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# FEDERAL REGULATION—2011

# HEARINGS

BEFORE THE

## COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

**APRIL 14, 2011**
**HOW BEST TO ADVANCE THE PUBLIC INTEREST?**

**JUNE 23, 2011**
**A REVIEW OF LEGISLATIVE PROPOSALS—PART I**

**JULY 20, 2011**
**A REVIEW OF LEGISLATIVE PROPOSALS—PART II**

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Committee on Homeland Security and Governmental Affairs

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# FEDERAL REGULATION: HOW BEST TO ADVANCE THE PUBLIC INTEREST?

**THURSDAY, APRIL 14, 2011**

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:06 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, presiding.

Present: Senators Lieberman, Carper, Begich, Collins, McCain, Johnson, and Portman.

## OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. The hearing will come to order. I want to thank everybody for being here. This is a hearing on "Federal Regulation: How Best to Advance the Public Interest."

The hearing is occasioned by an interest, once again—I do not know that the interest in regulatory reform ever goes away, but it seems to have peaked again. We have several pieces of legislation before the Committee about which we are going to hold a hearing in June. But we thought it would be important to convene this hearing with Cass Sunstein to really set the predicate for what is to follow, both to discuss the values, the concepts of law that are at play here, and Mr. Sunstein is particularly well-suited to do that based on his long experience in this area, but also to discuss, to the extent that he wants, the initiative that President Barack Obama took in January toward regulatory reform.

This is another one of those issues where probably there is more agreement than the tenor of the debate would indicate, or the content of the debate would indicate, which is to say that I have not yet met anybody who does not think there should be some regulation. Regulation emerges to implement laws that we pass—one of the first major legislative experiences I had was in the amendments to the Clean Air Act in 1990, which fortunately were adopted on a broadly bipartisan basis. But we are dealing with a topic so large that you simply could not cover it in the law, so regulations follow to achieve that purpose and need to be based in that exercise of congressional authority.

I suppose the question is how effectively it is done. Inevitably, regulations ask something of individuals, businesses, etc. They impose requirements. Some people think that the requirements are, in case to case, burdensome and beyond what either was intended by Congress or beyond what they achieve. I am always affected by



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this, and maybe this takes me back to the fact that nobody ever argues for no regulation just as no one argues for no law. This is the insight of the Talmud in which one of the rabbis says that if there was no government, unfortunately, by our nature, people would act like fish, which is that the larger ones would eat the smaller ones.

And so it is a bit vivid, I would say, but it makes the point that the law exists to make this a more orderly and fair society. The point, as always, in this is to find processes in a government, which has become very large and very complicated really, that find the sweet spot, that regulates, if I could put it this way, as little as possible to achieve the objectives that the laws that Congress adopts have.

Again, I cannot thank Mr. Sunstein enough for being here because he is perfectly situated by both past and present to help us set the table, if you will, for our focus on the legislative proposals that are before our Committee because, again, Office of Information and Regulatory Affairs (OIRA), which Mr. Sunstein heads, is within the governmental affairs jurisdiction of this Committee. So I thank you for being here. I look forward to your testimony and the question and answer period.

I now call on Senator Collins.

## OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman. I was trying to think of a Catholic analogy to the one that you quoted from Jewish tradition—— [Laughter.]

Chairman LIEBERMAN. I am sure there are many.

Senator COLLINS [continuing]. But since none comes instantly to mind, I am going to proceed with my statement instead.

At the outset, I want to thank the Chairman for holding this hearing today and also for agreeing to schedule another hearing soon on the many legislative reform proposals that have been referred to our Committee. With these hearings, we begin our review of the Federal regulatory process, how it works now, what its impact is on jobs, the economy, and our well-being, and how it might work better in the future.

We are beginning this review with the Office of Information and Regulatory Affairs. I welcome its Administrator, Cass Sunstein, back to our Committee and look forward to hearing his views on how the regulatory burdens on our economy, especially on our smaller businesses, can be lightened or simplified.

Although few outside of Washington are familiar with OIRA, it, in fact, has tremendous influence on the regulations that affect the everyday lives of Americans. Through the process of regulatory review, OIRA plays a critical role in shaping the rules by which Federal laws are implemented. OIRA both informally advises agencies as they are developing their rules and then formally reviews the rigor of the methodologies used to develop the regulations.

In Administrator Sunstein's confirmation hearing, I noted with approval his support for cost-benefit analysis as well as his recommendation that agencies be required to explain a decision to regulate when the costs of a proposed rule exceed its benefits. I also

noted that he recognized that such analysis has limitations when it comes to considering intangible costs and benefits.

The idea of using cost-benefit analysis is not new, of course. In 1981, President Ronald Reagan issued an Executive Order (EO) prohibiting agencies from issuing regulations unless the potential benefits to society from regulation outweighed the potential costs. In 1993, President William Clinton issued an Executive Order that incorporated cost-benefit analysis requirements. And, of course, in January of this year, President Obama issued his own Executive Order.

When President Obama issued his Executive Order, he also authored an op-ed piece in the *Wall Street Journal* in which he said that Federal regulations have "sometimes gotten out of balance, placing unreasonable burdens on business, burdens that have stifled innovation and have had a chilling effect on growth and jobs." I agree. All too often, it seems that Federal agencies do not take into account the impact on small businesses and job growth before imposing new rules and regulations. Without a thoughtful analysis of the impact of regulations, we risk imposing an unnecessary burden on job creation, an unacceptable result at a time when so many Americans remain without jobs.

Furthermore, too often, I have seen the goals of one agency directly contradicted by the regulations of another agency. Let me give you a concrete example. Last year, the Environmental Protection Agency (EPA) proposed new regulations known as Boiler Maximum Achievable Control Technology (MACT). These regulations, as originally proposed, could have cost Maine businesses $640 million, despite the availability of less costly approaches to address boiler emissions. These proposed rules also pitted two agencies directly against each other. The Department of Energy at that time had recently awarded a Maine high school a $300,000 grant to help buy a new wood pellet boiler to reduce the school's use of fossil fuels. But because the EPA's proposed regulations would have greatly increased the cost of that boiler, the school board ended up turning down the Federal grant.

Another example of poorly thought out regulation was the EPA's new lead paint rule. While all of us want to see lead paint removed or contained for health and safety reasons, the EPA's flawed implementation of its lead paint regulations would have imposed an impossible burden on our carpenters, painters, plumbers, and electricians; virtually everyone in the construction industry. The rules required contractors who worked in homes built before 1978 to be EPA certified or to face massive fines of up to $37,500 per violation per day. That is more than many of the painters and carpenters and plumbers and electricians in my State make in an entire year.

At the time, however, there were only three certification trainers in my entire State and all of them were in Southern Maine. Two States had no trainers at all. I am looking at my colleague from Alaska, who was a co-sponsor with me of this amendment and had a similar problem in the vast State of Alaska.

So last June, the Senate passed a bipartisan amendment that I authored by more than 60 votes to extend the training deadline and to delay the punitive fines until the trainers were in place. The support for my amendment was a strong indication that many

States were facing this regulatory catch-22 of being required to get contractors certified from non-existent trainers.

Last month, I offered legislation which I call the Clearing Unnecessary Regulatory Burdens (CURB) Act to clear unnecessary regulatory burdens that are holding our job creators back. My proposal would codify the cost-benefit analysis provisions of President Clinton's Executive Order, impose good guidance practices on Federal agencies, and help small businesses that face penalties for first-time non-harmful paperwork violations.

The struggling economy has challenged our Nation's entrepreneurial spirit. We are recovering and that recovery will come from the innovative and bold job creators of America's small business community. I look forward today to hearing Mr. Sunstein's testimony on how we can work together to improve the regulatory process to ensure that we are not crushing that entrepreneurial spirit that produces innovation, economic growth, and most important, new jobs. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks very much, Senator Collins.

I cannot resist, in continuing the Catholic-Jewish dialogue, recalling for the record—the first time I have had the honor to do this—that almost 10 years ago, there were eight or nine Senators—Senator McCain was with us—who went over to Afghanistan after we had won the war at the outset there, and we were on a military plane flying back. It was a very long flight, and for some reason, Senator Collins, Senator Jack Reed and I got into a debate to pass the time on the relative merits of Catholic guilt versus Jewish guilt. [Laughter.]

And after an hour—it seemed hard to imagine we could spend that much time, but again, we were trapped in a plane, and Senator Fred Thompson was next to us snoring loudly—do you remember that?

Senator COLLINS. I do. [Laughter.]

Chairman LIEBERMAN. And Senator Collins closed the argument, as she very often does by saying, OK, let us agree with regard to guilt that your people created it and my people perfected it. [Laughter.]

What relevance that has here—I suppose if there was more guilt, there would be need for less law and regulation because people would always do the right thing.

You need not respond in any ecumenical way, Mr. Sunstein, but we are glad you are here.

He is Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and before that, really one of America's leading law professors, writers, and experts on administrative law. Thank you for being here.

## TESTIMONY OF HON. CASS R. SUNSTEIN,[1] ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SUNSTEIN. Thank you, Mr. Chairman, Ranking Member Collins, and Members of the Committee. You are witnessing not only a discussion of regulation but a Catholic-Jewish marriage. My wife,

[1] The prepared statement of Mr. Sunstein appears in the Appendix on page 108.

Samantha Power, is here, and our wedding, which was relatively recent, was blessed personally by the Pope—a story which I will tell you if you like—and I hope and trust by my many rabbinical ancestors, as well.

Chairman LIEBERMAN. Good beginning.

Mr. SUNSTEIN. I am grateful to have the opportunity to appear before you—honored, even—to discuss the topic of Federal regulation and regulatory review. As both of you indicated, the President issued an Executive Order on January 18, 2011, an historic Executive Order, and that will be my principal focus.

I will also briefly discuss a presidential memorandum involving small business also on January 18, which focuses in particular on protecting small businesses, as job creators from excessive regulation.

And I will say a bit about a presidential memorandum more recently, from late February, with the title "Administrative Flexibility," which is focused in particular on streamlining regulations imposed on economically challenged State, local, and tribal governments. So there, the emphasis is on protecting them from undue regulatory and paperwork requirements.

The new EO 13563 is meant to lay the foundations for a regulatory system that protects public health, welfare, safety, and our environment while also—and this is in the first sentence of the Executive Order—promoting economic growth, innovation, competitiveness, and job creation. The words "job creation" are up front in the new Executive Order. It requires a series of concrete steps to achieve that overriding goal.

As Senator Collins indicated, the process of regulatory review was actually initiated by President Reagan in 1981, shortly after assuming office, and continued by President Clinton with an Executive Order in 1993. The two documents, that is, the Clinton and Reagan documents, are continuous in the sense that they both require careful consideration of costs and benefits—that has been at the heart of regulatory review now for decades; for tailoring regulations to impose the least burden on society, which the Chairman referred to in his opening remarks; for selection of the approach that maximizes net benefits, which means even if the benefits justify the costs, we ought to find an approach that drives the cost down and drives the benefits up to the extent permitted by law; for consideration of alternatives, a point that has turned out to be extremely important in the last 2 years, where we have sought to identify alternatives that maybe are more creative, less costly, more beneficial; and for a process of interagency review, which the Office of Information and Regulatory Affairs coordinates.

President Obama's Executive Order, issued on January 18, is designed to supplement and to improve that process. In reaffirming the Clinton Executive Order, which, you recall, reaffirms many of the core principles of the Reagan Executive Order, it also stresses as no similar Executive Order had before the need for predictability and certainty, responding to the emphasis in the last years on concern that regulation had become less predictable in a way that had deterred economic growth.

The new Executive Order squarely affirms the need to ensure that the benefits of regulation justify the costs, emphasizes the im-

portance of attending to cumulative burdens which often can run the burdens imposed by individual regulations, and emphasizes in an unprecedented way the need to measure and seek to improve the actual results of regulatory requirements. That is a quotation.

Second, the Executive Order calls for increased public participation. It directs agencies to promote an open exchange—that is the language of the EO—that involves not only a 60-day period of public comment before rules are finalized, an opportunity to receive input on rules to correct errors, but also use of the Internet to provide for the first time access both to rules and to supporting documents, such as technical and scientific documents, so that they can be corrected by the public if there is an error.

The Executive Order also asks agencies to act even in advance of rulemaking to seek the views of those who are likely to be affected. This emphatically includes small business, to seek their views before regulations are even proposed.

Third, the Executive Order directs agencies as no President had so clearly in the past to harmonize, simplify, and coordinate rules. Senator Collins referred to the risk that agencies will impose conflicting and inconsistent requirements. The President has squarely addressed that risk by saying that to promote simplicity and to reduce costs, agencies must coordinate with one another in a way that will promote advance planning and prevent confusion.

Fourth, the Executive Order directs agencies to consider flexible approaches—that is the name of the section to which I am pointing—that reduce burdens and maintain freedom of choice for the American public. I would like to underline those words, maintain freedom of choice for the American public. The idea here is that to the extent that the law permits, agencies should give careful consideration to and identify approaches that promote flexibility, allow companies both large and small to find their own best, cheapest, most effective ways of promoting the end in question. Flexible approaches may, for example, include provision of information rather than a flat ban, or public warnings rather than a mandate.

Fifth, the Executive Order calls for scientific integrity. There has been bipartisan emphasis on the need to ensure that the information that underlies regulatory judgments is objective, and this Executive Order more clearly than anything that preceded it calls for regulatory processes to include the scientific integrity principles that have recently been applied elsewhere in the Federal Government and that must animate regulatory choices.

Sixth and finally—this is the last one on the Executive Order—there is a call for retrospective analysis of existing rules. What the Executive Order does is to ask for periodic review to ensure that rules that might be outmoded, ineffective, insufficient, or excessively burdensome—these are rules that are already on the books, not new ones—are revisited periodically and streamlined. The Executive Order has a concrete requirement here, which is by May 18—an important date—agencies are now required to produce preliminary plans for that retrospective review, and we have seen impressive results in the last months of agencies going back, revisiting proposed, and longstanding rules to increase flexibility and diminish costs.

Briefly on the Memorandum on Small Business, what the President has done here is squarely to direct agencies to consider methods to reduce those regulatory burdens, methods that include simplified reporting and compliance requirements, so the paperwork burden is lower next year than it is today; extended compliance dates, so small businesses which often have a harder time complying have more time in which to comply; and even partial or total exemptions.

The most noteworthy part of the President's Memorandum on Small Business may be the specific requirement that if agencies are not providing flexibilities for small businesses, they must specifically explain themselves. No president had done that before.

The Memorandum on Administrative Flexibility, as noted, focuses on State, local, and tribal governments. It acknowledges, as Senator Collins noted in general, that there are sometimes onerous requirements imposed on them, and asks the Director of the Office of Management and Budget to explore how best to eliminate those unnecessary requirements, and directs agencies within 180 days to identify requirements that can be streamlined, reduced, or eliminated.

In the recent past, in a quite remarkable development, countless agencies in the Federal Government have been reaching out to the public for ideas about how to eliminate or streamline excessive regulations. The Environmental Protection Agency, the General Services Administration, the Department of Transportation, the Department of Defense, the Department of Energy, the Department of Treasury, and many more have issued *Federal Register* notices saying, help us to comply with the President's requirement. Not only that, a number of agencies have created Web sites dedicated to the purpose of regulation, regulatory reform, and regulatory relief.

The Executive Order and the two memoranda create strong foundations for improving regulation and regulatory review in an economically challenging time. I greatly appreciate the Committee's interest in this topic and look forward to answering your questions.

Chairman LIEBERMAN. Thanks very much. That was an excellent opening statement.

We will do a round in which Senators will have 7 minutes each to question.

Let me get to this basic test that, as you said, has been fundamental to the regulatory process or attempts to reform it, which are to try to calculate costs against benefits of particular regulations, and necessarily, I will get to the retrospective part of it in a minute, but some of this has to happen before we actually know, so we are trying to make educated guesses. And I know it is a requirement that OMB submit regular reports annually, I guess, in this regard to Congress.

Tell us a little bit more, without telling us too much, about how you rationally go about calculating costs and benefits.

Mr. SUNSTEIN. Some of it is very straightforward. So if you have a regulation, let us say it is a regulation that involves automobile safety, it may cost companies a certain amount of money to make their cars safer, and then we work with companies, which provide relevant information, to find out what the cost is, and if the information provided by the companies looks inflated or may be too low,

we have a very careful reality check which involves a number of parts of the Federal Government, including the Council of Economic Advisors. So on the cost side, if the cost is purely economic, basically, we need to see what companies, consumers, and workers are going to bear.

On the benefit side, there are a number of regulations that provide monetary benefits, such as a recent, this week, rule that eliminates the application of the oil spill rule to milk producers. That one, which has been called for by many Members of Congress, is going to save companies $140 million a year, mostly small business, by the way. So that is economic.

There are others that are not strictly speaking economic benefits, but you are going to save lives or make people healthier. For example, there is a Food and Drug Administration (FDA) regulation involving salmonella. It involves best practices with respect to eggs. And there are well established techniques for trying to turn those health and safety benefits into monetary equivalents. What we are typically talking about with respect to death is a risk of death, and economists have what Republican and Democratic Administrations have agreed are at least state-of-the-art techniques for valuing that. But it is important to see that the economic benefits, purely economic benefits, really matter. Frequently, regulation involves protecting lives, and sometimes significant numbers of lives.

Chairman LIEBERMAN. Yes. That is a very helpful answer. It always strikes me that it is easier to calculate the costs. For instance, in your case, you speak to the auto industry about the costs of a particular regulation. They can do pretty well at estimating it. It is harder in advance to—but maybe there is a credible system—to calculate the benefits, because often, obviously, when you try to monetize them, the benefits are of costs that are avoided. So those are often subject to dispute and debate.

But really, what you are saying is that—and I appreciate it—both Republican and Democratic Administrations have accepted some of the science now of calculating benefits. I guess the question in the example is whether the auto industry accepted the science of calculating the benefits as opposed to the costs that they knew were real.

Mr. SUNSTEIN. Our rules involving fuel economy are among our most expensive rules. They are saving consumers a great deal of money, actually billions of dollars in terms of reduced costs from gasoline. So this is, especially in a situation where the cost of gasoline is increasing, the fuel economy standards are going to save a lot of money. So consumers are gaining a great deal.

The automobile companies themselves actually not merely accepted the analysis and the outcome, but participated in celebrating it on the ground that it helped solve a problem of the sort to which Senator Collins referred, of lack of coordination of two kinds: Lack of coordination between the Department of Transportation and the Environmental Protection Agency—they had to mesh their legal authorities, and they did; and lack of coordination between State governments and Federal Government, in particular California, and these were meshed, as well. So in this case, the auto companies were very helpful with respect to the analysis of

costs, but also were informative with respect to the analysis of benefits.

Chairman LIEBERMAN. I am going to go to the retrospective analysis that you are asking for now, because obviously there, in simple terms, you are still estimating, but there is experience to inform as opposed to the estimate of what is happening. In March of this year, EPA put out a report on the benefits and costs of the Clean Air Act, which I referenced in my opening statement, from 1990 to 2020, so part of it is look-back, but part of it, obviously, is still forward, and the benefits were substantially greater than the initial prospective analysis. A note at the bottom here, "The most influential change appears to result from updates over the last decade in the epidemiological studies which provide estimates of changes in population, risk of premature mortality associated with exposure to fine particles."

Has this report been broadly accepted by people who are regulated under the Clean Air Act of 1990, because more of it is the look-back?

Mr. SUNSTEIN. That particular report was subject to peer review——

Chairman LIEBERMAN. Yes.

Mr. SUNSTEIN [continuing]. So it was carefully analyzed by specialists. I do not know whether it has received a careful assessment by those who are subject to regulatory requirements. I do know it is broadly agreed that the benefits of the Clean Air Act, on balance, exceed the costs of the Clean Air Act.

Chairman LIEBERMAN. My time is rapidly expiring. Let me ask for a quick response. Just add a little bit more on that interesting case because I saw you blogged on it the other day, about the milk products and milk product containers which were originally included—which surprised people, I suppose—in oil spill prevention regulations. EPA then delayed compliance by the milk sector while it reviewed their concerns. And then, as you say, the agency decided it would place unjustifiable burdens on dairy farmers and producers. Can you give us a quick explanation of what happened there because that is the way the process should work, I think most of us would say. How did it get to that point?

Mr. SUNSTEIN. Yes. One of the representatives of the dairy industry, who had been arguing for this exemption, said on the day it was announced the phrase "Got Milk?" does not ordinarily mean the same thing as the phrase "Got Oil?" He was trying to explain that this was a common sensical decision.

Chairman LIEBERMAN. Yes.

Mr. SUNSTEIN. It has a complicated history. Roughly, the original definition of oil could pick up milk products under the statute from the 1970s. There is a subsequent statute that gave EPA the authority to make adjustments to the original definition. In 2006, 2007, 2008, the milk industry said that this exemption, you have to make, because you are imposing costs on us, and while oil has serious environmental effects, the kinds of milk spills that this would control, this is imposing costs for no significant environmental benefit.

The Bush Administration proposed, actually, in its final week, I believe, an exemption of milk. What we did was actually to broaden

the exemption. It is less conditional and it is broader than what was initially proposed.

Chairman LIEBERMAN. Thank you very much, Mr. Sunstein. My time is up. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Administrator Sunstein, what I have found is that cost-benefit analysis can be subjected to very strange interpretations on what is the benefit. So let me give you an example by illustrating from a recent EPA rule on waste incinerators. According to reports, the EPA counted as a benefit the cost to firms of hiring workers to comply with the new regulations. Now, I doubt that any small business that was subjected to this new regulation would consider it a benefit to have to hire new employees specifically to comply with the regulation, yet EPA put it this way: "Environmental regulations create employment in many basic industries." So translated into English, the EPA is actually saying that the regulations create jobs by forcing companies to hire more people to comply with the regulations. Do you believe that is what is intended by a benefit of regulation?

Mr. SUNSTEIN. No, I do not, but I can tell you what my recollection is of what the EPA actually said. I take your point completely. My recollection is that the EPA did not count the increased jobs that come from needing to comply with a regulation as a benefit, as part of cost-benefit analysis. So there was a part of the regulatory impact analysis which analyzes benefits and costs with great care and finds ways to reduce costs, and then there is a separate part of the document that analyzes job effects and that is responsive not only to the President's call in the Executive Order to investigate job creation, but also the concern that many people have expressed about the adverse effects—the potentially adverse effects of environmental regulation on jobs.

And so what the EPA was doing there was not saying the fact that you have to hire people to comply is an independent benefit that jacks up the benefit figures. It was just trying to make a projection of the total employment consequences of the rule, and for a typical environmental regulation, there can be adverse effects—if you increase cost, that is not a great thing by itself for job growth—but it can also be the case that you, by virtue of imposing costs, produce some more employment, which may not be a wonderful thing from the standpoint of competitiveness, but does suggest that when you are thinking about job growth as such, there may be an offset.

Senator COLLINS. I will tell you that a small business or even a larger business that reads that regulation and looks at what EPA is doing assumes that EPA is saying that the fact that the company has to hire more people to comply with the new regulations is a benefit. I understand your more sophisticated analysis, but that is certainly what it sounds like.

Let me switch to a different issue. There are rules, in fact, there are many rules where the benefits do outweigh the costs and the regulations may, in fact, be worthwhile. But there may nevertheless, be a less expensive way of achieving those benefits or of achieving most of those benefits. Often, the complaint that I hear—and I heard it just this last week from wastewater treatment plant

operators in Maine who were criticizing EPA—is that the marginal benefit is so small compared to the cost. That is a slightly different issue. Does OIRA look at whether there is a less expensive way of achieving the benefits that EPA or other agencies might propose?

Mr. SUNSTEIN. Yes, we do, Senator Collins, and this is something that the President has placed a great emphasis on in the Executive Order. So there are a couple separate ideas here. One is that independent of the benefits having to justify the costs, we have to find the approach that maximizes net benefits, and that is kind of technical speak, but it is exactly on the point that you raise, where you can have a rule where the benefits are a little higher than the costs, but maybe there is a way of doing it where the costs go way down and the benefits go just a little down and the net benefits are way higher that way, and we are really interested in that.

One thing that the notice and comment process does is to raise alternatives and have an analysis of costs and benefits for those. So if we have situations where the benefits are justifying the costs, that is a good thing, but we are not maximizing net benefits, there is a problem and we should do better.

The President's emphasis on flexible approaches, and Section 1 of the Executive Order refers to performance standards rather than design standards, that is designed to say to companies, we will not tell you how to do it. We will tell you the outcome. You choose the way. So there are a bunch of ideas in this very short Executive Order that are meant squarely to address that problem.

Senator COLLINS. Well, I want to thank you for taking a look at many of the regulations that have been issued and applying a more common sense approach, so that we can achieve benefits without so overburdening our businesses that they cannot create jobs and we are getting only a marginal benefit. I know you have worked very hard in a number of areas to achieve that goal, and I appreciate it.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you very much, Senator Collins.

In order of appearance this morning, we will call on Senators Johnson, McCain, Begich, and Portman. Senator Johnson.

## OPENING STATEMENT OF SENATOR JOHNSON

Senator JOHNSON. Thank you, Mr. Chairman.

Mr. Sunstein, welcome. Recently, probably within the last year, the Small Business Administration issued a report that estimated the annual cost of Federal Government regulations at about $1.7 trillion a year, which is more than 10 percent of our total Gross Domestic Product. Is that a number that you pretty well agree with?

Mr. SUNSTEIN. I have not studied that document with care. Our own analysis of costs and benefits, annually and cumulatively, suggests that number is too high.

Senator JOHNSON. What would your analysis put it at?

Mr. SUNSTEIN. Well, I can tell you based on the last 2 years, the total costs of final economically significant regulations are about $11.9 billion, and if you look at the 2-year average over the course of the decades for which we have numbers, that number, $4 or $5 billion a year, is not way off. Two-thousand-and-seven was the big year for regulation in the recent past under the Bush Administra-

tion and there, it was significantly over that $11 billion figure. But if you add them all up, it is going to be hard to get in the trillions.

There is a paper by a guy named Thomas Hopkins, who tried to estimate the aggregate figure, and it was significantly lower than those trillions.

Senator JOHNSON. But you are saying your own analysis has $11 billion versus $1.7 trillion?

Mr. SUNSTEIN. Well, no. The $11 billion is for the last 2 years, our addition to the stock. So what the Crane and Crane study to which you refer tries to do is think of the total costs of all regulations and we do not have an analysis of that, OMB and OIRA do not. What we do have an analysis of is each year, and we have an analysis of decades, and if we are adding to the stock, I hope the numbers are as low as possible for us, but if you are adding to the stock as the Clinton Administration did, roughly $5 billion a year, then it is going to be hard to get you up in the trillions.

Senator JOHNSON. If you are adding $5 billion a year, what is the benefit of that, then? What is your estimate of the benefit?

Mr. SUNSTEIN. Well, what I can tell you is our benefit estimate is over $40 billion—the discussion we just had with Senator Collins—actually, for our first two fiscal years, the net benefits of the Obama Administration are more than three times the net benefits of the Clinton Administration and more than 10 times the net benefits of the Bush Administration in its 2 years.

Senator JOHNSON. I am not an attorney, but as I read this Executive Order, to me, it looks like it is sort of putting the burden of proof on a cost-benefit analysis on the agency. Is that kind of how you view that Executive Order?

Mr. SUNSTEIN. I think that is fair.

Senator JOHNSON. In terms of just classic cost-benefit analysis, I mean, it really is pretty simple—from a manufacturer's standpoint, if you have a piece of equipment that is broken, it costs me $25,000 to repair it, I look at what is the revenue stream. If it is a couple hundred thousand dollars, I go, yes, I am going to spend that $25,000.

My concern with this Executive Order is I think there is just a huge loophole, and I am sure you are aware of the phrase, in terms of measuring benefits, it allows the agency to take into account values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. I mean, is that not a rather large loophole? Is that not a pretty amorphous standard? I mean, how can you even begin to—and again, I am looking at the standards you also put on there in terms of something that is measurable, predictable, certain, something with scientific integrity. How can you defend that type of standard?

Mr. SUNSTEIN. Thank you for that, Senator. I can walk you through, if I may——

Senator JOHNSON. Sure.

Mr. SUNSTEIN [continuing]. The structure of the Executive Order on this. The immediately preceding sentence requires quantification through the best available techniques in a way that is more focused on quantifiable measures than any President has been in the past. So the opening sentence of that section is quantify, in italics.

Then there is a recognition that under relevant statutes, which is what this Executive Order is ensuring implementation of, under relevant statutes, there are sometimes values that cannot easily be turned into monetary equivalents. I will give you a couple of examples, both involving dignity.

There were rules issued by the Department of Justice involving access to buildings, both public and private, and the quantifiable benefits well exceeded the quantifiable costs. The Department of Justice did a very quantitative analysis of the benefits and costs. But for one provision, we are talking about access to bathrooms for people who are in wheelchairs, and the Department of Justice acknowledged without embarrassment that if we are speaking about wheelchair-bound people—a number of them may be veterans returning from wars—who are now going to be able to use bathrooms without relying on their colleagues for assistance to get in the room, that has something to do with dignity under the——

Senator JOHNSON. And those are wonderful things. We all agree with that. But again, the purpose of this Executive Order was to put a burden of proof on the agencies, and when you have such an amorphous standard, including distributive impacts—I am not quite sure what that is. I mean, the EPA, I think in one of their rulings, is environmental justice. How does that create a burden of proof when it is a loophole that you can drive a truck through?

Mr. SUNSTEIN. Well, as it is operating on the ground, it is hardly a loophole. It is a recognition that under some statutes, a statute that prevents rape, a statute that is designed to prevent children from being run over in driveways by ensuring better rearview visibility, under some statutes, there is a value that is not readily turned into a monetary equivalent and agencies may—it is just a "may"—consider that.

I take your point completely that in the abstract, a reference to qualitative values can be harmful to the enterprise. But on the ground, if you look at what happened in the Bush and Clinton Administrations, which had distributive impacts, also, and equity, this was just a nod in the direction of statutes that may be concerned with protecting people from sexual harassment, which may not easily be turned into dollar equivalents. It is not intended and it will not operate as an obstacle to the enterprise of ensuring that we get the costs as low as possible and the benefits as high as possible.

Senator JOHNSON. Thank you.

Chairman LIEBERMAN. Thank you, Senator Johnson. Next is Senator McCain.

## OPENING STATEMENT OF SENATOR MCCAIN

Senator MCCAIN. Welcome, sir. Are you familiar with the ongoing rulemaking for the proposed Department of Agriculture (USDA) Catfish Inspection Office?

Mr. SUNSTEIN. Yes, sir.

Senator MCCAIN. Are you aware of the recent GAO report entitled, "Opportunities to Reduce Potential Duplication in Government Programs and Save Tax Dollars," that warrants the proposed USDA Catfish Inspection Office as duplicative, high risk for waste, further fragments our food safety system, and estimates it will cost

$30 million just to implement the new USDA Catfish Inspection Office?

Mr. SUNSTEIN. I am aware of the existence of that report, but I have not read it.

Senator MCCAIN. Well, it is only $30 million. You might want to take a minute. So you would not know how much it would cost taxpayers to continue operating the USDA Catfish Inspection Office after it has been established?

Mr. SUNSTEIN. What I do know is that the proposed rule, and it is merely a proposed rule, has a wide range of alternatives, and consistent with the President's call for public participation and comment, the USDA is receiving a lot of comments not only on what option it ought to select, but also on exactly the issue to which you point, which is the cost issue.

Senator MCCAIN. Are you consulting with the U.S. Trade Representative in the State Department because they obviously have significant concerns, as well?

Mr. SUNSTEIN. Yes. We have worked very closely with them on this issue.

Senator MCCAIN. Your biography mentions that you authored a book, Laws of Fear Beyond the Precautionary Principle, which Cambridge University Press synopsizes as "attacking the idea that regulators must always take extreme steps to protect against potential harms, even if we do not know that harms are likely to come to fruition." Is this USDA Catfish Inspection Office driven by food safety fears or an issue drummed up by the domestic catfish industry and farmville politics?

Mr. SUNSTEIN. Well, the Secretary of Agriculture is very aware of his obligations to implement the law, and what the rule to which you are referring begins with is a recitation of the language of the farm bill of the statute. So he is in the implementation business in this area, as well, and the analysis that accompanies the rule, as you will see, it is very long, has a detailed, science-driven account of the possible costs and possible benefits.

Senator MCCAIN. So the commentary comes back to the actions of Congress. They snuck a phrase into a massive bill which now has the effect, according to the Government Accountability Office, that will cost the taxpayers an additional $30 million, again, emphasize the redundancy between two different agencies and overlap between two different agencies, all in the name of—and, of course, if this is implemented, it will cause a fight at the World Trade Organization (WTO). It will obviously increase the cost dramatically or even shut off the importation of catfish, which then the consumer pays a higher price even. There is an article in the *Wall Street Journal* this morning about the higher price of catfish triggered by ethanol, because the corn growers now sell their corn for ethanol rather than feeding various consumers of it in the animal world. So we find ourselves in a rather interesting cycle, which the ultimate victim is the unwitting taxpayer. Would you disagree with that rant? [Laughter.]

Mr. SUNSTEIN. Thank you, Senator. I guess what I would say is that this is a proposed rule. Whether the adverse consequences to which you point are possibly going to occur depends on what alternative the U.S. Department of Agriculture chooses. Your comments

and those comments of others who are concerned about one or another of the proposals are more than welcome. They are needed to make sure we make the right decision.

Senator MCCAIN. And thank you. By the way, if we get into this kind of trade dispute with Vietnam, it would cut off the tens of millions of dollars of exports that we have of our agricultural products to Vietnam.

Mr. SUNSTEIN. We work very closely with the U.S. Trade Representative to make sure there are not violations of any agreements and to make sure that what is done in the regulatory area is consistent with our interest in trade and exports, partly because of the connection to jobs.

Senator MCCAIN. Given your vast academic background and candor and good work, do you have an opinion on ethanol tax credit.

Mr. SUNSTEIN. Not quite my lane.

Senator MCCAIN. All right.

Mr. SUNSTEIN. I barely remember my academic work, and if the issue involves legislation, that is not quite our domain.

Senator MCCAIN. Well, again, it really is an interesting ripple effect that one line in a very large piece of legislation can have the both intended for the sponsors of that, but many unintended consequences, again, which ends up with the American taxpayer and the American consumer being the ones who pay the penalty for it. So it is, I think, a graphic example of sort of the irresponsibility of the way that we do business as we criticize other bureaucracies about the way that they do business.

I thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator McCain. Senator Begich.

**OPENING STATEMENT OF SENATOR BEGICH**

Senator BEGICH. Thank you very much. Thanks for being here.

I actually want to ask a quick question to follow up with Senator McCain's. I guess the simple question is, in your office, will you review if, for example, that type of operation needs to exist?

Mr. SUNSTEIN. No. We review regulatory actions.

Senator BEGICH. Well, let me ask it this way, then. If you review that and the regulatory action is another layer on top of another department or division, will you comment on that?

Mr. SUNSTEIN. Our office does not have that role. Others in the Office of Management and Budget may. Certainly, if there are budgetary implementations, OMB would be involved, but our role is narrowly focused on regulatory action.

Senator BEGICH. Let me ask you, and I had to remind myself of it, I chaired a hearing yesterday with, as a matter of fact, Senator Collins' colleague, Senator Snowe. Senator Collins, it is about the blue fin tuna, so I do not want to go down the wrong path. If I say something wrong, please correct me.

But the question came up, and it was intriguing when you said through some Executive Orders, there is this engagement with the business community or the small business community, flexibility, some of the phrases you used, so I am going to give you an example that I heard yesterday from Senator Collins's colleague, Senator Snowe.

There is an endangered species listing of the blue fin, or potential listing on the blue fin tuna. Their fishing grounds are right next to, obviously, Canada, which does not have it listed. But as soon as it does its process of listing, it goes right into the rulemaking process for a year. And the question that Senator Snowe had yesterday—is there a way to have a kind of a middle step, where what is going to happen is the business community, which are fishermen, will be impacted. So when you talk about that Executive Order, does the National Oceanic and Atmospheric Administration (NOAA) have to follow that, also, because, to be very frank with you, we asked the question and they did not have an answer. But according to this Executive Order where you laid it out, they should show some flexibility, especially if it affects small business. Is that a fair statement?

Mr. SUNSTEIN. Well, it is so that any regulatory action, including regulatory action that involves protection of endangered species is subject to the Executive Order, and we actually had regulatory action very recently involving killer whales where great flexibility was introduced in the final rule, in part because of public comments from small business.

Senator BEGICH. Well, I just wanted to get that on the record because they will maybe cross that over to Commerce, and I will just leave it to Senator Collins and Senator Snowe, but it was a very interesting question, but the response was not as flexible as your response just was. I will use your phrase.

You made a list of agencies that have gone out to ask for input on how to improve their system and so forth. You listed off a whole slew of them. I did not hear you list EPA. Is that just because you did not list it, or they are doing that, too?

Mr. SUNSTEIN. EPA has actually been a leader here. They have gone out for public comment——

Senator BEGICH. I smile only because I am waiting for that moment that they are a leader, but——

Mr. SUNSTEIN. Well, Senator Collins has been emphatic that the greenhouse gas permits should not include biomass, and EPA exempted for 3 years. EPA, as just noted with respect to milk, followed up a series of concerns from the agriculture community and EPA has held a series of meeting about eliminating and streamlining existing rules, and they have a whole Web site dedicated to the topic.

Senator BEGICH. Let me ask this, and I will just give you some examples from Alaska's perspective. We have large issues, large projects, and it is always around development, may it be resource development, oil and gas, or mineral resources. But in almost every case, it seems to be EPA comes into the mix and the delay process is enormous. And one of the suggestions and a piece of legislation we are going to lay down is a coordinating office that deals with all Outer Continental Shelf development (OCS), to coordinate these offices because it seems like they just stumble over each other. We have leases that are 10-year leases. Five years into them, nothing is developed.

How does your office connect in those situations, the larger macro and big projects, and trying to figure out how to streamline this system just for an answer, not necessarily—obviously, I would

like a positive answer, but sometimes we just do not get an answer. What do you do to engage—because it is a very expensive process. As we talked about some here that are in the millions, a few millions, these are in the hundreds of millions of dollars of regulatory requirements.

Mr. SUNSTEIN. I appreciate it. We have heard a lot about this in the last 2 years, so our role is——

Senator BEGICH. I am sure you have seen those emails, so go ahead.

Mr. SUNSTEIN. Yes. [Laughter.]

Our role is in overseeing the rules that underlie particular permit decisions. So if there are rules that are proposed or coming through, our charge is to make sure that they are compatible with the President's goals, including economic growth and job creation.

Senator BEGICH. If I can interrupt for a second, that is good to know that last part there, job creation. Is there also the consistency of the rule, and what I mean by that is EPA regulates air quality for Alaska's water, but in the Gulf of Mexico, it is the Interior Department, and they have two different regimes for the exact same development elements in the sense of oil and gas. Do you intervene and say, these have to be cleaned up, because it is a significant disadvantage for us in Alaska, to be very frank with you.

Mr. SUNSTEIN. This is extremely important and there is a long way to go, and we hope in the next short period even to try to promote coordination. When there is regulatory action—I guess I will step back and tell you a little bit about the process. What is often called in those small segments of American society that have terms for such esoteric OIRA review is actually interagency review.

So if we have a rule from EPA that bears on the action of Interior, and that is not rare, then the Interior Department will specifically be asked to comment on the EPA regulatory action, and because they have expertise and, as you say, legal authority, they will not infrequently have something significant to say. And then our job is to make sure that what is done by one or the other fits with the authorities and perspective of the sibling agency.

And the President really has underlined that in a very clear way with this section. It is only a few sentences, but it starts out with exactly your point, that sectors and industries often face overlapping, inconsistent, or redundant requirements, and it identifies that as a problem.

So our role has been to try to diminish that, and if this is causing problems in Alaska or elsewhere, we really should hear about it, partly because we are looking back at the stock of regulations——

Senator BEGICH. Right.

Mr. SUNSTEIN [continuing]. And this is a really terrific opportunity to try to fix this.

Senator BEGICH. And, Mr. Chairman, there are clearly two agencies doing the exact same thing. I do not want you to raise the requirement. I just want to get equal treatment, and so I will leave it at that and we will send you definitely something on this.

Mr. SUNSTEIN. Great.

Senator BEGICH. Thank you.

Chairman LIEBERMAN. Thanks, Senator Begich. Senator Portman, welcome.

**OPENING STATEMENT OF SENATOR PORTMAN**

Senator PORTMAN. Thank you, Mr. Chairman, and Administrator Sunstein, thank you for being here. I do not have to tell you what an incredibly important job you have. It was always important, but particularly at a time like this, with a weak economy and a recovery that is not as strong as any of us would hope for with high unemployment. This is one of the areas, regulatory review, where we all believe, I think, Democrat and Republican alike, that there is room to help get the economy moving again and create more jobs, and there are certainly plenty of examples. You just heard about some of them from my colleagues from Alaska and Maine, where there are specific job impacts of legislation and regulation that does not make sense.

One of the things that I am particularly interested in, as you probably know, is the inability for us to have the same cost-benefit analysis of independent agencies that we do with the other parts of our regulatory system—and you have written about this—and this independent agency exemption is significant because so many independent agencies now are promulgating regulations and they are not under the scrutiny of the Unfunded Mandate Reform Act (UMRA) or the Executive Orders you talked about earlier today, EO 13563 and EO 12866.

I looked at a law review article that you wrote back in 2002 where you said the commitment to cost-benefit analysis has been far too narrow. It should be widened through efforts to incorporate independent regulatory commissions within its reach. In that article, you proposed including independent agencies. You named the Federal Trade Commission (FTC), the Federal Communications Commission (FCC), the U.S. Consumer Product Safety Commission (CPSC), and you said there is every reason to include independent agencies within the basic structure of an Executive Order on Federal regulation. I notice that President Obama's Executive Order you talked about today, EO 13563, does not move in that direction. Can you tell the Committee why not?

Mr. SUNSTEIN. Senator, as former head of OMB, I bet you are as alert as anyone to the fact that pre-government experience writings are just that and that once you are in government, you are part of a team and you are responsible to the President, the team's captain. So that is what I would like to speak to.

What the President did in his Executive Order was to follow the precedent set by President Reagan in the 1980s in the Executive Order to which Senator Collins referred, and President Reagan's judgment at the time—I happen to know, because I was in the Department of Justice and I saw it close up—was that there were various concerns about presidential overreaching that would arise, legal or political, by application to the independent agencies. And what followed that in the last generation has been Republican and Democratic Presidents have agreed with President Reagan that they would continue the process and not extend to the independent agencies.

Senator PORTMAN. So given that there are legal concerns about OIRA, the Executive Branch, and the Office of the President extending that reach to independent agencies, does it not make sense for Congress to enact legislation that brings independent agencies

at least within the cost-benefit requirements of the Unfunded Mandates Reform Act?

Mr. SUNSTEIN. We have encouraged in our guidance document that independent agencies voluntarily comply with the most recent Executive Order in early February.

In terms of legislation, the Office of Information and Regulatory Affairs, as again I know you know, has a narrow implementation mission, and so we are hard at work in implementing the Executive Order and there is a process for formulating Administration positions on questions of the sort you raise. It is not really my role to take that position.

Senator PORTMAN. You know, as a professor, he is really learning this bureaucracy thing well. [Laughter.]

Chairman LIEBERMAN. It is unsettling, is it not?

Senator PORTMAN. It really is. [Laughter.]

Well, let me look at this another way with you. Assuming that you agree, based on your previous writings, and assuming that the hundreds of regulations that are now being promulgated by the independent agencies, you believe, ought to come under the same cost-benefit analysis as you have asked them to do voluntarily, let me just ask you, not as a matter of commenting on specific legislation but as a general matter, does it not make sense for Congress then to act to the extent there is not a legal concern with Congress acting on independent agencies to be able to bring them under this same rubric that other agencies are required to follow?

Mr. SUNSTEIN. If you will permit, that is a question that would benefit from sustained engagement, both in the standard Administration-wide process for formulating positions on controversial questions——

Senator PORTMAN. I will take that as a yes. Well, and seriously, I think it is only logical that to the extent you have concerns, which I understand, and you mentioned political and legal concerns, I think it is the legal concerns that would constrain you, Congress has the ability to do this and it seems to me it only makes sense, at least under UMRA, to be sure that we are not exempting so many regulations that affect our small businesses, State, local, and tribal governments.

I would like to turn, if I could, to guidance documents for a second. The D.C. Circuit has described the use and abuse of guidance documents this way. They have said, several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what regulations demand to regulate entities. Law is made without notice and comment, without public participation, without publication in the *Federal Register* or the Code of Federal Regulations (CFR). I think you would agree that guidance documents are often an end run, and I certainly found that when I was at OMB, an end run around what would normally be the deliberative process and the give and take that you get in a notice and comment rulemaking process.

EO 13422 required agencies to give OIRA advance notice of significant guidance documents and permitted OIRA to review those documents for, among other things, their effect on the economy, which as I said at the outset is a critical issue right now. My understanding is President Obama revoked that Executive Order, and

I do not understand why. Under your leadership, is OIRA continuing to review significant guidance documents?

Mr. SUNSTEIN. Absolutely. In fact, the review of guidance documents, significant ones, is at least as robust under this Administration as it has ever been. I can give you a little background there.

President Bush revoked an Executive Order which had a number of elements in it, five or six, one of which was the review of significant guidance documents. It is just the case, as I am sure you are aware, that even before President Bush's Executive Order, OIRA had been reviewing significant guidance documents. In fact, that was a practice even under President Clinton. And after the revocation, just the question you asked arose and the then-Director of OMB, Peter Orszag—and this is in March 2009—issued a short but really important memorandum to the heads of agencies and departments saying that OIRA will be reviewing significant guidance documents, and the number is not small.

Senator PORTMAN. Do you think another Executive Order is appropriate then? It sounds like the practice does not differ from the substance of that part of the Executive Order that was revoked. In fact, it seems more robust than it was in previous Administrations.

Mr. SUNSTEIN. At least as robust. So I take your point about ensuring that guidance documents both are not evading the requirements of the Administrative Procedure Act and that they are, even when they are genuinely guidance documents, subjected, where appropriate, to public comment and review, those are concerns we take very seriously. Those are kind of our staples.

Because of the OMB Director, his memorandum is so extremely clear that significant guidance documents go through OIRA and every agency and department now understands that, it is not clear that there needs to be an Executive Order on that point.

Senator PORTMAN. Mr. Chairman, I think my time has more than expired. Thank you, Mr. Sunstein.

Chairman LIEBERMAN. I have a couple more questions that I would like to ask. This has been a very good exchange. Both of these, to some extent, deal with the role of Congress. As you know, there are proposals pending before our Committee that would require Congress to approve certain regulations once they are finalized within the Executive Branch. I want to ask about Congress' input, however, on the front end, which is in the authorizing laws that we passed that give rise to regulations.

There is always a tension about how specific to make those laws and how much decision to leave to the Executive Branch, the experts within the agencies. I wanted to ask you, generally, if you have any standards that you would apply to our work on legislation that leads to regulation and if you can think of examples where legislative mandates either significantly promoted or significantly impeded what you have called smarter rules.

Mr. SUNSTEIN. Thank you for that, Mr. Chairman. I have a few different thoughts. One is that, just as you say, it is often a hard decision about what level of detail to put in legislation, and then the decision is often made by asking such questions as, are circumstances changing so rapidly that precision would be regretted after a year or two, and the separate question, is there sufficient information now to set forth something with a high level of detail

or not, and another question, is there sufficient trust in the Executive Branch implementation process in the particular context that degree of discretion is acceptable? So those are some of the questions that are standardly asked.

