA has which is a hybrid hearing and

then to have the court review it under the substantial evidence test.

Mr. STEARNS. My time is over. It is just remarkable as you pointed out that the Regulatory Flexibility Act mandates that these agencies do it and no one is doing it. It is really disturbing to think that we have mandated Congress, and yet none of these agencies are complying.

Mr. KOVACS. Well, the first testimony I ever gave 13 years ago was on that issue.

Mr. STEARNS. 13 years ago? All right. My time has expired. The gentlewoman is recognized for 5 minutes.

Ms. DEGETTE. Thank you, Mr. Chairman. Mr. Kovacs, I agree, regulatory reform works at a maddeningly slow rate. And I also agree with your written and verbal testimony, it seems to be a bipartisan problem. It seems to happen under Republican and Democratic administrations; isn't that correct?

Mr. KOVACS. That is correct.

Ms. DEGETTE. Following up on the Chairman's questions—here is the problem sometimes with yes or no answers. Here is a question for a yes or no answer. Sorry to pick on you. Is today's jobless number which came out which we are all upset about caused primarily by overregulation; yes or no?

Mr. KOVACS. I have absolutely no idea, I am not an economist.

Ms. DEGETTE. Right, OK. Thanks.

Let me ask you. You said we should really target these economically significant regulations which have increased since 2005, again, on a bipartisan basis. Those are regulations that cost $100 million or more; is that right?

Mr. KOVACS. It is a broader group than that, but it also includes——

Ms. DEGETTE. OK. That's a term of art?

Mr. KOVACS. Right. Right.

Ms. DEGETTE. And I can't disagree with that. I think that is probably a good idea. But I would also say that the cumulative effect of other regulations, smaller regulations can be, even though it is not one regulation, if a small business has to comply with a number of regulation, that, for them, might add up to a heavy burden. So we shouldn't ignore the smaller regulations while we're focusing on these economically significant regulations; correct?

Mr. KOVACS. That's correct. And that's why I was saying the standard of review and the how the Agency approaches it is very important. And so that is one of the ways that you might be able to——

Ms. DEGETTE. Right. And I think that is an excellent suggestion. One of my questions because there have been different legislation proposed and one of the things you and Mr. Gattuso also said that you supported was the idea of having both Houses of Congress to approve any regulation that has this impact that is an economically significant regulation; correct?

Mr. KOVACS. That is one of the approaches.

Ms. DEGETTE. That's correct? And in your written testimony, you said that there were about 180 regulations like that that were issued in 2008, which was the last year of the Bush administration; is that correct?

Mr. KOVACS. Those are the government numbers, yes.

Ms. DEGETTE. So your answer is yes?

Mr. KOVACS. Yes.

Ms. DEGETTE. OK. So here is what I am concerned about. In 2008, that same year, we were in session 118 days but there were 180 such regulation. And I would assume it is not your view that every economically significant regulation should be repealed; right? Some of them are useful; right?

Mr. KOVACS. No, we're not—I am not here today saying that you should repeal anything.

Ms. DEGETTE. What you are saying is that there should be a higher standard of scrutiny which I agree with.

Mr. KOVACS. That's correct.

Ms. DEGETTE. My concern is if you require all of those things to come to Congress and Congress is only in session a few days a year, we might not get to reviewing all of those regulations. Do you understand that?

Mr. KOVACS. There is nothing being proposed that would go retro——

Ms. DEGETTE. No, let's say there is a new regulation that the Obama administration is proposing and it is an economically significant regulation. So it would come to Congress for review. If Congress did not review that regulation, what would happen is it would be null; isn't that correct? Under that legislation?

Mr. KOVACS. That is correct. It wouldn't be null——

Ms. DEGETTE. So—I don't have much time left. So that might affect a regulation that was a bad regulation or a good regulation; right? It's a great big mallet that comes down and kills that regulation.

Mr. KOVACS. No, it puts Congress in charge of the legislative——

Ms. DEGETTE. I hear what you're saying. Mr. Goldston, I wanted to ask you a couple of questions about the Clean Air Act. Because recently, Mr. Waxman asked the EPA to do a report on the Clean Air Act and what the report said was that the Act created American jobs, and in fact that it prevented 18 million child respiratory illnesses, 850,000 asthma attacks, 674,000 cases of chronic bronchitis, and 205,000 premature deaths. And also there was monetary value of $2 trillion by 2020.

Mr. Goldston, I am wondering if you can tell me whether you think—whether you agree with these results of this study that was done?

Mr. GOLDSTON. Most studies that have looked at the job and health impacts of regulations show net benefits of the health benefits and show——

Ms. DEGETTE. Of the Clean Air Act?