In line with Senator Collins' line of questions, one point is that benefits should ordinarily justify costs, recognizing that some benefits are hard to quantify and cannot be monetized, and it is probably a good idea, at least as a general rule, to allow careful consideration of benefits and costs so that we do not get unintended adverse effects of the sort that Senator McCain is obviously concerned about.

It is hard to answer. I am giving an abstract answer, which is not ideal, but we probably have to go statute by statute. I have seen in the last 2 years there is often the implementation involves a narrow band of discretion, and not infrequently, that is just right, because Congress has made the decision.

Chairman LIEBERMAN. Yes. That was general, but it was helpful. It is worth pondering by us.

Let me ask you about e-rulemaking. The Executive Order of the President directs agencies to promote public participation, specifically by providing the public with "timely online access to rulemaking docket on regulation at .gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded." I know you have issued three memoranda to guide agencies on how to improve electronic rulemaking, the process insofar as users are concerned. I wonder if you could describe progress in implementing that goal and, as you may know, Senator Collins and I have been working on this, as well, in our e-rulemaking bill. Are there other enhancements you would suggest legislatively that would maximize public participation in rulemaking?

Mr. SUNSTEIN. Sure. This has been a high priority for us, and what we did at the outset was we improved greatly a Web site called reginfo.gov, which while maybe not the most exciting Web site on the Internet, does have the advantage of providing access to every rule, at least the basic description of every rule that is under review at OIRA—the name, the agency, whether it is economically significant. And what we did with that was to create a graphic which is very clear—we call it a dashboard—where you can press EPA and see every rule under review from EPA. You can press the Department of Health and Human Services (HHS) and see every one there. And this gives the public—and we have found that it has been used by a large number of people—it gives the public a way of seeing what is under review and being contemplated.

We have also worked hard to improve regulations.gov, which is the online portal, which is now much more user friendly and clear. As Samantha, my wife, can tell you, I am on regulations.gov sometimes at night reading public comments and it is easy now. It was harder before. You can also on regulations.gov get access to the full rule basically in an instant.

What we have required in one of our guidance documents, and it is working, is that agencies put online basically everything they have in paper in a timely fashion so that if people are concerned

that there is a regulation involving, let us say, automobile safety that is not strong enough, that is too expensive, or that is going to have harmful effects on small business, they can see everything there. So those have been our initial steps. We have also tried to make the OIRA Web site a lot more usable.

In terms of legislation, again, this is not quite our lane, but we are broadly supportive of the effort to bring rulemaking into the 21st Century, as the President has made very clear in the Executive Order, and the kind of basic principle should be easy accessibility and clear transparency.

Chairman LIEBERMAN. Good. Do you have a sense, or can you report to us on what kind of usage there is of the Web site you talked about? I mean, what you have done is very laudable and I appreciate it.

Mr. SUNSTEIN. We actually do have the numbers and I believe they are in our draft cost-benefit report, which was released recently. I do not have them offhand, but there has been a significant increase.

Chairman LIEBERMAN. So that is the point. I do not care about the specific number, but there has been an increase and people——

Mr. SUNSTEIN. Yes.

Chairman LIEBERMAN. Thanks. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. I want to follow up on an issue that Senator Begich raised with you about whether OIRA has the authority on its own initiative to undertake a review of a regulation that affects many different aspects of our economy. The ethanol regulation is a perfect example of that, as Senator McCain pointed out, as well. I will concede up front, I am not a fan of the ethanol subsidy, but EPA recently increased the amount of ethanol that can be used in gasoline. This has all sorts of implications. It fouls the engines of snowmobiles and of lawn mowers, for example, and older cars. It drives up the cost of food as corn is grown for fuel rather than for food. Who looks at issues like that, other than, I suppose, Congress that cross agency lines and that have a multitude of impacts on our economy?

Mr. SUNSTEIN. If it takes the form of regulatory action, whose core is rulemaking, but which also extends to guidance documents, interpretative rules, and other related things, then we will see it. There are related actions being taken by EPA, including misbranding actions, which are definitely rulemaking, and those we do oversee, and our oversight really is a coordinating role. There are other things that agencies do that are permits that are not quite rulemaking and there we are not involved except we are available to consult if asked by you, others, or if asked by the agency.

Senator COLLINS. I am intrigued by the issue that the Senator from Alaska raised, because it seems to me ethanol is a perfect example of where we need a cross-cutting review of the implications. But if there is no agency currently involved in rulemaking on it, then it does not seem to happen, does it?

Mr. SUNSTEIN. No, but there is an opportunity now under the Executive Order, the retrospective review provision, to get a handle on that, and there are a couple of things to emphasize here. One is May 18 is a very important date. That is when the plans have to be submitted to us, and so ideas about problems stemming from

lack of coordination from you and your staffs and those who have concerns in Alaska or elsewhere, this is a great time for that. And also, what the President asked for is preliminary plans, which suggests clearly that this process of overseeing the stock of existing regulations to make sure what we are doing makes sense is not just a one-time matter. It will be a continuing series of evaluations.

Senator COLLINS. Senator Portman asked a question I was going to ask you about the 2002 University of Pennsylvania Law Review article that you wrote and about extending the cost-benefit analysis to independent agencies. But there was another part of that article which I thought was intriguing and that is you said that the requirements for cost-benefit analysis were widely ignored by Federal agencies. That was one of the findings that you made. What is being done by OIRA now to make sure that agencies are not ignoring the requirement for cost-benefit analysis?

Mr. SUNSTEIN. We work every day to make sure that the benefits exceed the costs and the benefits are very carefully and accurately assessed and the costs, as well. So it is our kind of staple to make sure that these are not ignored. And if you look through the regulatory impact analysis, you will see not necessarily unquestionable analysis, and the public comment period is designed to make sure we eventually get it right, but extreme care about costs and benefits.

And one thing that we have recommended and implemented that seems like a small step, but I think is significant, is that agencies put clear cost-benefit tables up front in the most conspicuous manner so that any Member of Congress or staff or any member of the public can see exactly what we are getting and exactly what we are losing as a result of a regulation. And we have emphasized that need for clarity about costs and benefits, which is the initial way of ensuring it is actually done, was something we quietly posted in late October, which is a checklist. It is a page and a half and it says what agencies have to do. It takes a 50-page technical document, turns it into a page and a half which will promote accountability and compliance.

And one thing on that page-and-a-half checklist is if you quantify the costs, in other words, if you quantify the benefits, a third, have you shown that the benefits justify the costs?

Senator COLLINS. And if that has not been done, does OIRA have the authority to block the issuance of the regulation?

Mr. SUNSTEIN. Absolutely.

Senator COLLINS. One final issue, just very quickly, that I want to get into, and that is the complexity of regulation. You would think when Congress passed the 2,700-page health reform bill that we would have taken care of every possible issue, but in fact, the new law directs the Secretary of HHS to make nearly 2,000 separate determinations, and these rules can come and turn into hundreds of pages each.

An example is the Medicare Shared Savings Program. I happen to think this is one of the few provisions of the bill that actually could help increase quality and hold down costs. The program takes up six pages of the new law, but the regulations implementing the program are 429 pages long. Do you look at complexity

and excessiveness as you look at the analysis done by Federal agencies?

Mr. SUNSTEIN. We just posted last night, I believe at 7 p.m., a guidance document that I think Senator Akaka would be pleased with. It is on plain writing. There is the Plain Writing Act, as you know, and this is something we have prioritized. And what we are trying to do in the regulatory area is to use executive summaries, so people can take a 400-page document and get the core of it in 8 or 10 pages. There is sometimes a trade-off, because a 400-page document—and do I not know it—can take a lot of time to read. But if you want to have the full analysis of effects, sometimes it just takes a lot of space. If there is not clarity in an executive summary that says exactly what the rule is doing and what its likely consequences are in brief form, then that is somewhere between not ideal and it is a disservice to the public.

Senator COLLINS. Thank you.

Chairman LIEBERMAN. Thanks, Senator Collins.

I want to ask the indulgence of my colleagues. You have been more engaging for a longer period of time than I thought you would be and I have to step out for a meeting. I do not know if you are able to stay, if you will take us to the finish. Senator Portman, Senator Begich, I believe it is the custom, if not the rule, of the Committee, since Senator Carper has not had a round, to call on him next if you can suffer your way through that.

Thanks, Mr. Sunstein. You have been very gracious.

**OPENING STATEMENT OF SENATOR CARPER**

Senator CARPER. Mr. Chairman, my guess is they have been waiting until I arrive. They did not want to miss any of this, any of the fireworks.

Mr. Sunstein, it is very nice to see you. Thanks for coming by. And my colleagues, thank you for allowing me to join in.

My staff, when they were putting together my schedule, they weighted this hearing today as a low priority. I have just come from another hearing on the Environment and Public Works Committee that focuses on transportation, what are we going to do about our transportation infrastructure, which is decaying, and we are not willing to summon the courage to pay for fixing it, and they thought that was high priority. That is, but this is high priority, as well.

I was very pleased in 1993 when President Clinton issued his Executive Order and called for making sure that we are trying to figure out what is the cost-benefit analysis when you promulgate regulations across Federal agencies, and I was especially pleased when our current President updated or supplemented the earlier Executive Order.

Let me just ask you—and for folks, if they have already asked this question, then please bear with me—but just talk to us about the implementation of this Executive Order. How is it being implemented? What effect does it appear to be having? Are there any evident consequences? Are other agencies paying attention to it? Thank you.

Mr. SUNSTEIN. Well, there are two things the Executive Order does that are significant. The first is that it creates a process for retrospective review of regulations——

Senator CARPER. Explain that, if you would, and give me an example, please.

Mr. SUNSTEIN. There are a lot of regulations on the books. The President, both in this Executive Order and in the Chamber of Commerce speech and in the State of the Union Address, emphasized that we are having a government-wide review of the existing regulations, meaning not just control of new regulations, but also assessment of regulations on the book.

Senator CARPER. That is a pretty big job.

Mr. SUNSTEIN. It is a big job.

Senator CARPER. Who is doing that?

Mr. SUNSTEIN. Well, what has happened is the EPA, the Department of Transportation, the Department of Defense, the General Services Administration, the Department of Commerce—am I boring you yet?

Senator CARPER. No, this is good.

Mr. SUNSTEIN. It is a very long list. I have asked the public for comments about what regulations they should change, streamline, eliminate, and modify.

Senator CARPER. And what kind of response are we getting, or are they getting across those agencies?

Mr. SUNSTEIN. We are getting significant responses from the public. I have been cc'd on a bunch of letters saying these are bad. And not only that, we have had the EPA, the Department of Labor, and HHS actually taking concrete steps, well before the May 18, 2011, deadline to get rid of or reconsider rules that are causing problems, like the EPA exempted milk and milk products from its oil spill regulation, something that is going to save a lot of money. EPA also exempted biomass from its greenhouse gas regulations, something that creates a great deal of flexibility. Some regulations from the Department of Labor that had been proposed and caused considerable concern in the business community, including small business in particular, have been withdrawn for reconsideration, and that is just for starters.

Senator CARPER. Well, that is good. Talk about, if you would, unintended consequences of this new Executive Order from the President.

Mr. SUNSTEIN. Well, so far, all——

Senator CARPER. Everything that you have just described would be a consequence, but are there any unintended consequences of which you are mindful?

Mr. SUNSTEIN. Well, my hours have gotten even longer.

Senator CARPER. You were saying earlier, at night, you are up reading these regulations or something on the Internet. I do not know if that is an unintended consequence. For your wife and your family, it is probably not a good one.

Mr. SUNSTEIN. My wife works for the Natinal Security Council (NSC). Her hours are pretty long, also.

Senator CARPER. Fine. But other than that——

Mr. SUNSTEIN. I can tell you that to say "so far, so good" would be to understate.

Senator CARPER. Did you say, "so far, so good" would be understated?

Mr. SUNSTEIN. Yes. So far, extraordinary. With respect to looking back at existing regulations, we have had something the Nation has ever seen before, which is a thorough engagement by a vast array of agencies with the public about what regulations are causing problems and should be eliminated, accompanied by a series of steps actually to withdraw or reconsider regulations that are causing problems.

With respect to the flow of new regulations, all of the consequences are the intended ones, which is we have had considerable discussion of the harmonization of different agencies' actions so as to ensure against inconsistency and overlap, and that is happening. Agencies are working carefully together so that companies and their workers and their consumers are not hit from the left, the right, and the center. Instead, they are working cooperatively to see what makes best sense, and that was an intended consequence.

Senator CARPER. All right. From time to time, we hear from constituents in Delaware, and actually from around the country, sometimes they are families, sometimes they are businesses large or small, and they suggest to us that a rule or regulation that is being considered, or maybe has been promulgated, does not appear to be consistent in spirit with our determination to provide a nurturing environment for job creation and job preservation. When those examples are submitted to us, what is the best way to convey them to somebody who is going to do something about it?

Mr. SUNSTEIN. Great. There are two ways. If there is a letter from you or any Member of the Senate or the House, that really gets our attention. So if you send a letter to me and to the relevant agency, that is, needless to say, very significant input into ultimate decision. And if you look over the last 2 years, there have been a number of options that have been meaningfully informed by concerns about effects on job creation, meaning we do not want those adverse effects.

The other thing which is maybe not as generally known as it ought to be is when a rule is under review at the Office of Information and Regulatory Affairs, our doors are open for discussion. Sometimes, Members' staffs have come over and said, this one is causing a great deal of consternation. Because it will have unintended adverse effects, it is going to hurt some companies and in the relevant area, it is not going to help anybody. This is a great time for that, both because we have the new Executive Order where public participation is actually the name of the second section and because it is an economically challenging time when the President has emphasized we need to square our regulatory requirements with our interest in economic growth.

Senator CARPER. Let me conclude by just saying to my colleagues, I do not know if the first time I heard of this Presidential Executive Order was at the State of the Union address. I think it may have been promulgated before, but I think the President highlighted it in his State of the Union address. We were sitting there that night saying this is terrific. And what you are describing is

even more encouraging in terms of retrospective aspects of the Executive Order.

And for Senator Portman, who literally was in position as the OMB Director, I am interested just in talking with you maybe later on, since I did not hear your comments, but just to hear how you view this. But this is very encouraging.

My staff had said this was a low priority hearing. I just want to say, this is a high priority for our country and for me, as well, so thank you.

Mr. SUNSTEIN. Thank you. Your staff is laughing.

Senator COLLINS [presiding]. Thank you, Senator Carper. Your staffer is saying, "I did not do it. It was not me." [Laughter.]

I was really looking forward to gaveling you down today, but it did not happen, and if I did do it, I would not get Senator Lieberman to give me the gavel again, so Senator Begich?

Senator BEGICH. Thank you very much.

I want to echo what Senator Carper said. I mean, I know you know this. I was not one of those that supported your appointment, but I am actually very impressed with the conversation today and I want to thank you for that.

Let me ask you, if I can, the retrospective review, that will be accumulated on May 18 and then you will review that. Is that what the next step will be, and then you will do what? I heard some that we should just get rid of. Here are some that we need to refine. So we will go through your process after that?

Mr. SUNSTEIN. Here is how it is going to work. In late April, under our guidance document, agencies will submit drafts of their preliminary plans to us, and these will be early versions and there will be what I expect to be a very intensive process——

Senator BEGICH. Give them back, yes——

Mr. SUNSTEIN. That is right. And then May 18, they will be formally submitted to us and our expectation is that they will generally then be made public. Now, we have a bunch of rules—they have not received a lot of attention. It has been quiet except in communities that have been quite excited to see. We have had a bunch of rules that have been streamlined, repealed, or withdrawn.

Senator BEGICH. Those are some examples you gave a little bit ago——

Mr. SUNSTEIN. Yes, and we have every expectation that the preliminary plans will have many more examples of things that are either achieved by them or anticipated to proceed to public review.

Now, if it is a guidance document, then that can be changed relatively quickly.

Senator BEGICH. Right.

Mr. SUNSTEIN. If it is a rule, then there is a process for that and we will be involved in that.

Senator BEGICH. Will you maybe, by that point, be able to, for the public consumption—and I do not know if you have it now on your Web site— make a list of those rules that you have been able to repeal or streamline? Will there be some sort of quick list that people can go to? This is what you have done.

Mr. SUNSTEIN. Thank you. That is a great question and we are thinking about exactly how to do this.

Senator BEGICH. I think we, in Congress, would love to see that. That will help us understand the role, but also give some assurances to folks we get calls from all the time saying, what are they doing actually?

Mr. SUNSTEIN. Right. I did have a blog post on the White House blog that has our preliminary list.

Senator BEGICH. OK.

Mr. SUNSTEIN. So there is publicly now about eight or nine that are collected. But there have been a bunch since, and——

Senator BEGICH. Excellent. So you are thinking of how to weave that into a future Web site, maybe?

Mr. SUNSTEIN. Yes.

Senator BEGICH. Let me ask you, as this process is getting comments from people, as a small business owner, my wife is a small business owner, the odds that we—and I say collectively, small business owners who are busy doing many other things—even know that you are doing what you are doing is probably pretty slim. I know some people will say, well, we contacted trade organizations, but I will tell you, that is limited. As a member of multiple trade organizations over the years, you are busy. If you are a three-person operation in a business, you do not have time to read more paper. You are just trying to keep the customers happy. What is your outreach to ensure the small business—usually, the small business community reacts once the regulation is in place.

Mr. SUNSTEIN. Yes.

Senator BEGICH. Then, it is too late. Then we have this whole process. So what are the steps now, or what do you think that we need to do—and I say, again, collectively, because there may be stuff we need to do—to get the small business community to know exactly what is happening here? Or get input to what they——

Mr. SUNSTEIN. That is great, and we have time to do a lot. The President has an initiative called Start Up America, which is very much focused on small business and start-ups, thinking that we can do so much more, in part through regulatory relief, to help job creation.

I was recently in Boston to talk to entrepreneurs about what their concerns are, what regulations on the books are causing problems, where there is the inconsistency, and Karen Mills, the head of the Small Business Administration (SBA), has been traveling a lot. Regulatory relief and our look-back retrospective review is something she has been highlighting. So we are getting a ton of ideas through that and the reaction there is extremely positive.

Still, your point is absolutely right. My dad was a small business owner in Concord, so I understand that Start Up America. He was not going to know about that and certainly did not have time to go.

Senator BEGICH. Right.

Mr. SUNSTEIN. So we are counting on a couple of things, and if you have other ideas, that would be great. One is Winslow Sargeant, who heads the Office of Advocacy at the SBA, is someone with whom we work really closely, and he was very enthusiastic about the Presidential Memorandum on Small Business, which is a little bit like a younger sibling to the Executive Order, and he is doing what he can to collect information from small businesses

about regulations that are coming that make them nervous and about regulations on the books that make them struggle.

Senator BEGICH. I am assuming you have on your Web site, and we will look at it now, but is there a link—is there a place where if someone has a suggestion, they go to?

Mr. SUNSTEIN. Since the agencies have rulemaking authority, the agencies that have published *Federal Register* notices, and I believe in four cases cabinet-level departments, now have Web sites specifically dedicated to retrospective review of regulations. They all provide it.

Senator BEGICH. But the problem will be that the small business owner, when they see a regulation, they do not have the time to figure out what agency——

Mr. SUNSTEIN. Right.

Senator BEGICH [continuing]. Is in charge of that regulation. They know—so I am wondering, and maybe we can explore this through our office—for example, we have on our Web site a feature that you can go to to give suggestions on the budget, whatever. They just put it on there. Then we accumulate those and utilize them in our budget meetings that we have.

Maybe there is a similar thing that we can do to accumulate it, and maybe instead of figuring out what agency to deliver it to, we just deliver it—I hate to do this—deliver it to you.

Mr. SUNSTEIN. Sure.

Senator BEGICH. But that is the issue that the small business folks need, is kind of a central depository, because otherwise, they will just give up. They will call us once the regulation is in play. I do not want to say they will totally give up. Once it is in play and they do not like it, we will hear about it, and then we will be doing who knows what here and probably causing all kinds of havoc. So maybe we will explore that.

Let me end on one last comment and that is on transportation. The Department of Transportation (DOT) is also doing the same thing. I am a former mayor. We did projects, trying not to get near Federal dollars because it would take too long, cost too much, we could produce a better product, in shorter time, and have actually higher environmental standards. In your office, do you use those? And I will use transportation as an example. When DOT is starting to do their regulatory, those local impacts, I know you mentioned something about local. Is that part of the equation?

Mr. SUNSTEIN. Yes, in two different ways. The President's Executive Order requires consultation with local officials and there are other presidential documents that call for emphasis on federalism and interactions with State and local governments. So we hear a lot from State and local government. This regulation makes sense. This regulation is going to hurt us. And that can have a very significant impact on what ends up in the regulation.

Senator BEGICH. Very good. Thank you very much for your testimony. Thanks for being here. It was very enlightening. Thank you.

Mr. SUNSTEIN. Thank you.

Senator COLLINS. Thank you. Senator Portman.

Senator PORTMAN. Thank you, Senator Collins.

Since you talked about the Small Business Administration, let me just ask you about some small business questions quickly, if I

could. One is what you think about their Office of Advocacy report. The Small Business Office of Advocacy has said that the annual burden of Federal regulations on the American economy is now $1.75 trillion. And in that same study, they talked about small business and they said that among small businesses, there is an annual regulatory cost of over $10,000 per employee. With unemployment close to 9 percent or over 9 percent in Ohio, obviously, we need to get serious. We talked earlier about using this regulatory burden on job creators.

During your tenure as OIRA Administrator, how many times has OIRA rejected or recommended revisions to a proposed rule based specifically on your assessment that there was a negative impact on jobs?

Mr. SUNSTEIN. Well, we have had 100-plus rules withdrawn from OIRA review. That is about 8 percent of the full set of rules that have come to us. And a significant number of those have been withdrawn because of concerns about costs. It is also the case that of the rules that we have approved, a very strong majority, something around 70 to 80 percent, are approved consistent with change, and that means that there has been some rethinking of the approach as a result of OIRA review.

I would want to emphasis that OIRA review means interagency review, so sometimes the idea will come from—the Department of Energy might have something to say about a rule that the Department of Transportation is proposing, or the SBA might have an idea about a rule the Department of Labor is proposing. We do not think, as under the Bush Administration where return letters were extremely rare, we tend not to think about rejecting. We tend to think about what is the best way to get the rule in the best place, and it is very frequently the case that adverse effects on small business are a basis for getting the rule in the best place and that unjustified costs are something that agencies are alert to——

Senator PORTMAN. But specifically on job creation, you do not keep a record of that. You do not have a way to answer that question as to how many were either recommended for revision or rejected based on jobs?

Mr. SUNSTEIN. I would have to take a look to get a number for you. But what is very clear is that under the President's Executive Order, job creation is kind of a front line issue, and you can see from recent developments, including withdrawals of rules, adverse effects on jobs are a primary consideration.

Senator PORTMAN. Under EO 12866, significant regulatory actions are defined as either having an effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, or jobs. How many rules have you treated as significant regulatory actions based on their adverse impact on the jobs part of that, based on EO 12866? Can you tell us?

Mr. SUNSTEIN. Standardly, the $100 million threshold is the basis for deeming a rule economically significant. But note that you are referring to economically significant. The significant rules actually are far more numerous and we care about costs and benefits for those, too, even if they do not cost $100 million. So if there is a rule that costs, say, $50 million, it may not qualify as economically significant under EO 12866, but it might hurt a sector, as EO

12866 recognizes. You could have adverse effects on a small sector—$50 million is a lot of money—even if it does not have economy-wide effects of $100 million. Then it could be deemed economically significant or it could well be deemed significant.

So in terms of pure numbers, we have reviewed approximately 1,400 rules, proposed or final, including guidance documents and regulatory actions, and a large number of them are significant, even though the vast majority, roughly 85 percent, are significant, even though they do not have $100 million or more in annual costs.

Senator PORTMAN. So, again, if you can provide this to the Committee, how many you have treated as significant regulatory actions because of their adverse impact on jobs as opposed to the level of $100 million. It sounds like today, you would not have that answer——

Mr. SUNSTEIN. I would not.

Senator PORTMAN [continuing]. But that is something you might be able to provide the Committee, is that accurate?

Mr. SUNSTEIN. Yes.

Senator PORTMAN. I think that would be very helpful to know.

In your legal scholarship that Senator Collins talked about earlier, you have been an advocate for strengthening cost-benefit scrutiny of proposed rules. I would be interested to know how often the theory meets practice, now that you are in this position. How many times as OIRA Administrator have you recommended against the adoption of a particular proposed or final rule because of its projected costs exceeding its benefits?

Mr. SUNSTEIN. Well, I think the best——

Senator PORTMAN. Have you ever recommended against a rule on that basis?

Mr. SUNSTEIN. Well, the way we do it, as I am sure you remember from your OMB experience, is suppose you have a rule that comes in and either the costs are higher than the benefits, or while the benefits are higher than the costs, it does not maximize net benefits. To recommend against a rule would be a little nuclear and uncollaborative. So the standard approach would be to work with the agency to think, is there a way you can do it so you drive down the costs so the benefits justify the costs, or is the way that you can do it so that the net benefits are higher, even though——

Senator PORTMAN. Collaboration is great, but at some point, there is a friction between you and the agency, I take it. Sometimes you have said the costs do not meet the standard of cost-benefit analysis, and then are there instances in that case where you have said to the agency, I have objections on the rule's costs and benefits and yet the agency has proceeded to issue a final rule? Has that ever happened?

Mr. SUNSTEIN. The only rule we have in the last 2 years where the benefits are unambiguously lower than the costs is a rule involving Positive Train Control, something that Senator Coburn has been particularly interested in, and that was one where we all worked together to try to make the costs as low as possible, but the underlying statute was quite prescriptive. The statute says——

Senator PORTMAN. So that is the only case where the costs have exceeded the benefits?

Mr. SUNSTEIN. It is the only case where the costs unambiguously exceeded the benefits.

Senator PORTMAN. OK.

Mr. SUNSTEIN. There are a few other——

Senator PORTMAN. But are there other instances where you believe the costs exceeded the benefits and yet the agency went to a final rule?

Mr. SUNSTEIN. Well, those were ones where there is a range, and so there is no other clear case aside from that one. There are some that have a range where the high end of the costs or the mid-point of the costs is higher than the mid-point or the high end of the benefits——

Senator PORTMAN. It sounds like the costs exceeded the benefits.

Mr. SUNSTEIN. Well, not necessarily, because it may be the best projection of the benefits is in the high end of the range and the best projection of the cost is—so the Positive Train Control one is the—I can get you the list. It is a very short list. And in everything that we have—the Administration has done, either the benefits exceed the costs, and that is the overwhelming majority, or there is some legal constraint on ensuring that the monetized benefits——

Senator PORTMAN. Would it be beneficial for Congress to strengthen the requirement of this cost justification debate you obviously have with the agencies, and that is part of your job, by permitting judicial review of an agency's compliance with UMRA? Would that help?

Mr. SUNSTEIN. As you are aware from your former colleagues and subordinates, Susan Dudley and John Graham, and the Administrator of OIRA is in the implementation business and not really in a position to recommend legislation.

Senator PORTMAN. Thanks for being here today.

Mr. SUNSTEIN. Thank you.

Senator PORTMAN. And thank you, Madam Chairman.

Senator COLLINS. Thank you. I want to thank our witness for appearing today. I think this was an excellent exchange that sets the groundwork for the Committee's future work on regulatory reform proposals, including one that I have introduced, and there are bills that have been referred to our Committee that have been introduced by other Members.

We recognize that OIRA is not in the business of determining the Administration's positions on regulatory reform bills or any other piece of legislation, but we also know that you have insights and data, and I hope that you will be willing to work with the Committee to give us your best technical advice on what the ramifications of the bills would be. We need that guidance to make sure that we are avoiding unintended consequences through a lack of understanding of exactly what the implications would be. So I would urge you to work with the Committee at least as a technical adviser as we begin to review all of these regulatory reform proposals.

Mr. SUNSTEIN. We would be delighted.

Senator COLLINS. Thank you. I anticipate that the hearing will occur in June, as the Chairman has announced, so we will be in touch with you very shortly to ask your analysis and technical advice as these various bills are considered by the Committee.

But again, I thank you very much for your very helpful and straightforward testimony, and for the very important work that you are doing. As I said in my opening statement, if you did a poll of the American people, I doubt that you would find very many who have ever heard of OIRA, and yet the office that you head is extraordinarily important in reviewing all regulations that go through the Federal process, and I, for one, think that you have approached that job very seriously and as we have intended.

The record for this hearing will remain open for 15 days for the submission of any additional questions, statements, or materials.

And with that, this hearing is adjourned. Thank you.

[Whereupon, at 12:04 p.m., the Committee was adjourned.]

# FEDERAL REGULATION: A REVIEW OF LEGISLATIVE PROPOSALS—PART I

**THURSDAY, JUNE 23, 2011**

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:02 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Levin, Pryor, Landrieu, Collins, Coburn, Brown, Johnson, Portman, and Paul.

## OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. The hearing will come to order. Good morning. Today we are going to continue our Committee's consideration of regulatory reform. Last month, we explored the structure of the Federal regulatory process and the Administration's recent efforts to ensure that rules and rulemaking are as effective and efficient as they can be.

Today we are going to focus on some of the legislative proposals to revise the existing system, which is a topic that has attracted particular attention in this Congress. At this moment, six Senators have legislation now pending before this Committee on regulatory reform. At this moment in my prepared remarks I was going to welcome and thank our colleagues who are testifying today, but I will do that when they appear.

I was also going to promise to make my opening comments brief in deference, but now I will just keep on talking. [Laughter.]

But I want to thank Cass Sunstein, the Administration's point man, as it were, on matters of regulation, who will be testifying on the second panel.

The question before us, as I see it, is not whether to regulate but how to regulate because a Nation without regulation would be a Nation at risk. For example, last week I read a news story about the devastating effects of lead poisoning in parts of China. Workers have apparently been absorbing dangerous amounts of lead in factories, and many children, who are particularly vulnerable to the neurological damage lead can cause, have been sickened in homes and schools that are located near those factories. Here in the United States, we have known for quite a long time that air pollution and workplace safety regulations were necessary, and they have protected workers and families living near similar industrial plants from being ill, and those were regulations that Congress di-



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rected agencies to put in place. And I think this example, and others that we could cite, such as the failure of regulation in a different sense to prevent some of the bad behavior in the financial sector of the American economy that contributed greatly to the Great Recession that we are still fighting our way out of—these kinds of regulations or the concept of regulation is not only correct but something that the public wants us to do. So the question in my mind is not whether to regulate but how.

Smart regulations, of course, can also help industry by, for instance, providing a predictable field on which they can operate. For instance, after recent national outbreaks of salmonella and other foodborne illnesses, the food industry, as I viewed it, seemed to welcome the recent food safety law as a way to fortify consumer confidence and restore damaged sales.

Of course, many regulations do impose costs on businesses, and not all of them are justified. So it is important to oversee the regulatory process continually to ensure that it is achieving the greatest public benefit at the smallest cost. That is particularly important now, of course, when our economy is struggling and businesses will be threatened in an especially consequential way by unjustified regulatory burdens.

In that spirit, President Obama moved recently to strengthen the process through an Executive Order (EO) that clarified and toughened guidelines for evaluating the costs and benefits of proposed regulations in order to select the least burdensome ones. The President has called on agencies to review existing regulations to ensure that they are still necessary. These so-called look-back reports are being assembled and, I gather, have identified ways to save a lot of money in reduced compliance costs as well as millions of hours of reduced paperwork for businesses and individuals. So I look forward to hearing about that effort from Cass Sunstein, who is overseeing the process as the head of the Office of Information and Regulatory Affairs (OIRA).

Once again, I thank our colleagues for the work that they have done—Senator Snowe is here now; we will call on her first—in this important area of governance. We are really fortunate to have several Members of our own Committee, as well as Senators not on the Committee, who have worked in this subject area and will testify before us today.

Senator Collins.

## OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman. At the outset of this hearing, I want to thank you for agreeing to hold this hearing today to allow our colleagues to describe their legislative proposals for regulatory reform. I am particularly pleased that my senior colleague from Maine, Senator Snowe, is here to present her bill. As the Ranking Member of the Small Business Committee, she brings a great deal of expertise to this issue, and so I welcome her.

I would also note, Mr. Chairman, that she is the only Member who is on time for our hearing and, thus, I believe that her bill deserves extra consideration. [Laughter.]

Chairman LIEBERMAN. I agree. Thank you.

Senator COLLINS. Our April hearing laid the groundwork for a thoughtful examination of how the regulatory burdens on our economy—especially on job creation and productivity—might be lightened or simplified, without diminishing important safety and health protections.

I am optimistic that we can build a bipartisan consensus to achieve this goal. President Obama has acknowledged that Federal regulations have "sometimes gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."

Most recently, when the President's Chief of Staff met with a group of manufacturers who complained to him about excessive and burdensome regulation, the President's Chief of Staff was quoted as saying that sometimes you just cannot defend the indefensible.

Notwithstanding these comments and the President's intentions, the growth of the Federal regulatory state, as measured in terms of employment by regulatory agencies, continues unabated. As this chart on display illustrates, since March 2010, job growth in the Federal regulatory agencies has far outstripped job growth in the rest of the Federal Government. Much more significantly, it has far outpaced job growth in the private sector.

Now, in some cases this is a reaction to new regulations that we have mandated in the financial area, for example, but in other cases there is no doubt that we have more Federal regulators churning out regulation that has had the effect of impeding private sector job growth.

All too often it seems that Federal agencies do not really take into account the impact on small businesses and job growth before imposing new rules and regulations.

I have introduced my own bill to address this problem. It is called the CURB Act, which stands for Clearing Unnecessary Regulatory Burdens.

First, the CURB Act requires Federal agencies to analyze thoroughly the costs and benefits of regulations, including indirect costs, such as the impact on job creation, the cost of energy, and consumer prices. Currently, most Federal agencies are not required by law to analyze these indirect costs and benefits.

The idea of using cost/benefit analysis is not new, of course. In 1981, President Ronald Reagan issued an Executive Order prohibiting agencies from issuing regulations unless the potential benefits outweighed the potential costs. President Clinton revised that Executive Order in 1993, obligating agencies to provide OIRA, the office that Cass Sunstein heads within the Office of Management and Budget (OMB), with an assessment of the costs and benefits of regulations. The focus of the Clinton Executive Order was on regulations that are "significant"—meaning those which can reasonably be expected to have an impact of $100 million or more on the economy. My bill would essentially codify that requirement.

Second, the CURB Act compels Federal agencies to comply with public notice and comment requirements and prohibits them from circumventing these requirements by issuing unofficial rules as "guidance documents." This has been a real problem. It is one that our colleague now-Senator Rob Portman tried to address when he was head of OMB in 2007. He tried to close the loophole by impos-

ing good guidance practices on Federal agencies. But the fact is that does not in many cases have the force of law, and I think we need to codify that.

Third, the CURB Act helps out the "little guy" trying to navigate our incredibly complex and burdensome regulatory environment. When a small company, a small business, inadvertently runs afoul of a Federal regulation and there is no harm done, I do not understand why we slap that business with a financial penalty. After all, that first-time violation that caused no harm, that may well be a paperwork violations, could impose a financial burden that could sink the business and all the jobs that it supports. It does not make sense to me to penalize a small business the first time it accidently fails to comply with paperwork requirements so long as no harm comes from that failure.

Each of the provisions in the CURB Act has been endorsed by the National Federation of Independent Business and the Small Business and Entrepreneurship Council.

So I would urge the Members of this Committee and my colleagues to take a close look at the CURB Act, to endorse it, I hope, and I also look forward to learning about the regulatory reforms proposed by my colleagues in the hope that we can produce a regulatory reform bill this session.

Thank you, Mr. Chairman. Again, thank you for holding this important hearing.

Chairman LIEBERMAN. Thank you, Senator Collins.

The original plan had been to go to the Senators not on the Committee who are visiting, but Senator Portman has a conflict at this hour, and with the leave of the others—because he has introduced a bill also, as has Senator Paul. I wonder if you would allow him to go forward. Senator Portman.

**OPENING STATEMENT OF SENATOR PORTMAN**

Senator PORTMAN. Well, thank you, Mr. Chairman. Thank you very much for holding the hearing, and I thank you and Senator Collins for your interest in the issue, and specifically, Senator Collins, your great work on this issue. The CURB Act is, as you said, an important codification of some existing practices, and it goes beyond that in some really important ways. So I am a supporter and I encourage her to continue to push this through this Committee.

There has been discussion already this morning about the importance of regulations and their impact on the economy, and I think it goes without saying that we are all looking for ways to stimulate growth right now, and certainly taking away this regulatory burden is an appropriate focus.

Let me give you a number: $1.75 trillion annually is the economic toll of Federal regulations. When you think about that, that is more than the Internal Revenue Service (IRS) collects in income taxes. So it is clearly an area for us to focus on.

A great Senator Lieberman quote this morning, "not whether to regulate but how to regulate," I would agree with that. But we certainly need to be smarter and better at it.

And I hear this all the time, as do my colleagues, I am sure, who are here today, from businesses saying—regardless, really, of what business they are in—that there is a Federal regulatory issue that

they are dealing with and making it more difficult to move forward and hire.

President Obama's Executive Order was spoken about earlier, EO 13563. I think the words in that Executive Order are very encouraging, actually, and I am hopeful that some of that lookback will be successful. But I have to tell you, I continue to be very concerned about the actual direction they are moving in, and I think this is, again, at this time in our Nation, with our economic problems, something that we appropriately should focus on.

I see more costs, more agency action. I think one of the best ways to get our hands around it to look at these regulations that have the most impact, and those are called "major" regulations or "economically significant" rules. That means they have an annual impact on the economy of $100 million or more. Of the 4,000 rules that Federal agencies issue every year—that is a rough estimate—only about 50 to 70 are in this category. But they are the ones that have the biggest impact, and I think that is one way for us to logically approach this.

The chart that I have distributed puts this in an interesting context.[1] It is about the regulatory trend. It shows that these economically significant rules that are in development across all Federal agencies are increasing dramatically. This is the 2010 OMB Fall Regulatory Plan, 224 of these major or economically significant regulations in the pipeline. That is a 60-percent increase since 2005. So this notion that somehow we are successfully dealing with these major impacts on our economy I think is not accurate based on the facts.

This might not be the perfect measure of regulatory burden, but I think it is an important one, and it is one we ought to be looking at because the trajectory we are on is not good for business.

I believe the best approach to bringing some balance is twofold.

First, I think we need to reform the way agencies develop these new rules—especially on these economically significant rules, as I say—by making the process more cost-conscious, more transparent—I think what Senator Collins talked about helps in that area—and more accounts. That is the goal of the Unfunded Mandates Accountability Act that I am going to talk about briefly here that I introduced this month, and we now have 20 co-sponsors.

Second, I think we should move toward a regulatory budgeting process—a more systematic framework for tracking and controlling these large, what really are unbudgeted costs that, again, Washington is imposing every year on the private sector. It is a subject I have been working on recently and discussing with Senator Mark Warner, who is here with us today. He has done great work in this area, and I know that he is going to talk about it today. He is very well versed on it, and I look forward to what he has to say.

On this first point—process reform—this legislation that I introduced this morning is focused on the Unfunded Mandates Reform Act of 1995 (UMRA), which is existing law. I was involved in that as the House co-sponsor back in 1995, and it was a bipartisan way to prevent the regulators and Congress, frankly, from imposing

[1] The chart submitted by Senator Portman appears in the Appendix on page 126.

burdens on State and local government, but also on the private sector.

My legislation improves UMRA in five ways. A thumbnail sketch:

Broader scope. It says that instead of having a direct expenditure, it has to be an effect on the economy. This is consistent, actually, with the way OMB currently looks at it through the OIRA regulatory review process, so I think that makes sense given, again, our economic situation.

Second, a stronger economic impact analysis. It would require an impact on jobs, which, again, is consistent with the President's speech when he talked about the importance of identifying and assessing available alternatives to encourage job creation.

Third, least onerous alternative. Right now the legislation does require the agencies to look at the least costly, least burdensome. This bill would change that to make it a requirement. It is discretionary now. This would say at least on these most costly rules, again, 50 to 70 a year, it ought to be required.

Fourth, it applies to independent agencies. This only makes sense. Independent agencies are regulating more, and, frankly, in 1995 we should have extended it. Think about the Securities and Exchange Commission (SEC) or even the newly created Consumer Financial Protection Bureau. There is no reason it should not apply to independent agencies.

Cass Sunstein, who is here today, and I have talked about this in testimony before, but he wrote a brilliant law review article back in 2002 where he advocated just that.

Finally, judicial review. Improving the enforcement of UMRA by permitting judicial review of agency actions, to me this is critical in terms of actual enforcement.

So, Mr. Chairman, thank you again for holding this hearing. No major regulation, whatever its source, should be imposed without a careful consideration of the cost, the benefits, and the availability of less onerous alternatives, and that is what this legislation is meant to achieve.

Chairman LIEBERMAN. Thanks, Senator Portman.

It would be my intention now to go to the panel, Senator Paul, and then go to you after. I am hoping that you will be staying.

Senator Snowe, Senator Roberts, Senator Vitter, and Senator Warner, thanks for being here. When I see Senator Roberts, I always have to feel that I should reassure him that all proceedings before this Committee are conducted in compliance with the Geneva Convention. [Laughter.]

Thank you. It is an ongoing routine that we do. It goes back to Jack Benny—most of you do not even know who Jack Benny was.

Senator Snowe, you have been a real leader in this area of regulatory reform, sometimes in a way that is frustrating to you, I know, but you are indefatigable, and we welcome you here and would welcome your testimony at this time.

## TESTIMONY OF HON. OLYMPIA J. SNOWE,[1] A U.S. SENATOR FROM THE STATE OF MAINE

Senator SNOWE. Thank you, Chairman Lieberman, and Ranking Member Collins for convening this crucial hearing on regulatory reform, and I applaud your efforts.

Mr. Chairman, I know you have been a steadfast advocate for small businesses as a longstanding member of the Small Business Committee and as my fellow co-chair on the Senate Task Force on Manufacturing. And, of course, Ranking Member Collins has been a true champion of small businesses. She hails from a family of entrepreneurs and small business owners and previously served as the New England Regional Administrator of the Small Business Administration. I want to commend you, Senator Collins, for your initiative on small businesses and on regulatory reform. I appreciate many of the issues that you have raised here this morning, as well as Senator Portman. We could certainly find common ground on a number of these issues, so I appreciate what you have offered here today.

I am very pleased to be able to testify on the Freedom from Restictive Excessive Executive Demands and Onerous Mandates (FREEDOM) Act, which garnered support of 53 Senators, including 10 Members of this Committee, when I offered it in the form of an amendment back on June 9 on the Senate Floor. I am especially thankful to my co-author, Senator Coburn, who was instrumental in the process of drafting and re-drafting this legislation in response to many of the issues that have been raised by our colleagues.

Mr. Chairman, we have experienced the highest percentage increase in long-term unemployment, of any recession since World War II. It is going to require us to create 285,000 jobs every month for 5 consecutive years to return to the pre-recession unemployment levels of 2007.

Since the recession began, small businesses have already lost $2 trillion in asset valuation and profits. So when we ask the question of why regulatory reform, why now, I think we know the answer to it. And even Chairman Bernanke yesterday indicated that economic growth is going to be lower than originally anticipated.

We need an economic game changer so that we can have entrepreneurs and small businesses—and all businesses, for that matter—to be able to take the risk to create jobs through investments. And that is why regulatory reform becomes so essential.

As a letter endorsing our bill from 32 major small business organizations stated, Federal regulations "add up and increase the cost of labor. If the cost of labor continues to increase, then job creation will be stifled because small businesses will not be able to afford to hire new employees." Moreover, we learned in a Small Business Committee hearing in November that a 30-percent reduction in regulations would result in a $32,000 saving for small business, which would be the equivalent of an additional new hire. So think about it. If we have 27 to 30 million small businesses in this country, if every business was able to add one additional employee, think about where we would be today.

[1] The prepared statement of Senator Snowe appears in the Appendix on page 161.

It is not hard to understand why regulations are stifling small business. Since the enactment of the Small Business Regulatory Enforcement Fairness Act back in 1996, more than 50,000 new rules have gone into effect, including 1,000 "major" rules, which Senator Portman referred to, each with an estimated impact of more than $100 million annually on the economy. More than 3,000 new rules are established each year.

In fact, just recently, in 2009 and 2010, there was an 11.5-percent increase in those rules that specifically affected small businesses. The Administration's own cost estimates for the 407 proposed or enacted regulations this year is over $68 billion with likely broader economic costs on our economy. So it is no coincidence, if you compare us to China, India, and other major competitors, that it costs American firms 18 percent more to manufacture goods.

The FREEDOM Act is based on existing laws and those processes that actually work. We include small business review panels, such as those that have already been in place for 15 years at the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), and now at the Consumer Financial Protection Bureau. The 32 organizations supporting our legislation stated "these panels have proven to be an extremely effective mechanism." The panels have evaluated 41 rules at EPA and 10 at OSHA, including the arsenic in drinking water rule, the ground water rule, and the ergonomics standard rule. And while we originally sought panels at every agency, in response to those who had concerns about having a smaller, phased-in approach, we decided to add nine agencies over 3 years, and that was one of five revisions that we made to our legislation to forge a consensus.

The Regulatory Flexibility Act (RFA) was passed in 1980, and that was at a similarly difficult economic time in our country. The RFA requires agencies to conduct small business analysis for any regulation that would impose a significant harm on a substantial number of small businesses. Yet agencies have circumvented this obligation by issuing "guidance documents," as Senator Collins has referred to, instead of formal rules, as occurred with OSHA's recent "proposed reinterpretation" of the noise standard. When Chairman Lieberman and I weighed in on behalf of small businesses, OSHA withdrew that proposal. Now, to prevent similar future occurrences, our bill extends the RFA to guidance documents as well.

Another disregard for the Regulatory Flexibility Act is when agencies fail to conduct a meaningful small business impact analysis at the proposed rule stage. Regrettably, the law does not allow small businesses to challenge these rules at that point in court, instead they must wait until a burdensome rule is finalized, when it is already too late with costly ramifications for small businesses. Therefore, using the nearly identical language from legislation that was previously filed by the chairman of the Small Business Committee, Senator Landrieu, and by Senator Benjamin Cardin, our bill extends judicial review to the proposed rule stage.

Agencies also ignore the Regulatory Flexibility Act, without consequence, when they do not review their rules each decade for possible elimination or to be made less onerous and punitive. That is why the FREEDOM Act also includes a "stick" for enforcement. If

agencies fail to do what they are required to do by law, to review these regulations every 10 years, then they would lose 1 percent of their budgets for salaries unless Congress intervenes. After all, why should citizens seeking to create jobs and prosperity bear the brunt of noncompliance by Federal agencies?

Now, as has been discussed here this morning, the President is conducting a review of regulations across 30 agencies. I know you will hear from Cass Sunstein from OMB. It is critial to note that the rules the Administration is examining diverse and areas consequential as Endangered Species Act procedures and EPA regulations on air pollution. And he expects that this examination will yield billions in savings. In fact, I brought here a sampling of the rules that are being reviewed by the Administration currently, and that is just a sampling of what is going to be reviewed by the Administration, which is a fragment of the Federal regulations.

That is the point. Why isn't this review the norm not the exception? That is how Congress can play its part in meaningful regulatory reform by adding consistency to the process, adding accountability through enforcement, and you only can achieve that with assurances through the weight of law. We have to have a consistent practice of regulatory reviews so that businesses can rely on it with certainty and predictability.

Finally, the FREEDOM Act requires agencies to consider foreseeable indirect costs of rules, as Ranking Member Collins has also proposed, which is a top legislative priority of the President's Small Business Administration (SBA) Office of Advocacy. Currently, the Regulatory Flexibility Act only mandates regulators to take into account the direct effects by a proposed rule—completely ignoring the secondary effects. If you have a factory that closes in a community, it can also affect the suppliers and the contractors. And we have addressed the concerns with our original language that might require agencies to consider too many types of indirect effects, by taking the precise language that was proposed by Dr. Winslow Sargeant, who is the SBA Office of Advocacy Chief Counsel.

To conclude, Mr. Chairman, the time to act to remove these barriers and impediments to job creation is now. Small businesses need the relief. Our economy needs help. The American people desperately need jobs in this country and we have failed them in providing the right kind of economic conditions. Regulatory reform will be paramount in being able to revive the economy and make a major step in the right direction.

Chairman LIEBERMAN. Thanks very much for your testimony, Senator Snowe, and we obviously look forward to working with you on this matter as we go forward.

Senator SNOWE. Thank you.

Chairman LIEBERMAN. I would say to my colleagues that our inclination is not to ask questions of the Senators at this point, so if your schedule requires you to leave, please feel free.

Senator Roberts, thanks for being here, and I am going to control myself and try not to be funny anymore. You somehow motivate me in that direction. I will just call on you because this is a serious subject.

## TESTIMONY OF HON. PAT ROBERTS,[1] A U.S. SENATOR FROM THE STATE OF KANSAS

Senator ROBERTS. Well, good morning, Chairman Lieberman, Ranking Member Collins. Chairman Lieberman, I was going to do our Jack Benny routine.

Chairman LIEBERMAN. It is a great one.

Senator ROBERTS. Thinking that perhaps it would add a little levity to this subject, but there are four regulations that prohibit that in this hearing room. [Laughter.]

I was not aware of that until this morning, and I had the full stack of regulations here, but it kept leaning over like the Leaning Tower of Pisa, and I did not want to have a problem.

I could say, "Now, Joe, cut that out." But I will not do that.

Chairman LIEBERMAN. Thank you.

Senator ROBERTS. All right. And distinguished Members of the Committee, I am pleased to be here today to testify on regulatory reform issues, obviously the topic of the day. Senator Warner's bill, Senator Vitter's bill, I am a co-sponsor of Senator Collins' bill and Senator Snowe's bill. I have 47 co-sponsors on my bill. Senator Warner, we need your help. I will visit with you.

My bill, the Regulatory Responsibility for Our Economy Act of 2011, would strengthen and codify President Obama's Executive Order from January 18. The President made a commitment to review, modify, streamline, expand, or repeal those significant regulatory actions that are duplicative, unnecessary, overly burdensome, or would have significant economic impacts.

My bill would ensure just that and would require that all regulations put forth by the current and future Administrations consider the economic burden on American businesses, ensure stakeholder input during the regulatory process, and promote innovation.

My legislation would ensure that this happens by laying out specific conditions that the Federal regulatory system must meet. It also puts forth new and codifies existing agency requirements for promulgating the regulations.

In a *Wall Street Journal* op-ed, the President stated, "We have preserved freedom of commerce while applying those rules and regulations necessary to protect the public against threats to our health and safety and to safeguard people and businesses from abuse." But he also noted, "sometimes those rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."

I absolutely agree with that statement. I hear Kansan after Kansan who find themselves weighed down by the deluge of regulations that threaten the future of their businesses.

During fiscal year 2010, 43 new major regulations were adopted, with estimated net new burdens on Americans exceeding $26.5 billion each year. Now, that is a record increase. Fifteen of the 43 new major rules involve financial regulation. Another five stem from health care reform. Ten rules adopted by the EPA were responsible for the lion's share of new regulatory costs—some $23.2 billion.

[1] The prepared statement of Senator Roberts appears in the Appendix on page 164.

Regulatory burdens—and the taxpayer burden—are expected to increase again this year as agencies continue to promulgate literally thousands of new rules.

A September 2010 report prepared for the Small Business Administration stated that the annual cost of Federal regulations—the annual cost today—was an outstanding $1.75 trillion in 2008. Now, imagine the cost since then. My legislation would simply codify the President's Executive Order and assure a review of these regulations.

The President's Executive Order "requires that Federal agencies ensure that regulations protect our safety, health, and environment while promoting economic growth." So does my legislation. However, it strengthens the President's commitment by promoting economic growth, innovation, competitiveness, and job creation.

The President's Executive Order commissions "a government-wide review . . . to remove outdated regulations that stifle job creation and make our economy less competitive." So does my legislation.

My legislation requires each agency to submit a plan to review existing significant regulatory actions, and then they must continue to do so once every 5 years and must report to the Congress.

We need to add some teeth to the President's commitment by closing existing loopholes. My legislation also requires the independent agencies to complete a review of their regulatory actions and imposes the same requirements on them. I am sure every office in the Congress, everybody here, hears about the egregious over-regulation by independent agencies such as the Commodity Futures Trading Commission (CFTC) and the EPA.

My bill also ensures valuable stakeholder input on regulatory actions, including standardizing the length of the comment period and when it should start. Today's comment periods can range from 2 weeks to 90 days, causing inconsistency, and stakeholders should have the time and a say in protecting their future.

In 2010, Federal agencies issued 3,573 final rules. The Administration's own cost estimates for the 280 proposed or enacted regulations this year is over $29.4 billion—almost $30 billion—with potentially even broader economic costs on our economy. And this is just a snapshot in time, with the hundreds of pages, more and more, that are coming out every day.

President Obama has made it his "mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb." I agree. We need to eliminate more of the "just plain dumb" in government, and I would encourage the Administration and my colleagues to support my legislation.

I thank the Chairman and the Ranking Member.

Chairman LIEBERMAN. Thanks, Senator Roberts. It is very heartening to hear the ways in which you and President Obama are of like mind.

Senator ROBERTS. He has a blueprint, sir, and I simply codify his rules and take out the exemptions. If you would like, I could read one particular exemption, or loophole, that I think is very egregious.

Chairman LIEBERMAN. I knew I should not have commented. [Laughter.]

Go right ahead.

Senator ROBERTS. Let me just say that in applying these principles—this is for each agency head and for Mr. Sunstein over here to take a look at it. "Each agency is directed to use the best available techniques to quantify anticipated and present and future benefits and costs as accurately as possible. Well, that is pretty good. But, where appropriate and permitted by law, each agency may consider and discuss qualitatively"—qualitatively now, Mr. Chairman—"values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."

Now, I defy anybody here to really define what that means, and, Mr. Sunstein, if you can define it, bless your heart. And many agency heads simply got their people together and said at the initial speech by the President back on January 18, when he issued the Executive Order, and said, "Well, are we doing equity? Are we doing human dignity? Are we doing fairness? Are we doing distributive impacts?" And everybody said, "Well, sure." And so the EPA came out and said, "Well, none of this applies to us." Now, they have changed their mind a little bit after they testified before Congress and after the President's Executive Order has been fully discussed.

I give the President great credit. Our bill simply uses his order as a blueprint to, I think, improve it some and put teeth in it, and I appreciate your indulgence.

Chairman LIEBERMAN. Thanks, Senator Roberts. When Mr. Sunstein is before us, I will ask him to respond on that particular paragraph that you read. I appreciate your taking the time to come and be with us and also for the work that you did on your proposal.

Next, our friend and colleague from Louisiana, Senator David Vitter.

## TESTIMONY OF HON. DAVID VITTER,[1] A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator VITTER. Thank you, Mr. Chairman, Ranking Member Collins and Members, for the opportunity to visit with you today and for this very important hearing. And I certainly agree with all of the previous comments. It is sometimes amazing that small business owners really have any significant time to actually run their business, grow their business, do anything else after all of this paperwork is done. Businesses have to deal with a myriad universe of Federal agencies—EPA, Corps of Engineers, Coast Guard, SBA, Labor, Commerce, IRS, and Customs, just to name a few.

I talk to and try to help Louisiana businesses every week who are trying to get through this maze, and it is very difficult. And that does not even mention the State and local regulatory agencies that they deal with on top of that.

There have been many great explanations and metrics about that burden. I will not belabor the point, but let me just add one.

In September of last year, the SBA Office of Advocacy released a study that gave us a little glimpse of the burden. The reports shows that small businesses with 20 or fewer employees face an

[1] The prepared statement of Senator Vitter appears in the Appendix on page 166.

annual cost from Federal regulations alone of $10,585 per employee.

When you are talking about that sort of family business, that sort of small business, that is an enormous burden. If we could cut that in half—and that burden would still be too high, in my opinion—that would mean for a business of 20 people, over $100,000 a year. That is a lot of money for a very small business. That is a lot of opportunity to hire, to grow, to innovate, and to compete more effectively. That is a big deal. So this is important work and an important topic.

Most of my other colleagues are talking about major regulatory reform, and I support those efforts. What I am going to talk about in terms of legislation, the Small Business Paperwork Relief Act, is fundamentally different and I think is an important complement to that and is a much more immediate relief valve. So I encourage you to look at this as a supplement to broader regulatory reform efforts.

Again, it is called the Small Business Paperwork Relief Act. I have been working on it since I was in the House, brought it to the Senate. It still is a leading proposition in the House, and it would direct Federal agencies not to impose civil fines for a first-time violation of their agency's paperwork requirements by a small business unless the head of the agency determines that, first, the violation has the potential to cause serious harm to the public interest; second, forgoing a fine would impair criminal investigations; third, the violation involves internal revenue law; fourth, the paperwork violation is not corrected within 6 months; or, fifth, the violation presents a clear danger to public health or safety.

Also, the bill says that fines can be waived in the case of a violation that could present a danger to public health or safety if the issue is corrected within 24 hours of the small business receiving notification.

So, again, this is an immediate relief valve. It does not take the place of much broader reform efforts, which I support, but it is a quick, immediate relief valve which we could pass and which would give immediate relief to small business.

Now, there are some who may argue against the proposal that it would encourage small business owners to break the law. I really do not think it would do that in any way.

Others could argue that devious business owners could wait for their free shot before filling out required documents. I do not think that would be the case. The bill does not remove any obligations. The bill is about pure paperwork violations. The bill lays out all of the requirements I just mentioned. And the bill would only temporarily provide relief from fines regarding first-time violations—not a series of violations, not a bunch of violations put together, but one first-time violation.

So I do think it is sensible, common sense, and would give some immediate relief as we work on broader reform efforts. I encourage the Committee to look hard at it along with these broader reform efforts.

Thank you very much for the opportunity to present the idea, and I look forward to following up with each of you.

Chairman LIEBERMAN. Thanks, Senator Vitter. We definitely will look at that proposal. I appreciate your describing it to us. Thanks for taking the time to be here.

Senator Mark Warner of Virginia.

**TESTIMONY OF HON. MARK R. WARNER,[1] A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WARNER. Thank you, Mr. Chairman, Ranking Member Collins, and Members of the Committee.

Obviously, this is a topic whose time has come, the question and challenge of how we try to get our regulatory burden in the right shape.

If you will let me be slightly controversial, I actually think rules and regulations are important, and I am not here to question the whole need for regulations. But I do think it is time to question how we can go about this process in a much smarter way and a more cost accountable way.

I actually have run small businesses. I have been involved in business for 20 years. I have been in business longer than I have been in politics. And it is kind of stunning to me at times—that any business that does not regularly review its processes, review its rules, review how it operates would soon be out of business.

Unfortunately, we cannot necessarily say that about government. Much of what we are talking about today is not the result of any single action. It is simply the accumulation over decades of rules and regulations without ever having a process to go back and fully prune out what has kind of outlived its purpose or moved beyond where technology is today.

I do want to commend the President as well, like Senator Roberts, in terms of his efforts, and I think Mr. Sunstein has moved forward on this. If I was doing this smartly, I would take Senator Snowe's prop and bring it down right here and point out the fact that OIRA has moved forward with the President's direction. Just in the last month after reviewing 30 agencies, it identified over 500 regulations. Some of those are pointed out over there. Most of those have not had cost analysis, but 5 percent of the recommendations did include potential savings. And even if 5 percent of those potential savings were realized, that is more than $7 billion and 60 million hours in possible compliance savings. So this is an area where we can, I think, make progress.

I have been working on a proposal for almost a year, working with Senator Portman, and would look forward to working with other Members, on seeing if this might be a slightly different approach. And it would do two things.

First, it would require all government agencies, both independent and executive agencies, to conduct the kind of impact analysis of economically significant rules that OMB already requires for executive agencies. I think it is time that we broaden that reach to independent agencies as well.

Next, my proposal would include a regulatory pay-as-you-go (PAYGO) approach that I think would start to put the appropriate balance in place. This PAYGO process would ensure that agencies

[1] The prepared statement of Senator Warner appears in the Appendix on page 171.

act on and expand their retrospective review plans to eliminate outdated rules and modernize others over the next few years.

Now, what does regulatory PAYGO mean? It actually says that as an agency puts forward a new regulation—and there is a need clearly at times to put forward new regulations as science and circumstance change—they would conduct an economic analysis of that regulation, and if they feel it is so critical to put forward, they would have to go back and, in effect, find one of equal size and shape and burden and take it off the books.

What this would do is to align the incentives inside the agencies the right way. Agencies do very important work, but right now, agencies often are rewarded with additional staff and personnel the more regulations they add. This would try to on an internal basis kind of get that process right.

I believe this PAYGO process would actually force more conversations about alternatives to necessary regulations and get that rebalancing done before the whole regulatory process goes forward. And it would actually force that weighing of costs/benefits beyond some of the proposals which my colleagues have put forward. This PAYGO process would be overseen by OIRA, and I think it would be appropriate.

Now, I have had a number of folks say it is a great concept, but how would you actually do it? Could you actually put this kind of process forward where you could have regulatory PAYGO?

I would simply add that, as much as I would love to claim this was an idea that I came up with, it is not. This is something the U.K. Government has actually done. It is called "one-in, one-out." It has been embraced by both the Labour Government and the new Coalition Government. And one of the things that constantly kind of haunts me is the United Kingdom, which for I think for most of our lives was always viewed as this kind of overly burdensome with regulations—we did not want to become like the United Kingdom. The United Kingdom has actually passed the United States in terms of ranking of international competitiveness because the United Kingdom has taken on this issue of regulatory reform and has taken bold steps like one-in, one-out. I think regulatory PAYGO would be a similar type approach, and, again, I commend the Committee and all the Members for taking on this issue. I hope my idea that could be put into the mix will get appropriate review as well.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Warner. That is a very interesting idea, and I promise you we will give it full consideration, and I hope we can engage with you in more detail about how to implement it. Thank you.

Two other Members of the Committee have introduced regulatory legislation, Senator Paul and Senator Pryor, so I would call on Senator Paul at this time.

## OPENING STATEMENT OF SENATOR PAUL

Senator PAUL. Thank you, Mr. Chairman, and thank you, Senator Collins, for having these hearings. I think they have been very informative.

I think if we truly care about our country, if we care about joblessness, if we care about unemployment, if we wanted to stimulate the economy, we should incorporate the ideas we have heard today, a lot of good ideas from a lot of different Senators, Republicans and Democrats. I would encourage the Chairman, who is famous for being independent and respected for working with both sides of the aisle, to let us do something. I mean, why not take these ideas—if we cannot put them into one bill, let us stack them, have five or six regulatory freedom bills, and let us get them passed. Let us say within a month we will get them to the floor and we will vote on them. If people do not like them, vote no, but let us get them to the floor, because this would provide jobs.

The President said, well, the shovel-ready jobs were not so shovel-ready. Well, the thing is that there is sort of a fallacy there. That is the government creating jobs. What we are talking about here is regulatory freedom, letting business create more jobs, who already are creating jobs. The businesses who have already been voted on by the consumer and they are succeeding, but could succeed more and create more jobs if we would free them up.

The whole idea of the government passing out shovels just is not really good. It incorporates an economic fallacy. Milton Friedman one time was traveling in Asia, and they wanted to show him a canal project. So he went down there, and there were a bunch of guys with shovels, and he looked at them and he said, "Well, where are the bull dozers? Where is the heavy equipment to build your canal?" And they said, "Oh, no. This is a jobs project." And he said, "Well, if it is a jobs project, why don't you give them spoons?"

So, really, it is not about shovels or spoons. Let us try to help the businesses that are already out there being voted on by the consumer every day, and they are succeeding. But they are burdened with these regulations.

Senator Portman talked about there being $1.75 trillion worth of regulations. That is true. That is from the President's own estimates. They estimate that any business that has over 500 employees, it is costing $8,000 per employee. If you have only 20 employees, it is costing about $10,000 per employee. These costs are what make us noncompetitive with the world. We can control our taxes in our country, but our taxes are higher than much of the rest of the world. We can control our regulatory burden, but our regulatory burden is much higher than the rest of the world.

This is something we could do immediately to help people get jobs. We need regulatory reform. We need regulatory freedom. And I think it is a bipartisan thing. I think there is a lot of—we might not agree on everything, but there is a lot here that we could agree on.

You know, I am new here, and I feel the snail's pace. I feel like, well, people are out of work, let us do something to help them. I think we could get together, pass something within a month, at

[1] The prepared statement of Senator Paul appears in the Appendix on page 129.

least get it out there and let us vote on it. We may not pass all of these things. It may be easiest to look at them individually, just stack a whole bunch of regulatory reform votes, and let us try to get them out to the full Senate and see what we can get done.

My bill was originated by Congressman Geoff Davis in the House, but it came from a constituent who is a friend and a supporter of both of ours named Lloyd Rogers, and he is a veteran of the Korean War, he received medals, but he comes to Tea Party meetings and says, "Why do unelected bureaucrats get to write the rules? Why are the bureaucrats writing the rules? Why are you not writing the rules?"

A good example of this: "ObamaCare" has 1,700 references to the Health Secretary shall write these rules at a later date. Well, we do not even know what they are. That is why the comment by Congresswoman Nancy Pelosi was, "You will find out about it afterwards." Now we are finding out more and more because we did not know and we are not writing the rules.

The Dodd-Frank Act had hundreds of regulations in it, and these regulations are said to maybe lead to 5,000 pages of regulations. We are not going to write them. Furthermore, we are not even going to reappropriate the agencies that write them. The consumer agency that is going to be created is going to be under the Federal Reserve. It will be appropriated like the Fed creates credit: Out of thin air. They will just write their own appropriations. If we do not control the appropriations for these things and we do not write the rules for these things, we are not doing a good job. Our job should be oversight of these things. Our job should be whether to fund or not to fund, and particularly big regulations.

So the idea that came from my constituent, which Congressman Geoff Davis introduced in the House, is that big regulations—maybe we cannot oversee every regulation, but big regulations, regulations that cost the economy over $100 million, major rules, should not be written by unelected bureaucrats. They should come back to us. And what I would argue is that even if you like the regulation, if there are some on the other side of the aisle who say we need this regulation, let us vote on it. Do not let people who are not us—we are supposed to be responsive to the people. Those bureaucrats are not. Something so important as to add $100 million worth of cost should come back to us. I find that if you polled this, probably 90 percent of the public think it is supposed to happen that way. This is good government. A lot of these ideas are good government. But we have to do something about it. We cannot just sit and say, oh, it is so big, we can never do anything about it.

We have to start. We have to immediately get started reforming government, reining it in. And that is what our act is called. It is called the Regulations from the Executive in Need of Scrutiny (REINS) Act, and it simply says that these large regulations, once they are written by regulatory agencies, have to come back to Congress.

There are about 200 of them in the pipeline right now that would cost over $100 million. I think last year about 100 were enacted. We need to do something about this. This legislation would fix this problem. It would make us more meaningful. It would bring back congressional authority. And I think it can be a bipartisan issue in

the sense that it is not about even whether you are for or against the regulation. It is whether or not you are for or against the constitutional authority of the Congress to be writing these rules and not unelected bureaucrats.

I thank the Chairman very much for having this hearing and for letting me speak.

Chairman LIEBERMAN. Thanks, Senator Paul. And Senator Collins and I will work together to see if we can find some common ground here.

Senator Pryor, I have been informed now that you have actually not introduced regulatory reform legislation, but you intend to, so I guess under the rules that we have chosen for today, that gives you the opportunity to make a short opening statement——

Senator PRYOR. I will be very brief.

Chairman LIEBERMAN [continuing]. Of intention.

**OPENING STATEMENT OF SENATOR PRYOR**

Senator PRYOR. My intentional statement here.

Let me just say that I thank the Chairman and thank the Committee for having this hearing today and this great discussion. I look forward to hearing from our witness in just a minute, so I will not take long at all.

I am working on some legislation and the motivation for it is that we need to rethink how we regulate in this country. I think we are always going to need some regulation. I think that you can go back to any government in history—back to the Sumerian cuneiform tablets, which regulated different aspects of their society and their economy, and you will see that regulation goes all the way to today. So we are always going to have this, and we just need to make sure that as we are doing this, we are doing it in the smartest way possible. We need to recognize the changes in the global economy and how we want the U.S. economy to be more competitive. I feel like a lot of times our regulations hamper job growth, hamper economic growth, and as we are making the decisions that we are going to have to make, we need to keep our eye on the ball of the big picture. And I think sometimes when we regulate, we lose that.

We are working on this, and I look forward to working with all the Members of the Committee and all the previous panelists on their ideas. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Pryor. Senator Coburn, I think you have a letter you want to enter into the record——

**OPENING STATEMENT OF SENATOR COBURN**

Senator COBURN. I do want to enter an endorsement letter for the Snowe-Coburn FREEDOM Act listing 32 organizations who support our bill. I would just submit that for the record.[1]

Chairman LIEBERMAN. Thanks, Senator Coburn.

While we are at that, I will just introduce letters from a group called the Coalition for Sensible Safeguards and another one from the Natural Resources Defense Council (NRDC).[2]

[1] The letter referenced by Senator Coburn appears in the Appendix on page 159.
[2] The letters referenced by Senator Lieberman appear in the Appendix on page 115.

Chairman LIEBERMAN. So let us go to Senator Landrieu.

Senator LANDRIEU. Thank you. I am sorry to slip in. I had a previous meeting.

## OPENING STATEMENT OF SENATOR LANDRIEU [1]

Senator LANDRIEU. I am going to submit my opening statement for the record. But I just want to thank you, Senator Lieberman and Senator Collins, for holding this hearing. I have urged the calling of this hearing now for some time. As chair of the Small Business Committee, some of the bills that are pending for action in the Senate, my Committee has partial jurisdiction, but this Committee has primary jurisdiction. So I really appreciate the effort that you all are making, along with your staffs, to pull together the various bills that are presently before the Senate and try to pick the best pieces of them.

I understand, Senator Collins, you have a bill yourself to put forward to the Senate for consideration. I am glad that we are not doing this in a haphazard, disorganized fashion which will make an already difficult situation that much worse.

So I thank you, Mr. Chairman, and I will look forward to working with you all, the Members of our Committee, to try to fashion something we can bring to the Senate floor and to the Congress as soon as possible.

Chairman LIEBERMAN. Thanks, Senator Landrieu. We look forward to working with you, of course.

Mr. Sunstein, welcome once again. I am glad you were able to hear the testimony of our various colleagues, and we give you an opportunity now, obviously, to offer testimony of your own, but also to respond to anything you heard, and then we will go to questions and answers. Thanks very much. And you had the unique pleasure of hearing a Member of the Senate describe one of your articles as "brilliant," which is something, I am sure, that will carry you forward at least through the rest of the week. [Laughter.]

Mr. SUNSTEIN. Thank you so much. I wish my wife were here to hear that. [Laughter.]

## TESTIMONY OF HON. CASS R. SUNSTEIN,[2] ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SUNSTEIN. Thank you, Mr. Chairman. Thank you, Members of the Committee. I am honored to be here, and especially grateful to be discussing this topic, which is the daily fare of life at the Office of Information and Regulatory Affairs.

We start from common ground, which is to try to improve our regulatory system and to ensure, to quote from the opening words of the recent Executive Order, that "our regulatory system helps to promote economic growth, innovation, competitiveness, and job creation." Those words are in the first sentence of the Executive Order.

It is important to emphasize that the basic framework both for regulation and for regulatory review comes from Congress. Article

[1] The prepared statement of Senator Landrieu appears in the Appendix on page 127.
[2] The prepared statement of Mr. Sunstein appears in the Appendix on page 173.

I of the Constitution, referred to earlier, is the dominant article for our process. Relevant statutes establish both the sources and the limits of agency authority. These are partly specific statutes that, for example, create authorities for the Department of Energy, the Department of Interior, and also so-called generic legislation, which cuts across a range of agency activities.

There are four pillars in terms of the generic statutes, and as background for your discussions, I would like to just draw attention to them.

The first and the oldest is the Administrative Procedures Act, a central document both for public participation and for judicial review, creating mechanisms to ensure public participation in rulemaking and to test through the courts the question whether the agency has acted in conformity to law, and also whether the agency has acted arbitrarily or capriciously.

Fidelity to law is the first obligation of the Executive Branch under the Take Care Clause of the Constitution, and that is our foremost task as we oversee rules. The prohibition on arbitrary or capricious action in the Administrative Procedures Act is also of central importance for disciplining the exercise of such discretion, as Congress has seen fit to authorize.

The three other pillars are more recent. The Unfunded Mandates Reform Act has been referred to earlier. This imposes important requirements both of participation and of analysis, including analysis of costs and benefits, for rules that impose $100 million or more of cost not only on the public sector but also on the private sector. And you can see a clear overlap between the regulatory review process that dates back to President Reagan and the requirements of the Unfunded Mandates Reform Act.

There has been a great deal of discussion in the last hour of the difficulties that small businesses are facing, in part because of regulatory requirements. The Regulatory Flexibility Act, the third of the four pillars, is specifically designed to protect small business from excessive regulation, and we take that extremely seriously.

The fourth of the pillars is the Congressional Review Act, which provides Congress with the authority to oversee the rulemaking process, most importantly by vetoing rules of which it disapproves. Under the act, as you are aware, agencies are required to submit reports on rules to both Houses of Congress, and Congress has a period in which to assess those rules and, if it chooses, to prevent them from going into effect.

I would emphasize here that, like judicial review, the importance of the Congressional Review Act is not only its actual use but its existence. The Congressional Review Act is well understood by agencies, and the fact that Congress has the power to exercise authority under the Congressional Review Act is an ongoing material fact as agencies devise rules.

These statutes, as well as the organic statutes—that is, those that create the agencies in the first place—create ample opportunities for public participation and congressional oversight.

We also have three recent documents which are Article II rather than Article I of the Constitution, that is, documents that continue the process of disciplining the regulatory state by requiring careful attention to costs and benefits to alternatives and to the avoidance

of unjustified burdens. This process has contributed to a situation—and I would like to underline this—in which under both Republican and Democratic Administrations, the annual benefits of regulation have in every one of the last 10 years far exceeded their annual costs. Those benefits, which are frequently in the billions of dollars—and these are the benefits of actually finalized regulations, not regulations that turn up on an agenda that may never be materialized in the real world. The benefits of regulation include not only purely economic benefits, though those are often in the billions, but also savings in terms of deaths and illnesses prevented.

Consider as just one example the fact that highway deaths in the United States are at their lowest level in 60 years, in part as a result of highway safety rules. That is a statistic, but it is important to keep in mind that a number of our fellow citizens are alive today as a result of regulatory initiatives.

There has been a reference to a study that the Small Business Administration sponsored which finds $1.75 trillion in costs. We share the belief that the costs of regulation are too high. That particular study is deeply flawed and should not be relied on as a basis for quantifying regulatory costs. It has attained the status of an urban legend. We have cost estimates that are concerning. That one should not be the basis for our analysis.

The most recent guidance we have from the President of overriding importance is EO 13563, and as you are all aware, that Executive Order is designed both to discipline the flow of new regulations and to get better hold than ever before at the stock of existing rules.

New requirements are imposed on agencies for the quantification of costs and benefits, as Senator Roberts emphasized, and new requirements are also created for public participation and for the choice of flexible approaches that preserve—and I would like to emphasize these words—"freedom of choice for the public." Those words are in the Executive Order.

In terms of reviewing the stock of existing rules, our basic goal is to eliminate unnecessary burdens. Senator Warner referred to a $7 billion figure. In the fullness of time, we hope to be able to do better than that. In the short run, we have been able to release, in an unprecedented step, 30 preliminary plans for public review. Several of the steps outlined in those plans are not mere promises or hopes. They have actually been realized, meaning that we have been able to generate an elimination of tens of millions of hours in annual paperwork burdens and also to eliminate hundreds of millions of regulatory costs. We expect that figure will jump to over $1 billion in the very soon future.

It is important to emphasize, as some of the opening remarks have done, that while a great deal has been accomplished, the agency plans are preliminary and our efforts to get hold of the stock of existing rules and to reduce existing burdens is in a preliminary state. The comments are sought from the public and from you, your staff, and your constituents. We hope when the plans are finalized in August to have a higher level of ambition, and as we recently insisted in guidance issued by my office, we will ensure we have timelines and deadlines to make sure that this actually happens.

The President has also issued two memoranda: One involving small business in particular, going well beyond the Regulatory Flexibility Act; and another memorandum designed to recognize the problems that State and local governments are facing, particularly in the current economic climate, and seeking steps to reduce costs that they face. That will overlap with our lookback effort.

We are aware that there are a number of regulatory reform bills here that you are considering, and we agree on the importance of reducing unnecessary costs and paperwork burdens.

We believe that with the introduction of the new Executive Order we have the tools necessary to produce a smart and effective regulatory framework. The existing statutes and the Executive Order, now 6 months old, provide new guidance and discipline, creating a kind of framework to accomplish our shared goals.

With respect to the existing proposals, I would just emphasize one concern for present purposes, which is that it is important to be aware that increases in judicial power over regulation may have unintended adverse effects. Increases in judicial authority over what are often highly technical issues often can compromise both cost reduction and benefit creation and can create problems that might be worse than the disease.

In sum, we believe that the foundational statutes and the recent documents provide a basis for a system that, to return to the opening words of the Executive Order, "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."

I am looking forward to your questions.

Chairman LIEBERMAN. Thanks very much for that typically thoughtful opening statement. We will have 7-minute rounds of questions in the first round.

Let me pick up in a way where you concluded, which is to ask whether I am taking the correct inference here that, notwithstanding the testimony of our colleagues this morning about the legislation they are introducing, at this time the Administration would oppose any additional regulatory reform legislation?

Mr. SUNSTEIN. I would phrase it a little more cautiously than that. We believe we have the tools we need, and we believe we need your help in making sure that those tools actually operate the way we hope.

With respect to particular provisions, we would like to see them and study them. I can talk about principles and areas of concern.

Chairman LIEBERMAN. Right, and that is fair. Is there anything, any specific idea that you heard today that you thought was interesting enough to engage further consideration? Let me just phrase it, by yourself in your role at OIRA as opposed to asking you to do what you cannot really do, which is to commit the Administration.

Mr. SUNSTEIN. Yes. I think generally all ideas are welcome with respect to burden reduction and protection of small business in particular in the current economic environment. So to engage on all of those ideas is a good thing, and the motivation for the particular proposals we completely share. That is what is motivated the lookback process.

I would emphasize that insofar as there is an increase in judicial authority over administrative decisionmaking, that is a problem.

And there is also a risk that some procedural requirements would create the problem of paralysis by analysis. That could be a worry not only for regulation that is in the public interest, but also for deregulation that is in the public interest. So some of the lookback plans we hope to be able to implement in a hurry. Procedural barriers would make that more difficult.

Chairman LIEBERMAN. Let me ask you to speak in a little more detail about the concerns you have about the expansion of judicial review and how legislation expanding the role of courts and the regulatory system actually could, as you said, increase regulatory uncertainty and result in what you have described as unwelcome, unintended consequences.

Mr. SUNSTEIN. Right. Maybe the best way to answer that is to mention that our process of reviewing rules for consideration of costs and benefits is organized under a circular that is 50 single-spaced pages. It is very complicated. It has material on dealing with the discount rate, the flow of costs and benefits over time, for dealing with uncertainty about costs and benefits, for a lot of technically complex issues.

Federal courts are indispensable to our system, but their skill set is not well designed to deal with economic complexity. And there is a risk that judicial review would get courts into areas to which the Congress and the Executive Branch are much better suited. There is also a risk that rules, whether they are regulatory or deregulatory, would be tied up in litigation for years so that the milk rule, which some of you, I am sure, are aware of, which is helping small business avoid $140 million in annual cost, we got that done fast after the President's Executive Order.

Chairman LIEBERMAN. Right.

Mr. SUNSTEIN. That one might be tied up in litigation, and that would not be in the national interest.

Chairman LIEBERMAN. Let me go to the lookback review, which I find very encouraging, particularly to hear, as you said in your testimony, that more than $1 billion in savings are anticipated in the near future from the lookback review and that ultimately as it goes on it could save a lot more money.

Let me ask the question this way, which is, systemically why weren't those improvements identified earlier? And do they reveal weaknesses in the original rulemaking process? Or have circumstances changed since the original process, or both?

Mr. SUNSTEIN. Thank you, Mr. Chairman, for that. That is a great topic for an assessment of what is not working ideally for a regulatory state. Some of the rules that are being re-thought have been rendered redundant by changed circumstances, so there is a requirement of fuel vapor recovery systems for gas stations, which at the time was not crazy, but now cars have pollution control devices, so this is completely redundant. And we are talking tens of millions of dollars borne in significant part by small business. Because cars are now better in terms of pollution avoidance, this is rendered useless by changed circumstances.

For something like the milk rule, what happened was there was a statute designed to prevent oil spills, and the definition, just because of how the English language works, picked up milk. It took a while in terms of congressional action and then EPA action to

correct that not unfamiliar problem of excessive generalization from a well-motivated enactment.

Then there are other ideas on the plans that just learning over time has helped create improvements for us. OSHA has eliminated 1.9 million annual hours in paperwork and reporting burdens, and when I have talked to the business community, that is the one that has caught their eye. And that is not something that is going to happen soon. That is something that happened.

That one was OSHA that just investigated its reporting and paperwork requirements and saw this really was not necessary. It was not helping workers so they eliminated it.

So sometimes it is changed circumstances. Sometimes it is a rule that is written too generally. Sometimes it is just seeing how something is operating on the ground.

Chairman LIEBERMAN. Well, that is a very powerful and I hope instructive answer to the question. So the natural follow-on is: How do we, to the best of our ability, guarantee that essentially there is a constant lookback review? Because in the case of the fuel vapor that you cite, it is really outrageous that somebody somewhere did not say, this is totally redundant now, it is not necessary, and costing, as you said, businesses, including a lot of small businesses, tens of millions of dollars for something that is being achieved in other ways.

Mr. SUNSTEIN. What we are trying to do—and we would love your help on this—is to change the culture of regulation. So what the President has done is unprecedented. There has been a lot of talk about it. There has never been a case where dozens of agencies have formal lookback plans for the public.

One of the kind of sleeper provisions in a lot of the plans is they are creating offices or altering the mission of existing offices to make sure that retrospective review is hard-wired into agency operations. Ideas or support or emphasis on how that can be made to happen at every rulemaking agency, that would be very helpful and would leave a legacy.

Chairman LIEBERMAN. My time is up. Thank you very much. Senator Collins.

Senator COLLINS. Thank you.

Mr. Sunstein, just yesterday I met with business leaders of the forest products industry in my State, and once again they wanted to talk to me about the EPA Boiler Maximum Achievable Control Technology (MACT) rules which govern emissions. And you and I have had many conversations about those rules, and Senator Landrieu, Senator Pryor, and Senator Alexander—there are many of us who have been concerned. In fact, 41 Senators signed a letter that Senator Landrieu and I sent to the EPA.

The EPA has clearly made some progress—you have been very helpful in that regard—since its first attempt to propose a rule. But the fact is that this is still, if it goes forth, going to be an enormously expensive rule. The estimates are $5 billion for the forest products industry alone, $14 billion for general manufacturing.

My frustration is: How do we get EPA to better consider the economic impact of its rules, particularly the impact on jobs, in the first place, unless we mandate it by law? If this kind of rule, the first draft of which was so onerous and burdensome to the very

fragile forest products industry and manufacturing sector, was so off base and so expensive to start with, I have very little confidence that we can get reforms administratively. That is why I think we need to have legislation.

Mr. SUNSTEIN. Well, I completely appreciate the point. The first sentence of the new Executive Order has the words "job creation" in it, and for that final rule, as for all rules that have measurable and potentially significant impacts on jobs, that sentence of the Executive Order is taken really seriously. So if you look at EPA expensive proposals, they have careful analysis of job impacts, and that is something the President has really charged us to do. That is now built into the system.

With respect to the rule you mentioned, that has been stayed indefinitely, as I recall, in part by reference to the need for increased public comment and taking account of public comment on those issues. And the job impacts, that is something that not only for that rule but for all of them, the President has charged us to really focus on.

Senator COLLINS. I guess what I am saying is we need to build that into the process at the beginning rather than having these rules come out that are so onerous. And I know you are working toward that, but I for one think we need to legislate in that area.

Mr. SUNSTEIN. Well, I agree with the premise completely that if a proposed rule would have significant job impacts but the job impacts are not explored, that is a problem. And you may have noticed that an EPA rule, sometimes referred to as "Electric Generating Utility (EGU) MACT," which is also an important anti-pollution initiative with potentially very significant benefits, that has an analysis of job impacts at the proposal stage.

Another provision of the Executive Order kind of builds on the theme. It requires, for the first time, really, agencies to engage with affected members of the public, including those who would be burdened by a rule, before they issue a Notice of Proposed Rulemaking. And that is a way of getting hold of potentially adverse effects on the economy. And as I am sure you have noticed—in fact, some of this you were a leader on—there have been rules that have been altered or withdrawn for careful engagement with those who would be adversely affected, in part because the President has called for that form of advance engagement.

Senator COLLINS. And I do appreciate that, and we have made some progress on the biomass rule, for example.

Let me switch to another issue. By issuing guidance documents, agencies can essentially make regulations without notice and comment, without public participation, without publishing them in the *Federal Register* or the Code of Federal Regulations. And your predecessor, John Graham, at a recent business event noted that agencies are now trying to circumvent the very important OIRA review process by issuing guidance documents instead of regulations. And he has recommended that the regulatory process be expanded to capture these guidance documents.

The bill that I have introduced would give the force of law to the Good Guidance Practices Bulletin that was issued, when Rob Portman was head of OMB, to try to prevent agencies from circum-

venting the Administrative Procedure Act (APA) and the very important public notice and comment provisions.

Since it is just codifying a bulletin that is in effect today at OMB, surely you cannot be opposed to that part of my bill becoming law.

Mr. SUNSTEIN. Well, that part of your bill, complete agreement with the goals, and would welcome further discussion with you on exactly that.

On the general point about guidance documents, you may have noticed that within the last months some guidance documents have gone out with great clarity about two points:

One, they are there for public comment. They are not just being issued in advance of public comment.

And, two, they are not binding on the private sector. They do not have the force of law.

So this is something that with Senator Portman's document and with some of the keen interest on the part of affected stakeholders in the last 2 years that we very much have our eye on. It is also the case there are a number of judicial decisions which have invalidated guidance documents as rules in disguised. That is a very serious problem when that happens, and this is something we are very focused on.

So I would be happy to continue that discussion, and if you see in the next months guidance documents that are rules in disguise or guidance documents that have not gone out for public comment when they ought to, then we would love to hear about it.

Senator COLLINS. Thank you.

Chairman LIEBERMAN. Thanks very much, Senator Collins. Senator Paul, you are next.

Senator PAUL. Thank you, and thank you for your testimony.

You say you have the tools for regulatory reform, that you really do not need that much from Congress. I am a little bit doubtful, and I would say this whether you were from a Republican Administration or a Democrat Administration. I would say it has not happened, it has just been getting worse and worse and worse. But particularly for this Administration that added enormous amounts of new regulations through ObamaCare and through Dodd-Frank, I am a little concerned about really saying, well, everything is fine and I can trust you to go ahead and get rid of some of these bad regulations.

A couple of examples from ObamaCare: The health exchanges were said to, well, about 10 million people will lose their private insurance and go into these publicly subsidized ones in these exchanges. Now think tanks are saying it might be 100 million. The bottom line is we do not know. There are a lot of things we do not know, and that is why I do not want you involved in the economy in such a big way. I would rather you keep your hands out of the economy for the most part because there are so many unintended consequences that no one individual, no matter how smart, can know the consequences of. The marketplace is smarter than central planners.

With ObamaCare, 3 million waivers are being given, so you write these rules, you write these regulations, say this is how you are going to get your health care. But then if people are political supporters of yours, they get waivers. There seems to be some pref-

erential treatment for people to get waivers if they are political supporters. That is troublesome, that some people get waivers from these laws and other people do not.

Are there regulations that are coming forward that are so important that sort of contravene the will of Congress? A couple of examples. Greenhouse regulations are being pushed, and there have been quotes from people in the Administration saying, "We do not care what Congress thinks. We are going to do it anyway." The EPA says they have the authority and they will do it.

Congressman John Dingell, one of the authors of the Clean Air Act—and he is a Democrat—stated, "The Clean Air Act was not designed to regulate greenhouse emissions. I know what was intended when I wrote the legislation. I have said from the beginning that such regulation will result in a glorious mess, and regulation of greenhouse gas emissions should be left to Congress."

The Grain Inspection, Packers and Stockyards Administration (GIPSA) rule will fundamentally change the market rules for the sale of poultry and livestock in this country. Over 120 members have signed letters to the department affirmatively stating that this rule represents a drastic overstep and is not what was intended under the 2008 farm bill.

The EPA on its own accord will expand government jurisdiction over water and land that is currently regulated by the States. The text of the guidance is almost exactly the same as the Clean Water Restoration Act, which Congress has refused to vote on. The EPA is going to do it anyway.

Net neutrality, is perhaps the most blatant and dangerous subversion of congressional intent to date. The Federal Communications Commission (FCC) has promulgated its regulation despite the fact that Congress refused to pass this legislation at least three times and the fact that an appeals court unanimously agreed the FCC does not have the authority to engage in this regulation.

So when you say to us, "Well, we have got it under control, do not worry about it," and you say to us, "Well, the REINS Act would undermine our system by converting rules into mere proposals," well, yes, that is what we want. We think that you are undermining the economy with rules that are vast overreaches, that go against what Congress intended to happen, and are basically unelected bureaucrats deciding the law. We do not want that anymore. We want you to be restrained. We want Congress to have a say in this. And we frankly do not trust you—not just Democrats. If you were a Republican, I would say exactly the same thing.

I want there to be a separation of powers, checks and balances. We have gone way overboard in allowing the President and the Executive Branch to have way too much power. The bureaucracies have become a fourth estate. We really need more checks and balances. Businesses know it. It is out of control. We want to restrain the regulatory branch. Your comments?

Mr. SUNSTEIN. Well, there is a lot there. Thank you for that, Senator. I would say a couple of things.

Our first obligation is to respect the will of Congress, so I took an oath to do that. If there is anything proposed or finalized that is inconsistent with the will of Congress, that is a very serious problem.

I believe that no rule in the Obama Administration has been struck down as inconsistent with the will of Congress, and I hope that will continue. But if it does not, that is a big problem.

I also agree very much that regulatory costs are too high and we want to get them down. That is one reason that the lookback process is my current priority in terms of day-to-day work.

There is a bit of a myth about Obama rules and what has actually happened in the last few years. I understand the myth, and it stems from the fact that we are in a tough economy and rules can be simplified and costs can be reduced, but let me get at the content of the myth.

Fiscal year 2007 was actually the highest-cost year of the last 10 under President Bush. Fiscal year 2007–2008 had higher costs than fiscal year 2009 and 2010 in terms of final economically significant rules. And Senator Portman referred to the economically significant rules. Those were the ones that mattered.

In fact, the picture for our sensitivity costs is even better than that because in fiscal year 2009, the Bush Administration, in 4 months imposed more regulatory costs by a large margin than we did in 8 months.

Senator PAUL. Let me just interject. I agree with you. It is a bipartisan problem. That is why I want to make it not about Republicans and Democrats. It is a bipartisan problem. But it is a problem. The major rules, there are 224 major rules. Last year there were 180, the year before 160. The regulations are being piled on, and it is a problem. We need congressional oversight.

Mr. SUNSTEIN. Well, I certainly agree with the premise that to control the flow of existing rules disciplining costs is really important and to reduce costs through taking away the unjustified burdens in the stock is also really important.

The only thing I guess I would add is that there are a number of rules that are costly that have been benefits that dwarf costs and that actually industry invites. So you may know that the first round of the fuel economy standards, the automobile companies were very worried about California creating regulation that would actually be very aggressive and create a kind of odd inversion of what the Federal structure is supposed to do where California would dictate national policy. And nearly everyone celebrated something that relieved the burdens that California might have created and the interstate complexity at the same time that the benefits in terms of health dollars and energy security—they just dwarf the costs, even though the costs were high.

Senator PAUL. One quick rejoinder. You may have noticed that the car companies are still struggling, and part of their struggle is under regulatory burdens such as fuel efficiency.

Mr. SUNSTEIN. Agreed entirely. They are one of our areas where we want to figure out ways to reduce some of the costs that are now being imposed.

Chairman LIEBERMAN. Thanks, Senator Paul. Senator Johnson.

## OPENING STATEMENT OF SENATOR JOHNSON

Senator JOHNSON. Thanks, Mr. Chairman, and, Mr. Sunstein, welcome back.

To pick up on Senator Paul's comment that this is a bipartisan problem, I realize this is not a perfect surrogate for the size of the Federal bureaucracy, but at the end of President Franklin Roosevelt's terms, we had 86,000 pages in the *Federal Register*. By the end of President Richard Nixon's term, there were 560,000 pages in the *Federal Register*. Today there are over 3 million pages of rules, rulemaking, and regulations. It is really incomprehensible.

I have been building a manufacturing business for the last 31 years. I have certainly lived under the rules and regulations. I kind of get it. One thing that amazes me is, as I traveled around Wisconsin, not only was this out-of-control spending a primary issue because people understood the fact that we are bankrupting this country, that threat created a high level of uncertainty and prevented job creation. But right after that was the number of regulations and the burden it was imposing on businesses that was really preventing businesses from growing and job creation.

Now that I am here, every day I cannot tell you how many business people come in from the State of Wisconsin, and I am just amazed at the rules and regulations they are talking about and begging me to help them, "Please stop this. It is going to put us out of business." This is a very serious problem.

I read in the *Wall Street Journal* an estimate—and I just want to get your comment on this. The mercury control proposal the EPA has proposed as an amendment to the Clean Air Act, would put 17.6 percent of coal-fired electrical generation out of commission. Have you looked at that? Do you know what that would cost our economy on an overall basis?

Mr. SUNSTEIN. Thanks very much for that. On the general point about business concern about regulation, I would emphasize a couple of things.

The first is that the notice and comment process is crucially important to make sure that those concerns are noticed.

By the way, this noise is not a result of a bad regulation issued by either a Democratic or a Republican Administration.

The process of taking account so business concerns is perhaps insufficiently appreciated even by the business community. There is a regulation from the Equal Employment Opportunity Commission (EEOC) implementing the Americans with Disabilities Amendments Act which, at the proposed stage, was celebrated by the disability community, but a grave source of concern from the Chamber of Commerce.

In the final stage, it was celebrated again by the disability community, but also celebrated by the Chamber of Commerce, which said the EEOC completely got our concerns about a lack of clarity and about excessive regulation.

Senator JOHNSON. Can you address the EPA regulation on coal-fired generation plans? Because that is going to be huge.

Mr. SUNSTEIN. You referred to the increases in pages in the *Federal Register*. The regulatory impact analysis are also longer, but that is because we are being really careful. Those issues are addressed at great length there. What the proposal finds is this is an expensive rule.

Senator JOHNSON. How expensive?

Mr. SUNSTEIN. Approximately $9 billion annually total.

Senator JOHNSON. That has to be such an incredible understatement. That is unbelievably understated.

Mr. SUNSTEIN. If so, then that comment is welcome because this rule is in a proposed stage. The benefits, I should say, the health benefits for this rule are enormous. This is a rule where the benefits at the proposed stage are well in excess of the costs. But if the cost estimate is low-ball and if the benefits are too high, then we are going to fix that.