Mr. GOLDSTON. Of the Clean Air Act in particular.

Ms. DEGETTE. Now to comply with updated pollution standards, businesses must design, manufacture, install and operate pollution-reducing technologies. And so a lot of people argue that the Clean Air Act has created hundreds of thousands of domestic jobs in the field of environmental technologies, and generated about $300 billion in annual revenues and supported 1.7 million jobs.

So my question to you is, do you think that Federal regulations like these can support economic growth and foster job creation.

Mr. GOLDSTON. Yes, and again, most studies have found a neutral to net benefit of jobs overall. That has been on the whole. So yes, absolutely.

Ms. DEGETTE. Thank you very much, Mr. Chairman.

Mr. STEARNS. The gentlewoman's time has expired. The gentleman from California, Mr. Bilbray, is recognized for 5 minutes.

Mr. BILBRAY. Thank you very much, Mr. Chairman. David, let me go through a scenario that I will call the good, the bad, and the ugly. And you know my background in California. So let's use California as sort of the test platform for a national strategy on regulatory oversight, especially environmental stuff.

The Air Resources Board, one of the most successful environmental agencies ever implemented, has reduced pollution by—you know, the air in California is twice as clean as it was when the ARB started off. And the population is twice as much. Are you aware that the mandates to those of us that were at the ARB and are there now, there is a mandate that cost-effectiveness must be considered before passing any reg; right?

Mr. GOLDSTON. I certainly take your word for that.

Mr. BILBRAY. And it obviously has not been a major barrier to the protection of the public health or the implementation of that environmental strategy?

Mr. GOLDSTON. Right.

Mr. BILBRAY. The success speaks for itself. And in fact, let me tell you as somebody who worked 6 years with that program. Sixteen totally, between 10 years Air District and 6 years on the board, it actually helped us. And one of the things I get upset about is I find people here freak out about that as if it is anti-environmental, where I found that one of the great tools, even for myself, I got held up by that and stopped from doing—implementing a regulation that I thought was good because we had to look at that.

Don't you think that both Democrats, Republicans and everybody else in Washington could learn something by looking at that cost-effective mandate, and the way ARB has handled it as being something that both sides should be able to agree looking at making that trying to learn from that and integrating it into our Federal program?

Mr. GOLDSTON. Everybody obviously should look the at the range of experiences. I think the Federal Clean Air Act has been effective as well, and CARB obviously is operating under its general auspices.

Mr. BILBRAY. But would you agree that when you say that—and I will come back on you and say was there another agency that has implemented the Clean Air Act that has had as much reduction as CARB?

Mr. GOLDSTON. Not that I am aware of.

Mr. BILBRAY. Not that I am aware of either.

Mr. GOLDSTON. The point is under some parts of the Clean Air Act, the standard that is selected is based on health but then the decision on how to implement it, which is what you are talking about, economics are allowed to take into account and there are other parts of the Clean Air Act where economics are allowed to be——

Mr. BILBRAY. David, you admit that the EPA and the Federal Government has recognized the leadership of CARB to the point where we have had carveouts and not just Federal Government, but other States have adopted our standards as being the gold standard for clean air; right?

Mr. GOLDSTON. That is my understanding.

Mr. BILBRAY. OK. Now let's talk about the ugly. AB 32, an environmental strategy, was put into our legislation. But CEQA still applies to our implementation of our greenhouse stuff. Now that has created a situation where now my scientists who have developed alternatives to fossil fuels using California financing and research is forced to leave the state to go to production. They are actually leaving and doing their production in New Mexico for a good reason. Because under the regulations of CEQA, it will take 10 years plus to go into production of algae, where in New Mexico it is 9 months minus. Big difference.

And this is, I would say, the bad side of it and showing that—now the legislature said they cared enough about the environment to put in AB 32, but they didn't care enough to exempt it from environmental regulations that would stop the implementation. And let me just point out this is the same legislature that exempted a football stadium and industry from CEQA. So it is not like, you know, absurd.

Doesn't this tell us something that when we go to implementation or we pick our goals we have got to do what it takes to implementation practical?

Mr. GOLDSTON. I don't know the specific case that you are talking about. As a general rule, certainly, as a New Yorker, it doesn't hurt me to hear tales of the oddness of the California State legislature. But I don't know the specific case.

Mr. BILBRAY. I think it is mind-set, the problem was. Not understanding the great goals and standards are easy for legislators to do but it is tough for them to take the hit on the fact that regulatory obstructionism is a major barrier to innovative environmental and economic growth.