Senator JOHNSON. Did the EPA just admit that their estimates for mercury were 1,000 times overstated? And is that the basis of your net analysis?

Mr. SUNSTEIN. What I see about this correction of error, as in the case of the EEOC rule, is that it is a sign of the process working. When a proposal is exposed as having an error in it, either an error of judgment or an error of fact, that shows how indispensable the system of public comment and finalization only after thorough engagement with comment is. So if you or your constituents have concerns about that rule in particular, and if you think the cost estimate is too low, please tell us. We need to get that right.

Senator JOHNSON. You are on notice. Please look into that carefully.

You said that the SBA study that found the annual cost of regulation at $1.7 trillion is an incorrect study. What is the cost on an annual basis of people trying to comply with 3 million pages' worth of rules and regulations? What is that cost?

Mr. SUNSTEIN. We have it for the last 10 years, and on average it is about $5 billion a year.

Senator JOHNSON. I have seen reports from the IRS, I believe—and it is a range—anywhere from $200 to $338 billion a year just to comply with the Tax Code. Now, we are generating a little more than $2 trillion in tax revenue, maybe $2.5 trillion; $338 billion would be 15 percent of that.

Mr. SUNSTEIN. What I am talking about is the final economically significant rules that come through the Executive Branch. The Tax Code is a kind of separate animal, and it is not ordinarily thought of as regulation in the sense that we have been discussing.

Senator JOHNSON. Well, it is a cost of compliance, isn't it? It is a drag on the economy. It reduces job creation.

Mr. SUNSTEIN. Absolutely. And one of my keenest interests, by the way, is in working with the IRS to reduce some of the reporting and paperwork burdens, and their proposals in the last couple of years promise to eliminate approximately 55 million annual hours in paperwork and reporting burdens. That cuts some of that cost. We would like to think of ways to cut more.

Senator JOHNSON. I guess my final comment is we are looking at a huge bureaucracy, and it is just out of control. And my concern in terms of having another bureaucracy built up to control another bureaucracy I just do not think works. We are spending over $1.5 trillion this year that we do not have, and certainly in business, if you want to control a department, you stop feeding the best. Or if you want to reduce regulations, you cut the budget.

I guess that would be my final comment. If we are really going to get control over this government, if we are going to actually move our economy forward and start creating jobs, we have to stop

feeding the beast. We have to prevent America from going bankrupt. Thank you.

Chairman LIEBERMAN. Thanks, Senator Johnson.

We will go to Senator Levin and then back to Senator Portman.

**OPENING STATEMENT OF SENATOR LEVIN**

Senator LEVIN. Thank you, and welcome. As you know, I have been a long-time supporter of cost/benefit analyses and think they have a very critical role, and I want to make sure that we are using them as broadly as they need to be.

When looking at costs and benefits, do you look at struggling industries differently? Do you look at impacted industries differently than other industries? Is that part of the calculus?

Mr. SUNSTEIN. Well, it would not be a technical part of cost/benefit analysis, but it would be part of a full accounting of the anticipated effects. So if we are going to close businesses, that would have job impacts; we would take careful account of that.

Senator LEVIN. There is a great deal of emphasis you put on lookback. What agencies are doing a better job in lookback than other agencies? Give us the best agencies, if you know them offhand.

Mr. SUNSTEIN. Well, I hope the ones I am not going to mention are not listening, but the Department——

Senator LEVIN. I hope the ones that you do not mention are listening, as a matter of fact.

Mr. SUNSTEIN [continuing]. Of Transportation did an excellent job. The Department of Health and Human Services (HHS) has a very impressive plan, and the EPA plan has a number of very impressive items on it.

Senator LEVIN. Are there any agencies that should be singled out for not doing a good job in terms of lookback?

Mr. SUNSTEIN. Well, I think the answer to that cannot be no, but what I would like to do now because these are preliminary plans that are out for public comment—they will be finalized in late August—is to give you all and the public an opportunity to make the ones that are not as good as they should be terrific by late August.

Senator LEVIN. And would you let this Committee know which agencies you think fall short by the end of the summer?

Mr. SUNSTEIN. Well, I think in my position—it is probably more appropriate for those who are scrutinizing the plans even as we speak to be saying these are not good than for me to intervene in the middle of the process.

Senator LEVIN. I was suggesting at the end of the process.

Mr. SUNSTEIN. Oh, sure, absolutely.

Senator LEVIN. That is why I said at the end of August.

Mr. SUNSTEIN. Yes. Definitely.

Senator LEVIN. Would you let us know which ones after the process is over are falling short?

Mr. SUNSTEIN. I would be happy to do that, and I would also be happy to see what you and your constituents and others think needs improvement.

As some of the earlier questions suggested, this is an effort not to do a one-shot deal but to change the regulatory culture. And so this can be seen as Lookback 1.0.

Senator LEVIN. But I think that if we ask you for that kind of an assessment and if they all know that you are going to be giving it to us, it can help you get good results.

Mr. SUNSTEIN. I bet you are right.

Senator LEVIN. On the interim final rules that are issued now under certain circumstances, are those rules subject to legislative review?

Mr. SUNSTEIN. Yes. They are not subject to review under the Congressional Review Act.[1]

Senator LEVIN. That is what I mean.

Mr. SUNSTEIN. The Congressional Review Act—the legislative history I think is pretty clear on this—does not pick up interim final rules, but there is an opportunity, of course, for Congress to overturn an interim final in the ordinary course.

Senator LEVIN. Right. But in terms of using that expedited procedure, it is not available for that. Should it be?

Mr. SUNSTEIN. I would want to think hard about that. I can give you some competing considerations. One is in my view the most important word in the phrase "interim final rule" is "interim."

Senator LEVIN. For others, the most important word is "final."

Mr. SUNSTEIN. Second most important.

Senator LEVIN. Because sometimes they, in effect, become final rules and last for years.

Mr. SUNSTEIN. Yes, that is not ideal. Interim final rules invite public comments. We have seen that a lot in the last 6 months. And it is important to take account of those comments.

Senator LEVIN. All right. Would you let us know any thinking on that issue.

Mr. SUNSTEIN. Sure.

Senator LEVIN. Because if we are going to do legislation, that is one of the things I think we ought to be looking at.

What is the relationship between OIRA and the Council on Environmental Quality (CEQ)?

Mr. SUNSTEIN. Friendly. We are both part of the Executive Office of the President, and we work carefully with CEQ on rulemaking.

Senator LEVIN. There was a meeting between the CEQ and some of the automobile industry, I think yesterday, and there was a scenario that was placed on the table, which, frankly, shocked me. It was very different from what we were told was not in the cards even in terms of discussions just hours before. Were you involved in that?

Mr. SUNSTEIN. No, I was not.

Senator LEVIN. Was OIRA involved in that?

Mr. SUNSTEIN. I do not believe so.

Senator LEVIN. Should they be?

Mr. SUNSTEIN. Well, our formal role is to review rules once they are submitted to us. That particular rule has not been submitted to us. It is still under formulation. It is perfectly appropriate, though it is not obligatory, for someone at OIRA to be apprised of discussions about rules as they are being formulated, especially if they are really important.

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[1] "Agency Guidance, Congressional Review of Agency Rules," submitted by Mr. Sunstein appears in the Appendix on page 189.

Senator LEVIN. Well, I think you know that is an important rule that is being considered, and I am wondering if you would check that out, and if you think it is appropriate, whether you would become involved in those discussions.

Mr. SUNSTEIN. Sure. I have been discussing this coming rule with CEQ. The meeting to which you refer—I was not there.

Senator LEVIN. Nor was anyone from OIRA?

Mr. SUNSTEIN. I do not believe so.

Senator LEVIN. You made reference to California and the waiver that they have been given, and that is, of course, a hotly discussed issue as to whether or not they should have any right to assume they would be given a waiver.

Are you familiar enough with the law to agree with me that whether they get a waiver is totally discretionary and that there is no assumption that they would be given a waiver under the Clean Air Act?

Mr. SUNSTEIN. I concur broadly with that statement, though the exercise of discretion would, as any other exercise of discretion, be subject to Clean Air Act and arbitrariness constraints.

Senator LEVIN. Subject to any constraints either way, whether they exercise the discretion or lack thereof is arbitrary, which can go either way and can be challenged. But would you agree that it is discretionary, it is not something which anyone has a right to assume would be forthcoming?

Mr. SUNSTEIN. I would want to study this a little bit more, if you will permit, before giving an answer.

Senator LEVIN. Sure. I would be happy to have you study it and let me know the outcome. Would you let us know what the outcome of that study is?

Mr. SUNSTEIN. Sure.

Senator LEVIN. Thank you.

Thank you, Mr. Chairman. Thank you for holding this really important hearing.

Chairman LIEBERMAN. Thanks, Senator Levin. Thanks for being here. I know you have been involved in these questions constructively for quite a while.

Senator Portman, welcome back.

Senator PORTMAN. Thank you, Mr. Chairman, and I would reiterate what I said earlier and echo the comments of Senator Levin. Thanks for doing this.

I have so many questions and so little time, but Senator Levin talked a little bit about the lookback and how it is working. I said some things earlier about how I was encouraged by the President's EO 13563 and some of the comments he made, and I was. But I am now looking at the results, and I have some questions.

If we could explore today a little about how we have translated some of these commitments into action, looking particularly at the 30 preliminary agency plans for retrospective analysis of existing regulations that we have been able to look at. There may be more out there that you have seen or you can give me some better data on this, but based on our analysis, it looks like less than 10 percent of those rules slated for revision are linked to any estimate at all of any monetary cost savings or compliance hours saved, which is discouraging. At what stage in the process do you expect agencies

to be able to report or at least project some quantifiable savings from these revisions or repeals of the rules that they have identified?

Mr. SUNSTEIN. We directed them very recently, in the last week or so, to quantify and monetize more, as much as they can. As you are aware from being OMB Director, it depends on how far along the agency is in its thinking. If you have some proposal, let us say, to reduce burdens on hospitals on the ground that they are redundant, and you have a sense that this is duplicative of a requirement that is already in play and doing the relevant work, if that is all you know, you will not be able to project at that stage hours or money.

Senator PORTMAN. At what point do you expect them to be able to do that? What have you directed them to give to you so you can quantify it?

Mr. SUNSTEIN. I would like to get that number, the 5 to 10-percent figure up significantly in the next few months, by late August. But for some of them, it is at a sufficiently preliminary state that it will only happen at the state of proposed rulemaking.

Senator PORTMAN. Have you given them guidance on what your targets are for either costs or reductions in compliance costs?

Mr. SUNSTEIN. We have not given them a number, but we would like it to be as high as possible, and they are aware of that.

Senator PORTMAN. Well, we look forward to the next hearing where we will see whether, in fact, we begin to get some real meat around the bones of this good idea of looking back. We do not have it yet.

Mr. SUNSTEIN. If I may say, Senator, we have about $1 billion in savings, and Senator Dirksen is said to have said, "A billion dollars here, a billion dollars there, sooner or later . . ."——

Senator PORTMAN. That has been revised to a trillion now. [Laughter.]

Mr. SUNSTEIN. But a billion dollars, and we are right about there as of today. Very close.

Senator PORTMAN. You noted in your testimony in connection with judicial review, which, as you know, is part of our legislation we talked about earlier, that you do not think the courts have the "skill set" to review issues such as the adequacy and rationality of an agency's consideration of cost. So you are basically casting doubt on the court's ability to do that. As you might imagine, I disagree, and that is why we have it in the legislation. I agree that no court can take the place of OIRA. Your job is safe. But I do feel strongly that having that judicial review would have a significant impact on how the agencies went about their work.

I just would like to ask you about that. Look, you have been in the legal profession. You have been a professor. You understand how these cases work. And courts are already reviewing rulemakings constantly. They are looking at it under all sorts of enabling statutes that make cost or feasibility either a mandatory or a discretionary factor. And I just wonder why you think courts cannot do it. Let us talk about the D.C. Circuit for a second, which, as you know, routinely decides APA challenges. The Administrative Procedures Act is always before them, and they look at very complex, scientific, technical issues. Do you think they are actually un-

prepared to apply at least the arbitrary and capricious standard? Which would be the standard, I suppose, that they would apply, basically saying, are there any obvious gaps in the agency's rulemaking? Why are you so skeptical about the court's ability to do that?

Mr. SUNSTEIN. I do believe that courts have the skill set to decide whether agencies, first, are statutorily required to consider costs, and I believe they have the skill set to engage in arbitrariness review of such requirements as Congress has imposed, including a requirement to do cost/benefit analysis as under the Toxic Substances Control Act.

The concern is more specific than that. It is that if the analysis produced under the relevant Executive Orders, including dealing with what is the appropriate discount rate for the future stream of cost and benefits, is subject judicial review, then you tend to get into murky waters—and I speak from experience as a lawyer; that is, lawyers are not well trained, and especially generalist lawyers are not well trained, and judges—to decide whether the discount rate should be 3 percent or 7 percent or, as some economists believe, a little higher than 7 percent, or some believe in the context of intergenerational issues 1 percent of 2 percent. This is very technical stuff.

I think we have a shared belief that there is a serious problem here, that steps need to be taken to reduce or eliminate the problem. The problem that the regulatory state now faces is not insufficient oversight by the Federal judiciary.

Senator PORTMAN. Well, I would tell you that if you look at what, again, courts are already, again, applying the arbitrary and capricious standard to very complex, scientific, technical analysis, then I would think applying it to the cost issue and the cost/benefit would have an impact, and they certainly have proven capable of doing it.

Let me ask you one other question, if I could, and get your views more broadly on the feasibility of tracking actual costs of these rules over time. Right now OIRA and Federal agencies generally make a great effort to evaluate the cost of rules ex ante, so they are looking at what the cost is going to be. And that analysis I think has been critical in some cases in producing a better result at lower cost. At the same time, that estimate occurs when we know the very least about what the actual cost is going to be, which would be after implementation.

So what are your thoughts on the feasibility of asking agencies to periodically evaluate and report the actual costs annually or on a quarterly basis of compliance with all or some subset of economically significant regulations? Again, all this is in the context of the 50 to 70 major rules.

Mr. SUNSTEIN. Yes. Well, without speaking about legislative requirements but speaking about the general principle, I completely agree, and I think it is one of the most important things that could improve both assessment and eventually performance of the regulatory state. So the fact is that there are sometimes retrospective analysis of rules that show the costs were higher than anticipated or the benefits lower or vice versa. And that should very much inform decisions about what to do with rules. So the President's Ex-

ecutive Order refers to the need to measure and improve the actual results of regulatory requirements. That is ex post. That is not ex ante.

Senator PORTMAN. Don't you think a better accounting of the actual costs would help to actually, again, translate that good language into something that is meaningful?

Mr. SUNSTEIN. I absolutely agree.

Senator PORTMAN. Do you intend to proceed with something along those lines?

Mr. SUNSTEIN. Oh, we do. This is something we have discussed in our draft cost/benefit report. I hope that will be finalized fairly soon, and we are very keen on retrospective analysis of rules and trying to learn from analysis of what has actually happened. We had a discussion of a rule where the concern was the prospective assessment was too low. We want to see where we have gotten it wrong, fix the rules accordingly. And the beauty of that is if we know where we have gotten it wrong on the cost or benefit side, that should make our prospective estimates more accurate.

Senator PORTMAN. It absolutely can be applied then prospectively with additional rules and give us a little basis for coming up with a cost that is more based on reality. Thank you very much, Mr. Sunstein.

Thank you, Mr. Chairman, for your indulgence.

Chairman LIEBERMAN. Thank you, Senator Portman.

Before we wind up, would you like an opportunity to respond to Senator Roberts' reference to the thresholds of human dignity and equity?

Mr. SUNSTEIN. Thank you, Mr. Chairman, for that. I would be delighted. A couple of things.

First, the words "equity" and "distributive impacts" are not new in this Executive Order. President Bush operated under those words for 8 years. And I think no one thought under President Bush or under this Administration's first 2½ years that is some loophole that creates a terrible problem.

What President Bush was thinking and President Clinton before him is suppose you have a rule that really hammers poor people. Suppose the regulatory costs hit people who are struggling particularly really hard. It is legitimate for the agency to consider that. Or suppose a rule has particular benefits for people who are struggling. It is not illegitimate, if the law authorizes, for that to be considered.

With respect to human dignity, which is a new term, if you have returning veterans who are in wheelchairs and protected under the Americans with Disabilities Act, it is legitimate to consider whether their access to bathrooms would be improved by the rule so that returning veterans get to go to the bathroom without having to rely on their colleagues. That is a point that has a connection to human dignity.

If you have a rule—and we have one—that would reduce the incidence of rape, it is important to acknowledge that whether or not you can turn the active rape into a monetary equivalent, something which is a big challenge. Rape is an assault on dignity, and under a law that is designed to reduce the incidence of rape, to take ac-

count of that fact, the assault on dignity is not a loophole but it is an acknowledgment of a legal and human reality.

Chairman LIEBERMAN. I will tell Senator Roberts your answer. I find it thoughtful and sensible.

I want to thank you for your testimony. It has been actually a very good exchange this morning. And I will tell you that I think you enjoy credibility among Members of this Committee of both parties. That is a compliment and a statement of truth, which will lead undoubtedly to a burden on you, which is to say that there is real interest in both parties on the Committee and in the full Senate in regulatory reform, notwithstanding the advances in regulatory reform that this Administration has carried out. And if we could, I look forward to engaging you in that process.

Again, I understand, as I said earlier, that decisions about what the Administration will or will not support are—you will presumably be involved in those, but they are not singularly yours. On the other hand, the fortunate fact is, as Senator Portman said in describing your *Wall Street Journal* article as "brilliant," that you are about the best resource we could have for assisting us in not a kind of wanton deregulation, because nobody wants that—I certainly do not—but in figuring out how we can make the regulatory process work better, work more efficiently.

And so it is with that hope—and I know Senator Collins feels that—that we conclude this hearing, with thanks to you for what you have added to it, and we will keep the record of the hearing open for 15 days for additional questions and statements. But I hope this is not the end of the dialogue but a continuation of it. I thank you very much.

The hearing is adjourned.

[Whereupon, at 12:04 p.m., the Committee was adjourned.]

# FEDERAL REGULATION: A REVIEW OF LEGISLATIVE PROPOSALS, PART II

**WEDNESDAY, JULY 20, 2011**

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:04 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Carper, Pryor, Collins, Johnson, Portman, and Paul.

## OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. The hearing will come to order. Good morning and thanks to everyone for being here. This is the third in a series of hearings we have been doing in our Committee to assess the impacts of Federal regulation and consider whether legislation is needed in this session to improve the process or substance of rulemaking. In fact, you might say this is actually the second half of a hearing we began last month to focus on the various legislative proposals that have been introduced by Members of our Committee relating to rulemaking.

At the first session we heard from Senators, on and off the Committee, who are sponsoring reform proposals and from the Director of the Office of Information and Regulatory Affairs (OIRA), Cass Sunstein, who testified on behalf of the Administration. Today we are going to welcome one more colleague, Senator Sheldon Whitehouse of Rhode Island, who has introduced two new regulatory reform proposals since our last hearing.

Perhaps we should announce that this is the last time we will hear another colleague, just in case there are more bills that are imminent. But we are glad to welcome Senator Whitehouse today.

Then we are going to have the honor of hearing from four experts and advocates, including two former directors of the Office of Information and Regulatory Affairs, the aforementioned OIRA, who have extensive knowledge of the regulatory process and many of the proposed changes.

As I said at our last hearing, the question—for me, anyway—is not whether to regulate but how best to regulate, how to weigh the benefits and the costs of regulation, and our aim, which I think is broadly shared, is to have the most efficient and effective rule-



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making process we can. So, with that in mind, I am going to put the rest of my statement in the record.[1]

I will say, as we continue our discussion today, that after this I think the Committee is going to move to a stage where we are going to work with each other to see whether there is a consensus on the Committee that will enable us to legislate, essentially to move to markup on one or more of the pieces of legislation, hopefully one that there is a broad agreement on, but if there is enough of an interest in Members of the Committee, including, obviously, the Ranking Member, then we will go to markup, even if there is a lot of uncertainty or dissension about it because I know that there is a lot of interest in this subject.

So with that, Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. Mr. Chairman, my statement is quite lengthy, and yet I do want to give it, and so I would be happy to yield to our colleague to go before my statement, even though he will miss the wisdom of my statement.

Chairman LIEBERMAN. Yes. [Laughter.]

Senator COLLINS. But in order to respect what I am sure is a very tight schedule.

Chairman LIEBERMAN. Thank you.

In many ways Senator Collins has presented you with a very difficult choice, Senator Whitehouse. [Laughter.]

But we will understand if you go ahead because we know your schedule.

## TESTIMONY OF HON. SHELDON WHITEHOUSE,[2] A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. I appreciate the difficulty of that choice, and I appreciate the courtesy both of the Chairman, Senator Lieberman, and the Ranking Member, Senator Collins, in allowing me this time. I do have the Defense of Marriage Act hearing in the Judiciary Committee, an issue on which both Senator Lieberman and Senator Collins have shown immense leadership in the military context. So I will just thank both of you for your interest in improving regulation for the American people and how best to regulate, as the Chairman said, and thank you for inviting me to testify about my proposals to improve our regulatory system by rooting out and preventing regulatory capture.

Federal regulations touch broad swaths of American life and are a key reason why highway deaths have fallen to their lowest levels in 60 years, why we have safe and clean drinking water, and why our food producers are held to high safety standards. By preventing injury, illness, and environmental harm, effective and appropriate regulations also save the country money. Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB), recently explained, for example, that in the first 2 years of the Obama Administration, the net benefit of regulations exceeded $35 billion for Americans.

There are two major hazards to regulation, however. One is unwise or obsolete regulation. The Obama Administration appro-

[1] The prepared statement of Senator Lieberman appears in the Appendix on page 199.
[2] The prepared statement of Senator Whitehouse appears in the Appendix on page 207.

priately has begun an effort to target and eliminate such regulations. The other hazard is regulatory capture.

"We the People" pass laws through our democratic and open American process of lawmaking. Regulated industries and other powerful interests then seek to "capture" the agencies that enforce those laws to avoid their intended effect and to seek regulations and enforcement practices that protect their limited private interests as opposed to the public interest that was intended to be served by the law. Regulatory capture both violates fundamental principles of the American system of government and, as we saw in the Gulf, can lead to disaster.

The concept of regulatory capture is extremely well established. There is a consensus on in economic, regulatory, and administrative law theory. It is a doctrine that is reflected in the research of Nobel Laureate George Stigler, in the writings of President Woodrow Wilson, in the opinion pages of the *Wall Street Journal,* and in innumerable textbooks and hornbooks. So agreement on the subject is broad. During a hearing on regulatory capture that I chaired last year, the witnesses of a wide range of political perspectives all agreed on each of the following seven propositions.

First, regulatory capture is a real phenomenon and a threat to the integrity of government.

Second, regulated entities have a concentrated incentive to gain as much influence as possible over regulators, opposed only by a diffuse public interest.

Third, regulated entities ordinarily have substantial organizational and resource advantages in the regulatory process when compared to public interest groups.

Fourth, some regulatory processes lend themselves to gaming by regulated entities seeking undue control over regulation.

Fifth, significantly, regulatory capture by its nature happens in the dark—done as quietly as possible. No industry puts up a flag announcing its capture of a regulatory agency.

Sixth, as we have seen, the potential damage from regulatory capture is enormous.

And, finally, the point that all agreed on, effective congressional oversight is key to keeping regulators focused on the public interest.

We have seen the devastation in the Gulf of Mexico that occurred after the Minerals and Management Service was captured by the industry it was supposed to regulate. The cost of that disaster in lives and economic well-being, as well as the human toll of what I would contend also was capture at the Mine Health and Safety Administration and the Securities and Exchange Commission (SEC), should be a call to action to finally address in the political world this established problem of regulatory capture. The doctrine has an undeniable basis in academic regulatory theory and in the precepts of administrative law. We have known about it for a hundred years; we have seen it in action; but we have never yet done anything specific to prevent it.

I have introduced the Regulatory Capture Prevention Act to create an office within the Office of Management and Budget that would investigate and report on regulatory capture wherever it may appear. The office would shine a light into neglected corners

of the regulatory system and would sound the alarm if a regulatory agency were showing the symptoms of capture. This office's ability to bring scrutiny and publicity to the dark corners where regulatory capture flourishes would strengthen the integrity of our regulatory agencies.

To provide even more sunlight into agency action, a second bill, the Regulatory Information Reporting Act, would require regulatory agencies to report to a public Web site three important pieces of information: First, the name and affiliation of each party that comments on an agency regulation; second, whether that party affected the regulatory process; and finally, whether that party is an economic, non-economic, or citizen interest. This information would help inform effective public scrutiny and congressional oversight of who seeks to influence regulatory behavior and who succeeds.

Thank you again for inviting me to testify. I appreciate the opportunity to explain why Congress should pursue efforts to prevent regulatory capture in our Federal administrative agencies. People may disagree about particular cases, but I hope that we can all recognize that powerful special interests have a constant interest in capturing our regulatory agencies and have the means to do so, and that we have a systemic interest on behalf of ordinary Americans in preventing the capture of those American agencies.

Thank you very much for this opportunity.

Chairman LIEBERMAN. Thanks, Senator Whitehouse. That was really most interesting to me, and I suppose I have always felt that what you are describing as regulatory capture existed, regardless of which party was in control of the White House. That is part of a natural sort of functioning of the political system. But it has consequences. I must say I never have thought before about the way in which, apart from through transparency, you are trying to encourage; that the normal flow of media, political opposition, etc., could be combated legislatively. But you have made an interesting and thoughtful proposal, and I promise you that I will certainly give it my own due consideration.

Senator WHITEHOUSE. I appreciate that, and I thank the Committee for its attention.

Chairman LIEBERMAN. Thanks. Have a good day. Senator Collins.

## OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman.

Mr. Chairman, before beginning my formal remarks, let me first thank you for holding this series of hearings to examine the regulatory system and efforts to improve it. I believe that the testimony we just heard shows the breadth of our proposals that have been introduced and referred to this Committee for consideration, and I share your interest and determination in putting together the best provisions from all the bills that have been referred to us to come up with a comprehensive, bipartisan bill.

It is absolutely critical that we reform the regulatory system with the goal of reducing the regulatory burden. Data released earlier this month show an economy on the brink, I fear, of a double-

dip recession. Unemployment is up, job creation is down, and the news just keeps getting worse.

Technically, we are in the 24th month of an economic recovery, but it surely does not feel that way. Based on past recoveries, we should be adding hundreds of thousands of new jobs every month, and the jobless rate should be dropping briskly. Two years after the end of the 1981 recession, for example, almost 7 million new jobs had been created, and the unemployment rate had fallen from 10.8 to 7.2 percent. Most important, the number of Americans looking for work who could not find a job had dropped by almost a third below the recession's peak, but not so in today's so-called recovery.

The recession supposedly ended in June 2009; the unemployment rate at that time stood at 9.5 percent. Today, after an initial drop, it is back up to 9.2 percent and going up. Incredibly, instead of adding jobs, we have actually lost jobs. More than 14 million Americans are still without jobs, half a million more than just 4 months ago.

So where are all the jobs?

Well, there is an area of robust job growth, and that is in our regulatory agencies. Job growth in the Federal regulatory agencies has far outpaced job growth not only in the rest of the Federal Government but, much more significant, in the private sector.

In the past, we could rely on small businesses—our Nation's job creators—to put America back to work, but no longer. And I believe the heavy cost of regulation is one reason why. Instead of helping these small businesses create jobs, too many agencies have issued a flood of rules that have swamped small business in red tape and created so much uncertainty that it is impossible for them to plan, grow, or add jobs.

Recently, I received a letter from a constituent that really sums up this problem. The letter is from Bruce Pulkkinen, who runs Windham Millwork, a small business founded by his father in 1957 that employs 65 people. Mr. Pulkkinen's letter describes an attitude in the regulatory agencies that he says is "undermining the creation of new jobs" and has gone from "helpful and informative to disruptive and punitive."

One example he shared with me is the Boiler Maximum Achievable Control Technology (MACT) rules proposed by the Environmental Protection Agency (EPA). Just a few years ago, Mr. Pulkkinen's company made a $300,000 investment in a state-of-the-art wood waste boiler that allowed his company to stop using fossil fuels for heat and to eliminate its landfill waste stream. But the EPA's proposed Boiler MACT rules would have required him to scrap that boiler and install a new one that burned fossil fuels, squandering the investment that he made, for minuscule and, indeed, I would argue no public benefit because we are trying to reduce the dependence on fossil fuels.

Now, EPA has scaled back that portion of the initial Boiler MACT rules, but Mr. Pulkkinen remains concerned that it is only a matter of time before the EPA takes aim against small boilers once again. To help prevent that from happening, today I am introducing a bipartisan bill that attempts to give more time to EPA to come up with more reasonable rules, and I would like to ask unani-

mous consent that Mr. Pulkkinen's letter be included in our hearing record.[1]

Chairman LIEBERMAN. Without objection, so ordered.

Senator COLLINS. Mr. Pulkkinen's experience is not unique or even unusual. Small businesses all over the country are facing the same kind of pressure from regulators and drawing the same conclusion. Instead of investing and growing, they are hunkering down just to survive.

Let me share a few statistics to underscore the point: Federal agencies are at work on more than 4,200 new rules, 845 of which affect small businesses; 224 of these rules are major rules—that means that their impact is $100 million or more.

One has only to look at the growth of the *Federal Register* over the past few decades to see the growth of regulation. As the chart on display demonstrates,[2] the *Federal Register* has grown by almost three-quarters of a million pages in the first decade of this century—a rate of 73,000 pages per year. That is nearly 40 percent more than in the 1980s, and the trend is up.

These regulations do not come without a cost. According to the Crain study, commissioned by the U.S. Small Business Administration (SBA), the annual cost of Federal regulations now exceeds $1.75 trillion. OMB has a very different estimate, but it is still billions and billions of dollars, and these costs fall disproportionately on small businesses. For companies with fewer than 20 workers, the cost per worker of complying now exceeds $10,500 per year. That is way more than the cost per worker faced by big businesses, which is approximately $2,800 a year.

Now, let me indicate that, like the Chairman, I recognize the role for effective regulation. It does have benefits to our society. So that is not what we are talking about. We are not talking about wiping out essential health and safety regulations. What we are trying to do is to come up with balance. I believe that regulatory reform requires three essential elements at a minimum:

First, we should require agencies to evaluate the costs and benefits of proposed rules, including the indirect costs on job creation, productivity, and the economy, including energy prices;

Second, to make sure agencies do not attempt to go around the rulemaking process by issuing guidance documents, and that is something that Senator Portman worked on when he was head of OMB;

And, third, we must provide relief to small businesses that face first-time paperwork violations that result in no harm. That is the key qualification.

I have offered these concepts as part of my Clearing Unnecessary Regulatory Burdens (CURB) Act, one of the bills referred to this Committee. Many Members of this Committee—and others in the Senate—have also introduced excellent legislation deserves careful consideration. Again, I hope we can work together in the tradition of this Committee under the strong leadership of our Chairman to advance legislation that improves the regulatory process, to make

[1] The letter from Mr. Pulkkinen appears in the Appendix on page 204.
[2] The chart referenced by Senator Collins appears in the Appendix on page 202.

it less burdensome, more friendly to job creators, and no less protective of the public interest.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Collins, very much. I share that hope of course.

Let me invite the witnesses to the table, and while you are coming up I can say for the record who you are:

Sally Katzen is the former Administrator of the Office of Information and Regulatory Affairs (1993–98);

Susan Dudley, former Administrator also of OIRA (2007–09);

David Goldston is the Director of Government Affairs at the National Resources Defense Council;

And Karen Harned is the executive director of the Small Business Legal Center, which is part of the National Federation of Independent Businesses.

This is an excellent panel, very diverse, very balanced, and essentially we are asking you to give us your judgment on the state of regulation in our country and whether we need some regulatory reform.

We will start with Ms. Katzen. Welcome back.

**TESTIMONY OF HON. SALLY KATZEN,[1] FORMER ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (1993–98)**

Ms. KATZEN. Thank you very much, Mr. Chairman and Senator Collins.

There are a number of issues with the various legislative proposals before you, but in the limited time available for my oral presentation, I wanted to focus on three. The top three would be the codification of the cost/benefit provisions of Executive Order 12866, the suggestion to add additional analytical and procedural requirements during rulemaking, and the subject of judicial review.

To provide some context for my comments, I was struck by the fact that virtually all of the bills before this Committee apply across the board to all Federal agencies, from the Department of Agriculture and EPA to the Department of Homeland Security and the Department of Defense. And they would apply to all types of regulations, from eligibility for government programs and benefits to standards for public health and safety or financial institution safety and soundness requirements.

The coverages of these bills and the one-size-fits-all approach raises for me the questions: Are all Federal agencies bad actors? Are all regulations equally problematic? And I would urge you to please keep this in mind as I touch on these three subjects.

First is the codification of the cost/benefit provisions, such as quantifying and monetizing the costs and benefits, ensuring the benefits justify the costs, and selecting the alternative that maximizes net benefits.

Having had a hand in drafting Executive Order 12866, I think these provisions are eminently sensible. But given their reaffirmation by Executive Order 13563 and the now more than 30-year implementation of these principles by presidents of both political par-

[1] The prepared statement of Ms. Katzen appears in the Appendix on page 209.

ties, what, I would ask, is the benefit, the value-added, of putting them in legislation? Executive Branch agencies routinely undertake cost/benefit analysis, and if more is needed, OIRA works with them to assure that happens.

To be sure, the quality of the work done—how sophisticated, technically proficient—is mixed, but this should not be surprising because agencies are very different from one another, with different cultures and different resources. The latter is particularly important because thoughtful, careful, comprehensive analysis takes time and resources, and the more significant the proposal, the more time and resources it should consume. And yet some of the same people who call for more analysis are the first to suggest straightlining or reducing the agencies' budgets.

Those who support codifying these provisions argue that legislation would be better than an Executive Order (EO). I am very dubious about that because OIRA is well situated to impress upon Executive Branch agencies in real time the need for compliance with the terms of the Executive Order. Really—and I think Senator Portman would support me in this—agencies do listen when OMB talks; whereas, legislation may or may not be self-executing or self-enforcing.

But even if there were a case made that legislation is superior, there are serious problems with legislating these principles. Among other things, they are not simple and straightforward. Look at how many different definitions of costs you have in the various bills before you. Incidentally, it is not easy to capture these things. OMB Circular A–4 is 50 pages single-spaced to tell agencies how to do a regulatory impact analysis.

Moreover, while undertaking economic analysis in the course of developing regulations is highly beneficial, it is, of course, only an input. Even if it is carried out by the most eminent economists, according to tried and true methodology, it is not and cannot be dispositive. It was Professor Einstein who had a sign in his office that said, "Not everything that can be counted counts, and not everything that counts can be counted."

So under the Executive Order, those costs and benefits which cannot be quantified and monetized are, nonetheless, essential to consider, and there are other considerations—like disparate effects or regional effects—that have to be taken into account. And different agencies face different challenges. I would remind this Committee that the Department of Homeland Security (DHS) has its own set of issues. How do you quantify and monetize a reduction in risk of a terrorist attack? And if you can figure it out, do you really want to publish this and let the world know what sites you have hardened and what you have not?

Most importantly, under the Executive Order, while agencies are required to conduct economic analysis in developing the regulations, they are in the first instance bound by their authorizing legislation—what Congress decided they should do and what they should consider when they were delegated the authority to do it.

Some of the authorizing statutes are silent on the role of costs. Others do not permit consideration of such factors. And for that reason, the EO applies "to the extent permitted by law." But if these provisions were codified, they would become the law. And as

a result, a proposed regulation, even a regulation under a statute that does not permit the consideration of costs, could not become effective unless the benefits justify the costs. So by codifying these provisions, Congress is amending or would be amending a host of previously enacted statutes, and at this point we do not know how many, we do not know which ones, and we do not know the implications for either the regulated entities or the intended beneficiaries. Talk about uncertainty. Talk about what businesses need in order to plan rationally. This would throw, truly, a monkey wrench into the whole system.

Now, there is one area where I think you can proceed, and that is extending the economic analysis and centralized review requirements to the independent regulatory commissions (IRCs). A number of people have touched on it, and I will not go there for now.

The second subject is the imposition of additional analytical and procedural requirements on the agencies, and one proposal is to require affirmative congressional approval before rules become effective.

Chairman LIEBERMAN. Let me interrupt a moment. I think we gave you only 7 minutes. Normally we give the witnesses 10 minutes, so I am going to add 3 minutes to everybody. If you can finish within 7 minutes, you will have earned the gratitude of the Committee, but if you need the extra 3 minutes, go ahead.

Ms. KATZEN. Thank you, Mr. Chairman.

These extra steps are not cost free, both in terms of delaying or eliminating beneficial regulations as well as the cost of increased uncertainty and unpredictability. So, again, what is the compelling need?

The bills' sponsors cite the relatively slow recovery from the recent economic meltdown, which some commentators believe is attributable to inadequate regulation of the banking industry rather than too much regulation. They cite the numbers of regulations. In fact, in the first 2 years of the Obama Administration, there were fewer regulations than in the last 2 years of the Bush Administration. And they cite the total regulatory burden on the U.S. economy, the $1.75 trillion, which has taken on a life of its own, notwithstanding reputable scholars' critiques of both the assumptions and the methodologies.

If, however, you are moved by the aggregates, then I would urge you to look at the document that Senator Whitehouse referred to earlier, which shows that in the aggregate Federal regulations do, in fact, provide more benefits, greater benefits than costs, producing net benefits, and these reports have been issued for over the last 10 years, so it is not a partisan document.

The other question is: Why now? President Obama launched an initiative 6 months ago, which is continuing to date. As recently as 2 weeks ago, he issued an Executive Order affecting the IRCs. He has called for a regulatory lookback, and I have a sense, having lived through several of these, that this is being done much more aggressively than others in the past.

He has also called for greater public participation, and his Executive Order specifically stresses the importance of promoting the economy, innovation, competitiveness, and job creation.

So how will these edicts from the President to those who report to him and for whom he is constitutionally responsible play out? At least will the results of his efforts not inform you where the real problems are? Again, going back, it is not a one-size-fits-all. It is not all agencies. Where do you want to focus your attention and your resources?

As you know, Congress has imposed on the agencies a series of process and analytic requirements over the last 30 years, including the Paperwork Reduction Act, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandate Reform Act, to name a few, without increasing the agencies' resources to carry out those tasks assigned. Whether there is a causal connection or not, it takes years now rather than months to dot all the "i's" and cross all the "t's," and the additional requirements in these bills will necessarily lengthen the process, if not lead to paralysis by analysis or due process to due death.

Perhaps Congress should rationalize the current set of requirements before adding another one or provide more resources to the agencies to do what they are already required to do. If there is an implementation, Congress should address that specifically and not just add another requirement that cannot be implemented.

You obviously have a number of alternatives by which you can target your concerns, like Senator Collins' concern with the Boiler MACT and the Utility MACT that EPA is producing. Maybe it is agency overreach. Maybe it is the underlying statute, which Congress can do something about. But we do not know, and an across-the-board provision is not going to help us figure that one out.

My time is running out, so I am just going to be very fast on the third subject which is the question of judicial review.

Chairman LIEBERMAN. Just give us a couple of sentences because I promise you we are going to ask you about that.

Ms. KATZEN. Yes, OK. I think it would be a mistake to add the courts as another check to the President and to the Congress in overseeing whether the economists are right about how to maximize benefits and the various determinations that must be made in implementing cost/benefit analysis in addition to the lawyers who are now going to have an opportunity to debate whether this statute trumps all the other statutes that have been out there in terms of substantive requirements.

With Chevron and the hard-look doctrine, I suspect there will be deference to the agencies but there, nonetheless, will be a lot of time and money devoted to trying to pin down what are essentially judgment calls. And I want to emphasize the time element because, as I mentioned earlier, the issue of uncertainty. In my private practice and in my consulting work, I run across so many businessmen who want to do what is right. They want to comply with applicable regulations. They may not be happy with the rules, but they really want to do what is right. What is driving them crazy is regulatory uncertainty. And so if it takes years to do a regulation now, let us add another couple of years for more judicial review of these issues? What are we asking these people to do? I think that is a serious problem. Thank you.

Chairman LIEBERMAN. Thank you.

Ms. Dudley, thanks very much for being here. We welcome you back.

**TESTIMONY OF HON. SUSAN E. DUDLEY,[1] FORMER ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2007–09)**

Ms. DUDLEY. Thank you, Chairman Lieberman, Ranking Member Collins, and Members of the Committee. I am Susan Dudley, Director of the George Washington University (GWU) Regulatory Studies Center and a research professor of public policy at GWU. And as you mentioned, from April 2007 to January 2009, I oversaw the Executive Branch regulations of the Federal Government as Administrator of the Office of Information and Regulatory Affairs, where I had the pleasure to work under OMB Director Rob Portman. But the views I express here are my own.

I appreciate this Committee's interest in bringing more accountability to Federal regulation. Successful regulatory reform efforts in the past have been bipartisan, and this Committee has an opportunity to effect needed improvements through bipartisan reforms.

Probably the most significant historic period of reform was in the 1970s when bipartisan efforts of both branches of government brought about dramatic improvements in innovation and consumer welfare by removing unnecessary regulation that kept prices high, to the benefit of the regulated industries and at the expense of consumers. At the same time, a new form of regulation aimed at addressing environmental safety and health concerns was emerging, administered by newly formed agencies such as EPA, Occupational Safety and Health Administration, National Highway Traffic Safety Administration (NHTSA), and the Consumer Product Safety Commission.

Concerns over the burden of these new regulations led President Jimmy Carter to expand on procedures begun by Presidents Nixon and Gerald Ford for analyzing the impact of new regulations and minimizing their costs. Every modern President has continued and expanded the procedural and analytical requirements that began in the 1970s. Nevertheless, the growth in regulation continues and with it concerns that we may have reached a point of diminishing returns.

Executive and legislative requirements for analysis of new regulations appear to have been inadequate to counter the powerful motivations in favor of regulation. Politicians and policy officials have faced strong incentives to do something, and passing legislation and issuing regulations demonstrates action. Requirements to evaluate the outcomes of those actions—the benefits, the costs, and the unintended consequences—tend to take a back seat. So I really appreciate this Committee's interest in examining the merits of legislative reforms that alter both the procedures by which regulations are developed and the decision criteria on which they are based.

In the procedural reform category, I would include the Regulations in Need of Scrutiny (REINS) Act and regulatory pay-as-you-go (PAYGO).

[1] The prepared statement of Ms. Dudley appears in the Appendix on page 220.

The REINS Act would require a congressional vote before a major new regulation can become effective. It would have the benefit of making not only legislators but presidents more accountable for the content of major new regulation. On the other hand, it could alter agency incentives in unintended ways.

Under the regulatory PAYGO proposal about which Senator Warner spoke with the Committee last month, for every new regulation issued, agencies would have to remove an equivalent burden from regulations already on the books. While this poses non-trivial analytical challenges, a regulatory PAYGO system has the potential to impose needed discipline on regulatory agencies and generate a constructive debate on the real impacts of regulation.

In the decision criteria category, several bills would build upon the widely accepted regulatory analysis requirements reinforced by President Obama in January. Some bills, including Senator Collins' CURB Act, would codify the requirements to examine regulatory costs and benefits currently embodied in Executive Orders and extend them to independent agencies. Others would expand the coverage of existing cross-cutting regulatory statutes, such as Senator Portman's Unfunded Mandates Accountability Act and Senators Snowe and Coburn's Freedom from Restrictive Excessive Executive Demands and Onerous Mandates (FREEDOM) Act.

Since presidents of both parties have adopted virtually identical analytical requirements, I do not think codification is necessary to ensure future presidents continue to do so. But I do see three important advantages to creating a statutory obligation for regulatory impact analysis.

One, it would lend congressional support for these non-partisan principles and decision tools.

Two, legislation could apply them to independent agencies, something presidents have been reluctant to do but many policy experts endorse.

And, three, legislation could make compliance with these requirements judicially reviewable, though it sounds like we will have a debate on whether that is a pro or a con.

In my view, Congress should not limit legislation to codifying the requirement for benefit/cost analysis but, rather, should capture the broader philosophy and principles articulated in EO 12866 that regulation should be based on the identification of a compelling public need, an objective review of alternatives, and an understanding of the distributional impacts of different approaches—who is expected to gain or lose.

Congress may also need to consider whether these cross-cutting decisional criteria would supersede or be subordinate to the decision criteria expressed in individual statutes. Rather than a super mandate, Congress may prefer to amend those statutes that constrain agencies' ability to weigh trade-offs, which have produced regulations with questionable benefits that divert scarce resources for more pressing issues, and I think the Boiler MACT may be an example of that.

In closing, let me offer one more idea and respectfully encourage you to consider assigning responsibility for evaluating regulatory bills and regulations to a congressional office. Just as the Congressional Budget Office provides independent estimates of the on-

budget costs of legislation and Federal programs, a staff of congressional regulatory experts could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation.

And with that, I will close—earning myself undying gratitude from the Committee. [Laughter.]

Chairman LIEBERMAN. Yes, really, a gold star next to your name.

Thanks very much. That is an interesting idea that you ended with. I appreciate it. We will talk more about it.

Mr. Goldston, thanks for being here, and we welcome your testimony now.

**TESTIMONY OF DAVID J. GOLDSTON,[1] DIRECTOR, GOVERNMENT AFFAIRS, NATURAL RESOURCES DEFENSE COUNCIL**

Mr. GOLDSTON. Thank you, Mr. Chairman, Senator Collins, and Members of the Committee. Thank you for inviting me to testify today and for setting up a balanced review of the many bills pending before the Committee.

I would add that as someone who spent more than 20 years as a House staffer, it is nice to be sitting in a seat in the Senate where they might feel obligated to hear me out. [Laughter.]

It seems to me that the question before the Committee today is not whether regulatory agencies sometimes make mistakes or issue controversial rules. The question, rather, is twofold: One, is there something fundamentally amiss with the regulatory system? And, two, would the pending legislation make things better or worse? In other words, the Committee ought to be asking itself the very questions the existing Executive Orders and some of the pending bills put forward to the agencies: What problems are you trying to solve? Is this the best way to solve them? And would the benefits outweigh the costs?

It seems to me that no one has identified a fundamental problem with the regulatory system for which the pending bills would serve as a remedy. The regulatory system has repeatedly been shown to yield benefits that significantly outstrip its costs, and studies have found the system to have, at worst, a neutral effect on employment. Moreover, the system produces benefits that the public has rightly come to expect: Cleaner air and water, safer food, and so on. When banks lend money with abandon, an oil platform collapses in the Gulf of Mexico, or salmonella sickens consumers, no one responds by praising the restraint of regulators.

And I must say the complaints about the specific rules, including the industrial boiler rule that Senator Collins brought up that I am sure we will be discussing more, that are held up as examples of why these bills are necessary seem almost entirely unrelated to the legislative text. The offending rules, whatever their merits or flaws, have undergone cost/benefit analysis and public comment and are subject to judicial review. It is often not clear how the proposed measures would have changed anything except by making the process more time-consuming, expensive, and cumbersome for all concerned.

[1] The prepared statement of Mr. Goldston appears in the Appendix on page 242.

It seems at times that these bills are not an effort to craft targeted solutions to specified problems but, rather, to use any tool at hand to run a war of attrition against already overburdened agencies that are trying to follow the laws that Congress has passed. Surely inducing exhaustion is not the proper way to reform the regulatory system, whatever its failings.

Which brings me to my second question: Would these bills make the system better or worse? In general, I fear the bills would make the system less able to provide the protections the public expects. First, the additional, often ill-defined analysis required by some of these bills would provide little reliable or needed information but would impose additional costs on the agencies. Especially at a time when agencies may see their budgets cut substantially, these additional requirements seem like the wrong priority. In effect, the bills themselves would end up imposing unfunded mandates on the agencies.