I guess the other issue that I would bring up is a good example of, and you were aware of it because you were working on this, we are required to go to secondary sewage across the sec—with activated sludge. When you have the Scripps oceanographers telling us that it is going to not only to hurt the environment, but when we do the environmental assessment implementing the Federal law on secondary in certain instances hurts the environment to the point where the Sierra Club and the environmental health Department of the County of San Diego sued the Federal Government to stop it.

Don't you think we really need to go back and start looking at that outcome base, the cost-benefit and how it really affects the real world and not just what it was meant to do?

Mr. GOLDSTON. Again, I don't know the specific case, but the notion of judging by outcome I think makes a lot of sense, yes.

Mr. STEARNS. I thank the gentleman. The gentleman from Virginia is recognized for 5 minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman. Mr. Goldston, I believe, very mildly put, that rules have gotten out of balance placing un-

reasonable burdens on business, burdens that have a chilling effect on growth and jobs. My understanding of your testimony is you disagree with that?

Mr. GOLDSTON. I would say as a broad conclusion I disagree. That doesn't mean that there are no rules that could be changed.

Mr. GRIFFITH. And so that I'm being fair with you I will tell you that that actually is a line that I agree with. Probably my version would be put on steroids, but that is a line out of President Obama's January 2011 Wall Street Journal op-ed piece. So it is not just me, it is the President who thinks we ought to do something about this. And that is why I was very pleased that Mr. Sunstein spent so much time with us because it is probably one of the few things that I would agree with the President's administration on. I believe this is an area where we can all come together and recognize that it does have—these regulations do have an effect on jobs, and my district in particular, which is the ninth district of Virginia, which is a large district. Some would call it rural, others might not. It is heavily dependent on manufacturing and mining. We do have a university or two in the mix, but it is heavily dependent on that. And we are seeing the effects of these regulations.

You indicated in your comments that you felt like that if we started rolling back some regulations it might make things less predictable. And I am just wondering if you have had the opportunity to hear the testimony in front of one of the committees where Notre Dame came in and testified that in 2004, they attempted to comply with what they believed the EPA regulations were going to be in regard to boilers. And of course, the EPA has backed off of its boiler MACT regulations, but they were very concerned about it because they spent millions of dollars to comply with what they thought the EPA wanted, only to find out a few years later that that wasn't good enough and they were not going to be able to qualify as a valid boiler if the new regulations had come into effect. And these are folks who were really trying. And I just can't agree with you. I believe that we need to do more to make things predictable.

And Mr. Kovacs, if I might ask you, on page 12 of your prepared statement, you have got a copy, I believe I have seen this or a similar chart before of all the new regulations coming into effect at that time, and again, boiler MACT is not—it is on the back burner if not off the stove completely.

But I just—you can look at all of these colors from over there and see. If a member of your organization, doesn't matter which agency, whether it is EPA or OSHA, sees that much coming at them, do you think they think that is predictability in regulation?

Mr. KOVACS. Well, it is clearly not predictability.

Mr. GRIFFITH. That's why I asked it.

Mr. KOVACS. Whatever it is going to change. I would like to make a point without being stuck to the yes or no. We have been talking about jobs all day. And if jobs are really being created by all of these rules, then the Environmental Protection Agency should be implementing the continuing jobs analysis that it's got under 321 and all the other rules. There are mechanisms.

If you go through everything that Congress has done for the last 30 years, you have least restrictive alternatives. It is never applied.

You have unfunded mandates any time it is over 100 million dollars. There are an entire list of issues to be done. You have within each of the environmental statutes some form of this continuing jobs analysis. We have it there and it is not being done. So there are ways to bring resolution to this issue.

But going back to your question, yes, that is an enormous amount of regulatory uncertainty. But if you look going forward between health care—which I am not an expert on—or financial services, we went from the 137 to 224, that chart is going to go this way.

Mr. GRIFFITH. If I understand your answer in general, and your other comments as well what I am hearing you say—correct me if I am wrong—what I'm hearing you say is if, as some would like to think that regulations actually create jobs, then they should embrace congressional requests that they establish what jobs they are creating and what the impact is on jobs. Because if these regulations are so good for jobs, a requirement to detail the jobs effect of the regulation would come out that these regulations are actually helping everybody.

And so the EPA and the administration and all the others actually ought to actually get behind the TRAIN Act and other Acts that call for more data that show that these regulations are, in fact, creating job, if that is true. Is that what you are saying sir?

Mr. KOVACS. Absolutely. That is what they should do. The Congress has already mandated it in the other statutes. But I would even go one step further. EPA uses proprietary models. It does not use the public models as required under the Data Quality Act. It should begin releasing all of its models so that we can see the assumptions. They should go in and begin applying the Data Quality Act, which the administrator said gave a hint to that, it is a good way of testing the statistics, the data, the information.

The agencies have written, since Congress passed that in 2000, the agencies have literally written that out. And the only thing it says is that the agencies are to open up their data, to use the most up-to-date data, put that data in the record and allow that data to be peer-reviewed and tested within the system. That has not occurred since the law has passed.

Mr. GRIFFITH. Thank you, sir, I see my time is up.

Mr. STEARNS. I thank the gentleman. We are ready to close. I think one thing I am getting out of this panel is that the frustration that routinely the Federal agency ignore the requirements contained in such laws as Mr. Kovacs mentioned, the Regulatory Flexibility Act, the Information Quality Act, and the unfunded Mandates Reform Act.

I mean, that is a concern I think for a member of either party, a bipartisan issue to think that they routinely ignore that. And we really have a responsibility to make them comply. And so with that——

Ms. DEGETTE. Mr. Chairman, I just would point out to the gentleman from Virginia, I completely agree that there should be some explanation by these agencies, the EPA and the other agencies, about, in fact, what the impact of these regulations should be on jobs. And that is, as Mr. Kovacs says, why most of the existing laws require that analysis.

My concern about this REINS Act, which the gentleman refers to, is it does not just say you shall submit to Congress how many jobs it creates. It submits these regulations to Congress for approval or disapproval and if Congress just doesn't get around to doing it, it fails. And it might be a useful regulation that we all could agree on. That's the issue. It goes much farther than just that jobs issue. And with that, I yield back.

Mr. STEARNS. Does the gentleman want to comment on that?

Mr. GRIFFITH. Yes, Mr. Chairman, I would just say that the reference I made was actually to the TRAIN Act, which we had in subcommittee last week. I do support the REINS Act and your comments are valid but my reference was to TRAIN Act today.

Ms. DEGETTE. Trains, reins.

Mr. STEARNS. I thank my colleagues and with that, the subcommittee—oh, we have 10 days to submit for the record any opening statements or any questions that we might further ask for you folks. So thank you, and the subcommittee is adjourned.

[Whereupon, at 12:45 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

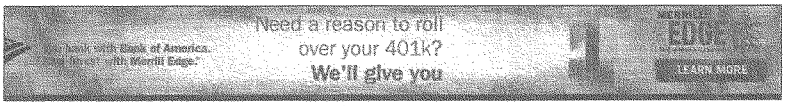
PREPARED STATEMENT OF HON. JOE BARTON

Thank you, Mr. Chairman, for holding this important hearing to discuss OIRA's role in reviewing proposed and final rules before those rules are published in the Federal Registrar. As the president stated, this new approach is supposed to remove outdated regulations that stifle job creation and make our economy less competitive. According to Obama's 2011 Executive order, agencies were required to submit to OIRA a "preliminary plan" laying out how each agency intended to review its existing "significant" regulations and determine which ones should be modified or repealed. On the face of it, that sounds great. However, after reviewing those plans, I am troubled.

I am not sure anyone really took this seriously. Many agencies submitted plans that simply regurgitated the Executive order, claiming that they were already engaged in the process of reviewing their existing significant regulations. Most of the agencies that actually submitted a substantive "plan" focused on streamlining reporting and making information available online. This type of review is not the "look back" that I was hoping for, or that the President ordered.

What I consider significant regulations, are rules that have a major impact on American jobs and our economic recovery—such as the Environment Protection Agency's move to regulate green house gasses, or their role in overseeing the implementation of Title V programs in States. Unfortunately, the EPA did not consider these important enough to consider in the near term.

We were led to believe that agencies were directed to listen to the public's grievances and consider the regulations identified by stakeholders in the private sector before submitting their plans. If the EPA had actually done this, they would have listened to the 12 states that have already filed suit to protect domestic jobs. They would have also heard from industry, small business.



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REVIEW & OUTLOOK | JANUARY 4, 2011

The EPA's War on Texas

The agency punishes the state for challenging its anticarbon rules.

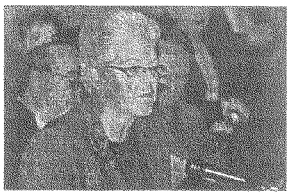
The Environmental Protection Agency's carbon regulation putsch continues, but apparently abusing the clean-air laws of the 1970s to achieve goals Congress rejected isn't enough. Late last week, the EPA made an unprecedented move to punish Texas for being the one state with the temerity to challenge its methods.