Allowing judicial review—I guess we will all be discussing that to some extent. Allowing judicial review before a rule is final would needlessly burden courts and agencies and short-circuit the regulatory process. It would fly in the face of an elementary principle: How can one sue over something that, by definition, is not affecting anyone? That seems like a particularly odd approach for conservatives who have not been enamored of recourse to the courts.

And early judicial review seems to contradict other goals of these bills, such as more open discussion of alternatives. How open will agencies be if they can be hauled into court simply for broaching an idea someone does not like?

The worst and by far the most radical bill before the Committee is the REINS Act, which sets out really to destroy the regulatory system as it has existed for well over a century. Congress rightly decided long ago that it was not the right venue to decide every scientific, technical, and quasi-judicial issue that a modern economy poses for the government. The REINS Act rejects that hard-earned wisdom in a way that legislators, business, and the general public would all quickly come to regret if this measure were ever enacted.

If Congress truly believes the regulatory system needs reform, the proper approach would be to review the underlying statutes that direct the regulatory agencies, not to impose one-size-fits-all work-arounds. Agencies are carrying out their legislative mandates. If there are problems with those mandates, the solution is not monkeying with the regulatory process or, in the case of REINS, trying to overthrow it. No doubt one reason Congress is reluctant to address these purported concerns more directly is the level of public support for these underlying statutes, which have been and continue to accomplish their goals.

Indeed, it is interesting that lists of offending rules are almost always prospective. Once rules are in effect, they generally are viewed as successful and far less expensive than anyone had claimed in advance.

I urge the Committee not to further complicate a system that is fundamentally protecting the public without unduly burdening the economy. Thank you very much.

I do not know if I left more or less time than—— [Laughter.]

Chairman LIEBERMAN. There is a momentum here. Thanks very much, Mr. Goldston.

Finally, Ms. Harned, thanks for being with us, and we welcome your testimony now.

**TESTIMONY OF KAREN R. HARNED,[1] EXECUTIVE DIRECTOR, SMALL BUSINESS LEGAL CENTER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

Ms. HARNED. Thank you. Good morning, Chairman Lieberman, Ranking Member Collins, and Members of this Committee.

The National Federation of Independent Business (NFIB), the Nation's largest small business advocacy organization, commends this Committee for examining legislative solutions which would help grow the economy by reducing overly burdensome regulation. We believe that it is vitally important to the Nation's economy to achieve regulatory reform now, especially when there is momentum to do so in the 112th Congress. Various proposals have been introduced or discussed that would improve current law, and we are hopeful that the Committee takes the needed steps to act in a bipartisan way and pass these important provisions.

The NFIB Research Foundation's Problems and Priorities, has found "unreasonable government regulations" to be a top 10 problem for small businesses for the last two decades.

Job growth in America remains at recession levels. Small businesses create two-thirds of the net new jobs in this country, yet those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007, according to the Bureau of Labor Statistics. Moreover, for the first 6 months of 2011, 17 percent of small businesses responding to the NFIB Research Foundation's Small Business Economic Trends report cite regulation as their single most important problem. Therefore, reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce. NFIB believes that Congress must take actions to level the regulatory playing field for small business.

The Small Business Regulatory Enforcement and Fairness Act (SBREFA)—when followed correctly—can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. NFIB supports reforms like S. 1030, introduced by Senator Snow, which would expand SBREFA's reach into other agencies and laws affecting small businesses. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how the agency can develop simple and concise guidance materials.

In reality, small business owners are not walking the halls of Federal agencies lobbying about the impact of a proposed regulation on their businesses. Despite great strides in regulatory reform, too often a small business owner will find out about a regulation after it has taken effect. Expanding SBAR panels and SBREFA requirements to other agencies would help regulators learn the po-

[1] The prepared statement of Ms. Harned appears in the Appendix on page 245.

tential impact of regulations on small business before they are promulgated. It also would help small businesses be alerted to new regulatory proposals in the first instance.

Regulatory agencies often proclaim indirect benefits for the regulatory proposals they offer, but they decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. As an example, environmental regulations have particularly high costs. Whether a regulation mandates a new manufacturing process, sets lower emission limits, or requires implementation of new technology, the rule will increase the cost of producing goods and services. Those costs will be passed on to the small business consumers that purchase them. Does that mean that all environmental regulation is bad? No. But it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals.

NFIB would like to thank Senator Collins for ensuring more small business owners had a chance to learn about and be certified under EPA's lead renovation and repair rule. Although the rule took effect in April of last year, Senator Collins was successful in pushing the effective date back to October 2010. However, the rule continues to negatively impact small business. NFIB member Jack Buschur, of Buschur Electric in Minster, Ohio, recently testified that because of the time and financial costs of EPA's lead renovation and repair rule, he will no longer bid on residential renovation projects. Because he will no longer be bidding on these projects, Mr. Buschur will not be hiring new employees at his company that currently has 18 employees. That is down from 30 employees in 2009.

Reforms like those in the CURB Act, introduced by Senator Collins, S. 602, and S. 1030 would be a great start in ensuring that agencies make public a reasonable estimate of a rule's indirect impact. Other regulatory reforms that would help minimize unintended consequences of regulation on small business include reforms to strengthen the role of the Small Business Administration's Office of Advocacy, increased judicial review within SBREFA, and ensure agencies focus adequate resources on compliance assistance.

Finally, Congress should pass legislation which would waive fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because of a lack of specialized staff, mistakes in paperwork will happen. If no harm is committed as a result of the error, the agencies should waive penalties for first-time offenses and instead help owners to understand the mistake they made. We appreciate that Senator Collins and Senator Vitter have introduced legislation to add a first-time waiver protection into law, and we look forward to working with them toward finding an effective solution.

With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burden on small businesses. NFIB is hopeful that the 112th Congress can pass regulatory reforms that would improve current law and level the regulatory playing field for small businesses.

NFIB looks forward to working with you on this and other issues that are important to small business. Thank you.

Chairman LIEBERMAN. Thanks, Ms. Harned. That was very helpful testimony. Thanks to all of you.

I am very pleased that there is a good turnout of Members of the Committee here, which expresses the interest in Congress in this subject, so we will have 7-minute rounds of questions.

The Committee has heard in recent hearings, particularly from Cass Sunstein—and as you know, because it is a matter of public record—the Administration has undertaken some regulatory reform initiatives of its own, including a lookback process which is designed to weed out flawed regulations already on the books. I wanted to ask each of you, if you are familiar with this, to give the Committee a quick reaction to the recent Administration executive regulatory reform effort. Ms. Katzen.

Ms. KATZEN. Thank you, Mr. Chairman. We had a lookback process during the Clinton Administration. There was another one during the Bush Administration, and now we have the Obama Administration.

Chairman LIEBERMAN. Yes, we do. [Laughter.]

Ms. KATZEN. I think this is being pursued more aggressively than in earlier times. I think we will find some savings, as Cass Sunstein has indicated. But there is something that Mr. Goldston mentioned that I think is very relevant here, and that is, when the regulation is being proposed, everyone says it is going to cost a fortune and it is going to be totally disruptive and it is going to be impossible to comply. Then the regulation is adopted, and we find that the estimated cost is appreciably less than had been originally estimated, in part because of American ingenuity. When you are told you have to do something, you figure out an efficient way of doing it.

Similarly with existing rules. Once they are on the books, they become part of what we do. So we have a lookback. Do you want to get rid of seat-belt regulation? After all, we have airbags now. But the assembly lines have already been set up with the seat belts all ready to be put in. So what kind of savings would we have?

Therefore, while I think a lookback is important and it keeps the regulators on their toes and provides the right incentives, I am not so sure that we will find that this is the silver bullet that will cure all.

Chairman LIEBERMAN. Thank you. Ms. Dudley.

Ms. DUDLEY. Yes, it has been done before. Previous Administrations have taken a look back. And I think there is an element of truth to the idea that for existing regulations, once we have complied with them, some costs are sunk. And so removing them—there are some big regulations, if you have already invested in that very expensive boiler, you do not want to hear that if you did not have to. But I do take issue with the idea that costs are always less than predicted. There are some academic studies that suggest that, others that suggest otherwise, because there are opportunity costs to complying with regulation. So the American ingenuity that is diverted to addressing the regulatory goal is not addressing something else that consumers may want more. So I think you do need to keep that in account.

As far as looking specifically at the current lookback, I think we need to look carefully at what the effects of those reforms are. For

example, one of the big ones that has been used as an example is that milk will not be classified as a hazardous waste if it is spilled.

Chairman LIEBERMAN. That is right.

Ms. DUDLEY. That was never enforced. Maybe some zealous enforcement officials at EPA thought, under the statute we could define milk that way, but that was not something that was ever implemented that way. And, in fact, that was one of the midnight regulations on my watch, was to put that clarifying regulation in place. It was withdrawn and then reissued in this Administration.

Chairman LIEBERMAN. Mr. Goldston, is the Administration review a good idea, enough, or not enough?

Mr. GOLDSTON. We think it is a reasonable idea. It would not necessarily be our top priority for what they should be doing, but it is reasonable to look at past regulations. We think that it has been done in a serious and reasonable way. The regulations that they have come up with seem in this preliminary look—and there is a notice and comment period now, or a comment period now on it—seem to be regulations that merit being looked at.

But I would say the point that—taking a slightly different take on the point that Ms. Dudley just made, I mean, the fact is some of these horror stories about regulations on the books, when you look at what has actually happened with them, they are not enforced or they did not actually create a problem. So I think that needs to be kept in mind as well.

A last point on—I believe it is—I cannot find it quickly, but it is a Resources for the Future study that is most often cited that did look in detail at costs of regulations that had been anticipated and then that actually occurred, and not in every case, but in the vast majority of the cases, the actual costs were far smaller than the predicted ones—for two reasons: One, innovation, as Sally Ericsson and Ms. Katzen said. I am thinking of the current OMB person—as Sally Katzen said; and also because most of the cost estimates come from industry that has no incentive to give the lowest cost estimates. So it is not a surprise, but there have been some studies, and routinely but not universally, the actual costs are significantly below the predicted ones.

Chairman LIEBERMAN. Thanks. Ms. Harned.

Ms. HARNED. Yes, I mean, NFIB thinks it is a good step that the Obama Administration is looking at existing regulations. But we really believe that, as a practical matter, we need more regulatory reform so that we can really get teeth and, as a practical matter, actually eliminate some regulations that are on the books. We just have not seen, as Ms. Dudley indicated, regulations that have been a true problem for small business eliminated under these provisions, these lookback provisions yet.

And I would also say, as Ms. Dudley alluded to, and actually even Ms. Katzen said, there is an issue—again, once the regulation is in effect, we see that it is very hard to get it off the books, and that is why NFIB is so committed to reforms that will do more on the front end to assess small business impact, because once they are on the books, it is hard to pull them back. And really getting our homework done on the front end will help with that.

Chairman LIEBERMAN. Thank you. My time is up. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Ms. Harned, I want to start just where you left off. I could not help but think when we were talking about the recently repealed regulation on spilled milk being treated as if it were an oil spill—and we heard that it has never been enforced—that to me is not of great comfort because it raises the issue of why was it issued in the first place, and that is why I think we do need more attention on the front end.

There is a lot of disagreement about the cost of regulation, and I would like to ask you a few questions about the Crain study that was commissioned by SBA, and that study estimated the total cost of the regulatory system as more than $1.75 trillion. By contrast, OMB estimates the cost as far, far lower, ranging between $62 billion and $73 billion.

Now, clearly, that is an extraordinary range. I know you have looked at the Crain study. Could you explain for the Committee the difference in methodology and what OMB covered versus what the Crain study covered?

Ms. HARNED. Right. Well, one of the main things that the Crain study covered that OMB did not capture, my understanding is, is those rules that are not considered to have a significant economic impact. And there are hundreds of those that come out every year.

Senator COLLINS. Let me just interject. So OMB's estimate only included major rules which have an impact of $100 million on the economy, correct?

Ms. HARNED. That is correct. And, truthfully, what small business owners face is the death by a thousand cuts, and we feel like the Crain study better reflects that number because it does show the disproportionate impact to small business by capturing the entire regulatory burden that they are experiencing and not just focusing on those major rules.

Senator COLLINS. It is also my understanding that OMB did not count rules that were adopted 10 years ago. Is that correct also, to your knowledge?

Ms. HARNED. To my knowledge, that is correct. And, again, small business owners, every paperwork requirement, once it is out there, that is a continuing burden for them because they do not have the in-house staff to deal with these issues. So they really do feel the burdens longer than, I would say, a larger company. I think it is easier for a large firm to absorb those earlier.

Senator COLLINS. Now, Ms. Katzen made the point that once regulations are in effect, she believes that the costs go away or disappear or tend to be much lower. Yet your survey, which was done just a month ago, seems to indicate that small businesses still consider government regulations to be a major problem for them. Could you tell me where it ranked among the 10 issues that you asked small businesses about?

Ms. HARNED. Right. Well, this year, like I mentioned, we do this monthly study that is very well regarded and is a very good indicator of where the economy is and what small business owners are thinking about the economy. And regulation has consistently come in third only to poor sales and taxes as the biggest issues that they are facing. And we have definitely seen the numbers, if you look at the trends over the past probably 30 or more years—I think it

was somewhere in the middle of last year and in the high teens consistently as one of the most important problems they are facing today as they are trying to grow their business.

Senator COLLINS. And has that grown as a higher percentage in the last couple of years?

Ms. HARNED. Yes, very much so.

Senator COLLINS. Thank you.

I would like to, for my final question, ask each of the panelists about the issue of applying cost/benefit analysis and other provisions of the President's Executive Order to independent regulatory agencies because this is a big issue. It is something that Cass Sunstein advocated for when he was an academic at Harvard but no longer advocates for it now that he is head of OIRA. So I would like to get the opinion of each of you, and let me start by pointing out that last week, on July 11, 2011, the President issued an Executive Order and a directive, a Memorandum to the Executive, to the independent regulatory agencies in which he requests that they comply with cost/benefit analysis, public participation, and other provisions of the Executive Order. He cannot direct it without changes in law, but he asked them to do so.

So, Ms. Katzen, do you agree with the President's request in this area?

Ms. KATZEN. It is somewhat more complicated than that. When I was at OMB, we were drafting EO 12866, and we asked the Office of Legal Counsel at the Department of Justice whether or not the President had the constitutional authority to extend these requirements to the IRCs. We were told yes. We declined to do so solely for political reasons, and that was in deference to the Congress.

The same thing was true with President Reagan in 1981. His Office of Legal Counsel, in which a young man named Mr. Sunstein worked, said that they had the constitutional authority to do it, but might want to consider deferring that out of deference to Congress.

I have flipped completely. Having recommended that we not extend these provisions to the IRCs in 1993 when the President signed the Executive Order, I am now a staunch supporter and have been testifying in the House on several occasions over the last 3 or 4 years in favor of extending these requirements to the IRCs. I think it is a no-brainer.

Senator COLLINS. Thank you. Ms. Dudley.

Ms. DUDLEY. I think they should be extended to the independent agencies. We had a conference of all the former OIRA Administrators on the 30th anniversary of ORIA last month, and all the former Administrators agreed they should be extended to the independent agencies.

Senator COLLINS. Very interesting. Mr. Goldston.

Mr. GOLDSTON. Claiming some of my earlier time, if I could say two quick things before that. First is the Crain study has been discredited by numerous people, even if you accept what should be in or out of the package, the methodology used, and I refer the Committee particularly to the Congressional Research Service (CRS) report on that.

Second, in terms of regulations that are already on the books, it is not just that there are sunk costs; it is that the public comes to

expect the benefits of those, and it turns out those benefits come at acceptable costs. So it is actually truly accepting those——

Senator COLLINS. Since my time has expired, if you could answer the question I asked.

Mr. GOLDSTON. Yes, absolutely. We do not support the extension to the IRCs because we feel their independence is a feature of law that should be maintained. I would say that Sally Katzen in her testimony, even when talking about extending them, talks about treating the IRCs differently, recognizing that difference in statute. And, again, CRS in their review of the bills has pointed out that it would change the fundamental understanding of the IRCs.

Senator COLLINS. Thank you. Ms. Harned.

Ms. HARNED. Yes, NFIB strongly supports extending to the independent agencies.

Senator COLLINS. Thank you. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Collins.

As is the Committee's tradition, in order of appearance we will have Senators Johnson, Pryor, Portman, Carper, and Paul. Senator Johnson.

**OPENING STATEMENT OF SENATOR JOHNSON**

Senator JOHNSON. Thank you, Mr. Chairman.

As somebody who has lived under the rules and regulations in a manufacturing plant for about 31 or 32 years, I will just say that certainly there are up-front costs of compliance with regulations, so you maybe have to invest in some equipment, and that is kind of a one-time cost, but even that equipment has to be maintained. And the costs of reporting compliances, that is a continuous cost. It is a cumulative cost. It simply is. And it costs jobs in the long term.

Mr. Goldston, you said that we are looking at what is the fundamental problem with regulation. I think the fundamental issue here is the fact that there is a trade-off between safety and economic activity. I think the theory behind regulation is that you are doing something for the public good, in the public interest. But from my standpoint, the first part of the public interest is robust economic activity, and I think we are not seeing it.

As an accountant, I kind of look for metrics, and if you go back to the Franklin Roosevelt Administration—I know that is a long time ago—the total number of pages in the *Federal Register* was about 80,000. As recently as under the Nixon Administration, the total number of pages was about half a million. Right now the *Federal Register* totals about 3 million pages. I realize that is not an exact replica in terms of what the regulatory burden is, but it is a pretty good indicator.

In trying to maintain that delicate balance between public safety and economic activity, which is the trade-off, certainly in hard economic times people like me, people who have lived under the rules and regulations, do come down on the side that I think we have overregulated. I think regulation is strangling our economy. I want to get everybody's opinion in terms of where you fit in that spectrum. Do we have too many regulations? And is it harming our economy? Ms. Katzen.

Ms. KATZEN. Well, first, if I could talk about the number of pages in the *Federal Register* because it has been used now by both Senator Collins and by yourself. When I teach a course in administrative law, I have a 1977 NHTSA rule on airbags and a 1997 NHTSA rule on airbags. One is four pages. One is 40 pages. The difference? The 40-page rule has all the data that everybody wants to see displayed, and it has a response to all the comments which everybody wants to have considered. Repetition to the point of insanity, so that the number of pages I would respectfully say is not a——

Senator JOHNSON. And I admit it is not perfect, but it is indicative. But to answer my question, what is the effect of regulation on employment? Do you believe we are at a point where it is harming our economic activity?

Ms. KATZEN. I think most of the academic studies show that it is essentially neutral on employment, and I think the *Wall Street Journal* yesterday said lack of employment is because of lack of demand. Lack of employment is because the Federal payments to the States have been, and are expected to continue to be cut and the States have fired a lot of people. And in the private sector, I think part of the reluctance to add jobs is regulatory uncertainty, not regulatory burden; employers are not sure what is going to be happening. While unemployment is still up, it is interesting that corporate profits are at an all-time high. So if regulation is such a burden, why is it not coming out of the corporations' bottom line?

Senator JOHNSON. Ms. Dudley.

Ms. DUDLEY. I think everyone agrees that regulations have benefits as well as costs. We have heard several times today that OMB's estimates of the benefits are so much higher than their estimates of costs, and I think it is important to understand what those benefits are. The costs, as you say, are real compliance costs. They might prevent you from hiring a new employee or being able to make a new innovation. Whereas, the benefits—and I will not take up too much of your time, but the benefits are much more uncertain. They are not dollars that a family can use to put food on the table or that you can use to hire a new employee. They are estimates of how people might value a change in risk.

So I think while we all agree that some regulation is necessary, I think we have reached a point of diminishing returns. And that does not mean all regulations, but there are some that are not providing incremental net benefits.

Senator JOHNSON. Mr. Goldston.

Mr. GOLDSTON. First of all, I would agree with everything that Sally Katzen said on this. Obviously, we are not arguing that there are no regulations that are in error or that regulations do not impose costs on industry. But the idea that the Nation is grossly overregulated or that regulations are responsible for the current unfortunate economic situation I do not think can be borne out by the facts.

The other thing I would say is regulations also protects the economy. I think there is certainly a strong argument to be made that one of the reasons we got into this problem that we have right now is because of inadequate regulation, and those are real costs.

Senator JOHNSON. Do you think the banking industry was underregulated?

Mr. GOLDSTON. I am not an expert on the banking industry, but there is certainly an argument that they were not sufficiently regulated in terms of the kinds of loans they were allowed to make, in terms of the way they packaged them, and in terms of the kinds of reserves they had to hold.

Senator JOHNSON. So there is a difference, though, in terms of effective regulation versus the number of regulators.

Mr. GOLDSTON. Sure.

Senator JOHNSON. Coming from a small business that had to compete against large businesses, it was very easy to compete, because as a small business you were close to the customer, you were very nimble, you could be very effective in terms of customer service. Whereas, the bureaucracies in large businesses made it very easy to compete, and I think that is part of my problem with the regulatory environment. Actually, I agree with you, Ms. Katzen. Throwing more laws on top of this, another layer of bureaucracy—I am quite dubious about putting more bureaucrats in charge of making other bureaucrats more effective and efficient. I have a real concern about that.

Ms. Harned.

Ms. HARNED. Yes, three quick points. What we continue to hear from our small business owners anecdotally is, "We need the government to get off our backs, out of our way, so we can get moving again." That is borne out again by the numbers I reflected earlier today where nearly one in five small business owners are saying that regulation is their most important problem today.

And, finally, to your point on the regulatory costs, the continuous regulatory costs, our research has shown—the "Coping with Regulations" study that our research foundation did—that 26 percent of small business owners say that paperwork costs are their biggest Federal regulatory burden, and that is an ongoing annual cost that they must incur.

Senator JOHNSON. I will just make one final statement in terms of government's ability to estimate costs. Back when they passed Medicare in the 1960s, they said it would cost $12 billion in 1990. It ended up costing $109 billion. So I just do not have a great deal of faith in government's ability to estimate costs.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Johnson. Senator Portman—and the Committee will note the extraordinary tribute paid to you by your former employee, Ms. Dudley here.

**OPENING STATEMENT OF SENATOR PORTMAN**

Senator PORTMAN. I thought it was kind of mild, actually. [Laughter.]

Chairman LIEBERMAN. It just all depends on where you sit how you hear these things.

Senator PORTMAN. Well, first of all, she did a terrific job, and I am delighted that you are here today, Professor Dudley. And, Ms. Katzen, thank you for your testimony.

Sally Katzen actually asked me to come up and speak at one of her classes at the University of Michigan Law School, which was really intimidating. Not just that these students are so bright, but there is Ms. Katzen, as a former OIRA Director, and me talking

about OIRA, and as Administrator you did get involved in a lot of these issues, so this is a great experience for us to have.

If I could just quickly talk about this legislation we have introduced, we have over 20 co-sponsors. It addresses many of the issues that have been raised here today. It gets into this issue of strengthening the economic impact analysis. Understanding that we do not want to overburden the agencies, you also, I think want to have consistent information coming from the agencies. And, frankly, the Unfunded Mandates Reform Act, which I was a co-sponsor of in the House, was directed as much at State and local government as it was at the private sector. In fact, that was our focus. And so there are some things that I think need to be changed to be sure that it makes sense for the private sector. One I would say is broadening the economic impact definition.

Under UMRA now it is triggered by rules that require a direct expenditure of $100 million or more, and I think major rules is where we need to put most of our focus. That works well for State and local government. It works less well for the private sector. So in this legislation we have a change in the economic impact definition to say it focuses on expenditures, not from intergovernmental mandates but on a whole host of other compliance costs that may be borne by the private sector. So it says annual effect on the economy of $100 million or more. I think that would be helpful to put more rules into this major rule category.

It also says, as we have talked about today, that independent agencies ought to be covered, and I really appreciate the testimony today. It was sort of fun, as Senator Collins was saying, to talk to Professor Sunstein about his previous writings in 2002. I think it was a law review article where he said what Ms. Katzen said, in essence. You said "no-brainer." He did not go that far. He used more legalistic language, but that it should be done. And I think it makes sense. In the last 15 years, there have been over 200 major rules over $100 million in expenditure, and that is the Government Accountability Office (GAO) data. Seventeen rules, by the way, in fiscal year 2010 and none of them included a monetized assessment of both costs and benefits, despite, again, the urging from OIRA and OMB.

I think, Ms. Katzen, you and I may disagree a little bit on the President's ability to direct the independent agencies. You received legal advice at the time in the Clinton Administration, it sounds like, saying it could be done. There is certainly a mixed view on that, and it is a question that we can address through a statute. As Senator Collins said, we can put into statutory language what the President has just put into an Executive Order last week and a presidential memorandum. And we have offered that now on, I think, three bills, and I have separate legislation on that as well. And this is an area, Mr. Chairman, I would hope we could find some bipartisan buy-in.

But this legislation is broader than that. It also talks about judicial review, which is more controversial, so let me talk about judicial review for a second.

The debate often gets focused on what should the criteria be that agencies follow in writing new rules. How do they weigh the costs and the benefits? And how do they evaluate the economic impact,

consider alternatives, and so on? And the goal, as then-Professor Sunstein said, ought to be for judicial review to "increase the likelihood that agencies will take the order's requirements seriously." Again, that is when he was a professor. I am not saying he is taking that position today as Administrator.

I think that is about right, and I guess my question would be to Professor Dudley and Ms. Katzen: Do you agree that agencies would tend to take their obligations more seriously and do a more thorough job if there was some judicial check?

Ms. KATZEN. No. I can add to that—but, first of all, I do support the bill that you have to extend the requirements to the IRCs. I think that is a sensible, sound decision.

What I was referring to in terms of the complexity—what David Goldston referred to is how the requirements are enforced. Do you go straight through OIRA or do you have another oversight group? And if you do not want to go the full nine yards, you could simply have a Sense of Congress resolution that the President can do this. That would give the signal, I think, for the President to go ahead.

But on the issue of judicial review, I think the agencies take their responsibilities seriously now, period. I do not think they sit around saying, "Will we get caught? Will anyone take us to court?" I mean, we are a litigious country, and there is virtually no disincentive for running off to Federal court whenever you are unhappy with what an agency has done. I think the agencies expect that they will constantly be under scrutiny for something. But I do not think simply saying, "And now there is going to be a third check on you, in addition to the President, in addition to the Congress, we are now going to have the courts looking at these things," I do not think that is going to make them take their job more seriously.

Senator PORTMAN. I would say there is a current check, which is OIRA. I would not say that Congress, once it passes the statute, does not do an ongoing check.

Let me hear from Professor Dudley, and then I am going to ask you about an example.

Ms. DUDLEY. I do not think courts are expert in economic analysis. But I do think that having the judicial review will make agencies take their analysis more seriously. I think what a lot of these bills do is it adds checks and balances, which is what our Constitution is founded on, and that is why I think judicial review could be very helpful.

Senator PORTMAN. Let me give you an example. Section 321(a) of the Clean Air Act says that, "The EPA Administrator shall conduct continuing evaluations of potential loss or shifts of employment caused by certain regulations." Would it be fair to say that they take this statutory obligation seriously? Have you ever seen any rigorous or regular job impacts analysis coming out of Section 321(a)? I mean, it is just one example, because I think it has been effectively ignored. It is not subject to judicial review. They never produce an analysis as is called for in Section 321(a). And when it includes job impact assessments in some of these individual proposed rules we have been talking about, the estimates are viewed by others—subjectively, I think, some third-party groups—as being incomplete.

So I agree with what Professor Dudley says. The courts are not necessarily experts at this, although they do it a lot. I mean, you think about all the statutes within which there is judicial review. The courts are asked to do it frequently, and so I do think it would help. The Toxic Substances Control Act, Energy Policy and Conservation Act, Federal law governing pesticides, safe drinking water—all those are ones where the courts are asked to step in and provide some of that expertise, both on the science and the economic impact side.

Any thoughts on that, Ms. Katzen?

Ms. KATZEN. I think, again, the agencies do what they can with the resources that they have, focused on the most pressing obligations. They are subject to OIRA oversight. You are right, Congress has not been diligent in its oversight, and I think that is something that should and could easily be improved. But while the courts have some expertise, I would not just throw them in wholesale. Remember, major regulations cover the whole gamut, and I would refer you back to Department of Homeland Security problems, in quantifying and monetizing costs and benefits. Do you really want courts going through that with a fine-tooth comb? I do not think it is very helpful.

Senator PORTMAN. And, again, fine-tooth comb, this would be the arbitrary and capricious standard, a highly deferential standard?

Ms. KATZEN. Even substantial evidence—and I know that has been in the bills proposing to change the standard, a subject that one could write volumes on. But, in fact, as Justice Scalia has said, you are looking for rationality, and there is not a whole lot of daylight between arbitrary, capricious, and substantial evidence. What you are talking about is the difference between two types of proceedings, formal and informal. I know there is support now for formal rulemakings, but in my view that is misguided. With formal rulemaking, we had the peanut butter case that took two decades to figure out something because we due process to due death.

Senator PORTMAN. Well, again, I think if you look at the statutes where agencies are discouraged from cutting corners, it works. And it may be imperfect because not all courts have the expertise, but at that deferential standard, I think it would be an improvement and would not be, therefore, the exception rather than the rule that you have that kind of review.

My time is up, and I want to keep in good graces with the Chairman because I know he is eager to move forward on all this legislation, and I want to support him in that. So I will end my questions, hoping we have a second round.

Chairman LIEBERMAN. Thanks, Senator Portman. We will. Senator Paul.

## OPENING STATEMENT OF SENATOR PAUL

Senator PAUL. Thank you. Much has been said about this President looking back at regulations. I think trusting this President to look back at regulations is sort of like trusting the fox to guard the henhouse. If this Administration was serious about reducing regulations, we would see proposals to reduce regulations. Instead we have seen ObamaCare, we have seen Dodd-Frank, we have seen a whole host of new regulations. In fact, the estimates are now that

the regulations for this current year will cost us $26 billion, and it will set a record for the most regulations.

Mike and Claudia Sackett bought a lot up near Priest Lake in Idaho, and they wanted to build a house on it. There is a house on either side of them. There is a sewage hook-up already in the ground that the developer put in there. They dumped some gravel down. The EPA told them it was a wetlands. There is no river. There is no pond. There is no standing water on their lot. But to fight this, to fight for their property, to build on it, will cost them more than their property is worth. For anybody to argue that we are short of regulations I think is just on its face wrong, and the public disagrees with you.

I think we need checks and balances. The problem is that professional regulators want to regulate. They do not care about business. They may think they do, but they think they do a good job when they regulate. Our job is to protect the interest of people trying to do business, people trying to create jobs. And so I think you need give and take, but you also need review.

I think our Founding Fathers would roll over in their grave to think that we are passing rules that would cost $100 million and the people's representatives have no say in that. I think to say that we are going to trust this Administration just to review these rules when there is no evidence that they are against regulations, I think the REINS Act is what we need. It is what the American people expect. They think that we are supposed to be writing these rules. They do not understand why unelected people would write rules that would have such impact on the economy.

Now, some have said this is paralysis by analysis. If only we could paralyze some of the onslaught of new regulations, I think we would unleash an economic boom. If we could get some of these regulatory reforms, we could unleash an economic boom unseen—it would be a stimulus unforeseen, unseen before in our economy.

My question for Professor Dudley is: With the REINS Act, would it not help to bring back and have some checks and balances to have Congress involved in these major rulemaking processes?

Ms. DUDLEY. I do think that is a real advantage of the REINS Act. I think OMB is a necessary office, OIRA's review is necessary, but it is not sufficient. Part of the problem is that legislators can pass legislation with good-sounding goals, but then they can turn around and blame agencies for the implementation of those regulations. I think really it should be called the "Congressional Accountability Act" because it would make Congress accountable for the legislation it passes.

I do not really see it slowing things down because agencies would still go through the analysis, but the final determination would be made by our elected officials rather than unelected.

Senator PAUL. It would at least give the people some say and there would be some check and balance, because I think even honest regulators are honestly trying to regulate. They really think they are doing the right thing. But they are not seeing it from our perspective because they are not business people. They do not employ people. They are seeing only one side of the equation. We need somebody who is on the other side of the equation which would be the check and balance.

The other problem we have is there are disagreements. I mean, we cannot agree on how much regulations cost, and obviously that is probably difficult to make estimates and difficult to be precise about. But when we come to regulating mercury—Senator Johnson has talked about this—how do we know and can we prove that two parts per billion is better than four? Well, less is better than more, but do we know that there might be crippling effects? Some are estimating 17 percent of the power plants will shut down. Some have estimated that the greenhouse regulations could be so onerous as to make it difficult to continue to produce the electricity we produce for our country.

So the realistic aspect of this, I think, is difficult when you only have one side, professional bureaucrats, professional regulators, and no people speaking out for the people. And I just think that the system is so horribly broken, but I can tell you from being on the front lines that the people out there in industry and the business and the farmers—I have a farmer, a German immigrant in northern Kentucky who was moving some dirt around on his cattle pond, and a host of bureaucrats showed upon his land one day and said, "We will fine you $25,000 a day until you put the dirt back." It was, like, "Well, how do I know exactly where I pushed the dirt from? And what business do you have on my land?" And finally he showed them the bill—they were out there, 10 of them, some of them armed. He had to show them the bill that said, "Farms are exempt from this regulation." They were not even reading their own regulations properly, and he said, "Get off my land."

That is what is going on in America. People want you off their land. And that is why we have to have checks and balances. We feel like it is out of control.

I guess I would like to hear Professor Dudley make a comment about the mercury rule. And how can we get to agreeable science and how do we impose science that may not be even technologically feasible?

Ms. DUDLEY. I have looked a little bit at the mercury rule. What you will find with the mercury rule and a lot of EPA's regulations is that the benefits that are being estimated are not actually from reducing mercury. The benefits from reducing mercury, according to EPA's analysis, are 510 intelligence quotient (IQ) points per year nationwide. That works out to two one-thousandths, I think, or maybe two ten-thousandths of an IQ point per affected child. The calculated benefits are from reductions in particulate matter, which comprise the vast majority of OMB's benefits estimates; more than 65 percent are from particles in the air.

Senator PAUL. We lose some general things, is that, if you talk to school kids in America, what they are being taught, they are being taught that we are polluting the world in a horrible way. Pollution is much better than it has ever been. Air quality is much better than it has ever been. The whole point is: Is there a reasonable amount of regulations? No one is proposing that we pollute the air or that we go back to the way it was in 1919. But I think we have gotten to the point where everybody is accepting that polar bears are dying, New York will be flooded next year. This environmental extremism has taken over education and public debate, and

because of that we have a real problem with having any sensibleness to the regulations being promulgated.

I have reached the end of my time. Thank you.

Chairman LIEBERMAN. Thanks, Senator Paul.

I have just a couple of quick questions. Some of the bills that are before us would codify all or parts of existing Executive Orders governing the regulatory process, and I wanted to ask for a quick reaction from the panelists whether you think the advantages outweigh the disadvantages of doing that or vice versa. Maybe we will start with you, Ms. Harned.

Ms. HARNED. Well, I think that Ms. Dudley actually articulated very well why codification is such an important thing. It will signal to the agencies, again, culturally that this is important, that Congress needs to follow these rules going forward. That truthfully is an issue we continue to see out of different agencies, if there are still instances where the rules are not being followed. And, also, the judicial review component would be something that NFIB would very much support that would happen as a result of that.

Chairman LIEBERMAN. Mr. Goldston.

Mr. GOLDSTON. I think the disadvantages of codification were cited by Ms. Katzen well. I do not think there is any particular advantage. I do not think there is any agency at this point that thinks that they are going to escape from doing cost/benefit analysis. And many of the bills actually, when you look closely—as, of course, you have—they actually expand on the requirements of the current Executive Orders. The CURB Act, for example, CRS says would add about another 650 rules a year for OIRA to look at because of the definition it uses. That is rules—separate from the guidance issue.

Chairman LIEBERMAN. Ms. Dudley, you talked a little about this. I wonder if you think codifying an Executive Order would have the effect of opening up an agency's actions under its provisions to judicial review and how you would weigh that.

Ms. DUDLEY. Well, I think future presidents will definitely continue to require regulatory impact analysis, so I am not worried that it is necessary for that. I do think it is valuable for extending it. Mr. Goldston said that every agency does it. No, they do not. Independent agencies do not do benefit/cost analysis, as Senator Collins' bill would do. They do not always do it for a guidance document, so her bill would require more analysis of guidance documents that are big enough to have the effect of law.

And then I do think it is valuable for judicial review for the reasons mentioned earlier. Not that courts are going to be great at it, but agencies take more seriously things they might get sued over.

Chairman LIEBERMAN. Ms. Katzen, codification.

Ms. KATZEN. I think this is where I used the bulk of my time, and so I will not use it again.

Chairman LIEBERMAN. OK.

Ms. KATZEN. But I think the disadvantages greatly outweigh the advantages. Or stated a different way, I think the benefits do not justify the costs.

Chairman LIEBERMAN. That was clear. Thank you.

Let me ask you and Ms. Dudley particularly, if Congress enacts legislation that mandates cost/benefit analysis or other require-

ments, a question has naturally been raised about whether—and there has been some testimony on this—that language would trump the provisions of existing statutes, and both of you testified on this, Ms. Katzen, saying, I believe, you would oppose that, and Ms. Dudley raising some concerns, I think it is fair to say, about whether it might be more appropriate to amend existing statutes. But I wanted to invite you both to speak a little more in detail to that question.

Ms. KATZEN. I think codifying Executive Order provisions would, in fact, amend previously existing laws, and it would create a super mandate, and that would be, I think, highly detrimental. There are some underlying statutes that maybe should be amended, but it should be done one at a time with attention through the authorizing committee that knows the subject rather than an across-the-board, government-wide, change-all-the-laws, and we do not even know which laws we are changing.

Chairman LIEBERMAN. Ms. Dudley.

Ms. DUDLEY. I do think that is something that Congress needs to think through—whether a benefit-cost requirement should supersede or be subordinate to existing statutory requirements. There are several statutes that are silent, and it may be that Congress would like those statutes to—when they are reviewed judicially—for courts not to say silence means you cannot consider trade-offs.

Chairman LIEBERMAN. Right.

Ms. DUDLEY. I think there are some specific statutes that really are doing more harm than good because they prohibit trade-offs, in part because they suggest that science can give you an answer on the right level of risk, and science alone can not. And I think Mr. Goldston has actually said this more articulately than I can. A lot of the problems or concerns about politicization of science, are really because we have statutes that ask science to do things it is not capable of doing. Policy decisions need to weigh trade-offs. So I think going after some of those statutes—and only Congress can do that—would be very useful.

Chairman LIEBERMAN. Do the two of you have any comments on a super mandate?

Mr. GOLDSTON. I think we would be particularly concerned about that. I think as both Ms. Katzen and Ms. Dudley said, that requires looking at the individual statutes and thinking through them, even in the case that we have alluded to, sometimes indirectly, sometimes directly, of the one part of the Clean Air Act that has been interpreted 9–0 by the Supreme Court to say that you cannot take costs into effect. It is for that piece of setting the standard and then for how you actually apply the standard, costs are allowed.

So I think that it really does—I think a super mandate would probably cause collateral damage that Congress would not intend or even fully be aware of if it were done in that way.

Chairman LIEBERMAN. Ms. Harned.

Ms. HARNED. I do not have a comment.

Chairman LIEBERMAN. Thank you. You have been really helpful. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. I think we have a vote coming up momentarily.

Chairman LIEBERMAN. We do.

Senator COLLINS. So I am going to withhold any further questions for the record, but let me just thank all of the members of the panel. I think this was a very helpful discussion that will be very valuable to our Committee as we move ahead. So thank you all for your testimony.

Chairman LIEBERMAN. Thanks, Senator Collins. I agree with you. As has become clear throughout this discussion particularly and our earlier hearings, these regulations do not spring miraculously into the *Federal Register*. They are the result of congressional action. And so part of the problem is us, and how we regulate ourselves, how we self-regulate in that regard is an interesting question and a challenge.

But the other thing to say is that, generally speaking, it is not easy to get legislation through this checks and balances system of ours, so that there is probably some reason why it was passed, which the public is interested in. On the other hand, it is clear that some of the regulations have a disproportionate effect on some of those who are regulated. And how we balance this—I am not saying anything new because this is always the challenge. It takes me back to what I said at the outset. The question is not whether to regulate, because there is and should be regulation, but it is how best to regulate, how most fairly to regulate, and you have all helped us—you have really informed our efforts here.

There is a lot of interest in this subject in this Congress. It is a controversial area, and it is politically touched, but Senator Collins and I have waded into such storms before——

Senator COLLINS. And emerged.

Chairman LIEBERMAN [continuing]. And emerged on our feet and hopefully with some rational response. So we are going to try that again.

We will leave the record of the hearing open for 15 days for any additional questions or statements. I thank you very much for your testimony today, and with that, the hearing is adjourned.

[Whereupon, at 11:47 a.m., the Committee was adjourned.]

# APPENDIX

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United States Senate
Committee on Homeland Security and Governmental Affairs
Chairman Joseph I. Lieberman, ID-Conn.

Opening Statement of Chairman Joseph Lieberman
"Federal Regulation: How Best to Advance the Public Interest"
Homeland Security and Governmental Affairs Committee
April 14, 2011

The hearing will come to order. I thank everybody for being here. This is a hearing on "Federal Regulation: How Best to Advance the Public Interest." The hearing is occasioned by an increased interest in regulatory reform. I don't know that it ever goes away, but we have several pieces of legislation before this Committee on which we'll hold a hearing in May.

We thought it would be important to convene this hearing with Cass Sunstein to really set the predicate for what's to follow: both to discuss the values and concepts of law that are at play here—Mr. Sunstein is particularly well suited to do that based on his experience in this area—but also to discuss the initiative that President Obama took in January on regulatory reform.

This is another one of those issues where there's probably more agreement than the tenor of the debate would indicate. I haven't yet met anybody who doesn't think there should be some regulation. Regulation emerges to implement laws that we pass.

One of the first major legislative experiences I had was in the amendments to the Clean Air Act in 1990, which fortunately were adopted on a broadly bipartisan basis. We were dealing with a subject so large we simply couldn't deal with it in the law, so regulations followed to achieve our purposes and, in general, they need to be based in that exercise of Congressional authority.

I suppose the question is how it's done and how effectively it's done. Inevitably, regulations ask something of individuals, of businesses, etc. They impose requirements. Some people think that the requirements are burdensome and beyond what was intended by Congress.

No one ever argues for no regulation, just as no one argues for no law. It takes me back to the insight of the Talmud in which one of the rabbis says if there's no government, unfortunately people would act like fish. The larger ones would eat the smaller ones.

That's a bit vivid, but it makes the point that the law exists to make this a more orderly and fair society. The point, as always in this, is to find processes - in a government that's very large and very complicated - that find the sweet spot, that regulate as little as possible to achieve the objectives of the laws Congress adopts.

Again, I can't thank Cass Sunstein enough for being here because he's perfectly situated by both his past and present to help us set the table for our focus on the legislative proposals that are before our Committee. The Office of Information and Regulatory Affairs, which Cass heads, is within the jurisdiction of this Committee's governmental affairs portfolio. So, I thank you for being here, I look forward to the question and answer portion of the hearing, and now I will call on Senator Collins.

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**Statement of Senator Susan M. Collins**

**Federal Regulation: How Best to Advance the Public Interest?**

**U. S. Senate Committee on Homeland Security and Governmental Affairs**

**April 14, 2011**

Mr. Chairman, at the outset, I want to thank you for holding this hearing today, and also for agreeing to schedule another hearing soon on the legislative reform proposals that have been referred to this Committee. With these hearings, we begin our review of the federal regulatory process: how it works now, what its impact is on jobs, our economy, and our well-being, and how it might work better in the future.

We are beginning this review with the Office of Information and Regulatory Affairs - OIRA. I welcome its Administrator, Cass Sunstein, back to our Committee and look forward to hearing his views on how the regulatory burdens on our economy—especially on our small businesses—might be lightened or simplified.

Though few outside of Washington are familiar with OIRA, it has enormous influence on regulations that affect the everyday lives of millions of Americans. Through the process of regulatory review, OIRA plays a critical role in shaping the rules by which federal law is implemented. OIRA both informally advises agencies as rules are developed, and then formally reviews the rigor of methodologies used to develop these rules.

In Administrator Sunstein's confirmation hearing, I noted with approval his support for cost-benefit analysis as well as his recommendation that agencies be required to explain a decision to regulate when the costs of a proposed rule exceed its benefits. I also noted that he recognized that such analysis has limitations when it comes to considering intangible costs and benefits.

The idea of using cost-benefit analysis is not new, of course. In 1981, President Reagan issued an Executive Order prohibiting agencies from issuing regulations unless the potential benefits to society from the regulation outweigh the potential costs to society. In 1993, President Clinton issued an Executive Order that incorporated cost-benefit analysis requirements, and in January of this year, President Obama issued his own Executive Order.

When President Obama released his Executive Order, he also wrote an op-ed piece in the Wall Street Journal, in which he said that federal regulations have "sometimes ... gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."

I agree. All too often it seems federal agencies do not take into account the impact on small businesses and job growth before imposing new rules and regulations.



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Without a thoughtful analysis of the impact of regulations, we risk imposing an unnecessary burden on job creation - an unacceptable result at a time when so many Americans remain jobless.

Furthermore, too often I have seen the goals of one agency directly contradicted by the regulations of another agency. Let me give an example: last year, the EPA proposed new regulations known as "boiler MACT." These rules, as originally proposed, could cost Maine businesses $640 million, despite the availability of less costly approaches to address boiler emissions. These proposed rules also pit two agencies directly against each other. The Department of Energy, for example, had recently awarded a Maine high school a $300,000 grant to help buy a new wood pellet boiler to reduce the school's use of fossil fuels. But because the EPA's proposed regulations would have greatly increased the cost of that boiler, the school board turned down the federal grant.

Another example of poorly thought-out regulation was the EPA's new lead paint rule. While all of us want to see lead paint removed or contained for health and safety reasons, the EPA's flawed implementation of new regulations would have placed an impossible burden on our carpenters, painters, plumbers, and electricians - virtually everyone in the construction industry. The rule requires contractors who work in homes built before 1978 to be EPA-certified or face massive fines of up to $37,500 per violation per day.

At the time, however, there were only three certification trainers in my entire state - and all in Southern Maine. Two states had no trainers at all! Last June, the Senate passed a bipartisan amendment I authored to extend the training deadline and to delay the punitive fines. The support for my amendment was a strong indication that many states were facing this regulatory Catch-22 of getting required training from nonexistent trainers.

Last month, I offered legislation - which I call "the CURB Act" -- to clear unnecessary regulatory burdens that are holding our job creators back. My proposal would codify the cost-benefit analysis provisions of President Clinton's Executive Order, impose "good guidance practices" on federal agencies, and help small businesses that face penalties for first-time, non-harmful paperwork violations.

The struggling economy has challenged our nation's entrepreneurial spirit. We are recovering, and that recovery will come from the innovative and bold job-creators of America's small-business community.
I look forward to Mr. Sunstein's testimony on how we can work together to improve the regulatory review process to ensure that we are not crushing that entrepreneurial spirit that produces innovation, economic growth, and most important, new jobs.