To wit, the EPA violated every tenet of administrative procedure to strip Texas of its authority to issue the air permits that are necessary for large power and industrial projects. This is the first time in the history of the Clean Air Act that the EPA has abrogated state control, and the decision will create gale-force headwinds for growth in a state that is the U.S. energy capital. Anyone who claims that carbon regulation is no big deal and that the EPA is merely following the law will need to defend this takeover.

Since December 2009, the EPA has issued four major greenhouse gas rule-makings, and 13 states have tried to resist the rush. The Clean Air Act stipulates that pollution control is "the primary responsibility of states and local government," and while the national office sets overall priorities, states have considerable leeway in their "implementation plans." When EPA's instructions change, states typically have three years to revise these plans before sending them to Washington for approval.

This summer, the 13 states requested the full three years for the costly and time-consuming revision process, until the EPA threatened economic retaliation with a de facto construction moratorium. If these states didn't immediately submit new implementation plans to specification, the agency warned, starting in 2011 projects "will be unable to receive a federally approved permit authorizing construction or modification." All states but Texas stood down, even as Texas continued to file lawsuits challenging the carbon power grab.

Two weeks ago, EPA air regulation chief Gina McCarthy sent the Texas environmental department a letter asserting that the agency had "no choice" but to seize control of permitting. She noted "statements in the media" by Texas officials and their "legal challenges to EPA's greenhouse gas rules," but she cited no legal basis.


Associated Press

And no wonder. The best the EPA could offer up as a legal excuse for voiding Texas's permitting authority last Thursday was that EPA had erred in originally approving the state's implementation plan—*in 1992*, or three Presidents ago.

The error that escaped EPA's notice for 18 years was that the Texas plan did not address "all pollutants newly subject to regulation . . . among them GHGs [greenhouse gases]." In other words, back then Texas hadn't complied with regulations that *didn't exist and wouldn't be promulgated for another 18 years.*

Gina McCarthy

The takeover was sufficiently egregious that the D.C. circuit court of appeals issued an emergency stay on Thursday suspending the rules pending judicial review. One particular item in need of legal scrutiny is that the permitting takeover is an "interim final rule" that is not open to the normal—and Clean Air Act-mandated—process of public notice and comment. So much for transparency in government.

The EPA claims its takeover is a matter of great urgency, but Texas is being pre-emptively punished for not obeying rules that don't exist today because the EPA hasn't finalized them. "Now, at this early stage, there's no specifics to tell you about the rules in terms of what we're announcing today, other than they will be done and we'll move—take steps moving forward in 2011," Mrs. McCarthy told reporters on a conference call last week about the agency's "performance standards" for oil refineries, power plants, cement manufacturers and other such CO_2-heavy facilities.

"It's way too early in the game right now to be talking about what we think the standards are going to look like," she added helpfully. "Today's announcement is just the fact we're going to move to those standards."

This and other permitting uncertainties have brought major projects in the U.S. to a standstill. The Texas takeover in particular is pure political revenge and an effort to intimidate other states from joining the Texan lawsuits. The reason states are supposed to run the clean-air process is that local regulators have the staff, capacity and expertise that Washington lacks. When the carbon rules eventually are issued, that means the takeover will extend the current moratorium even longer in Texas.

The EPA concedes that some 167 current projects will be affected, and many more in the future. Our guess is that all of them will be delayed for years and many will simply die. This is precisely the goal of a politically driven bureaucracy that wants to impose by illegal diktat the anticarbon, anti-fossil fuel agenda that the Obama Administration has been unable to pass by democratic consent.

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POLITICO

Now's the time to redraft ACO rule

By: Tevi Troy
June 3, 2011 04:37 AM EST

If there was one element of the controversial Obama health care law that Republicans could have embraced as part of a bipartisan compromise, it was the concept of the Accountable Care Organization, a grouping of doctors and hospitals that provide treatment in a more efficient and cost-effective manner. Republicans, in fact, even included ACOs as part of the Patient Choice Act, their alternative to the health care bill.

While this GOP alternative had very few points of overlap with President Barack Obama's health care law, it did call for ACOs that could "improve payment to physicians, hospitals, pharmacists and nurses for demonstrable improvements in quality and patient satisfaction while reducing costs."

Unfortunately, when the Obama administration came forth with its proposed rule governing ACOs on March 31, it landed with a resounding thud. As The Washington Post noted in a piece about ACOs, "major groups of hospitals and doctors are skeptical of the government's plans." Instead of flexible organizations that encourage teamwork as a way of saving both providers and the government money, the Obama administration came up with an over-directed, 400-page proposal that provides economic disincentives to create ACOs and hoped-for cost-saving alliances.