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**EXECUTIVE OFFICE OF THE PRESIDENT**
**OFFICE OF MANAGEMENT AND BUDGET**
**WASHINGTON, D.C. 20503**

**TESTIMONY OF**
**CASS R. SUNSTEIN, ADMINISTRATOR**
**OFFICE OF INFORMATION AND REGULATORY AFFAIRS**
**BEFORE THE SENATE COMMITTEE ON HOMELAND SECURITY**
**AND GOVERNMENTAL AFFAIRS**
**FEDERAL REGULATION: HOW BEST TO ADVANCE THE PUBLIC INTEREST?**
**APRIL 14, 2011**

Chairman Lieberman, Ranking Member Collins, and Members of the Committee, I am grateful to have the opportunity to appear before you today to discuss Federal regulation and regulatory review. I will be focusing on Executive Order 13563, "Improving Regulation and Regulatory Review," issued on January 18, 2011. I will also briefly discuss the Presidential Memorandum, "Regulatory Flexibility, Small Business, and Job Creation," issued on January 18, 2011, which is focused on protecting small business from excessive regulation, and the Presidential Memorandum, "Administrative Flexibility," issued on February 28, 2011, which is focused (among other things) on streamlining regulations imposed on State, local, and Tribal governments.

As the President has made clear, Executive Order 13563 is meant to lay the foundation for a regulatory system that protects public health, welfare, safety, and our environment, while also promoting economic growth, innovation, competitiveness, and job creation. It requires a number of concrete steps to achieve that overriding goal.

Let me begin with a few words by way of background. Since September 30, 1993, the process of regulatory review has operated under Executive Order 12866, issued by President Clinton, which builds on the framework established by Executive Order 12291, issued by President Reagan on February 17, 1981. Executive Order 12866 sets out a number of principles and requirements. Among other things, it calls (to the extent permitted by law) for careful consideration of costs and benefits, for tailoring regulations to impose the least burden on society, for selection of the approach that maximizes net benefits, for consideration of



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alternatives, and for a process of interagency review, coordinated by the Office of Information and Regulatory Affairs. Such a process has been in effect for thirty years.

Executive Order 13563, issued on January 18th of this year, has six provisions designed to supplement and to improve that process. First, it reaffirms the principles, structures, and definitions established by Executive Order 12866. In doing so, it also stresses the need for predictability and certainty, for ensuring that the benefits of regulation justify the costs, and for using the "least burdensome tools for achieving regulatory ends." It emphasizes the need to "measure, and seek to improve, the actual results of regulatory requirements."

Second, Executive Order 13563 calls for increased public participation. It 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.

Third, Executive Order 13563 directs agencies to take steps to harmonize, simplify, and coordinate rules. It 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.

Fourth, Executive Order 13563 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.

Fifth, Executive Order 13563 calls for scientific integrity. It asks each agency to ensure the objectivity of the information on which it relies to support its regulatory actions.

Sixth, and finally, Executive Order 13563 calls for retrospective analysis of existing rules. It asks for "periodic review" to identify "rules that may be outmoded, ineffective, insufficient, or excessively burdensome." It directs agencies to produce preliminary plans for periodic review of significant rules and to submit them to OIRA within 120 days. Such plans are due on May 18. By requiring retrospective analysis, or "look-back," Executive Order 13563 is aimed at the "stock" of existing regulations as well as the "flow" of new requirements.



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The Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation is focused especially on the "essential role" of small businesses in the American economy. It directs agencies to consider methods "to reduce regulatory burdens on small business." Under the Regulatory Flexibility Act (RFA), agencies may consider such flexibilities as extended compliance dates, simplified reporting and compliance requirements, and partial or total exemptions. The Memorandum specifically requires agencies to provide an explanation when they do not offer such flexibilities in proposed or final rules. As the President wrote in the Wall Street Journal on January 18, "today I am directing federal agencies to do more to account for—and reduce—the burdens regulations may place on small businesses."

The Presidential Memorandum on Administrative Flexibility is focused on State, local, and Tribal governments. Emphasizing that such governments have sometimes been subject to "onerous" requirements, the memorandum notes that it is possible to "reduce unnecessary regulatory and administrative burdens." It emphasizes that Executive Order 13563 applies to State, local, and Tribal governments. It directs the Director of the Office of Management and Budget to explore how best to eliminate "unnecessary, unduly burdensome, duplicative, or low-priority recordkeeping requirements." It also directs agencies, within 180 days, to take actions "to identify regulatory and administrative requirements that can be streamlined, reduced, or eliminated."

I might add that in the recent past, numerous agencies have reached out to the public for ideas about how best to revisit existing regulations. For example, the Environmental Protection Agency, the Equal Employment Opportunity Commission, the General Services Administration, the Pension Benefit Guaranty Corporation, the Small Business Administration, the Social Security Administration, and the Departments of Commerce, Defense, Energy, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, and the Treasury have all issued Federal Register notices, asking the public to assist in the identification of rules that warrant reassessment.. In addition, the Environmental Protection Agency and the Departments of Homeland Security, Labor, State, and Transportation have gone one step further, creating websites to engage the public in the process of retrospective review. The Environmental Protection Agency and Department of Transportation have also held public meetings to solicit additional feedback about retrospective review. And in recent months, agencies have taken a number of concrete steps to rethink, modify, streamline, and reduce existing regulatory requirements.

Executive Order 13563 and the two presidential memoranda create strong foundations for improving regulation and regulatory review. I greatly appreciate the Committee's interest in this topic and look forward to answering your questions.



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**Post-Hearing Questions for the Record**
**Submitted to the Honorable Cass R. Sunstein**
**From Senator Susan M. Collins**

**"Federal Regulation: How Best to Advance the Public Interest"**
**April 14, 2011**

1. Executive Order 13563 directs agencies to promulgate regulations consistent with, among other things, the five principles listed in Section 1(b), as stated in Executive Order 12866 and "to the extent permitted by law."

    a. To what extent are agencies not permitted by law to promulgate regulations consistent with the five principles listed in Section 1(b)?

Section 1(b) of Executive Order 13563 states that each agency must:

> (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

The inclusion of the phrase "to the extent permitted by law" is used as a matter of ordinary course in Executive Orders, and reflects the fact that agency rulemaking must be consistent with federal law. The authority to promulgate regulations is given to agencies by Congress, and agencies must always respect the limits and scope of that statutorily delegated authority. The principles discussed in Section 1(b) of Executive Order 13563 apply generally and across the board to agencies, except where their application is precluded by statute. In some cases, Congress has not authorized agencies to base their decisions on the outcome of cost-benefit balancing.

    b. With respect to significant regulations, which statutes or court rulings prohibit agencies from promulgating regulations consistent with the five principles listed in Section 1(b)?

See previous answer. No specific statutes or court rulings are referred to in the Executive Order.



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c. Are there instances where Executive Order 12866 would not permit agencies to promulgate regulations consistent with the five principles listed in Section 1(b)? Please explain.

No. Executive Order 13563 reaffirms Executive Order 12866, and the five principles in Executive Order 13563 section 1(b) come from Executive Order 12866.

2. Section 1(c) of Executive Order 13563 directs each agency to use "the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."

   a. To what extent are agencies not permitted by law to promulgate regulations consistent with this principle?

So far as I am aware, agencies are always permitted to quantify anticipated present and future costs and benefits as accurately as possible. Again, the inclusion of the phrase "to the extent permitted by law" is used as a matter of ordinary course in Executive Orders, and reflects the fact that agency rulemaking must be consistent with authority statutorily delegated to the agency by Congress. In some cases, Congress has not authorized agencies to base their decisions on the outcome of cost-benefit balancing.

   b. With respect to significant regulations, which statutes or court rulings prohibit agencies from promulgating regulations consistent with this principle?

See previous answer.

   c. Are there instances where Executive Order 12866 would not permit agencies to promulgate regulations consistent with this principle? Please explain.

No. Again, Executive Order 13563 reaffirms Executive Order 12866.

3. Section 4 of Executive Order 13563 directs each agency to "identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public."

   a. To what extent are agencies not permitted by law to promulgate regulations consistent with this principle?

As far as I am aware, agencies are always permitted to identify and consider such approaches. In some cases, Congress has limited agencies' ability to rely exclusively on such approaches by, for example, requiring a regulatory approach that goes beyond information disclosure. Congress grants agencies the authority to issue rules, and agencies must always respect and work within the limits and scope of that statutorily delegated authority.

   b. With respect to significant regulations, which statutes or court rulings prohibit agencies from promulgating regulations consistent with this principle?



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See previous answer.

c. Are there instances where Executive Order 12866 would not permit agencies to promulgate regulations consistent with this principle? Please explain.

No. Again, Executive Order 13563 reaffirms Executive Order 12866.

4. Section 6 of Executive Order 13563 directs each agency to "periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

a. To what extent are agencies not permitted by law to review existing significant regulations consistent with this principle?

To my knowledge, no law forbids agencies from engaging in such review. The Administrative Procedure Act describes the procedural requirements for changing rules; some statutes impose additional procedural requirements. Changes to rules must also fit with the substantive requirements in relevant statutes.

b. Which statutes or court rulings prohibit agencies from reviewing existing significant regulations consistent with this principle?

See previous answer.

c. Are there instances where Executive Order 12866 would not permit agencies to review existing significant regulations consistent with this principle? Please explain.

No. Again, Executive Order 13563 reaffirms Executive Order 12866.



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United States Senate
Committee on Homeland Security and Governmental Affairs
Chairman Joseph I. Lieberman, ID-Conn.

**Opening Statement of Chairman Joseph Lieberman**
**"Federal Regulation: A Review of Legislative Proposals"**
**Homeland Security and Governmental Affairs Committee**
**June 23, 2011**
**As Prepared for Delivery**

Good morning. Today, we are continuing our Committee's consideration of regulatory reform. Last month, we explored the structure of the federal regulatory process and the Administration's recent efforts to ensure that rules and rulemaking are as effective and efficient as they can be.

Today, we're going focus on some of the legislative proposals to revise the existing system, which is a topic that's attracted particular attention this Congress. At this moment, six Senators have legislation now pending before this Committee on regulatory reform. I welcome and thank my many colleagues – both on and off the Committee – who are here today to explain their proposals to change the regulatory process and why they feel it is important to do so. I also want thank Cass Sunstein, the Administration's point man on regulatory issues, who will be appearing on our second panel.

The question before us as I see it is not whether to regulate, but how to regulate. A nation without regulation would be a nation at risk. For example, last week I read a news story about the devastating effects of lead poisoning in parts of China. Workers have been absorbing dangerous amounts of lead in factories, and many children – who are particularly vulnerable to the neurological damage lead can cause – have been sickened in homes and schools near those factories. Here at in the U.S., we have known for quite a long time that air pollution and workplace safety regulations are necessary and protect workers and families living near similar industrial plants from being ill – regulations that Congress directed the agencies to put in place.

This example, and others that we can cite, such as the failure of regulation to prevent some of the bad behavior in the financial sector of the American economy, are not only correct, but something that the public wants us to do. So the question is not whether to regulate, but how.

Smart regulations don't just help individuals. They can also help industry by providing a predictable field on which they can operate. For instance, after recent national outbreaks of salmonella and other food-borne illnesses, the food industry seemed to welcome the recent food safety law as a way to fortify consumer confidence and restore damaged sales.

Of course, many regulations do impose costs on businesses, so it is important to oversee the process continually to ensure it is achieving the greatest public benefit at the smallest cost. That is particularly important now, when our economy is struggling and businesses will be threatened by any unjustified burdens.

In that spirit, President Obama moved to strengthen the process through an executive order that clarified and toughened guidelines for evaluating the costs and benefits of proposed regulations in order to select the least burdensome ones. The President also called on agencies to review existing regulations to ensure that they are still necessary. These so-called "look back" reports are being assembled and, I gather, have identified ways to save tens of millions of dollars in reduced compliance costs as well as millions of hours of reduced paperwork for businesses and individuals. So I look forward to hearing about that effort from Cass Sunstein, who is overseeing that process as the head of the Office of Information and Regulatory Affairs.

Once again, I thank our colleagues for the work that they've done in this important area. We're really fortunate to have many members of our own committee, as well as many not on our committee, who have worked in this subject area and will testify before us today.



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SUBMITTED BY SEN. LIEBERMAN

NATURAL RESOURCES DEFENSE COUNCIL

June 23, 2011

Senator Joe Lieberman, Chair
Committee of Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Lieberman:

We appreciate you having a hearing on regulatory reform issues today. NRDC has testified strongly against REINS and against making fundamental changes in a system that saves lives, protects the economy and the environment and has consistently produced wide societal benefits that outstrip any costs.

The bills before the Committee intend to slow down the already turtle-like regulatory system. These proposals would threaten public health and safety and our environment by delaying necessary health, safety and environmental protections, wasting staff time and resources, and denying consideration of the value to the lives saved, illnesses and natural resource damage avoided, and safety improvements our regulatory system provides. Have we already forgotten the lessons of the devastation of the Gulf spill or the millions of jobs losses because of failure to adequately regulate our financial institutions?

Thank you for your consideration of these ideas, and for your staff's willingness to meet with us to discuss them. Please feel free to contact us with any questions or concerns we might be able to address.

Sincerely,

Scott Slesinger
Legislative Director

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SUBMITTED BY SEN. LIEBERMAN

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COALITION FOR SENSIBLE SAFEGUARDS

(202) 234-8494
info@sensiblesafeguards.org

June 23, 2011

The Honorable Joseph Lieberman
Chairman
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

Dear Senators Lieberman and Collins:

The Coalition for Sensible Safeguards represents millions of people who count on their government to provide protections from harm. We write to urge you to stop unneeded legislative proposals that would harm regulatory protections and to speak out affirmatively for the need for strong safeguards and effective enforcement of regulations.

A number of bills will be discussed at your hearing today, June 23. None of these bills are needed and many will do harm. Instead of streamlining the regulatory process, several of them add new, unnecessary bureaucratic hurdles. Some create an expansion of judicial review, adding the potential of more litigation and preventing rules from being implemented. Other bills add more special favors to special interests, particularly to big corporations disguising themselves as small businesses. Yet others, such as the REINS Act, would tip the balance of power between Congress and Executive branch inappropriately in favor of Congress, establishing procedures that would further politicize the rulemaking process and imperil important regulations from taking effect. We strongly oppose these bills.

In light of the BP oil disaster, the Massey Energy mine explosion, food safety crises, the financial collapse, and more, it is our hope that Congress will put its energy into strengthening the rulemaking process. To do this calls for identifying ways to stop the special interest influences on rulemaking agencies, strengthening enforcement mechanisms, addressing regulatory gaps that can protect the public, and reducing burden for real small businesses, not those big corporations masquerading as small entities.

In order for America once again to be a government of, by, and for the people, we need our government to work for us for a change. Special interests have gamed the system for too long. We need real accountability – from big businesses and our government. We have paid the price for weak regulation and poor enforcement. The twin failures of business and



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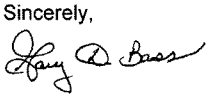
government to look out for hardworking Americans has cost us over a trillion dollars and over 8 million jobs.

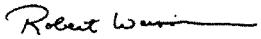
Regulations are not the only solution, but they are an important way to protect people from harm. They provide a line of defense for the little guy and in the past have protected Americans from dangerous or even fatal products, contaminated food, and polluted air and water. With more and more Americans falling out of the middle class, we need to protect our seniors and families from having their life savings and retirements stolen or gambled away by Wall Street. We need regulations that ensure that products, both domestic and foreign, are safe—especially for kids. We need protections for Americans who work hard and play by the rules to build a better future for themselves and their children. Protecting our fellow Americans is part of who we are.

We look forward to working with you to improve the regulatory system.

Sincerely,



Gary D. Bass
Executive Director, OMB Watch
Co-Chair, Citizens for Sensible Safeguards



Robert Weissman
President, Public Citizen
Co-Chair, Citizens for Sensible Safeguards



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United States Senate
Committee on Homeland Security and Governmental Affairs
Senator Susan M. Collins

Contact: E.R. Anderson
202-224-4751

**Statement of**
**Senator Susan M. Collins**

**As Prepared for Delivery**
**""Federal Regulation: A Review of Legislative Proposals"**

**U. S. Senate Committee on Homeland Security and Governmental Affairs**
**June 23, 2011**

Mr. Chairman, at the outset, I want to thank you for agreeing to hold this hearing today to allow Members to describe their legislative proposals for regulatory reform.

We began our review of the federal regulatory process two months ago, with an excellent hearing featuring OIRA Administrator Cass Sunstein, whom we will welcome back later this morning.

April's hearing laid the groundwork for a thoughtful examination of how the regulatory burdens on our economy—especially on job creation and productivity —might be lightened or simplified, without diminishing important safety and health protections.

I believe we can build a bipartisan consensus for reasonable action to achieve this goal. Earlier this year, for example, President Obama wrote an op-ed piece in the Wall Street Journal, in which he said that federal regulations have "sometimes … gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."

Notwithstanding the President's intentions, however, the growth of the federal regulatory state, as measured in terms of employment by regulatory agencies, continues unabated. As the chart I have on display illustrates, since March of 2010, job growth in the federal regulatory agencies has far outstripped job growth in the rest of the federal government. More significant, it has far outpaced job growth in the private sector.



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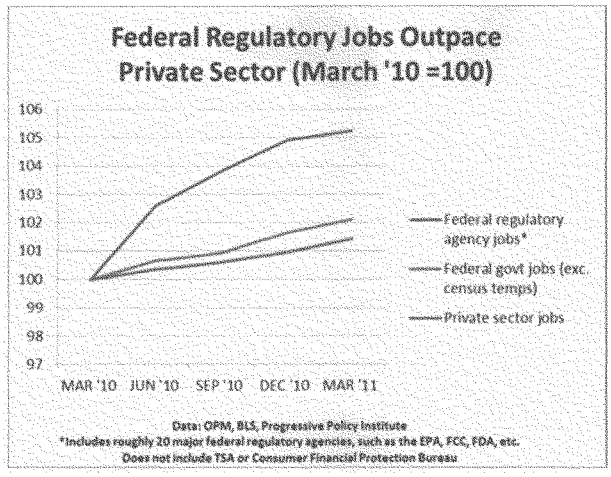


All too often it seems federal agencies do not take into account the impact on small businesses and job growth before imposing new rules and regulations. In my view, there are three keys to changing this reality: *first*, we should require regulatory agencies to analyze the costs and benefits of their proposed regulations on job creation; *second*, we should ensure that these agencies do not attempt to avoid that obligation by imposing unofficial rules masked as "guidance;" and *third*, we should provide relief from onerous penalties for small businesses facing first-time paperwork violations that do not result in any harm.

I have introduced legislation called the "CURB Act" – which stands for "Clearing Unnecessary Regulatory Burdens" – which combines the three points I just summarized. Let me take a few minutes to describe it in a little more detail.

First, the CURB Act requires federal agencies to analyze the costs and benefits of regulations, including indirect costs, such as the impact on job creation, the cost of energy, and consumer prices. Currently, most federal agencies are not required by statute to analyze these costs and benefits.

The idea of using cost-benefit analysis is not new, of course. In 1981, President Reagan issued an Executive Order prohibiting agencies from issuing regulations unless the potential benefits to society from the regulation outweigh the potential costs to society. President Clinton revised this Executive Order in 1993, obligating agencies to provide OIRA with an assessment of the costs and benefits of proposed regulations. The focus of the Clinton Executive Order was on regulations that are "significant" – meaning those which can reasonably be expected to have an impact of $100 million or more on the economy. My bill would essentially codify this provision of President Clinton's Executive Order.



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Second, the CURB Act obligates federal agencies to comply with public notice and comment requirements and prohibits them from circumventing these requirements by issuing unofficial rules as ''guidance documents.''

Let me explain why this is needed: After President Clinton issued his Executive Order in 1993, federal agencies found it easier to issue so-called "guidance documents," rather than formal rules. Although these guidance documents are merely an agency's interpretation of how the public can comply with a particular rule, and are not enforceable in court, as a practical matter they operate as if they were legally binding. Thus, they have been used by agencies to circumvent OIRA regulatory review as well as public notice and comment requirements.

In 2007, under the leadership of then OMB Director Rob Portman, OMB tried to close this loophole by imposing "Good Guidance Practices" on federal agencies. The Bulletin requires agencies to follow standard procedures when issuing guidance documents, and to provide public notice and comment for "economically significant guidance documents" – proposed guidance documents which would impose costs of $100 million per year, or adversely affect the economy.

The CURB Act would give the force of law to the Good Guidance Practices in the Bulletin.

Third, the CURB Act helps out the "little guy" trying to navigate our incredibly complex and burdensome regulatory environment. When a small business inadvertently runs afoul of a federal regulation, that first penalty could sink the business and all the jobs it supports. The CURB Act would provide access to SBA assistance to small businesses in a situation where they face a first-time, non-harmful paperwork violation. It simply doesn't make sense to me to punish small businesses the first time they accidently fail to comply with paperwork requirements, so long as no harm comes from that failure.

Each of these provisions has been endorsed by the National Federation of Independent Business (NFIB), and the Small Business & Entrepreneurship Council.

I urge my colleagues to support the CURB Act, which contains these important reforms to our regulatory system. I look forward to learning more about the other regulatory reform proposals before the Committee, and I again thank the Chairman for scheduling today's hearing.



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**Prepared Statement of Senator Mark L. Pryor**

**June 23, 2011**

Thank you, Chairman Lieberman and Ranking Member Collins, for holding this important hearing on regulatory reform. The Senators represented on the first panel, as well as several members of this committee, have proposed or are considering proposing legislation to improve and streamline the regulatory process. I look forward to working with my colleagues on this issue.

I have heard from many Arkansans and businesses, particularly small businesses, which are struggling to meet an increasing regulatory burden. Each year, federal agencies issue between 3,000 and 4,000 final rules many of which have significant economic impact. There appears to be a lack of transparency and timeliness in the rulemaking process that also contributes to economic uncertainty and discourages investment and job creation by the business community. As a result, our economy suffers.

For example, the EPA is currently considering more stringent regulations of dust as part of the National Ambient Air Quality. From county roads to farm fields, dust is an unavoidable reality in rural areas. Imposing strict dust regulations on these communities would hurt family farmers and rural economies across Arkansas and the nation.

Another example is a new rule that could cost municipalities and states across the country tens of millions of dollars to replace their street signs. According to the new regulations, the lettering on street signs has to be a combination of lower-case letters with initial upper-case letters. Moreover, the upper-case letters must be at least six inches in height, while lower-case letters must be 4.5 inches tall. Streets with speed limits of 40 mph and over need sizes of eight inches and six inches for upper- and lower-case letters, respectively.

I believe it is time to establish in law principles that are fair, reasonable, and can help reduce the regulatory burden on American companies. I think it is timely that Congress reviews several of the laws that form the basis of our Federal regulatory system and find ways to make these laws more effective in meeting the dual challenges of protecting the public while making our economy stronger and more competitive.

Many of the regulatory reform bills have common themes that I agree with.

1. There is a need for a more robust regulatory impact analysis of proposed, interim final, and final rules that have a "significant economic impact" that considers the effect of the regulation on job creation.



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2. All cabinet level agencies, independent agencies, and independent regulatory agencies should be subject to the regulatory process.
3. The Regulatory Flexibility Act, which was last amended 15 years ago, that protects the rights of small businesses needs to be updated.
4. Retrospective or periodic reviews of significant rules could help eliminate or change regulations that are no longer necessary or unduly burdensome.

Again, thank you Mr. Chairman for holding this hearing and I look forward to hearing Mr. Sunstein' testimony.



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**Senate Committee on Homeland Security and Governmental Affairs**

**"Federal Regulation: A Review of Legislative Proposals"**

**STATEMENT OF SENATOR ROB PORTMAN**

**June 23, 2011**

Chairman Lieberman, Ranking Member Collins, I appreciate this opportunity to present my views today on the critical issue of improving our regulatory system.

At a time when our nation's economy is still struggling — unemployment at 9.1%, first quarter growth at 1.4% — I believe there is a growing, bipartisan consensus about the need to reduce the barriers to job creation.

Excessive regulation is one of the most serious obstacles.

One recent estimate put the economic toll of all federal regulations at $1.75 trillion dollars annually – more than the IRS collects in income taxes. Others have suggested this figure is somewhat lower, but by any measure this is a significant burden.

And I hear it personally from small businesses across Ohio — 'We'd like to begin hiring, we'd like to expand, but the cost and the uncertainty of today's regulatory environment is holding us back.'

I was encouraged by the words of President Obama's recent executive order on Improving Regulation and Regulatory Review, Executive Order 13,563.

But I continue to be concerned about the direction this Administration is heading.

One way to get our arms around the problem is to focus on "economically significant" rules—those that have an annual impact on the economy of $100 million or more. Federal agencies issue roughly 4,000 final rules every year, but only 50 to 70 of those are "economically significant" rules.

These regulations have the largest economic footprint and are most deserving of scrutiny.

The chart that we distributed [hold up] illustrates the regulatory trend in an interesting way. It shows the "economically significant" rules that are in development across all federal agencies. And as you can see, OMB's 2010 Fall Regulatory Plan reported a total of 224 economically significant regulations in the pipeline – that's a 60% increase from 2005 levels.

This isn't a perfect measure of increasing regulatory burdens. But it is a window into the trajectory we're now on — without real reform.

My approach to bringing some balance to the regulatory system is twofold.

First, I believe we must reform the way all agencies develop new rules—especially economically significant rules—by making the process more cost-conscious, more transparent, and more



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accountable. That's the goal of the Unfunded Mandates *Accountability* Act, a bill that I introduced this month and pleased to be joined by 20 cosponsors.

Second, I think we should consider moving toward regulatory budgeting — a more systematic framework for tracking and controlling these large, unbudgeted costs that Washington imposes on the private economy every year. That's a subject I've been working on recently and discussing with Senator Mark Warner, who is well-versed on these issues.

On the first point — process reform — my bill is designed to strengthen the Unfunded Mandates *Reform* Act of 1995 or "UMRA," which I co-authored in the 104th Congress.

UMRA was a bipartisan effort to prevent Congress and federal regulators from blindly imposing major economic burdens on the private sector and on state, local, and tribal governments without weighing the costs and benefits.

My legislation would improve UMRA in 5 basic ways – and I have time today to give just a thumbnail sketch.

1. Broader scope. First, this bill would broaden the scope of UMRA to require cost-benefit analysis of economically significant rules – those that have an "effect on the economy" of $100 million or more. Today UMRA is triggered only by regulations that require direct "expenditures," and that has limited its effectiveness. This revision would bring the scope of UMRA into line with the regulation review process overseen by OMB's Office of Information and Regulatory Affairs (OIRA).

2. Stronger Economic Impact Analysis. Second, this bill would strengthen the analysis that agencies perform before issuing major rules. It would require agencies to evaluate and (if possible) quantify the potential impact on jobs, and to consider market-based, flexible and non-governmental alternatives to regulation. That's consistent with President Obama's Executive Order 13,563, which called for a regulatory system that promotes job creation and instructed agencies to "identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior."

3. Choose The Least Onerous Alternative. Third, this bill would require agencies to select the "least costly, least burdensome, or most cost-effective" regulatory approach that achieves the policy goals set out by Congress. Today that choice is discretionary under UMRA. In this economic climate, the least we can is ask of regulators is to ensure that the 50-70 or so most costly rules issued each year are not more costly than is necessary.

4. Apply UMRA to Independent Agencies. Fourth, this bill would extend UMRA's regulatory analysis to all independent agencies, such as the Securities and Exchange Commission and the newly created Consumer Financial Protection Bureau.

   There is no principled justification for excusing these agencies from the basic cost-benefit rules that apply to all other federal regulators.



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The rules issued by this "headless fourth branch" of government are currently exempt from cost-benefit review by OIRA, based on legal concerns about maintaining their independence from the White House.

But the exclusion from OIRA review is an even *more* compelling reason to bring independent agencies within the the cost-benefit framework created by Congress. These agencies are, after all, creatures of congressional enactment.

Extending cost-benefit scrutiny to independent agencies is a bipartisan idea that has been endorsed by, among others, our witness today, OIRA Administrator Cass Sunstein [Sun-STEEN] (in a 2002 law review article) and more recently by President Clinton's OIRA Administrator, Sally Katzen.

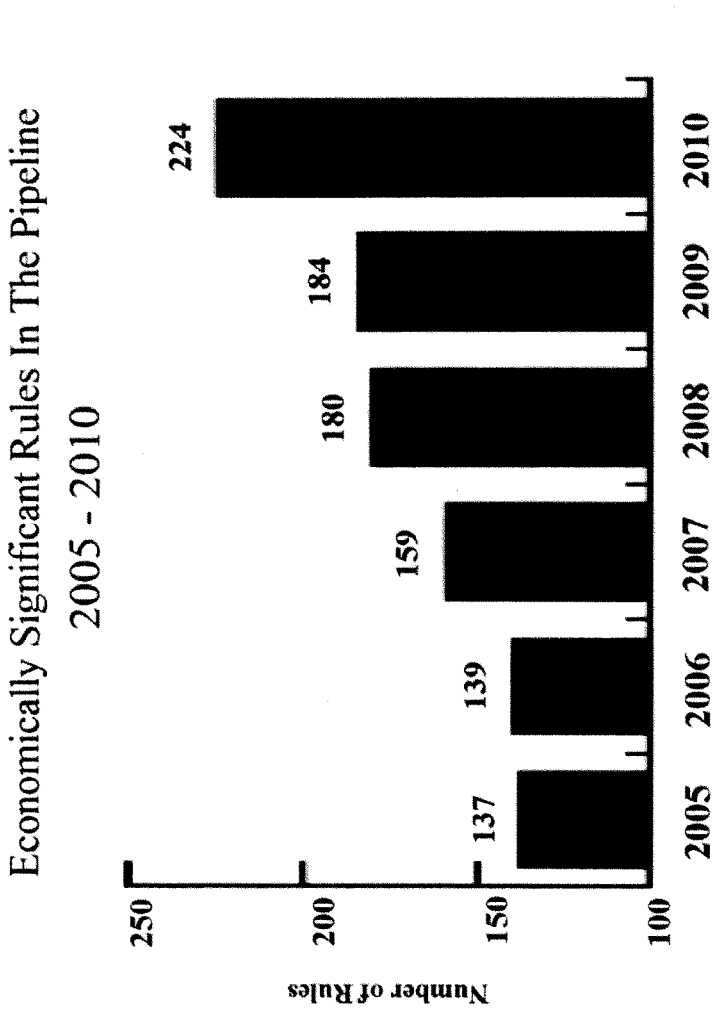
**5.** Judicial Review. Finally, our bill would improve enforcement of UMRA by permitting judicial review. Each agency's cost-benefit analysis, as well as its approach to less burdensome alternatives, would be reviewed under the arbitrary and capricious standard. Review under UMRA would be deferential, but it would ensure that agencies take their obligations under UMRA seriously.

No major regulation, whatever its source, should be imposed on American employers or on state and local governments without a careful consideration of the cost, the benefits, and the availability of less onerous alternatives.

I believe this bill would move us further toward that goal.

Mr. Chairman, thank you for the opportunity to offer a statement today, and I look forward to continuing to work with my colleagues on this committee on improving the regulatory process.

SUBMITTED BY SEN. PORTMAN




**Source: Compiled from "Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, December edition, various years.**

**Opening Statement of Senator Mary L. Landrieu**
U.S. Senate Committee on Homeland Security and Government Affairs
Hearing: "Federal Regulation: A Review of Legislative Proposals"
June 22, 2011

Good morning. I'd like to briefly thank the Chairman, Senator Lieberman, as well as the Committee's Ranking Member, Senator Collins, for holding today's hearing on legislative proposals to reform the federal regulatory process. I'd also like to thank the other Senators that have joined us here today to present their proposals, as well as Cass Sunstein, the Administrator of the Office of Interagency Regulatory Affairs (OIRA), who will testify on the second panel. I think this a very important topic that merits detailed examination and I look forward to hearing everyone's testimony.

I want to begin by saying that I strongly support efforts to streamline and reform the regulatory process. As Chair of the Senate Committee on Small Business and Entrepreneurship, I have heard repeatedly from the small business community about the disproportionate burden that regulations can place on our small businesses. Although I believe that the current regulatory process is well-intentioned and contains a number of protections for our small businesses, it is certainly not a perfect system. Unfortunately, when this process fails and Federal government regulations do not take into account the unique challenges faced by our nations nearly 28 million entrepreneurs and small business owners, the misguided regulations that emerge from this process can stunt small business growth, or worse, put small firms out of business completely. At a time when we need to be creating more jobs, we cannot afford to be creating unnecessary barriers that prevent our small businesses—who are our nation's chief job creators—from expanding, innovating, and putting people to work.

In my capacity as Chair of the Small Business Committee, I have worked closely with my colleague, Senator Snowe—the Committee's Ranking Member—who has been a strong proponent for regulatory reform. We have held several hearings about the impact of federal regulations on small businesses. I even worked with her to include several of her provisions on regulatory relief in the *Small Business Jobs Act of 2010*, landmark, bipartisan small business legislation that was signed into law by the President almost nine months ago today. Thanks to these efforts, the SBA's Office of Advocacy—which plays a critical role in protecting the small business community from burdensome regulations—now has an independent line item in the SBA's budget, allowing it to play a stronger role in protecting our small businesses for years to come.

I'd like to take a moment to briefly comment on one of the proposals being considered by the Committee today. S. 1030, the FREEDOM Act, seeks to amend the *Regulatory Flexibility Act of 1980* and the *Small Business Regulatory Enforcement Act of 1996*, in an effort to improve the regulatory process for our small businesses. This legislation has come before the Senate in



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the form of an amendment to unrelated legislation twice in the last six months. Although I appreciate the intent of the legislation and actually agree with many of its provisions, I opposed this legislation primarily due to the process by which it was forcefully brought to the floor, without first going through the Committee process for appropriate. Regretfully, due to these actions, it derailed an unrelated and critical piece of small business job creation legislation, S. 493, the *SBIR-STTR Reauthorization Act of 2011*, which has widespread, bi-partisan in both the Senate and the small business community.

However, I also have substantive concerns with the legislation that I hope we can explore today:

- Section 4 of the legislation would allow for judicial review of proposed rules. I am deeply concerned that this provision would undermine the fundamental role of the notice and comment period of the rulemaking process, which is to gather public feedback and to fix any flaws or deficiencies in a proposed rule. Opening up the rulemaking process to judicial review this early would be burdensome to the judiciary and extremely disruptive to the ability of agencies to carry out congressionally directed initiatives.

- Section 6 of the legislation would require at least nine federal agencies to establish small business review panels, also known as SBREFA panels. Although I appreciate the intent of this provision, I believe it would be extremely costly to the taxpayer, requiring the agencies to divert critical resources away from other programs and unnecessarily prolong the regulatory process.

Again, while I appreciate the intent behind these provisions and others in the FREEDOM Act, I am concerned about the potential for unintended consequences. I look forward to working with my colleagues on both the Homeland Security and Small Business Committees to fashion an effective legislative response that will ease the regulatory burden on our businesses. I thank the Chairman and Ranking Member for holding today's hearing, and I look forward to the testimony from our witnesses.



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**Senator Rand Paul**
**Testimony before the Senate Committee on Homeland Security & Governmental Affairs**
**Federal Regulation: A Review of Legislative Proposals**

**June 23, 2011**

Good morning. Chairman Lieberman and Ranking Member Collins, I appreciate the opportunity to speak for a few minutes this morning about the issue of federal regulations.

The regulatory burden in this country is immense. One study, commissioned by President Obama's Small Business Administration, recently estimated the annual cost of regulations to be $1.75 trillion, annually.[1] To put that number in context, $1.75 trillion is nearly twice the amount of all individual income taxes collected last year.[2] Businesses with 500 employees or more now pay $7,775 per year to comply with federal regulations.[3] For businesses with fewer than 20 employees, that number jumps to $10,585 per employee.[4] Each household pays, on average, $15,586 to comply with the regulatory burden.[5] It is worth noting that these assessments were done *without* taking into consideration the approximately 370 new regulations that will result from the health care overhaul and Dodd-Frank.[6]

This tangle of regulations has gotten so bad that in a meeting with manufacturing executives, President Obama's Chief of Staff, William Daley, could offer no comforting words except to tell these executives whose businesses have been stymied and stalled that, "sometimes you can't defend the indefensible."[7]

It is clear that regulations in this country have gotten out of hand. I am here today to talk about my proposal to address this issue, the Regulations from the Executive in Need of Scrutiny Act of 2011, or the REINS Act, which has also been introduced in the House by my fellow Kentuckian, Congressman Geoff Davis. The central provision of the REINS Act provides that new, major regulations – those with an economic impact of $100 million or more – cannot take effect unless Congress and the President approve them first.

This morning I'd like to focus on two fundamental aspects of regulatory reform that the REINS Act achieves. The first is to give Congress the ability to review regulations for their adherence to what Congress intended when they first directed the regulation to be created. The second and more important goal that the REINS Act achieves is to return accountability for regulatory decisions to where it belongs – elected lawmakers.

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[1] Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, report prepared for the SBA (Sept. 2010) (available at http://www.sba.gov/advo/research/rs371tot.pdf).
[2] See Council of Economic Advisers, Economic Report of the President tbl. B-81, at 426 (2010); *see also* James L. Gattuso et al., *Red Tape Rising*, Heritage Foundation Backgrounder No. 2482, (Oct. 26, 2010).
[3] *See* Clyde Wayne Crews, *Ten Thousand Commandments: A Snapshot of the Federal Regulatory State*, (2011 edition), at 8.
[4] Id.
[5] *See* Crain and Crain, *supra* note 1.
[6] Estimate provided by the Congressional Research Service.
[7] Peter Wallsten & Jia Lynn Yang, *White House's Daley seeks balance in outreach meeting with manufacturers*, WASH. POST, (June 16 2011).



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***Over-delegation of authority***

The last century has seen an unprecedented amount of authority delegated to agencies by Congress, at the expense of their ability to review how that authority is exercised.

For example, between passage of Dodd-Frank and the Patient Protection and Affordable Care Act, the 111th Congress authorized approximately 370 rulemakings. That is major and controversial legislative action that Congress has delegated to a specified number of agencies, without the requirement to ever review it for accuracy or adherence to Congressional guidelines. While judicial review may ensure that the agencies play by their statutory guidelines, it does not scrutinize policy choices for alignment with contemporary priorities or Congressional intent. This is the role for Congress, but one which Congress lacks the mechanism to fulfill.

The need for a Congressional review mechanism is obvious. There is plenty of evidence to suggest that agencies frequently overstep their statutory mandates and regulate in a way that is inconsistent with what Congress intended. Even more dangerously, recent initiatives suggest that in the absence of specifically delegated statutory authority, agencies will create out of thin air an entirely new authority for themselves, twisted out of some previously delegated, non-specific mandate for the purposes of doing an end-run around Congress. The following are examples of agency regulations or guidance documents put forward in the last two years that are in direct violation of Congressional intent. In short form, they are:

- ***Greenhouse Gas Regulations***; Congressman John Dingell, one of the authors of the Clean Air Act, stated that "the Clean Air Act was not designed to regulate greenhouse gases, as the then-Chairman of the House Energy and Commerce Committee I know what was intended when I wrote the legislation. I have said from the beginning that such regulation will result in a glorious mess and regulation of greenhouse gas emissions should be left to Congress."[8]
- ***The Grain Inspection, Packers & Stockyards Administration (GIPSA) Rule***; This rule will fundamentally alter the market rules for the sale of poultry and livestock in this country. Over 120 Members of Congress have signed letters to the Department affirmatively stating that this rule represents a drastic overstep of what Congress directed the agency to develop in the 2008 Farm Bill.[9]
- ***EPA Jurisdictional Guidance for the Implementation of the Clean Water Act***; This guidance will expand federal government jurisdiction over water and land that is currently regulated by the states. The text of the guidance is almost exactly the same as the *Clean Water Restoration Act,* which was introduced in the 111th Congress, and which Congress refused to pass. The EPA decided to regulate anyway.[10]

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[8] Press Release, Rep. John D. Dingell, Dingell on EPA Action Concerning Greenhouse Gases (Dec. 7, 2009) (available at http://dingell.house.gov/news/press-releases/2009/12/091207EPAGreenhouseGases.html).
[9] Letter from American Meat Institute to Rep. Darrell Issa (January 3, 2011) (on file with House Committee on Oversight & Government Reform).
[10] Letter from Sen. John Barrasso et al., to Adm'x. Lisa Jackson, EPA (May 27, 2011) (available at http://barrasso.senate.gov (follow "News Releases" hyperlink under "Newsroom"; then follow "Barrasso, Senators Oppose EPA Takeover of Private Water" hyperlink)).



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- ***Network Neutrality***; In perhaps the most blatant and dangerous subversion of Congressional intent to date, the FCC has promulgated this regulation despite the fact that Congress has failed to pass this as legislation upon three separate introductions, and one vote in which the concept was rejected in the House by a vote of 269 to 152.[11] Even more appalling is the fact that the FCC promulgated this rule in the face of an appeals court ruling in which the court unanimously and authoritatively stated that the FCC did not have the right to engage in Internet regulation.[12] Despite these stinging rebukes from the courts and Congress, FCC Chairman Julius Genachowski stated he would find a way to regulate anyway.[13]

When agencies will not be constrained by either the legislative or judicial branch, it is clear that their authority has exceeded Constitutional intent and now constitutes a shadowy and unrestrained Fourth Branch of government. However, Congress has limited means to combat agencies like the FCC, who are bent on regulating in the face of all opposition. Rather than wielding the power of one branch of government against regulations that are clearly subversions of original intent, Members of Congress are reduced to writing letters and strongly worded press releases to voice their displeasure with what has become a frequent abuse of authority by unelected agency bureaucrats. This is a dangerous imbalance that the REINS Act will correct.

***Restoring accountability***

The most important thing that the REINS Act accomplishes is to bring transparency and accountability back into the legislative process. As then-judge Stephen Breyer explained in a 1984 lecture in which he advocated for a REINS-style system, requiring congressional authorization of regulations "imposes on Congress a degree of visible responsibility" for new regulatory initiatives.[14]

Members of Congress are known as lawmakers precisely because it is their job to make the law. And while all statutes are still generated by Congress, the actual substance of the law is now routinely made by regulatory agencies. This has allowed Congress to game the system. On one hand, we can pass a measure like Dodd-Frank and take credit for protecting Americans from the excesses of the financial system, while on the other we can chastise the agencies for writing and implementing the burdensome regulatory directives that we ordered created. The regulatory process has become a handy shield for legislators to pat themselves on the back while pushing off unpopular policy decisions to regulatory agencies. John Quarles, EPA's first general counsel, noted this distinction, remarking that the regulatory system Congress has designed for itself provides "a handy set of mirrors – so useful in Washington – by which a politician can appear to kiss both sides of the apple."[15]

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[11] "Advanced Telecommunications and Opportunities Reform Act: Roll Vote No. 239." *Congressional Record* 152:72 (June 8, 2006) p. H3583.
[12] *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).
[13] Edward Wyatt, *U.S. Court Curbs F.C.C. Authority on Web Traffic*, N.Y. TIMES, Apr. 6, 2010, at A1.
[14] Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793-96 (1984).
[15] H.R. Rep. No. 410, pt 2, at 71 (1979) (dissenting view of Rep. Corcoran).



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The ability of elected legislators to shift responsibility to agencies may be a win for Congress, but it is a loss for the people who elected them. This open-ended delegation of authority shields elected officials from the weightiest mantle of elected office – the accountability that comes with actually making the law. Americans deserve elected officials with enough courage and conviction to vote for a statute and all of its regulatory directives. President-elect Hoover made the same point when he argued against the Congressional delegation of tariff authority in 1929:

> "Our people have a right to express themselves at the ballot on so vital a question as this. There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. This is the only commission which can be held responsible to the electorate."[16]

The REINS Act is not anti-regulatory, it is not about regulation bashing or about haranguing individual agency actions. At its crux, REINS simply represents good government – where elected representatives vote openly and transparently for major regulatory initiatives, and take accountability for decisions impacting our economic future.

As a means of more fully addressing the substance of the REINS Act, and hopefully also to preempt some questions that will follow this testimony, I'd like to use the remainder of my time to respond to some of the frequently cited criticisms of the bill:

**The REINS Act and the Constitution**

Critics of the REINS Act claim it imposes unconstitutional constraints on executive power, particularly the executive's responsibility to execute and enforce federal laws. This objection is based on confusion about the nature of executive power. To summarize law professor Jonathan Adler's distinction: the power to enforce laws – that is, to see that rules are complied with – is different from the power to make rules using authority delegated from Congress. So, for instance, the EPA's power to impose fines or other sanctions on companies for violating emissions limits is distinct from the agency's ability to set the emission limits themselves. The REINS Act would have an impact on agency action by requiring approval of final rules, but would have no impact on the ability of the President or his agencies to enforce the law once it has been enacted.[17]

It should also be noted that the power to adopt legislative-type rules, as agencies do, is not a core executive function. Rather, Article I, section I of the Constitution vests all legislative power in the Congress, to delegate as necessary, but within limits. As has been stressed by the courts multiple times, an agency

[16] With our Readers, 13 Const. Rev. 100, 100 (1929) (citing Hoover's speech of Oct. 15, 1929).
[17] Jonathan H. Adler, *Reflections on the REINS Act Hearing,* THE VOLOKH CONSPIRACY (Jan. 27, 2011, 11:20 AM), http://volokh.com/2011/01/27/reflections-on-the-reins-act-hearing/.



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can do only "what Congress has said it can do."[18] Federal agencies have no inherent authority to promulgate regulations beyond what has been given by Congress. And what Congress has given, it may take back.

Finally, a frequently cited argument against REINS is that it constitutes a legislative veto – and by doing so, violates the principles of bicameralism and presentment required by the Constitution. This is incorrect. First, it must be noted that the REINS Act provides for the enactment of a joint resolution in the constitutionally required way: passage by both Houses of Congress and presentment to the President. Furthermore, because major rules could not be finalized after passage of the REINS Act without congressional consent, the REINS Act would not be used to veto or repeal any final executive regulation, or affirmative action. By empowering an agency to implement a rule that would otherwise be unauthorized, the resolution is "essentially legislative in purpose and effect," therefore distinguishing itself from the legislative veto that the Supreme Court found to be unconstitutional in *I.N.S. v. Chadha*,[19] and satisfying the additional requirement laid out in *Bowsher v. Synar* that Congress "pass new legislation" in order to "control the execution" of old legislation.[20]

Indeed, the very concept of the REINS Act was first outlined by then-Judge Stephen Breyer as a constitutional replacement for the legislative veto struck down in *Chadha*. As Breyer explained, the Congress could make new rules ineffective "unless Congress enacts a confirmatory law" within a set time frame.[21] According to Breyer's interpretation, it was completely consistent with the Constitution to hold the legal effect of exercises of delegated authority contingent upon the "subsequent enactment of a confirmatory statute."[22]

**Congressional Workload**

During the 111th Congress, agencies promulgated 126 final rules, which would have required Congressional action if the REINS Act was in place. During that same period of time, Congress enacted 70 public laws naming post offices, considered 279 bills using the word "congratulates," 74 using the word "commends," and 356 using the word "honoring." The REINS Act would simply require Congress to shift its attention from passing symbolic legislation and to focus on taking responsibility for regulations that bind and protect Americans. Further, as I will explain later, the bill provides for expedited consideration of approval of regulations in the Senate and the House.

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[18] *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1998) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").
[19] *INS v. Chadha*, 462 U.S. 919 (1983).
[20] *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).
[21] Breyer, *supra* note 14, at 789.
[22] Id. at 793.



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**Congressional Expertise**

The REINS Act does not materially change the agency's role as the technical expert in the drafting of complex regulations. The agency would still be responsible for creating a record in support of a regulation and for evaluating its impact. Further, once Congress approves the regulation, the agency still takes the lead in implementation of and compliance with the rule. REINS would simply require elected lawmakers to take responsibility for the adoption of these rules which were drafted at the behest of the statute they originally passed.

**The REINS Act and Finalizing Regulations**

The REINS Act, as law professor David Schoenbrod noted in his recent testimony before the House Judiciary Committee, is "pro-accountability rather than anti-regulation."[23] Indeed, if agencies are discharging their duties in a reasonable manner, then the controls of the REINS Act will have little effect. If the public requests regulations or believes more regulations are necessary, then requiring a resolution of approval will not stand in the way. In fact, the REINS Act would serve to enhance the legitimacy of those regulations by demonstrating that such initiatives have the support of both the legislative and the executive branches.