One of the most onerous requirements is that ACOs have to track 65 different quality measures, an expensive proposition. The Centers for Medicare & Medicaid Services estimates that forming an ACO will require an initial investment of $1.8 million. An analysis by the American Hospital Association shows that startup costs will actually be in the $11.6 million to $26.1 million range.

Beyond the initial investment, the basic problem with the rule is that it will not encourage so-called normal organizations that face cost challenges to create ACOs. The combination of the difficulties in living up to the rule's 65 standards, the costly initial investment and the potential penalties for not meeting those standards make participation far too risky. This is why the American Medical Group Association wrote a letter to CMS Administrator Don Berwick informing him that an overwhelming 93 percent of AMGA members would not enroll in an ACO under the proposed rule. As AMGA head Don Fisher — whose organization is sympathetic to ACOs — wrote to Berwick, the proposed rule "is overly prescriptive, operationally burdensome, and the incentives are too difficult to achieve to make this voluntary program attractive."

The initial reaction to the rule was that most organizations would not join ACOs, but that hyperefficient model organizations such as the Cleveland Clinic, Geisinger Health System and the Mayo Clinic would. This would be problematic in itself — another instance of regulations that help well-off entities that can afford to handle them. But a recent report in Congressional Quarterly revealed that even these elite health systems, which are fans of the ACO concept, were wary of the new rule and, therefore, are unlikely to participate. According to CQ's Rebecca Adams, "officials at those tightly organized institutions have so many concerns with the proposed rule to create ACOs that they doubt that they will participate." As Geisinger's Thomas Graf put it, the fine print on the regulations seems "to be very

Geisinger's Thomas Graf put it, the fine print on the regulations seems "to be very prescriptive and restrictive with a fair amount of administrative and regulatory oversight." The Mayo Clinic's Patricia Simmons summed up her view of the rule thusly: "There'd have to be substantial revisions for us to participate."

If only these top-flight institutions participated, the proposal would not have been able to reform our health care delivery systems but would have at least provided a model for how high-functioning health providers could utilize ACOs to find important cost savings. But if even these organizations fail to play, the concept seems destined to suffer an ignominious and premature demise. As a health staffer for a Republican senator who is a fan of ACOs asked me, "How did they manage to screw this one up?"

Berwick has been engaging in a full-court press of ACO interviews and conference calls, in which he has been offering sweeteners to encourage ACO participation by industry despite their concerns. Even this effort, though, appears unlikely to succeed. While Berwick notes that he is open to suggestions for how to improve the draft rule — the comment period closes June 6 – he is less willing to address the question of the ACO rule's unpopularity. In a recent TV interview, he dodged a question on the subject, saying, "We need a payment system that doesn't say the more you do, the better you get paid, but the better you do, the better you get paid." This does not bode well for those hoping CMS will reissue a vastly improved revised rule.

ACOs remain a good idea, and the concept has been embraced on both sides of the aisle. At this point, though, the Obama administration needs to rethink its approach in order to recapture ACOs' bipartisan appeal. Given how flawed the initial draft was, though, they may want to think about starting the whole process from scratch.

Tevi Troy is a senior fellow at the Hudson Institute and a former deputy secretary at the Department of Health and Human Services.

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IRIDES WEB HOSTING

Questions for the Record, Cass R. Sunstein
House of Representatives Energy and Commerce Committee
Subcommittee on Oversight and Investigations
"The Views of the Administration on Regulatory Reform: An Update"

The Honorable Cliff Stearns

1. **Were any significant rules submitted informally to OIRA since the passage of the Patient Protection and Affordable Care Act?**
   a. **Did OIRA suggest any changes to them during an informal review process?**
   b. **If so, can these suggested changes be supplied to the Committee?**

It is not uncommon for OIRA to consult with agencies before they submit regulations for OIRA review—for example, while agencies are still engaged in policy development or regulatory drafting. Sometimes, in order to meet tight deadlines, especially statutory and judicial deadlines, agencies have shared materials and preliminary drafts of documents with OIRA prior to formal review. This informal exchange allows the issuing agency to receive the benefit of preliminary input at an early point, thereby facilitating subsequent formal review under tight deadlines. In providing input of this type to the issuing agency, OIRA consolidates comments from a variety of agencies and offices and generally does not identify which comments originate from OIRA.

The Honorable Tim Murphy

1. **The Department of Energy appears to be using a new standard to evaluate the Yucca Mountain license application – "social consensus." This is something outside the law that authorizes Yucca Mountain. Does OIRA intend to review the Department of Energy's apparent use of a new standard for reviewing license applications that is not contained in the law?**

OIRA does not review individual permitting decisions under Executive Order 12866 or 13563. The specific permitting decision related to Yucca Mountain rests with the Nuclear Regulatory Commission (NRC), an independent agency.

The Honorable Michael Burgess

1. **In the past, we know that medical device stakeholders have presented constructive ideas to FDA on guidance documents under development that the agency has chosen not to incorporate into the final versions of those documents.**
   Given the President's executive order that "each agency…shall seek the views of those who are likely to be affected" by new requirements, how does the Administration plan to reform the process at FDA to ensure industry experts are provided a "meaningful" opportunity in developing new Guidance documents or revising ineffective ones?

Guidance on medical devices is extremely important, and I appreciate your concern about this topic. As you note, Executive Order 13563 directs agencies to act, in advance of rulemaking, to seek the views of those who are likely to be affected. Public participation in the design of rules allows members of the

public to provide valuable information to the agency about likely effects, existing problems, creative solutions, and possible unintended consequences. OIRA has also recognized the benefits of public participation in the development of significant guidance issued by agencies. OMB's "Final Bulletin for Agency Good Guidance Practices" establishes the policies and procedures for the development, issuance, and use of significant guidance documents. Among other requirements, the bulletin requires agencies to "prepare a robust response-to-comments document and make it publicly available" for economically significant guidance documents.

In addition to following the requirements above, the Food and Drug Administration (FDA) has a unique statutory framework under 21 U.S.C. 371(h), and a specific Good Guidance Practice as detailed in its regulations at 21 CFR 10.115. Under this framework, FDA issues draft guidance for public comment with a notice in the Federal Register and considers comments received from all stakeholders before issuing the final guidance. On certain issues, FDA also holds public meetings or workshops to solicit public input. Comments may be submitted at any time on final guidance documents. In addition to these opportunities to comment on draft and final guidance, FDA's regulations encourage stakeholders, including industry members, to participate in the development and revision of guidance by submitting topics for guidance, submitting draft guidance, and submitting suggestions that either draft or final guidance be revised or withdrawn.

We continue to consider possible reforms to improve participation in this important process. The Department of Health and Human Services has prepared a preliminary "lookback" plan, now out for public comment, and we look forward to receiving all relevant suggestions. All suggestions will be given serious review and consideration.

2. **Please submit all briefing materials, including summaries and lists of differences from the proposed to final rule, for the NPRM and Final Rule on the Medicare Physician Fee Schedule that were provided to your office by HHS or any of its agencies or prepared by OMB for internal discussion. This rule was released in final form on November 3rd, 2010.**

The Medicare Physician Fee Schedule is an annual rulemaking that establishes the updates to the relative weights of physician services. In calendar year 2011, this rulemaking also implemented provisions of the Affordable Care Act. The calendar year 2011 Medicare Physician Fee Schedule proposed rule was published on July 13, 2010 and can be viewed online at this website: http://www.gpo.gov/fdsys/pkg/FR-2010-07-13/pdf/2010-15900.pdf. Attached please find the version of the draft final rule as it was submitted to OIRA on October 21, 2010. The final calendar year 2011 Medicare Physician Fee Schedule was published on November 29, 2010 and can be viewed online at this website: http://www.gpo.gov/fdsys/pkg/FR-2010-11-29/pdf/2010-27969.pdf.

The Honorable Steve Scalise

1. **Can OIRA please provide the Committee with examples of when it said "no" to the EPA or the Department of Interior on any of their rules or regulations?**

Regulatory review under Executive Order 12866 and 13563 is a cooperative process, in which OIRA works with the lead agency and other affected agencies to ensure that the rule in question is in accordance with law and applicable principles, and is in the public interest. Many regulations have been

significantly modified as a result of interagency review under Executive Order 12866 and 13563. The versions of draft rulemakings as they were submitted for the OIRA review process, as well as the versions of rulemakings released after that process, are available to the public upon request.

One well-known example of a rulemaking that changed during review was EPA's proposed regulation of coal combustion residuals. As a result of feedback received during the review, EPA decided to modify its rulemaking to co-propose two separate approaches for consideration by the public.

The Honorable Cory Gardner

1. **In your testimony, you disparaged research produced by the U.S. Small Business Administration (SBA) that attempted to assess the cost of regulations on small firms.**
2. **Under Section 624 (a)(2) of the Regulatory Right-to-Know Act, your office is required to include an analysis of the impacts of Federal regulation on small business in your statutorily required annual report on the benefits and costs of federal regulation. A review of those annual reports reveals that your office has sought to comply with Section 624 (a) (2) by deferring to SBA's cost figures. Those are the same cost estimates which you criticized during your testimony before our Committee.**
3. **Please explain to the Committee how your office will provide cost estimates for small business in future reports as required by the Regulatory Right-to-Know Act.**

OMB has regularly noted, in both our current and previous Benefit-Cost reports, that the evidence of the impacts of regulation on small businesses, while suggestive, remains preliminary, inconclusive, and mixed. The inclusion of a specific study in a larger literature should be viewed as an attempt to describe the universe of studies, not an endorsement of any specific study, its methodology, or its conclusions.