It should also be noted that the REINS Act contains procedures for expedited consideration in the House and Senate. Particularly in the Senate, no resolution of approval would be subject to holds or filibusters. The bill ensures that each rule would be subject to a straight up or down vote on the floor of each body.

The REINS Act provides a means of curbing excessive or unwarranted regulation, but its ultimate goal is to restore balance to the regulatory process and to return accountability to where it belongs – in Congress. This legislation will hold elected representatives to a higher standard by demanding that we take a stand on major regulatory initiatives, cast our votes in the open, and be held accountable for the decisions that will affect our economic future. Similarly, it will empower us to ensure that agency actions are consistent with Congressional intent and contemporary priorities.

Thank you for the opportunity to discuss the REINS Act this morning.

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[23] *The REINS Act – Promoting Jobs and Expanding Freedom By Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary*, 112th Cong. 9 (2011) (statement of David Schoenbrod, Trustee Professor, New York Law School and Visiting Scholar, American Enterprise Institute).



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SUBMITTED BY SEN. PAUL

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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June 22, 2011

The Honorable Joseph I. Lieberman
Chairman
Homeland Security and Government Affairs Committee
United States Senate
Washington, DC 20510

The Honorable Susan M. Collins
Ranking Member
Homeland Security and Government Affairs Committee
United States Senate
Washington, DC 20510

Dear Chairman Lieberman and Ranking Member Collins:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, strongly supports S. 299, the "Regulations from the Executive In Need of Scrutiny (REINS) Act." The REINS Act is an effective regulatory reform critically needed to promote jobs and economic recovery. Also, the bill would help restore the balance between Congress and administrative agencies, promote regulatory transparency, and ensure all branches of the federal government are accountable to the American people.

As President Obama recognized in Executive Order 13563, the ever-expanding federal regulatory burden and its attendant uncertainty impede job creation, innovation and economic growth. For example, the Small Business Administration (SBA) estimates that the annual cost of federal regulations in the United States was more than $1.75 trillion in 2008.[1] Had every U.S. household paid an equal share of these costs, each would have owed $15,586, or nearly 50 percent more than health care costs, which were "only" $10,500 per household. Furthermore, Congress has long recognized that regulatory costs and burdens weigh heaviest on small businesses.[2] The SBA reports that small businesses employ just over half of all private sector

[1] Crain and Crain, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS at iv (Sept. 2010). The Weidenbaum Center at Washington University in St. Louis and the Regulatory Studies Center at George Washington University in Washington, D.C., jointly estimate that agencies spent $55.4 billion (on budget) to administer and police the regulatory enterprise. Adding the $1.752 trillion in off-budget compliance costs brings the total regulatory burden to $1.8 trillion. *See* Clyde Wayne Crews, TEN THOUSAND COMMANDMENTS: A SNAPSHOT OF THE FEDERAL REGULATORY STATE at p.2 (CEI, April 18, 2011) (citation omitted) accessed at http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202011.pdf, (June 20, 2011).

[2] *See* 5 U.S.C. § 601 et seq. (the Regulatory Flexibility Act); Pub. Law. 96-354 at §(a) (1980). The evidence is that businesses with more than 500 employees bear regulatory costs of $8,086 per employee. However, small businesses, defined as firms employing fewer than 20 employees, bear much larger annual regulatory costs of $10,585 per employee. *See* Crain and Crain, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS at iv (Sept. 2010).

workers, pay 44 percent of total U.S. private payroll, have generated 64 percent of net new jobs over the past 15 years, create more than half of the nonfarm private gross domestic product (GDP), hire 40 percent of all high tech workers (such as scientists, engineers, and computer programmers) and produce 13 times more patents per employee than large firms.[3] Therefore, it is no surprise that our nation's unprecedented regulatory expansion has correlated with unprecedented high unemployment and economic stagnation.

U.S. Chamber members tell us that regulatory costs, as crushing as they were in 2008, are increasing rapidly. Notwithstanding the nation's economic difficulties, Congress ceded its legislative and oversight power and turned over control of the economy to the bureaucracy. Now, the bureaucracy is regulating at a frenetic pace.[4]

The numbers show government is on the march. Federal agencies have promulgated 8,076 final rules in the past two years alone. The number of proposed rules increased by 19.3% in the last year alone, from 2,044 in 2009 to 2,439 in 2010. According to the 2010 "Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions," which lists federal regulatory actions at various stages of implementation, 58 federal departments, agencies, and commissions have 4,225 regulations in play. Of these, 224 are "economically significant" rules of at least $100 million in economic impact. The number of final "major rule" reports issued by agencies and reviewed by the Government Accountability Office (GAO) has surged. The 99 reports issued in 2010 represent the highest number since this tabulation began. Five years ago, there were 56 such reports.[5]

A modern economy needs sensible regulations. Agencies must have the power they need to efficiently implement Congressional enactments and continue the business of government. However, our system has become dangerously unbalanced.

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 restrained 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 to agencies ever more expansive power. Increased judicial deference to agency decisions and

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[3] SBA, "How important are small businesses to the U.S. economy?", accessed at http://www.sba.gov/advocacy/7495/8420 (June 21, 2011).

[4] For perspective, note that agencies issued 3,573 final rules in 2010, while Congress passed and the president signed into law 217 bills. Congress has obviously delegated a considerable amount of its lawmaking power to generally unaccountable federal agencies.

[5] *See* TEN COMMANDMENTS, *supra*. at 2-3 (citations omitted), accessed at http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202011.pdf (June 20, 2011).



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Congress's general abdication of its oversight authority have 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 of federal agencies, and judicial deference were fundamentally altering the traditional balance between the legislative and executive branches of government. 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 burden to economic activity the rules have upon a substantial number of small businesses.[6] However, six administrations and almost 30 years passed before this 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 decades to rein in the Executive Branch agencies, but has been unsuccessful. The Congressional Review Act has proven ineffective, having been used successfully only once since its enactment in the 1990s. Also, agencies are just too skilled at manipulating the regulatory and legal system. In fact, a 2005 GAO report concluded a new approach was needed to reduce the burden imposed by the bureaucracy on the public.[7] Something must be done.

The enactment of the REINS Act will both promote job creation and economic growth and help restore constitutional balance by creating an effective check on administrative agencies, bringing needed accountability and transparency to the regulatory process. By ensuring citizens have a meaningful voice in the regulatory process through Congressional review, the REINS Act would force agencies to seriously account for the employment and economic impact of their actions. The prospect of Congressional review will force agencies to transparently calculate, explain and justify the benefits and costs of economically significant rules and to truly regulate in the least burdensome and most effective manner. By creating a new regulatory dynamic and paradigm, the REINS Act will help reduce regulatory burdens and free small and other business to grow, innovate and create jobs.

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[6] 5 U.S.C. §§ 601-612 (1980).

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



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The REINS Act would also create desperately needed checks and balances on agency power, restoring balance to our system of government by constraining the improvident delegation of congressional authority and by enforcing accountability on agencies and Congress alike. The Act would require both houses of Congress to affirmatively approve, and the President to sign, any new "major rule," which is a rule with a projected impact to the economy of over $100 million, before it could become effective. It would restore to Congress the duty and obligation to make balancing decisions with respect to regulations. Enacting this bill would help ensure that all branches of the federal government are accountable to the American people.

The recently enacted health care and financial regulatory reform laws and the agencies' ongoing "legislation by regulation" of environmental, greenhouse gas and other areas means there will be a substantial number of new major regulations proposed and promulgated over the next two to three years. These regulations will touch every sector of the economy, impairing, dampening and distorting job creation, economic growth and investment. Passage of the REINS Act would mitigate these adverse effects by ensuring that agencies regulate in a transparent, cost-effective and rational manner and that Congress retains ultimate control and accountability for the implementation of the laws it writes, as the Constitution provides.

Sincerely,

R. Bruce Josten

cc: Members of the Committee on Homeland Security and Government Affairs



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*New Federal Initiatives Project*

# The Regulations from the Executive In Need of Scrutiny (REINS) Act

By
Jonathan H. Adler*

**January 14, 2011**

*The Federalist Society*
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**The Regulations from the Executive In Need of Scrutiny (REINS) Act**

Last year, the REINS Act was introduced in the U.S. Senate and House of Representatives (as H.R. 3765 and S. 3826, respectively) to prevent federal agencies from implementing major regulatory initiatives without Congressional approval. Equivalent legislation is virtually certain to be considered in the 112th Congress. As part of their "plan to rein in the red tape factory in Washington, DC" in the "Pledge to America," Republican congressional candidates promised to "require congressional approval of any new federal regulation that has an annual cost to our economy of $100 million or more."[1] The purpose of this requirement is to ensure that significant regulatory initiatives are approved by both Congress and the Executive Branch. As explained in the "Pledge": "If a regulation is so 'significant' and costly that it may harm job creation, Congress should vote on it first."[2]

The central provision of the REINS Act provides that new major rules cannot take effect unless Congress passes a Joint Resolution approving the regulation within 90 session or legislative days of the rule's submission to Congress.[3] "Major rules" are defined as those regulations that are anticipated by the White House Office of Management and Budget to impose annual economic costs in excess of $100 million or otherwise have significant economic or anticompetitive effects.[4] The Act further sets up an expedited procedure to ensure prompt consideration of resolutions of approval. In effect, the REINS Act amends pre-existing regulatory statutes to remove federal agency authority to unilaterally adopt regulatory measures, instead requiring agencies to forward "final" rules as proposals for congressional review.

This proposal is a response to concerns that federal regulatory agencies are imposing substantial costs on the American economy without sufficient Congressional oversight or political accountability. Federal agencies routinely issue thousands of regulations every year. In 2009, for instance, federal agencies issued over 3,503 final rules.[5] REINS Act supporters note that many federal regulations are promulgated pursuant to statutes that were passed years, if not decades, ago. Key portions of the federal Clean Air Act, for example, were enacted in 1970 and have not been amended since 1990. These provisions remain the source of substantial regulatory authority, including regulations recently adopted by the Environmental Protection Agency to control emissions of greenhouse gases. These regulations were promulgated to address the threat posed by global warming. According to the EPA, it is obligated to adopt these regulations even though Congress was not focused on global warming when the relevant provisions of the Clean Air Act were adopted over twenty years ago. Under the REINS Act, economy-wide regulatory measures of this sort could only be adopted with subsequent Congressional assent.

In 1996, Congress enacted the Congressional Review Act, creating an expedited process for consideration of joint resolutions to overturn regulations of which Congress disapproved. To be effective, such resolutions must be passed by both Houses and presented to the President for signature. In effect, the CRA created a framework for Congress to enact new laws to overturn or correct administrative implementation of previously enacted laws. This process has only been used once, however, and is not widely considered to have increased Congressional accountability for regulatory initiatives. The REINS Act takes the idea of the CRA one step further by requiring affirmative legislative action for new major rules.



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Congress previously attempted to control administrative agency decision-making through the adoption of legislative veto provisions. Between the 1930s and 1980s, Congress enacted legislative veto provisions into nearly 300 statutes. These provisions enabled Congress to delegate broad legislative-like authority to administrative agencies while retaining the unilateral authority to overturn administrative decisions through legislative action, but without Presidential assent or a super-majority vote.

A typical legislative veto provision was contained in the Immigration and Nationality Act, which authorized either House of Congress to invalidate a decision by the Attorney General to allow an otherwise deportable alien to remain in the United States with a simple resolution passed by majority vote. The Supreme Court invalidated such unicameral legislative vetoes in *INS v. Chadha* on the grounds that a single House of Congress could not overturn an administrative action.[6] Under Article I of the Constitution, legislative action of this type requires bicameralism and presentment – the concurrence of both Houses of Congress and presentation before the President for his signature or veto, the latter of which could be overturned by super-majorities in both legislative chambers.

As then-judge Stephen Breyer explained in a 1984 lecture, a congressional authorization requirement could replicate the function of the legislative veto invalidated in *Chadha* without the veto's constitutional infirmity.[7] By observing the formal requirements for legislation in Article I, he asserted, congressional oversight of agency activity could be maintained without violating constitutional principles of separation of powers. In addition, unlike the legislative veto, requiring Congressional approval for the adoption of new regulatory initiatives "imposes on Congress a degree of visible responsibility" for new regulatory initiatives.[8]

The presentment clause in Article I, section 7 of the Constitution provides that, for a bill to become law, it must be passed by a majority of both the House and Senate and signed into law by the President or, if vetoed by the President, repassed by two-thirds majorities in each house. It further provides that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States" for his signature or veto. Proponents conclude that the REINS Act fully complies with this requirement. Just like any other bill, a Joint Resolution requires the approval of both houses of Congress and is presented to the President.[9]

In some respects the REINS Act is more limited than Breyer's suggested proposal for congressional resolutions of approval for regulatory measures or the unicameral legislative vetoes, as the REINS Act would only require congressional approval for major rules. The unicameral legislative veto often operated as a replacement for targeted "private bills" affecting the interests of a few.[10] Those regulations subject to the REINS Act would, by definition, only be those that would impact many, if not the nation as a whole. Only those rules deemed to be "economically significant" – so-called "major rules" – are covered, and such rules are a small, but important, portion of federal regulatory activity. From 1998-2007, the number of major rules promulgated by federal administrative agencies ranged between fifty and eighty per year.[11]

One objection to requiring Congressional approval before major rules may take effect is that regulatory initiatives could be subject to procedural delays, particularly in the Senate, and that



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such a requirement would make it too easy for a determined minority or special interest group to block desirable regulations. The REINS Act seeks to address this concern by creating an expedited process for consideration of a joint resolution approving major rules in both the House and Senate. A joint resolution of approval is automatically introduced into both houses within three days of a federal agency's submission of a major rule to Congress, and legislative committees have only fifteen days to consider the resolution before it is automatically discharged. Debate on the resolution is limited, and other motions that could postpone or prolong debate are prohibited, as are amendments to the rule, so as to ensure that each House votes up-or-down on the resolution shortly after it is presented to Congress.

The REINS Act does not interfere with the Executive Branch's authority or duty to faithfully execute the law. Federal administrative agencies have no inherent power to adopt legislative-type rules governing private conduct. Rather all such power is delegated to administrative agencies by Congress. The Supreme Court has explained: "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[12] Regulation governing private economic conduct for public benefit is arguably a quintessentially legislative power, and Article I, section I vests "all legislative powers" in Congress. Under current doctrine, Congress is allowed to delegate broad regulatory power to administrative agencies, but it is not obligated to do so, and there is no constitutional prohibition against Congress deciding to curtail – or, as act supporters might say, "rein" in –federal agency authority to impose regulatory mandates, particularly where such mandates will affect large portions of the American economy.

The Republican Congressional leadership has endorsed the REINS Act, but the act is also likely to draw considerable opposition. Among other things, critics of the REINS Act are concerned that requiring Congress to approve major regulatory proposals will erect yet-another hurdle for federal regulations, particularly those that are necessary to protect health, safety, or the environment, and create another opportunity for business interests to block regulatory initiatives. Proposed federal regulations are already subject to substantial procedural requirements and judicial review to ensure they comply with relevant legal requirements and comport with existing statutory authorities. Regulations that impose substantial costs on corporations may produce equally substantial benefits for consumers. Critics are also likely to argue that Congress is already responsible and accountable for delegating regulatory authority in the first place, and that the public benefits from substantial delegation of such authority to expert administrative agencies.

Federal regulation reaches nearly all aspects of modern life and is pervasive in the modern economy. Much of this regulation may be necessary or advisable, and nothing in the REINS Act would hinder a sympathetic Congress from approving new federal regulations. In all likelihood, however the REINS Act's congressional approval process would prevent the implementation of particularly unpopular or controversial regulatory initiatives. The primary effect of the legislation would be to make Congress more responsible for federal regulatory activity by forcing legislators to voice their opinion on the desirability of significant regulatory changes.

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[1] *See* "Pledge to America," *available at* http://pledge.gop.gov/resources/library/documents/solutions/a-pledge-to-america.pdf.
[2] *Id.*
[3] A draft version of the legislation to be introduced in the 112th Congress shortens this period to 70 days. *See* http://geoffdavis.house.gov/UploadedFiles/REINS_Act_Bill_Text_112th_Final.pdf.
[4] The version of the REINS Act introduced in the 111th Congress exempted monetary policy proposals by the Board of Governors of the Federal Reserve System and Federal Open Market Committee, rules of "particular applicability," rules "relating to agency management or personnel," and "rules of agency organization, procedure, or practice" that do not "substantially affect the rights or obligations of non-agency parties."
[5] *See* Clyde Wayne Crews, *Ten Thousand Commandments A Snapshot of the Federal Regulatory State* (2010 edition), at 2.
[6] 462 U.S. 919 (1983).
[7] *See* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793-96 (1984).
[8] Breyer, at 794.
[9] The only exception to this rule is a Joint Resolution used to propose a constitutional amendment. Such a resolution is instead One exception to this rule is Joint Resolutions which are instead submitted to the states for ratification. *See* http://www.senate.gov/reference/glossary_term/joint_resolution.htm.
[10] In *Chadha*, the House of Representatives voted to overturn six of 340 cases in which the Attorney General had concluded an otherwise deportable alien should be allowed to remain in the United States.
[11] Crews, at 28.
[12] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 208 (1988); *see also* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)("an agency literally has no power to act . . . unless and until Congress confers power upon it.").

**Related Links:**

H.R.3765 - Regulations From the Executive in Need of Scrutiny Act of 2009
http://www.opencongress.org/bill/111-h3765/show

S.3826 - Regulations From the Executive in Need of Scrutiny Act of 2010
http://www.opencongress.org/bill/111-s3826/show



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Statement of David Schoenbrod

Trustee Professor, New York Law School
&
Visiting Scholar, American Enterprise Institute

before the

Senate Committee on Homeland Security and Governmental Affairs

on the

Federal Regulation: A Review of Outstanding Proposals

June 23, 2011

*The views expressed in this testimony are those of the author alone and do not necessarily represent those of New York Law School or the American Enterprise Institute.*



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I now am a professor at New York Law School and a visiting scholar at the American Enterprise Institute. Previously, through most of the 1970s, I was one of the principal attorneys at the Natural Resources Defense Council. In that capacity, I headed the campaign of environmental and anti-poverty organizations to protect children from lead in gasoline.

My testimony is focused on S. 299 titled the Regulations from the Executive in Need of Scrutiny Act or REINS and its analog in the House, H.R. 10. I prefer to think of the bill as the Congressional Accountability Act.

**Lead in gasoline: a tragedy illustrating the need for Congress to take responsibility**

Congress passed the Clean Air Act in 1970 because the public demanded protection. The pollution that worried voters most came from lead in gasoline. Lead was known to poison children. The bumper stickers read: "GET THE LEAD OUT."

In the 1970 legislation, Congress did take responsibility for a rule that would eventually reduce lead exposure, but the reason was not to protect children. The act authorized the EPA to require that new cars made from 1975 onward use only lead-free gas. The reason was that Congress had decided that auto manufacturers must, from 1975 onwards, include pollution-controlling devices in their cars. The device of choice, the catalytic converter, cut many pollutants, but not lead — in fact, lead would ruin it. For Congress to require motorists to pay for the device and then let it be ruined by leaded gas would look foolish.

Legislators could not tell voters in 1970 that this rule to protect pollution control devices and their own reputations was sufficient to protect children from



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lead. Children would still be exposed to lead from gasoline for many years after 1970. The rule did not even take effect until the 1975 cars became available. Even then, pre-1975 cars would still use leaded gas and in 1975, there would be roughly 100 million such cars using leaded gas. Many of them would remain on the road emitting lead well into the 1980s.

So Congress in 1970 had to do more to satisfy the demand to protect children from lead. But lawmakers could not simply ban leaded gasoline forthwith; voters also wanted cheap gasoline, and adding lead reduces slightly the cost of refining it. Congress was caught between voters' demand to protect children and voters' desire to keep gas cheap.

When Congress is faced with a controversial choice, it often follows a two-step plan. It (1) announces a lofty goal, but (2) orders an agency to achieve the goal, thus letting the agency take the heat for failing to achieve it or the painful steps necessary to do so. Congress danced this two-step with lead. It (1) announced that a health-based air quality standard for lead must be achieved by May 1976 and (2) ordered EPA to establish the rules to achieve that standard by the deadline.

After passing the statute, diverse members of Congress — Democrats and Republicans, liberals and conservatives — lobbied the EPA, often on the quiet, to do nothing about the leaded gasoline used by the pre-1975 cars. Other members complained about the failure to protect health. As often happens when an agency is caught in such a cross fire, the EPA went into a stall.

In late 1972, my colleagues and I at the Natural Resources Defense Council won a decision against the EPA that prompted it, at last, to issue a rule to reduce the amount of lead in gasoline used in the pre-1975 cars. This victory was followed by many others. Yet, those legal victories did not translate into any reductions in lead for many years. In fact, the amount of lead used in gasoline increased slightly from 1970 to 1975. Meanwhile, the May 1976 deadline to protect health was



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approaching.

When Jimmy Carter won the presidential election in 1976, I hoped that his tough campaign talk on the environment would translate into tough action on lead. But, to the contrary, President Carter eventually ordered the EPA to weaken the already weak lead reduction schedule adopted by his Republican predecessors.

Fortunately, lead in gasoline began to decline in the late 1970s, mostly because the pre-1975 cars were being replaced by new cars that could use only unleaded gasoline rather than anything the EPA was doing to protect health. By 1985, so many of the old cars had gone to the junkyard that the large oil companies found it unprofitable to continue distributing leaded gasoline in addition to the unleaded variety. But they did not want to drop leaded gas on their own, for fear of losing market share to small refiners who would still sell it. So Big Oil asked Ronald Reagan's EPA to ban lead additives to gasoline on the grounds that it is dangerous to health, and the agency complied. The EPA finally got tough on lead, but only after powerhouse corporations, protecting their bottom lines, got involved.

If Congress in 1970 had *not* given the EPA the responsibility to make the hard choices on protecting health from lead, Congress would still have had to do something in response to the popular demand to protect the children. Congress would have had to enact a rule cutting lead in gasoline, but that rule would have been a compromise, getting rid of more than half of the lead over the next several years with further reductions to come. After all, in the same statute, Congress had required the powerful auto industry to reduce emissions 90 per cent by 1975.

The reason that Congress did not enact a rule to cut lead in 1970 is that legislators would have been criticized on two fronts: by voters who wanted all the lead out right away and other voters upset by a small rise in gas prices. So, instead of enacting such a law, which would been good for the American people, legislators enacted a statute avoiding responsibility that was perfect for themselves.



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The upshot is that lead came out of gasoline much more slowly than if Congress had made the hard choice itself. As a result, massive numbers of children, especially inner-city children, died and or had their IQs reduced below 70. Using EPA data on the health effects of lead in gasoline, I estimate the scale of the disaster in a book published by Yale University Press.[1] *Suffice it to say that the body count from Congress's evading responsibility was on the scale of American casualties in the War in Vietnam.*

The lead in gasoline is far from the only instance suggesting that the people fare better when the elected lawmakers take responsibility. The most striking advances under the Clean Air Act have come when Congress did take responsibility. For example, Congress in 1970 took responsibility for requiring auto manufacturers to cut emissions from new autos by 90 percent. Then, in 1990, Congress took responsibility for requiring power plants to cut sulfur emissions by 50 percent and for phasing out completely stratospheric ozone destroying chemicals. In contrast, where Congress left responsibility for the hard choices to the EPA, as it did with hazardous air pollutants in 1970, the agency was unable to deal with the great bulk of them for 20 years until Congress acted in 1990.

Congress often evades responsibility in legislating on the environment. As EPA's first general counsel, John Quarles, put it, the statutes provide "a handy set of mirrors – so useful in Washington – by which a politician can appear to kiss both sides of the apple."[2]

Opponents of REINS claim that the bill is biased against health, safety, and other sorts of regulatory protection. Weirdly, they name the elimination of lead

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[1] DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE (Yale U. Press, 2005) at ch. 4.

[2] H.R. REP. NO. 410, pt. 2, at 71 (1979) (dissenting view of Rep. Corcoran).



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from gasoline as an example of the kind of protection that REINS would block. The environmental experience falsifies such scare tactics. Indeed, as this experience shows, less responsibility for agencies and more responsibility for Congress can well translate into more protection for the beneficiaries of regulation.[3]

Furthermore, because REINS would ensure that the big, hard choices would come back to Congress, REINS gives legislators an incentive to come up with a compromise in the first place rather than instruct an agency to produce the best of everything for everyone.

**Liberals showed how Congress can take responsibility**

When I left NRDC for academia, this experience with lead prompted me to consider how the people could get the benefit of the elected lawmakers taking responsibility for the laws. What I found was that some leading liberal thinkers had pointed the way.

James Landis, the New Deal's sage of administrative law and later dean of Harvard Law School, urged that agency regulations be presented to Congress for approval. He wrote, "It is an act of political wisdom to put back upon the shoulders of Congress" responsibility for "controversial choices."[4]

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[3]Christopher Demuth made a related point in testimony before Congress. "Environmental initiatives are often highly popular, and EPA, beset as it always is by interest groups whose métier is exaggeration and alarmism, may find it difficult to see past the lobbying fog: it may underestimate popular support in a way that constituency-minded legislators would not." *Environmental Regulations, the Economy, and Jobs: Before the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce*, 112th Cong. 9 (statement of Christopher DeMuth, D.C. Searle Senior Fellow American Enterprise Institute for Public Policy Research).

[4] JAMES LANDIS, THE ADMINISTRATIVE PROCESS 76 (1938).



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Judge (now Justice) Stephen Breyer has explained how congressional vetting of agency regulations could work in practice. As he wrote in a law review article, Congress could enact a statute that, first, bars agency regulations from going into effect unless confirmed through the United States Constitution's Article I legislative process and, second, establishes a fast track process that would require legislators to accept or reject the regulations by a deadline.[5]

**The Landis idea becomes REINS**

I have been pushing the Landis idea since I was a beginning academic still litigating for the Natural Resources Defense Counsel in the early 1980s.[6] In 1995, I helped turn Judge Breyer's idea into a bill called the Congressional Responsibility Act.[7] Congress borrowed the name, but did not enact the principle when it passed the Congressional Review Act.[8] It gave the Congress the option of taking responsibility for regulations, while the original bill would have forced Congress to take responsibility. Needless to say, Congress hardly ever opts to take responsibility under the Congressional Review Act.[9]

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[5] Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–94 (1984). Breyer was writing in 1984 about how Congress could retrieve the power it lost when the Supreme Court struck down the legislative veto in the I.N.S v. Chadha 462 U.S. 919 (1983). Breyer was showing that Congress could take on the job of voting on regulations rather than arguing that it should do so. Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO L.J. 785, 796–98 (1984).

[6] *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (Yale University Press, 1993).

[7] The Congressional Responsibility Act of 1995, H.R. 2727, 104th Cong. (1995).

[8] Congressional Review Act, Pub. L. No. 104-121. Codified as 5 U.S.C. §§ 801 - 808

[9] The Mysteries of the Congressional Review Act, 122 HARV. L. REV. 2162, 2163 (2008 - 2009).



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Now in 2011, this committee is considering REINS, which is modeled on the Congressional *Responsibility* Act.[10] Like the original bill, the new bill would implement Judge Breyer's suggestion, but unlike it would be limited to "major" regulations. These are defined chiefly as regulations that the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget finds have an annual effect on the economy of $100 million or more.[11] In particular, such major regulations[12] would not go into effect until confirmed through the legislative process.[13] The bill imposes deadlines requiring up or down votes in the House and the Senate within thirty legislative days after the bill is introduced.[14]

Although the idea behind the bill can be traced back to a New Deal champion of administrative law, some of its sponsors herald it with rhetoric that others hear to be anti-regulation agency-bashing. This raises hackles because it was Congress, often with broad bi-partisan support, that imposed the deadlines and duties on the agencies and authorized the courts to make sure the agencies comply.[15]

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[10] Regulations from the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. (2011).

[11] H.R. 10 at §804

[12] There are limited exceptions. H.R. 10 at §806.

[13] U.S. CONST. art. II, § 7.

[14] H.R. 10, 112th Cong., § 802(c),(e)(1), S. 299, 112th Cong., § 802(c),(e)(1).

[15] In her testimony before the Subcommittee on Courts, Commercial, and Administrative Law, Sally Katzen explained how agencies are "not free agents . . . .they can only issue regulations that implement existing law – that is, laws that are duly enacted (passed by both Houses of Congress and signed by the President)." *The REINS Act - Promoting Jobs and Expanding Freedom By Reducing Needless Regulations: Hearing on H.R. 10 Before The Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary,* 112th Cong. 4 (2011) (statement of Sally Katzen, Visiting Professor NYU School of Law and Senior Advisor of the Podesta Group).



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Regardless of the battles over rhetoric, the substance of the bill is pro-accountability rather than anti-regulation. That substance was aptly captured in the title of a *Wall Street Journal* editorial – "The Congressional Accountability Act."[16] Thoughtful people will focus on the substance rather than the rhetoric.

**REINS will help Congress better serve the people**

Consider, again, environmental regulation. Environmental politics are bi-polar. Industry sometimes vilifies environmental advocates as crazy ideologues and they sometimes vilify industry as greedy ignoramuses.

Such polarized politics affects Congress. Here is how William Ruckelshaus describes the history in 1995 shortly after the Republican victory in the 1994 mid-term elections:

> We recognize, as perhaps the newest members of Congress do not, that the current rhetorical excess is yet another phase in a dismaying pattern. The anti-environmental push of the nineties is prompted by the pro-

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Professor Katzen rightly notes that there are existing procedural safeguards that help restrain agencies. Statutorily, the Administrative Procedure Act "generally requires that agencies give notice of what they intend to do, along with their supporting data and analysis," and provide people with a meaningful opportunity to comment on the proposed agency action. *The REINS Act - Promoting Jobs and Expanding Freedom By Reducing Needless Regulations: Hearing on H.R. 10 Before The Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary,* 112th Cong. 4 (2011) (statement of Sally Katzen, Visiting Professor NYU School of Law and Senior Advisor of the Podesta Group). *See also* 5 U.S.C. 551 et seq. Furthermore, the agency that proposes the rule responds to "significant comments and explains whether (and why) they agree or disagree with the comments received." True, there are procedural safeguards in place to restrain agencies. But there are no statutes or safeguards in place that will accomplish what REINS would: force Congress to take responsibility.

[16]January 14, 2011



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> environmental excess of the late eighties, which was prompted by the anti-environmental excess of the early eighties, which was prompted by the pro-environmental excess of the seventies, which was prompted.... But why go on? The pattern is quite clear. The new Congress may believe that it is the vanguard of a permanent change in attitude toward regulation, but unless the past is no longer prologue, the pendulum will swing back, and we will see a new era of pro-environmental movement in the future.[17]

The pendulum has continued to swing down to the present. Its swings, Ruckelshaus concludes, have had a devastating impact on EPA's ability to act sensibly.

To modulate the bi-polar politics, what has to come, as *New York Times* columnist David Brooks recently put it, "is a sense of humility, that the reason people behave civilly to one another is because, alone, no one has the resources to really conduct an intelligent policy, that you need the conversation, you need the back-and-forth."[18] Brooks was speaking about the aftermath of the shooting of Congresswoman Gabrielle Giffords, but his statement applies fully to regulation in general and environmental regulation in particular.

The REINS Act would force a conversation between the EPA and centrist legislators, pressuring those on the left and right to join in. Both parties will find that they must adopt a modulated approach to regulation, both on the environment

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[17] *See* Cristine Russell, *Bill Ruckelshaus on EPA: "Battered Agency Syndrom,"* THE ATLANTIC (Dec. 4, 2010), http://www.theatlantic.com/technology/archive/2010/12/bill-ruckelshaus-on-epa-battered-agency-syndrome/67501/.

[18] *Shields and Brooks On Obama's Tucson Speech, Calls for Political Civility*, PBS NEWSHOUR (Jan. 14, 2011) http://www.pbs.org/newshour/bb/politics/jan-june11/shieldsbrooks_01-14.html



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and other fronts, or voters will punish them at the polls. [19] *That is how we should get to sensible outcomes in a democracy, not by elected lawmakers hiding behind unelected agency officials.*

REINS would also improve environmental regulation by giving legislators, at long last, a personal stake in updating obsolete environmental statutes. The basic structure of most key environmental statutes dates back 30 or 40 years. Congress has passed no major environmental statute since 1990 despite decades of experience and the changing nature of the environmental challenge. As a result, the statutes force the EPA to regulate in ways that are often ineffective and inefficient. This logjam in updating the environmental statutes gave rise to *Breaking the Logjam*, a New York Law School-New York University School of Law project that has proposed how to update the environmental statutes.[20]

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[19] As Professor Richard Lazarus explains, voters, "responded with such hostility to [the Republican proposals on the environment in the mid-1990s that their] legislative reform effort was effectively sapped of its political viability."Richard Lazarus, THE MAKING OF ENVIRONMENTAL LAW 131 (2004). "Somewhat ironically the executive branch under Clinton used the same tactics against Congress that Congress had used against the Nixon, Reagan, and Bush administrations during the 1970s and 1980s. Just as Congress had effectively exploited the public's distrust of government to defeat earlier retreats from environmental protection, so did the Clinton administration block Congress in the 1990s. President Clinton, Vice President Al Gore, EPA administrator Carol Browner, and Interior Secretary Bruce Babbitt repeatedly characterized Congress as seeking to undermine public health and environmental quality for the sake of industry profits. The U.S. public responded with such hostility to any proposed change that the legislative reform effort was effectively sapped of its political viability." *Id.*

[20]The co-leaders of the project are Richard B. Stewart (formerly chair of the board of the Environmental Defense Fund and assistant attorney general under George H.W. Bush and now professor at NYU School of Law), Katrina M. Wyman (professor at NYU School of Law), and myself. To help develop proposals to update the environmental statutes, the projects co-leaders brought together fifty diverse environmental law experts to propose and reflect upon ways to



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Congress, however, has found it convenient to continue to do nothing. The reason is that the inefficacy and inefficiency caused by the obsolete statutes are problems for the environment and the economy, but not for legislators. After all, legislators can blame the problems on the EPA. But, once responsible for major regulations, as REINS would require, legislators will find that they have a personal stake in finally updating the statutes.

In sum, REINS will condition the power of the EPA, but it improve environmental protection. On the environment and other regulatory fronts, REINS will make Congress more accountable to the people, a better and more responsible public servant, and less apt to cast the blame on agencies.

**Some concerns about REINS**

REINS would work a major change in how regulation would work so it is important to address some concerns that might be voiced by a hypothetical critic.

Concern: "Legislators are much less knowledgeable than agency experts." But, the agency would, as James Landis put it, continue to be "the technical agent in the initiation of rules of conduct, yet at the same time ... have [the elected

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modernize a wide spectrum of federal environmental statutes. The undertaking was built upon four principles. The first principle is to adopt market-based tools wherever they can reliably achieve environmental goals. The second is to realign the responsibilities of the federal government and the states so that each level has more effective power over the environmental problems that it is best placed to address. The third is to face trade-offs openly and based on reliable information. The fourth is to use cross-cutting regulatory approaches that address closely related problems together rather than separately. The *Breaking the Logjam* project has issued a report (available at breakingthelogjam.org.) and a book (DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, BREAKING THE LOGJAM (Yale University Press, 2010). These publications were completed before REINS came to the attention of the authors.



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lawmakers] share in the responsibility for their adoption."[21]

Concern: "Congress lacks the time to vote on agency regulations."[22] During the 111th Congress, agencies promulgated 126 significant interim final rules and final rules. During the same Congress, Congress enacted 70 public laws naming post offices, federal buildings and other lands.[23] These naming bills take less time than would deciding whether to confirm an agency regulation even though the agency would have already crafted the regulation, developed a record, and evaluated its impacts. The relevance of the naming bills is that they typify numerous ways in which legislators spend a great deal of time taking symbolic stances. Enacting REINS would be a decision by legislators to shift time from taking symbolic stances to taking responsibility for the most important regulations that both bind and protect their constituents. That is what elected lawmakers should do.

Concern: "Regulations will be filibustered." But, REINS limits debate on the confirmatory vote and all related motions to two hours in each house and there is no realistic way around this time limit.[24] Quorum calls, roll calls, and other

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[21]JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938). E. Donald Elliot makes a related point in calling for Congress to get expert help in crafting statutes."The function of Congress is not to devise solutions to complex technocratic problems, but to provide democratic legitimacy." DAVID SCHOENBROD ET AL., BREAKING THE LOGJAM 122 (2010)

[22]This concern was voiced in http://voices.washingtonpost.com/ezra-klein/2011/02/the_rein_act.html

[23] *Id.*

[24]H.R. 10, § 802(d)(2), §802(e)(2)(B) However, Professor Sidney Shapiro accuses the drafters of REINS of pulling a fast one. Sidney Shapiro, *The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment*, CENTER FOR PROGRESSIVE REFORM, www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder.pdf). He argues that the



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legislative business could well mean that each major regulation could take more than two hours. If the time for considering all the major regulations is too great in Congress's judgment, it should raise the criteria for a major regulation above $100 million rather than abdicate responsibility for the most significant rules altogether.

Concern: "REINS would change the powers of the administration in mid-presidential term." Congress routinely changes the powers of agencies. In any event, President Barack Obama and Democrats in the Senate could exact, as a price for passage, postponing the effective date until the start of the next presidential term. The issue with REINS is whether the elected lawmakers will be accountable to their constituents for the major regulations, not the powers of a particular president.

Concern: "Congress sometimes fails to act responsibly." To the extent this is

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"motion to proceed" to the confirmatory vote would be separately debatable and therefore could be filibustered. Motions to proceed are normally debatable, but not when they are to proceed to a time limited matter. Then they are not debatable. This was the opinion of the Congressional Research Service in evaluating motions to proceed under the Congressional Review Act.

> The Congressional Review Act omits one other provision that appears in many expedited procedures for taking up resolutions of disapproval. The Act does not explicitly make the disapproval resolution privileged. It is established Senate practice that a motion to proceed to consider a matter is debatable (and, therefore, subject to filibuster) unless the matter in question is privileged. Senate precedents, however, indicate that if a statute established a time limit for the consideration of a specified measure, the provision has the effect of rendering the measure privileged, so that a motion to proceed to its consideration is not debatable. Consistent with this principle, the Senate has treated a motion to consider a disapproval resolution under the Congressional Review Act as not debatable, even though the Act does not explicitly bar the debate."

Richard S. Beth, "*Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*," CONGRESSIONAL RESEARCH SERVICE (Oct. 10, 2001) www.crs.gov. REINS is an amendment to the Congressional Review Act and so the the same should hold true.



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so, it because Congress found ways to avoid responsibility for the consequences.[25] The solution cannot be for Congress to hand the choices over to even less accountable agencies. With REINS, Congress would reassume responsibility and thereby improve itself.

**Conclusion**

Agency regulations create rules of private conduct. That is, they make law. The lawmakers that the people elect should strive to be accountable for the laws. Such democratic accountability is the principle for which the Revolutionary War was fought. It is the principle for which revolutions are being waged today around the world. So it is particularly apt for the elected lawmakers in the United States Congress to vote to shoulder accountability for the most important laws.

[25] *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993).



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SUBMITTED BY SEN. COBURN

June 8, 2011

The Honorable Olympia Snowe
United States Senate
Washington, D.C. 20510

The Honorable Tom Coburn
United States Senate
Washington, D.C. 20510

Dear Senators Snowe and Coburn:

As representatives of small businesses, we are pleased to support Freedom from Restrictive Excessive Executive Demands and Onerous Mandates (FREEDOM) Act of 2011. This legislation puts into place strong protections for small business to help ensure that the federal government fully considers the impact of proposed regulation on small businesses.

In an economy with high unemployment, and where almost 2/3 of all net new jobs come from the small business sector, we appreciate that your legislation would require regulators to further analyze the impact of certain proposals on job creation. The annual cost of federal regulation per employee is significantly higher for smaller firms than larger firms. Federal regulations – not to mention state and local regulations – add up and increase the cost of labor. If the cost of labor continues to increase, then job creation will be stifled because small businesses will not be able to afford to hire new employees.

The Small Business Regulatory Freedom Act expands the scope of the Regulatory Flexibility Act (RFA) by forcing government regulators to include the indirect impact of their regulations in their assessments of a regulation's impact on small businesses. The bill also provides small business with expanded judicial review protections, which would help to ensure that small businesses have their views heard during the proposed rule stage of federal rulemaking.

The FREEDOM Act strengthens several other aspects of the RFA – such as clarifying the standard for periodic review of rules by federal agencies; requiring federal agencies to conduct small business economic analyses before publishing informal guidance documents; and requiring federal agencies to review existing penalty structures for their impact on small businesses within a set timeframe after enactment of new legislation. These important protections are needed to prevent duplicative and outdated regulatory burdens as well as to address penalty structures that may be too high for the small business sector.

The legislation also expands over time the small business advocacy review panel process. Currently, the panels only apply to the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection



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Bureau. These panels have proven to be an extremely effective mechanism in helping agencies to understand how their rules will affect small businesses, and help agencies identify less costly alternatives to regulations before proposing new rules.

We applaud your efforts to ensure the federal government recognizes the important contributions of job creation by small business, and look forward to working with you on this important legislation.

Sincerely,

Air Conditioning Contractors of America
American Bakers Association
American Chemistry Council
American Farm Bureau Federation
American Trucking Associations
Associated Builders and Contractors
Food Marketing Institute
Hearth, Patio & Barbecue Association
Hispanic Leadership Fund
Independent Electrical Contractors
Institute for Liberty
International Franchise Association
National Association for the Self-Employed
National Association of Home Builders
National Association of REALTORS
National Association of the Remodeling Industry (NARI)
National Automobile Dealers Association (NADA)
National Black Chamber of Commerce
National Federation of Independent Business
National Funeral Directors Association
National Lumber and Building Material Dealers Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
Plumbing-Heating-Cooling Contractors – National Association
Printing Industries of America
Small Business & Entrepreneurship Council
Snack Food Association
Society of American Florists
Society of Chemical Manufacturers & Affiliates
U.S. Chamber of Commerce
Window and Door Manufacturers Association



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**Senate Small Business Committee Ranking Member Olympia J. Snowe**
**Testimony for the Senate Homeland Security and Governmental Affairs Committee**
**in Support of the FREEDOM Act (S. 1030)**
**June 23, 2011**

**Chair Lieberman, Ranking Member Collins -- thank you for convening this crucial hearing on regulatory reform. Mr. Chairman, I know you have been a steadfast champion of small businesses as I've witnessed firsthand on the Small Business Committee and as my fellow co-chair on the Senate Task Force on Manufacturing. And small businesses have a true champion in my friend and colleague, Ranking Member Collins, who hails from a family of small business owners and who previously served as New England Regional Administrator of the SBA. I am pleased to offer testimony on the FREEDOM Act that 53 Senators *and TEN members of this Committee*, voted for on June 9th. I am especially thankful to my co-author, Senator Coburn, who has been instrumental throughout this process.**

**Mr. Chairman, we have experienced the highest percentage increase in long-term unemployment of any recession since World War II...it would take 285,000 new jobs every month for five years to return to pre-recession unemployment levels...and small businesses have lost an estimated $2 trillion in profits and asset valuation since the recession began. So, why regulatory reform, and why now? Because *indisputably*, we need an *economic game-changer,* to encourage entrepreneurs to invest and *create new jobs.***

**As a letter endorsing our bill from *32 major small business associations* stated, federal regulations "...add up and increase the cost of labor. If the cost of labor continues to increase, then job creation will be stifled because small businesses will not be able to afford to hire new employees." Moreover, we learned in a November Small Business Committee hearing that a 30% reduction in regulatory costs would save nearly $32,000 for a 10-person firm – enough to hire one additional person.**

**And it's not hard to understand *why* regulations are *stifling* small business. Since enactment of the Small Business Regulatory Enforcement Fairness Act of 1996, more than 50,000 new rules have gone into effect, including 1,000 "major" rules, each with an estimated impact of more than $100 million annually. More than 3,000 new**



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**federal rules are established each year! And the Administration's own cost estimates for the 407 proposed or enacted regulations this year is over $68.1 billion with likely broader economic costs on our economy. It's no coincidence that, compared to China, India, and other major competitors, it costs U.S. firms *18% more* to manufacture goods.**

**The Freedom Act is based on existing law and those processes that *actually work*. We include small business review panels, such as those that have *already been in place for 15 years* at EPA and OSHA and now at the Consumer Financial Protection Bureau. Those 32 organizations supporting this legislation stated "these panels have proven to be an extremely effective mechanism." The panels have evaluated 41 rules at EPA and 10 at OSHA, including the arsenic in drinking water rule; the ground water rule; and the ergonomics standard rule. And while we originally sought panels at every agency, in response to those who advocated a smaller, phased in approach when our legislation was on the floor, we revised our bill to add only nine additional panels over three years – one of five major revisions we made to forge consensus on this bill.**

**The Regulatory Flexibility Act (RFA) of 1980 requires agencies to conduct small business analyses for any regulation that would impose a significant impact on a substantial number of small firms. Yet, agencies have circumvented this obligation by issuing "guidance documents" instead of formal rules, as occurred with OSHA's recent "proposed reinterpretation" of its noise standard. Fortunately, Chair Lieberman and I weighed in on behalf of small businesses and OSHA withdrew its proposal. *Now,* to prevent similar occurrences, our bill extends the RFA to guidance documents as well.**

**Another disregard for the RFA is when agencies fail to conduct a meaningful small business impact analysis at the *proposed rule stage*. Regrettably, the law does not allow small businesses to challenge this in court, *until* a burdensome rule is *finalized*, when it is already *too late*. Therefore, using identical language from legislation previously filed by Small Business Committee Chair Landrieu and Senator Cardin, our bill extends judicial review to the *proposed* rule stage.**

**Agencies also ignore the Regulatory Flexibility Act, without consequence, when they do not review their rules each decade for possible elimination, or to be made less burdensome. That is why the FREEDOM Act carries a "stick," stating that if an**



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**agency ignores this requirement, its budget for salaries will be reduced by 1%, unless Congress intervenes. After all, why should citizens seeking to create jobs and prosperity bear the brunt of noncompliance by federal agencies?**

**Even the President is conducting a review of regulations across 30 agencies, in areas as diverse and consequential as Endangered Species Act procedures and EPA regulations on air pollution. And he expects this examination will yield *billions* in savings. In fact, here is just a sampling of regulations the administration is reviewing for possible revisions. So why wouldn't we want these reviews to be the *norm* rather than the exception? And *that* requires the consistency of process and accountability through enforcement that can only be assured through the weight of *law*.**

**Finally, the FREEDOM Act requires agencies to consider foreseeable indirect costs of rules, which is a top legislative priority of the President's SBA Office of Advocacy. Currently, the RFA only mandates regulators to take into account the entities directly affected by a proposed rule – *completely ignoring* the secondary effects on small businesses. For example, a factory closure devastates not only those working at that facility, but *entire communities* of suppliers and contractors. And we have addressed concerns that our original language might require agencies to consider too many types of indirect effects, by using the *exact language* proposed by Dr. Winslow Sargeant – the President's own chief small business regulatory appointee.**

**To conclude Mr. Chairman, the time to act to remove the impediments to job creation is now. Our economy needs help. Our small businesses need relief. Our families need work.**

**In a May 25th article, Cass Sunstein, OMB Administrator of the Office of Information and Regulatory Affairs, who will testify today, stated, "*...while maintaining critical health and safety protections* for the American people." While a good first step, more MUST be done to reduce the regulatory burdens obstructing our nation's economic growth. That is why Congress must do its part to enact meaningful regulatory reform. I thank this Committee for holding this hearing and for the opportunity to testify. I intend to submit additional materials for the record. Thank you.**



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**Senator Roberts Testimony on Regulatory Responsibility for our Economy Act of 2011**
**Homeland Security and Government Affairs Committee (HSGAC)**
**June 23, 2011**

Good afternoon, Chairman Lieberman, Ranking Member Collins, and distinguished Members of the Committee. I am pleased to be here today to testify on regulatory reform issues - the topic of the day.