Pages 35-36 of the 2011 Benefit-Cost report describe the impacts of regulation on small business as follows:

> The empirical evidence of the effects of regulation on small business remains less than entirely clear. We have cited in previous Reports research by the Small Business Administration (SBA) Office of Advocacy, suggesting that small entities disproportionately shoulder regulatory and paperwork burdens. In a study sponsored by SBA (and cited in our 2010 Report), for example, Dean, et al., concludes that environmental regulations act as barriers to entry for small firms.
>
> Becker offers a more complex view, focusing on the effect of air pollution regulation on small business. He finds that although "progressively larger facilities had progressively higher unit abatement costs, ceteris paribus," the relationship between firm size and pollution abatement costs varies depending on the regulated pollutant. For troposphere ozone, the regulatory burden seems to fall substantially on the smallest three quartiles of plants. For SOx, the relationship between regulatory burden and the firm size seems to be U-shaped. For total suspended particles, new multi-unit emitting plants in the smallest size class had $265 more capital expenditure (per $10,000 of value added) in non-attainment counties than similar plants in attainment counties, while "those in the larger

size classes had an additional $511-687 in expenditure…though the rise was not monotonic."

The evidence in the literature, while suggestive, remains preliminary, inconclusive, and mixed. OMB continues to investigate the evolving literature on the relevant questions in order to obtain a more precise picture. It is clear, however, that some regulations have significant adverse effects on small business, and that it is appropriate to take steps to create flexibility in the event that those adverse effects cannot be justified by commensurate benefits. As the President's 2011 memorandum directs, agencies should specifically explain any refusal to take such steps, especially in light of the importance of small businesses and startups for economic growth and job creation.

We continue to investigate the empirical research on the effects of regulation on small business and will provide the results in future reports.

The Honorable Morgan Griffith

1. **I have a question concerning the pending National Science Policy decision at the National Toxicology Program involving the listing status of formaldehyde. In light of the doubts expressed by the National Academy of Sciences of EPA's draft assessment, what steps have you personally taken to ensure that any policy decision by the NTP will reflect the best available science?**

As I stated during the hearing, I am aware of the concerns expressed regarding formaldehyde. I committed that I would share these concerns with the White House Office of Science and Technology Policy, and I have done so.

The Honorable Joe Barton

1. **With regard to the Ozone Transport Rule that EPA is promulgating to replace an older rule, the EPA recently disallowed a state implementation plan and set out some requirements that if implemented would shut down 25 percent of Texas' electricity generating capacity. The EPA recently concluded that the proposed action is not a significant regulatory action and is not subject to review under the relevant Executive Orders.**
   a. **Do you agree with EPA's judgment?**

OIRA found that the proposed disapproval of the Texas State Implementation Plan (SIP) was not a significant regulatory action under Executive Order 12866 or 13563. We would note, however, that the Clean Air Transport Rule itself sets the actual obligations for emissions reductions in Texas and all other states. We reviewed very closely the responsibilities for Texas in the final Clean Air Transport Rule.

   b. **What steps have you taken to look into this further?**

Having looked into this issue again, I would note that the proposed disapproval of the Texas SIP was a technical step associated with finalizing the Clean Air Transport Rule.

c. Has OIRA made a determination about the EPA's interstate transport decision?

OIRA concluded review of EPA's Clean Air Transport Rule on July 1, 2011.

Follow-up Questions for the Record, Cass R. Sunstein
House of Representatives Energy and Commerce Committee
Subcommittee on Oversight and Investigations
"The Views of the Administration on Regulatory Reform: An Update"

The Honorable Cliff Stearns
Were any significant rules submitted informally to OIRA since the passage of the Patient Protection and Affordable Care Act?

Yes.

a. Did OIRA suggest any changes to them during an informal review process?

Yes. Changes were suggested by many of those involved in the informal discussions, including participants from OIRA.

b. If so, can these suggested changes be supplied to the Committee?

OIRA has processed a large number of significant rules since the enactment of the Affordable Care Act. Unfortunately, it is difficult for us to determine how many of these rules involved some informal deliberations prior to the start of formal review. However, if the Subcommittee is interested in discussing a particular rule, we would be pleased to discuss further.

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