Earlier this year I introduced S. 358, the "Regulatory Responsibility for our Economy Act of 2011." This reform would strengthen and codify President Obama's Executive Order from January 18.

President Obama made a commitment to review, modify, streamline, expand, or repeal those significant regulatory actions, that are duplicative, unnecessary, overly burdensome or would have significant economic impacts. The "Regulatory Responsibility for our Economy Act of 2011" would ensure just that. My legislation would require that all regulations put forth by the current and future Administrations simply consider the economic burden on American businesses, ensure stakeholder input during the regulatory process and promote innovation.

Per the fact sheet, accompanying the Executive Order, "the President requires Federal agencies to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness." My legislation would ensure that this happens by laying out specific conditions that the federal regulatory system must meet. It also puts forth new, and codifies existing, agency requirements for promulgating regulations.

In a Wall Street Journal Op-ed, the President stated, "We have preserved freedom of commerce while applying those rules and regulations necessary to protect the public against threats to our health and safety and to safeguard people and businesses from abuse." But he also noted, "sometimes those rules have gotten out of balance, placing unreasonable burdens on business - burdens that have stifled innovation and have had a chilling effect on growth and jobs." I must say I absolutely agree with the President. As I travel across my home state, I have heard from Kansan after Kansan who find themselves weighed down by the burden of too many regulations. Even to the point that these regulations threaten the future of their businesses.

I have had a longstanding concern with the regulatory process.

- During fiscal year 2010, 43 new major regulations were adopted, with estimated net new burdens on Americans exceeding $26.5 billion each year, a record increase.

- Fifteen of the 43 new major rules involve financial regulation. Another five stem from the Patient Protection and Affordable Care Act. Ten rules adopted by the Environmental Protection Agency were responsible for the lion's share of new regulatory costs—some $23.2 billion.

- Regulatory burdens—and the taxpayer burden—are expected to increase again in 2011 as agencies continue to promulgate literally thousands of new rules related to health care, energy, financial services, and telecommunications.

- A September 2010 report prepared for the Office of Advocacy within the Small Business



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Administration (SBA) stated that the annual cost of federal regulations was about $1.75 trillion in 2008.

- And that is 2008 data. Imagine the cost since then! It's probably over $2 trillion now!

My legislation would codify the President's Executive Order and assure a review of these regulations to reduce burdensome and economically irresponsible regulatory actions that endanger struggling businesses in the United States.

The President's Executive Order "requires that federal agencies ensure that regulations protect our safety, health and environment while promoting economic growth." So does my legislation.

- However, my legislation strengthens the President's commitment by promoting economic growth, innovation, competitiveness, and job creation.

The Executive Order commissions "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." So does my legislation.

- My legislation requires each agency to submit a plan to review existing significant regulatory actions and then they must continue to do so once every 5 years and must report to Congress on the outcome of those reviews.

The President said, "It's a review that will help bring order to regulations that have become a patchwork of overlapping rules, the result of tinkering by administrations and legislators of both parties and the influence of special interests in Washington over decades."

In order to do this we need to add some teeth to the commitment, by closing the existing loopholes.

- My legislation also requires independent agencies to complete a review of their regulatory actions, and imposes the same requirements on them.

- A significant portion of the complaints that come to my office, and I am sure every office represented here, involve egregious over-regulation by independent agencies such as the CFTC and the EPA.

- My legislation also ensures valuable stakeholder input on regulatory actions including standardizing the length of the comment period and when it should start.

- It is both significant and noteworthy that comment periods range from two weeks to 90 days, causing inconsistency in the system that should allow stakeholders to have a say in protecting their future.

In 2010 Federal Agencies issued 3, 573 final rules. The Administration's own cost estimates for the 280 proposed or enacted regulations this year is over $29.4 billion with potentially even broader economic costs on our economy. This is just a snapshot in time and with the hundreds of pages of regulations coming out every day we can only assume that these numbers have and will grow.

President Obama has made it his "mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb." I agree. We need to eliminate more of the "just plain dumb" in government and would encourage the Administration and my colleagues to support my legislation.

**Sen. David Vitter, Louisiana**
**U.S. Senate Committee on Homeland Security and Governmental Affairs**

**Thursday, June 23, 2011**

**Hearing on Federal Regulation: A Review of Legislative Proposals**

- Mr. Chairman and Ranking Member Collins, thank you for this opportunity to speak today.
- Also, thank you for having a hearing on such an important issue.
- There are so many agencies that our small businesses have to answer to and file paperwork with.
- It is sometimes amazing that small business owners have any time to actually run a business, grow a business, or do anything else after all the paperwork is done.
- Depending on the nature of the business or the location of the business, firms have to deal with many federal agencies.
- These include the EPA, the Army Corps or Engineers, the Coast Guard, SBA, Labor, Commerce, IRS, and Customs, just to name a few.
- And that doesn't even count the state regulatory agencies, such as the Louisiana's Departments of Revenue, Labor, Wildlife and Fisheries, Insurance, Environmental Quality, and others. And then there are local and parish governments on top of all those.
- The compounded effect of these levels of regulation can be suffocating to the entrepreneurial spirit of small business owners.



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- And frankly, in the current environment here in Washington, the situation is getting worse, with the scope of regulations growing dramatically.
- While I understand the need for some basic level of regulations to protect consumers and to protect the public health and welfare, the massive amount of regulations and paperwork small businesses face today is overwhelming and way beyond what is reasonable.
- Compliance costs grow each year, increasing the cost of doing business and hampering our competitiveness in the world market.
- In September of last year, the SBA Office of Advocacy released a study that gave us a glimpse of the burden small businesses have under federal regulations.
- That reports shows that small businesses with 20 or fewer employees face an annual cost from federal regulations of $10,585 per employee.
- This is a staggering burden just to comply with federal regulations, and it doesn't take into account state and local compliance costs.
- Overall, we need reduce regulatory costs and burdens, enact a fairer and simpler tax code, and greatly curtail the time-consuming, often duplicative paperwork demanded from government agencies.
- But those efforts will obviously require time for significant debate in committees and on the Senate floor.
- As we continue to push for these drastic reforms, we need a temporary release valve, a quick solution to help our small businesses.
- Too often, from reports I have heard from small business owners, it seems as though federal regulators often play a "gotcha" game –



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fining small businesses for paperwork violations just for the sake of issuing the citation.

- Bureaucrats too often act in an oppressive way with the regulatory power they yield.
- The intent of paperwork fines should not be to create a new revenue stream for the government or to make criminals out of small business owners.
- Instead, these regulations, while currently being way out of hand and costly as I mentioned, should be intended to protect the general health of the public, protect our environment, or protect consumers.
- If a minor paperwork violation occurs, federal regulators should have the ability to waive fines for first time offenses and allow the business owner to correct the problem in a reasonable time frame.
- That's why I have introduced the Small Business Paperwork Relief Act, which is a bill I introduced when I served in the House and continued to push when I came to the Senate.
- This bill would give small businesses some small amount of relief from the federal regulatory regime.
- It would direct federal agencies not to impose civil fines for a first-time violation of their agency's paperwork requirements by a small business unless the head of the agency determines that –
    - the violation has the potential to cause serious harm to the public interest,
    - forgoing a fine would impair criminal investigations,
    - the violation is a violation of internal revenue law,
    - the violation is not corrected within six months,



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  - the violation presents a danger to public health or safety.
  - Also, the bill says that fines can be waived in the case of a violation that could present a danger to public health or safety if the issue is corrected within 24 hours of the small business receiving notification.
- So, in short, this bill would provide a reasonable, one-time pass on fines for minor paperwork violations, unless the violation is of a grave nature and as long the small business owner corrects the problem promptly.
- I know there are some who may argue against that proposal would encourage small business owners to break the law.
- Or, opponents of the proposal may argue that devious business owners could wait for their free shot before filling out required documents.
- I cannot see how that could be the case, as the bill does not remove any obligations.
- All required paperwork and compliance with other regulations remain intact.
- The bill would only temporarily provide relief from fines relating to first-time paperwork violations.
- It doesn't even address the issue of the excessive paperwork requirements, which of course is something that Congress should address.
- Also, the bill expressly limits the relief to first time violations, not a series of violations. And, as I mentioned, there are the provisions that preserve fines in case of serious violations.

- The intent of my bill is to inject some common sense into our regulations. With so much paperwork required from small businesses, with so many I's to dot and T's to cross, it is easy for a business owner to make a minor mistake in the vast amount of paperwork required of them.
- Fines can be very punitive, many times with assessments in the hundreds or thousands of dollars per day.
- I do not think we should bring down the hammer on innocent paperwork mistakes by small business owners.
- Instead, we should focus our enforcement efforts on serious violators and let minor paperwork violations be corrected promptly and without excessive fines.
- Again, thank you for your opportunity to discuss my bill, and I look forward to working with the committee to reform our regulatory process and support economic growth.



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**Senator Mark R. Warner**

**Testimony**

**Hearing: Federal Regulation: A Review of Legislative Proposals**

**Homeland Security and Government Affairs Committee**

**June 23, 2011**

Chairman Lieberman, Ranking Member Collins and Members of the Committee, thank you for holding this hearing today and inviting me to share my views.

Federal regulations are a frequent topic on Wall Street, Main Street and at kitchen tables across the country. I'm glad to see that this Committee is holding a hearing to consider the current proposals and how we can take action on the regulatory concerns voiced by many of our constituents.

Before I begin talking about some of my ideas – I think it's important to start by stressing how critical regulations are to the public and our nation. I am not here today to question the need for regulations – rather to challenge us to think about smarter regulations – about our tendency to add regulations and rarely, if ever, remove any that have become obsolete or unworkable. I also want to talk about how we might bring more accountability to the cost and burden that government regulations impose on our economy.

We need balanced regulations to protect the environment and the health and safety of our citizens. But as any nation matures over time, it comes to a point where the regulations need to be reviewed, prioritized and rebalanced.

I believe that time has come.

In fact, the administration has recognized this need. President Obama has launched an effort to review existing regulations. In January, he asked each executive agency to identify existing rules that could be modified or eliminated to reduce the cost to businesses.

So far, they've turned up some impressive results. Preliminary plans released last month from 30 agencies have identified more than 500 regulations to be reviewed for possible elimination or refinement. But most of these preliminary plans don't include cost estimates of how much they might save.

However, about 5% of the recommendations did include a potential savings – and even that 5% carried potential savings of more than $7 billion dollars and over 60 million hours in possible compliance savings.

Those are pretty impressive numbers.



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I'm here today because I've been working on a proposal to improve cost accountability for federal regulations. The proposal I plan to release soon, will require that all government agencies – independent and executive – conduct impact analysis on all economically significant rules, much like the ones OMB requires now for executive agencies. For the first time, independent agencies will be required to do this, too.

Next, my proposal will include a short-term Regulatory PAYGO process that will help to balance our regulatory costs over the next few years. The temporary PAYGO process will help ensure that agencies act on and expand their retrospective review plans to eliminate outdated rules and modernize others over the next few years.

Under Regulatory PAYGO, agencies would have to provide cost estimates for the economically significant rules they plan to impose -- and then offset those rules by cost burden reductions on existing regulations. And this PAYGO approach will help quantify the compliance savings to our businesses – something we currently do not do.

I believe a PAYGO process will force more conversations about alternatives to ensure that the needed regulations impose the least cost possible – balancing the costs with the benefits. In my proposal, the PAYGO process will be overseen by OMB's Office of Information and Regulatory Analysis (OIRA) and they will develop a scorecard to track agency compliance and government-wide savings.

Chairman Lieberman, Ranking Member Collins and Members of the Committee, thank you for the chance to share my views and information about my proposal today. I look forward to working with you to create more cost accountability and transparency in our regulatory framework.



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**EXECUTIVE OFFICE OF THE PRESIDENT**
**OFFICE OF MANAGEMENT AND BUDGET**
**WASHINGTON, D.C. 20503**

**TESTIMONY OF**
**CASS R. SUNSTEIN, ADMINISTRATOR**
**OFFICE OF INFORMATION AND REGULATORY AFFAIRS**
**BEFORE THE SENATE COMMITTEE ON HOMELAND SECURITY**
**AND GOVERNMENTAL AFFAIRS**
**UNITED STATES SENATE**

**JUNE 23, 2011**

Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to appear before you today to discuss issues relating to regulation and regulatory review. I believe that we can achieve our shared goal, which is, in the words of Executive Order 13563, to "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."

The basic framework for regulation and regulatory review comes, of course, from Congress. Relevant statutes establish both the sources and the limits of the rulemaking authority of particular agencies. Congress has also established the broader foundations for the exercise of regulatory authority through so-called "generic" legislation. The Administrative Procedure Act is the central document here insofar as it imposes general requirements for public participation in federal rulemaking (including a notice-and-comment period) and judicial review. Such review is available to test whether the agency has acted in conformity to law and also whether the agency has acted arbitrarily or capriciously. Three other enactments deserve particular attention:

1. Title II of the Unfunded Mandates Reform Act (UMRA) imposes important requirements on rules that impose annual costs of $100 million or more (adjusted for inflation) on state, local, and tribal governments or the private sector. Those requirements involve, among other things, an assessment of costs and benefits and an accounting of various potential effects on the economy. Importantly, Title II also requires agencies to identify and consider a reasonable number of alternatives and to select the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule (or explain why they did not).

2. The Regulatory Flexibility Act (RFA) is designed principally to protect small business from excessive regulation. The RFA emphasizes the importance of recognizing "differences in the scale and resources of regulated entities" and of considering "alternative regulatory approaches . . . which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions." To promote its central goals, the RFA imposes a series of requirements designed to ensure that agencies give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on such businesses.



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3. The Congressional Review Act is designed to provide Congress with the authority to oversee the rulemaking process and to "veto" rules it does not approve. Under the Act, agencies must submit reports on rules to each House of Congress. Congress has a period in which to assess such rules and if it chooses, to prevent them from going into effect.

These statutes, as well as the organic statutes for the regulatory agencies in the Executive Branch, provide robust opportunities for the public and Congress to have an opportunity to participate in the regulatory process.

While legislation provides the central sources and limits of rulemaking authority, important guidance is also provided by the President. For about thirty years, starting with President Reagan, both Republican and Democratic Presidents have required a process of interagency review of significant rules, overseen by the Office of Information and Regulatory Affairs (OIRA) and requiring careful attention to costs and benefits, to alternatives, and to avoiding unjustified burdens. That process has contributed to a situation in which – under both Republican and Democratic Administrations – the annual benefits of regulations far exceed their annual costs. (The benefits of regulation include not only purely economic benefits but also savings in terms of deaths and illnesses prevented; consider, as just one example, the fact that highway deaths are at their lowest level in sixty years, in part as a result of highway safety regulations.)

The most important recent guidance is Executive Order 13563, issued on January 18, 2011. In that Executive Order, President Obama laid the foundations for a regulatory system that protects public health and welfare while promoting economic growth and job creation. 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 consistent with obtaining regulatory objectives.
- Requires enhanced public participation.
- Directs agencies to take steps to harmonize, simplify, and coordinate rules.
- Directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public.

As you are aware, the Executive Order also requires agencies to "look back" at existing Federal regulations. The requirement of retrospective analysis directs agencies to review their significant rules, and to determine, on the basis of that review, which of those 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 month, and in compliance with the Executive Order, 30 departments and agencies released their preliminary plans. Some of the steps outlined in the plans have already saved 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



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billions of dollars in regulatory burdens on individuals, small businesses, state, local, and tribal governments, and other regulated entities. 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. They have been offered to the public, and to elected representatives at all levels, for their views and perspectives. Agencies will be carefully assessing all comments and suggestions before they finalize their plans. We look forward to your input and help in improving those plans.

The Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation is focused especially on the "essential role" of small businesses in the American economy. It directs agencies to consider methods "to reduce regulatory burdens on small business" through increased flexibility. Recall that under the RFA, agencies may consider such flexibilities as extended compliance dates, simplified reporting and compliance requirements, and partial or total exemptions. The Memorandum specifically requires agencies to provide an explanation when they do not offer such flexibilities in proposed or final rules. Another Presidential Memorandum, the Memorandum on Administrative Flexibility, is specifically designed to reduce unjustified burdens on State, local, and tribal governments.

A number of regulatory reform proposals are now under active discussion in Congress. In this period of economic difficulty, we start from common ground: It is especially important to reduce unnecessary costs and paperwork burdens, so that we can protect public health and welfare while promoting economic growth and putting Americans back to work.

The Administration is committed to achieving these goals, and to working with Congress, and with this Committee in particular, on that important task. With the recent announcement of the preliminary lookback plans, we look forward to working closely with you to deliver on the promise of the Executive Order, which, it bears emphasizing, is to protect public health and welfare while also promoting economic growth and job creation.

At the same time, our view is that, with the introduction of the President's Executive Order, we now have the tools needed to maintain a smart and efficient regulatory framework. Existing statutes, outlined above, are designed to promote public participation, protect small business, reduce excessive costs, and allow a congressional check. Executive Order 13563, merely six months old, provides new guidance and discipline, designed both for the "flow" of new regulations and the "stock" of existing regulations.

We are particularly concerned that some regulatory reform proposals might have unintended adverse consequences. For example, while there is an important role for judicial review of regulations, a significant expansion of judicial review in rulemaking could create unintended complexity in the regulatory system, preventing important rules from taking effect. An increase in litigation and judicial authority might also increase regulatory uncertainty, which would be most unwelcome in the current economic situation. At the same time, additional litigation and uncertainty can undermine important safeguards of public health, welfare, and safety, including safeguards that prevent illnesses and deaths.

I might add in this regard that since 2009, this Administration has launched initiatives that have, among other things, promoted airline safety while protecting passengers from tarmac



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delays, overbooking, and hidden charges; sharply reduced the risk of salmonella from eggs; and dramatically increased the fuel economy of the fleet, thus promoting energy independence while saving consumers a lot of money. At the same time, and there is absolutely no contradiction here, we are eliminating unnecessary regulatory burdens and tens of millions of hours in annual red-tape.

Other proposals, such as the REINS Act, would undermine our system by converting rules designed to implement congressional enactments into mere proposals. Such a transformation would not only increase uncertainty, but it would also undermine the implementation of countless statutes, while giving Congress no authority that it currently lacks. Recall that the Congressional Review Act enables Congress to overturn rules during the period for special legislative procedures established by the Act, and Congress always retains the authority to overturn rules at any subsequent point as well.

The Administrative Procedure Act, UMRA, the Regulatory Flexibility Act, and the Congressional Review Act, along with Executive Order 13563, provide strong foundations for a system that, to return to the opening words of that Executive Order, protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." I would be happy to answer your questions.



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**Questions for the Record**
**Senate Homeland Security and Government Affairs Committee**
Cass R. Sunstein
Administrator, Office of Information and Regulatory Affairs

**Pryor**

1. **Many Arkansans have written to me regarding regulations that place an increased regulatory burden on their businesses. Most of these people think their concerns were not addressed before the rule was issued even if there was a notice and comment period. How can agencies more effectively communicate with people affected by rules to make sure that their voices are being heard? How can agencies do a better job on the front end of analyzing a proposed rule's benefits and cost and the number of affected parties? Should indirect benefits and costs, such as job creation, be included in this analysis?**

Executive Order 13563 requires each agency, where feasible and appropriate, to seek the views of those who are likely to be affected before issuing a notice of proposed rulemaking. It also requires an "open exchange of information and perspectives." With the use of regulations.gov and agency websites, agencies are able to disseminate information widely about proposed rules and solicit comments from the public. We are taking steps to promote greater opportunities for public awareness and participation in rulemakings. For example, we are working carefully with agencies to ensure, consistent with Executive Order 13563, that public comments are addressed.

OIRA also works with agencies to help them improve their quantitative analyses of the costs and benefits of proposed rules. In the past year, OIRA has issued a checklist for agencies to use when preparing their regulatory impact analyses,[1] as well as a document outlining answers to questions that are frequently asked by agencies in the course of their analyses.[2]

We recognize the importance of understanding all relevant effects of regulation, including job effects, particularly in a difficult economic environment. When possible, agencies should include an analysis of the employment effects of their rules. OIRA works with agencies to encourage employment analyses when such analyses are feasible.

2. **In the Unfunded Mandates Reform Act, a threshold of $100 million/year, adjusted for inflation, is used to determine which proposed rules have a so-called significant economic impact, which can trigger detailed analyses of benefits and costs by the agency proposing the rule. What is the basis for this amount and what is the current threshold amount adjusted for inflation used by agencies? How many rules each year would be considered to have a significant economic impact? Should rules that have a significant economic impact be subject to a more rigorous benefit and cost analysis than required by UMRA? Is the $100+ million threshold adequate, or do you think the number should be changed? Should**

[1] Office of Information and Regulatory Affairs, "Agency Checklist: Regulatory Impact Analysis," (October 28, 2010), http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf
[2] Office of Information and Regulatory Affairs, "Circular A-4, 'Regulatory Analysis' Frequently Asked Questions (FAQs)," (February 7, 2011), http://www.whitehouse.gov/sites/default/files/omb/circulars/a004/a-4_FAQ.pdf.



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**there be a higher second tier, such as $1 billion/year, for major rules that would trigger a more formal proceeding under the Administrative Procedures Act?**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) states that, unless prohibited by law, "the agency shall prepare a written statement containing . . . a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate" before "promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published." (2 U.S.C. §1532). The choice of this amount appears to reflect a congressional judgment that the covered rules have a significant impact and should therefore be subject to careful analysis. (OIRA does not question that judgment.) Agencies typically adjust for inflation using price indices such as the GDP Deflator.[3] As an example, the threshold for 2010 is approximately $135.7 million using the GDP Deflator.[4]

In FY 2010, Federal agencies issued 13 final rules that they found were subject to Section 202 of UMRA. A further discussion of the UMRA provisions in agency rules from 2010 is provided in Chapter 4 of OIRA's latest Report to Congress on Agency Compliance with the Unfunded Mandates Reform Act, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf. Prior UMRA reports dating back to 1999 are available at http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress. We believe that the number of rules each year that contain a Federal mandate, as defined by UMRA, remains relatively consistent. For example, in FY 1999, Federal agencies issued 17 regulations that were subject to Section 202 of UMRA.

Please note that all rules that trigger UMRA analysis requirements are also considered economically significant under Executive Order 13563 and Executive Order 12866, because the threshold for economic significance under these Executive Orders (having costs or benefits of $100 million or greater in any one year) is not adjusted for inflation. That said, not all rules that are economically significant are covered by UMRA.

OMB's guidance on regulatory impact analysis (Circular A-4) contains a further requirement for rules involving annual economic effects of $1 billion or more. For these rules, agencies should present a formal quantitative analysis of the relevant uncertainties about benefits and costs. OIRA does not believe that a more formal proceeding under the Administrative Procedure Act is necessary for these rules.

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[3] For a description of the GDP deflator, *see, e.g.*, http://www.bea.gov/faq/index.cfm?faq_id=513&searchQuery=deflator.

[4] *See* Budget for Fiscal Year 2012, Historical Tables, Table 10.1, *available at* http://www.gpoaccess.gov/usbudget/fy12/pdf/BUDGET-2012-TAB.pdf.



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3. **Agencies are permitted by the Administrative Procedure Act to short-cut the rulemaking process by issuing interim final rules when a proposed rule is time-sensitive. Such rules are effective as of their date of publication, and public comments are not always solicited until this time. For example, in 1997, half of the 4,658 final rules issued were published without notices of proposed rulemaking. This appears to be an abuse of the intent behind interim final rulemaking. How often do today's agencies issue an interim final rule instead of issuing a notice of proposed rulemaking? How many interim final rules would be classified as having a significant economic impact?**

I share your belief in the importance of soliciting public comment during the development of a rule. At the same time, when it created the "good cause" exception in the APA, Congress recognized that there are situations in which it would be "impracticable, unnecessary, or contrary to the public interest" for a rulemaking agency to seek public comment before acting. Under the APA, the authority to determine whether "good cause" exists in a particular case is assigned to the rulemaking agency, subject to judicial review. When an agency finds that "good cause" exists, it includes an explanation for that finding in the rulemaking preamble.

OIRA does not maintain statistics on the total number of interim final rules that are published without notices of proposed rulemaking. OIRA reviews a subset of the Federal government's regulatory actions—those subject to Executive Order 12866. On OIRA's website, www.reginfo.gov, the public can view the OIRA Dashboard, which includes a snapshot of the rules under review at that time. As of August 11, 2011, OIRA had 140 rules under review, eight of which were interim final rules. Of those eight, none was economically significant. Please note that these figures change daily, as new rules come under review and OIRA concludes review on others.



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**Collins**

1. **If Congress were to put good guidance practices into law, would the best way to do this be to adopt, by statute, the process set out in the 2007 OMB Bulletin, or are there changes you believe ought to be made to that process?**

The Bulletin is an effective document. We do not believe that it needs to be changed.

2. **If the President finds that an agency has disseminated poorly designed or misused guidance documents, not in compliance with the 2007 OMB Bulletin, may the President:**

   a. **Require the agency to revise such guidance?**
   b. **Require the agency to revoke such guidance?**
   c. **Prohibit the agency or third parties from enforcing, or seeking to enforce, such guidance?**

This question raises hypothetical issues about the President's legal authority. The Executive Branch's practice is not to opine about the President's legal authority in hypothetical circumstances.

As general background, the Bulletin was issued by OMB, and the Bulletin in Section III.2 requires each agency to put into place "Public Feedback" processes by which the public can submit comments, and complaints, to the agency regarding its guidance documents and practices. Specifically, the Bulletin states that "[e]ach agency shall establish and clearly advertise on its website a means for the public to submit comments electronically on significant guidance documents, and to submit a request electronically for issuance, reconsideration, modification, or rescission of significant guidance documents." In addition, the Bulletin states that "[e]ach agency shall designate an office (or offices) to receive and address complaints by the public that the agency is not following the procedures in this Bulletin or is improperly treating a significant guidance document as a binding requirement."

In addition, if OMB has questions or concerns about a particular guidance document, OMB would raise these questions and concerns with the agency. As in other contexts in which OMB interacts with agencies regarding their implementation of the government-wide policies that OMB has issued, OMB and the agency would typically address the relevant issues through informal discussions, which would result in an appropriate resolution of the matter.

As is the case with other government-wide policies that OMB has issued, the Bulletin does not outline a role for the President to perform in the implementation of its provisions. It is not OMB's expectation that the Executive Branch's implementation of the Bulletin depend on the President taking any actions, especially case-specific actions of the kind mentioned in the question.



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Similarly, the Bulletin does not contemplate an implementation role for the courts. As Section VII of the Bulletin provides: "This Bulletin is intended to improve the internal management of the Executive Branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its agencies or other entities, its officers or employees, or any other person."

3. **With respect to the preceding question, to what extent would the President's actions be subject to judicial review?**

As with the prior question, this question raises hypothetical issues about the President's legal authority. The Executive Branch's practice is not to opine about the President's legal authority in hypothetical circumstances.

4. **The independent regulatory agencies are not required to follow the 2007 OMB Bulletin on Good Guidance Practices. Do you believe the President has the authority to require the independent regulatory agencies to follow this Bulletin?**

This question raises hypothetical issues about the President's legal authority. The Executive Branch's practice is not to opine about the President's legal authority in hypothetical circumstances.

5. **If Congress were to require the independent regulatory agencies to follow good guidance practices, would the best way to do this be to apply the process set out in the 2007 OMB Bulletin to the independent regulatory agencies, or are there changes you believe ought to be made to that process?**

As explained in the answer to question 1, the Bulletin is an effective document. We do not believe that it needs to be changed.

6. **Independent regulatory agencies are not required to comply with the provisions of Executive Orders 12866 and 13563. Do you believe the President has the authority, under existing law, to extend the provisions of these executive orders to the independent regulatory agencies?**

On July 11, 2011, the President issued Executive Order 13579, "Regulation and Independent Regulatory Agencies." The President asked the independent agencies to produce preliminary plans to reassess and to streamline their existing regulations, and to seek public comments on those plans. The President also asked the independent agencies to follow the cost-saving, burden-reducing principles in Executive Order 13563, including public participation; harmonization and simplification of rules; flexible approaches that reduce costs; and scientific integrity. The Administration believes that Executive Order 13579 is well within presidential authority.



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**7. Do you believe that Congress could provide such authority to the President?**

Congress has established the independent regulatory agencies through statutes. I am not aware of an argument under which Congress would be unable to provide such authority.

**8. If Congress were to require the independent regulatory agencies to examine the costs and benefits of their rules, would the best way to do this be to apply, by statute, the framework of Executive Orders 12866 and 13563, or do you believe that changes to that framework would be necessary? If so, what changes do you suggest?**

The Administration believes that, with the issuance of Executive Orders 13563 and 13579, we now have the tools needed to maintain a smart and efficient regulatory framework. As mentioned, Executive Order 13579 asks the independent agencies to follow the cost-saving, burden-reducing principles in Executive Order 13563.

**9. If the President finds that an agency has failed to comply with the provisions of Executive Orders 12866 or 13563, may the President:**

**a. Require the agency to revise regulations to comply with these executive orders?**
**b. Require the agency to revoke regulations which do not comply with these executive orders?**
**c. Prohibit the agency or third parties from enforcing, or seeking to enforce, such regulations?**

This question raises hypothetical issues about the President's legal authority. The Executive Branch's practice is not to opine about the President's legal authority in hypothetical circumstances. As general background, OIRA conducts an interagency review to ensure that draft regulations are consistent with the requirements of Executive Order 12866 and Executive Order 13563. These orders require agencies to comply to the extent permitted by law. During the interagency review, questions do arise as to whether a draft rule complies, in one respect or another, with particular provisions of these orders. Executive Order 12866 provides a set of procedures for the resolution of these issues. OIRA's experience is that these issues are typically resolved through informal discussions with the rulemaking agency.

**10. With respect to the preceding question, to what extent would the President's actions be subject to judicial review?**

As with the prior question, this question raises hypothetical issues about the President's legal authority. The Executive Branch's practice is not to opine about the President's legal authority in hypothetical circumstances.



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**Levin**

1. **This committee heard testimony that interim final rules are not subject to legislative review. The Congressional Review Act includes exceptions so some rules can be immediately enforceable under certain circumstances, but nonetheless continues to require reporting of rules to Congress and the GAO for review. Can you please clarify OIRA practices and guidance to agencies related the reporting of rules to Congress and the GAO for legislative review among different types of final rules, including interim final and direct final rules?**

In March 1999, OMB issued Memorandum No. 99-13 – "Guidance for Implementing the Congressional Review Act." The memorandum, which remains in force, provides instructions to executive branch agencies, including independent regulatory commissions and boards, on steps they should take to be in compliance with the CRA. As a part of the guidance, agencies are reminded that final rules, including interim final rules and direct final rules, are required to be submitted to Congress and the GAO to be in compliance with the CRA. A copy of this guidance is attached for your convenience.



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**McCaskill**

1. **Previously, members of your staff have asserted that 2007 was the costliest year for regulations.**
    a. **Can you provide me with a dollar amount of total cost?**
    b. **Is this a net cost or overall costs?**
    c. **Can you explain why the costs for 2007 were so high?**

Table 1-3 in our 2011 Report to Congress on the Benefits and Costs of Federal Regulation (available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf) reports the total benefits and costs, by fiscal year, of major final rules issued from October 1, 2000 to September 30, 2010 for which reasonably complete monetized estimates of both benefits and costs are available. The total annualized cost for fiscal year 2007 for these rules was $9.4 to $10.7 billion in 2001 dollars. This cost estimate is an overall cost estimate and does not net out the monetized benefits of the rules (e.g., health, safety and environmental improvements). The total cost for fiscal year 2007 was driven in large part by the issuance of a particularly expensive rule, EPA's "Clean Air Fine Particle Implementation Rule," published on April 25, 2007 (72 FR 20586). (Note that it is important to distinguish between fiscal years and calendar years in "ranking" years by expense; for example, fiscal year 2005 may be relatively inexpensive even if the calendar year turns out to be relatively costly.)

2. **During your testimony, you discussed the Crain and Crain study that was commissioned by the Small Business Administration to identify the impact of regulations on small businesses. In particular, you stated that the study was deeply flawed and should not be relied upon.**
    a. **Will you please expand on this statement and explain why the study is deeply flawed? In addition, please identify any other experts who have come to a similar conclusion and why.**

As the Congressional Research Service and others have noted,[5] there are multiple problems with the Crain and Crain analysis. I highlight two of the most significant here:

1. Crain and Crain misinterpret the World Bank's index of "Regulatory *Quality*" as an index of "Regulatory *Stringency*." If this confusion is carried to its logical conclusion, then the United States would be richer if we had regulations that were similar to those of Canada, Sweden, and the Netherlands. Canada, Sweden and the Netherlands have higher values in the World Bank's Regulatory Quality Index, which Crain and Crain misinterpret as meaning lower stringency. This misinterpretation of the World Bank index accounts for seventy percent of Crain and Crain's top-line estimate of $1.75 trillion in annual regulatory costs.

2. Crain and Crain assume that higher quality regulations *cause* higher GDP, when in fact the reverse may also be true. Countries with higher GDP are better able to enact higher quality

[5] Curtis W. Copeland, "Analysis of an Estimate of the Total Costs of Federal Regulations," *Congressional Research Service* (April 6, 2011).



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regulations. The Crain and Crain analysis makes no attempt to distinguish the effect of GDP on regulatory quality from the effect of regulatory quality on GDP.

**b. Since you state that the Crain and Crain study is deeply flawed, can you point me to a study that is a reliable and credible source of information for determining the impact of regulations on Small Businesses?**

The empirical evidence of the effects of regulation on small business remains less than entirely clear, as discussed in the 2011 Report to Congress on the Benefits and Costs of Federal Regulations. In a study sponsored by SBA (and cited in our 2011 Report), for example, Dean, et al. (2000), concludes that environmental regulations act as barriers to entry for small firms. Becker (2005) 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 relative pollution abatement costs varies depending on the regulated pollutant. For tropospheric ozone, the regulatory burden seems to fall substantially on the smallest three quartiles of plants. For sulfur oxides (SOx), the relationship between regulatory burden and the firm size seems to be U-shaped. For total suspended particles in the air, however, new power plants in the smallest size class had relatively smaller regulatory costs, as a percent of their capital expenditures, than plants in the larger size classes.

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 businesses, and that it is appropriate to take steps to create flexibility in the event that those adverse effects cannot be justified by commensurate benefits.

**3. During your testimony, you stated that though the Crain and Crain study was deeply flawed, the Administration does have cost estimates for the regulatory impact on small businesses that are "concerning."**

**a. Will you please expand on this statement? Can you provide me the cost estimates that the Administration finds concerning?**

My statement during the hearing was not a reference to any specific study, but instead an expression of general concern. Especially in this current economic climate, it is important to avoid imposing unjustified regulatory costs and to seek ways to eliminate unjustified burdens that are now on the books.



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4. **It is my understanding that the Crain and Crain study was conducted pursuant to a contract with the Small Business Administration (SBA).**
    a. **What was the cost of the total contract?**
    b. **What process did the SBA use to contract for this study?**
    c. **What was the intended purpose of the study?**
    d. **Did the SBA consult with the Office of Management and Budget (OMB) on the design for this study?**
    e. **At any time, did the SBA ask OMB to review or evaluate the study's conclusions?**
    f. **After several peer reviewers found serious problems with the study, why didn't the SBA ask Crain and Crain to re-assess their methodology?**

I would defer to the Small Business Administration, which is best suited to answer your questions.

5. **Chairman Lieberman stated during the hearing that "notwithstanding the testimony of our colleagues this morning about the legislation they are introducing, at this time the Administration would oppose any additional regulatory reform legislation."**
    a. **In light of Executive Orders 13563 and 12866, which recognize the "importance of considering flexible approaches and alternatives to mandates, prohibitions, and command-and-control regulation," why does the Administration now believe more regulatory reform is not necessary?**

As I mentioned in my testimony, the Administration believes that, with the issuance of Executive Orders 13563 and 13579, we now have the tools needed to maintain a smart and efficient regulatory framework. As you mention, Executive Orders 13563 and 12866 recognize the "importance of considering flexible approaches and alternatives to mandates, prohibitions, and command-and-control regulation." Section 4 of Executive Order 13563 is specifically focused on flexible approaches. As a result, those Executive Orders help to discipline agencies and ensure that regulations are designed flexibly. The Administration does believe that more regulatory reform is necessary, with an emphasis on simplification and cost-reduction, and the "lookback" process is specifically designed to produce such reform.

    b. **Can you explain further your idea of "paralysis by analysis"?**

It is extremely important to analyze the anticipated and actual effects of rules. Executive Order 13563 reiterates that our regulatory system "must measure, and seek to improve, the actual results of regulatory requirements." But it is also true that analysis takes time and other resources. Imposing excessive analytic requirements may paralyze the regulatory process and may not have benefits that justify the costs.



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**Johnson**

1. **In justifying a new regulation on air toxics included under the Clean Air Act, the Environmental Protection Agency overstated the amount of mercury by a factor of 1000. The EPA later admitted the error only after it was pointed out by an outside group. You stated in the June 27th hearing before the Homeland Security and Government Affairs Committee that industry compliance costs would be approximately "$9 billion annually." Does that figure rely on the EPA's original faulty estimates? If so, will you require that EPA reissue its regulatory impact analysis in compliance with your office's guidance memo (Circular A4) and the President's Executive Order No. 13563?**

We have consulted with EPA on this issue. We would note that EPA did not overestimate mercury emissions for the entire industry by a factor of 1000, but rather made an error in the calculations for a subset of the facility data. EPA has since revised its mercury calculations. The estimate that I mentioned at the hearing was drawn from the analysis EPA submitted with the proposed rule before EPA revised its mercury calculations. That said, I understand that EPA does not expect that the change in the mercury calculations will have any appreciable impact on the controls that will be needed for compliance or on the analysis underlying the proposal. I can assure you that any final regulatory impact analysis associated with this rulemaking will be consistent with the corrected data.

2. **Due to the magnitude of this error, does either EPA or OIRA plan to review its methodology for calculating cost and benefits to ensure that its assessments are fair, impartial and accurate?**

Again, EPA does not expect that the change in the mercury calculations will have any appreciable impact on the controls that will be needed for compliance or on the analysis underlying the proposal. That said, as with any rulemaking, EPA and OIRA will carefully review the estimates for this rulemaking as part of the development of the final rule package and review under Executive Order 13563. This Administration is committed to providing accurate and robust impact analyses for all economically significant rulemakings.

3. **The EPA's estimate of $10.9 billion in compliance cost for industry is annualized over 20 years. The proposed regulation would require massive upfront capital investment for many coal-fired electricity plants. That means this regulation alone would cost at least $200 billion. Shouldn't the American people through the Congress have the right to determine if a regulation that costs more than $200 billion is worth it?**

The regulatory process provides multiple opportunities for the American people to consider the costs and benefits of a proposed regulation and to express their views about the merits of a regulation. The Congressional Review Act establishes a process by which Congress may consider both the costs and the benefits of this regulation, and then decide whether to disapprove of it.



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4. **The EPA's own estimates admit that this rule will cost Americans up to 17,000 jobs. A private study puts the figure much higher, closer to a 1.4 million lost jobs. At a time of record unemployment, is it wise to issue job-killing regulations?**

The economy is this Administration's highest priority—and as a result, we are highly attentive to the potential impact of regulations on employment. We scrutinize regulatory job impact analyses very carefully, particularly for large rulemakings, and those analyses play a major role in our ultimate conclusions. I would refer you to EPA's analysis in its proposed rule, which does not offer a point estimate of 17,000 in lost jobs but explores a range of possible employment effects, including positive ones.

5. **Some studies estimate that as many as 17% of plants will close due to these costs. The NERA group study suggests that electricity rates will rise by 11.5% for the average family. Some Wisconsin households and businesses will pay as much as 22% more. The EPA's own estimates put the cost rise at 3.7%. Does the $10.9 billion figure include the economic costs of this massive energy price hike into its economic impact study?**

In the proposed rule analysis, EPA estimated a national average increase of 3.7 percent in electricity prices in 2015, and also estimated that the impact will decline over time, to 2.6 percent and 1.9 percent in 2020 and 2030 respectively. These electricity price impacts are consistent with and derived from the $10.9 billion estimated cost of compliance, as both sets of estimates were generated as part of the same impact analysis. Alternative and contrary estimates will be carefully considered before this rule is finalized.

6. **By shutting down electricity plants through regulation, the total electricity supply will be reduced. What effect will this diminished capacity have on businesses especially manufacturing? How much more will electricity cost for businesses and in regions that derive a large amount of their power from coal-fired plants?**

In the proposed rule analysis, EPA estimated that the rule would lead to about 10 gigawatts of retired coal capacity in 2015. The electricity price increases described above takes those retirements into account. EPA also provided an estimate of the range of average price increases across different regional electricity grids in Chapter 8 of the proposed regulatory impact analysis. EPA estimated that regional impacts will range from as low as 1.4% to as high as 7.1% in 2015, declining thereafter. Public comments are welcome on this analysis.



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ATTACHMENT FOR LEVIN

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

March 30, 1999

M-99-13

MEMORANDUM FOR THE HEADS OF DEPARTMENTS, AGENCIES, AND INDEPENDENT ESTABLISHMENTS

FROM: Jacob J. Lew
Director

SUBJECT: Guidance for Implementing the Congressional Review Act

The Congressional Review Act (CRA, 5 U.S.C. Chapter 8) directs agencies to send a copy of each new final rule (and certain analyses they may undertake related to the rule) to both Houses of Congress (for transmittal to the appropriate authorizing Committees) and to the General Accounting Office. In the FY 99 omnibus appropriations bill, Congress directed OMB to issue guidance on certain "requirements" of the CRA, specifically "5 U.S.C. Sec. 801(a)(1) and (3); sections 804(3), and 808(2), including a standard new rule reporting form for use under section 801(a)(1)(A)-(B)." Attached, in Question and Answer format, is this guidance concerning the CRA. Also attached is the "new rule reporting form."

On January 12, 1999, OMB issued Memorandum 99-07 (January 12, 1999), "Submission of Federal Rules under the Congressional Review Act." This Memorandum supersedes Memorandum 99-07 and Memorandum 99-07 is canceled. The attached new rule reporting form is a slightly modified version of the form previously sent to you.

Attachments

## AGENCY GUIDANCE
## CONGRESSIONAL REVIEW OF AGENCY RULES

In general terms, the Congressional Review Act (CRA) requires agencies to send a copy of each new final rule (and certain analyses that they may undertake related to the rule) to both Houses of Congress (for transmittal to the appropriate authorizing Committees) and to the General Accounting Office (GAO) before the rule can take effect.

When an agency sends a rule to Congress and GAO, the agency is to indicate whether the rule is "major" or not. The CRA directs OMB's Office of Information and Regulatory Affairs to find whether a rule meets the statutory definition of "major" -- that is, whether the rule is likely to result in an annual effect on the economy of over $100,000,000; a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises.

The designation of a rule as "major" has several consequences. Unless exempted, a major rule may not take effect until 60 calendar days after it has been submitted to Congress. In addition, GAO is to provide a report to the agency's authorizing Committee on each major rule. Whether or not a rule is designated as "major," Congress has 60 legislative days during which it may use expedited procedures to disapprove a rule.

The CRA had the strong support of President Clinton. It was signed on March 29, 1996. By passing this law, Congress acknowledged and assumed more responsibility for its continuing role in the regulatory system. With this law, Congress will be able to speak to any regulatory actions that it thinks are not true to its intent.

As of March 24, 1999, GAO informs us that it had received 187 major rules and 12,646 non-major final rules. Neither House of Congress has passed any motion to disapprove a rule; nor has any such motion been enacted.

### I. AGENCY SUBMISSIONS TO CONGRESS AND GAO (Section 801(a)(1)).

#### A. What does Section 801(a)(1) of the CRA require agencies to submit to Congress and GAO?

In order for a rule to take effect, you must submit a report to each House of Congress and GAO containing the following:

- a copy of the rule;
- a concise general statement relating to the rule, including whether the rule is a "major



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rule;" and

- the proposed effective date of the rule.

When you submit the report, you must also submit to GAO and make available to each House of Congress, the following information:

- a complete copy of any cost-benefit analysis of the rule;
- the agency's actions relevant to sections 603, 604, 605, 607 and 609 of the Regulatory Flexibility Act (RFA) (found generally at 5 U.S.C. chapter 6);
- the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act (UMRA) (found at 2 U.S.C. sections 1532 to 1535); and
- any other relevant information or requirements under any other Act and any relevant Executive Orders (see, for example, those listed on the second page of the CRA submission form, discussed in Question I.B, below).

**B. What is the purpose of the CRA submission form?**

On January 12, 1999, OMB sent the agencies a standard form for submitting rules to Congress and GAO, "Submission of Federal Rules under the Congressional Review Act." This standard form was attached to OMB Memorandum 99-07. This guidance supersedes Memorandum 99-07, and Memorandum 99-07 is canceled.

We have attached to this guidance a slightly modified version of the form previously sent to you. It is available on the OMB and GAO Internet web home-pages (www.whitehouse.gov/WH/EOP/OMB, and www.gao.gov).

The attached form is to be used in lieu of agency transmittal letters for submissions made under the CRA. The questions on the form cover information required by Section 801(a)(1) of the CRA. We are informed that the Senate and House Parliamentarians will accept this form as the cover for transmitting final agency rules, to be used instead of transmittal letters. The Parliamentarians request an original signature on the form sent to the Senate and to the House, signed by an authorized agency official (which need not be a political-level appointee).

**C. Where should agencies send their CRA reports?**

You should send CRA reports to--

- the Office of the President of the Senate, S-212, the Capitol, Washington, D.C. 20510;
- the Office of the Speaker of the House, H-209, the Capitol, Washington, D.C. 20515; and
- the Office of the General Counsel, General Accounting Office, Room 7175, 441 G Street, N.W., Washington, D.C. 20548.

**D. Which agencies have to submit their final rules to Congress and GAO?**

The CRA applies to every Executive branch "agency" as defined in 5 U.S.C. 551(1). This definition, from the Administrative Procedure Act (APA), includes the independent regulatory commissions and boards.

We would note that this definition of "agency" is informed by the general definitions in 5 U.S.C. 101-105. 5 U.S.C. 105 explicitly excludes the United States Postal Service and the Postal Rate Commission from the definition of "Executive Agency."

**E. Does the CRA require agencies to submit proposed rules to Congress and GAO?**

No. Under the CRA, Congress does not review proposed rules. Therefore, notices of proposed rulemaking (including advance notices of proposed rulemaking, notices of inquiry, and other forms of rulemaking that are not final) do not need to be submitted to Congress and GAO. Instead, you only need to submit final rules (including such documents as interim final rules, and direct final rules).

For a discussion of the "rules" covered by the CRA, see Topic II, below.

**II. THE CRA DEFINITION OF "RULE" (Section 804(3)).**

The following is intended to provide general guidance on what is a "rule" subject to the CRA.

**A. How does the CRA define a "rule"?**

Section 804(3) of the CRA defines a "rule" as having--

> "the meaning given such term in [5 U.S.C.] section 551, except that such term does not include--
>
> " (A) any rule of particular applicability, including a rule that approves or prescribes

for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions therefor, or accounting practices or disclosures bearing on any of the foregoing;

"(B) any rule relating to agency management or personnel; or

"(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."

Accordingly, the CRA's definition of "rule" is based upon the APA definition of "rule," but excludes certain APA rules.

**B. What is a "rule" under the Administrative Procedure Act?**

The APA defines a "rule" (in 5 U.S.C. 551(4)) as--

> "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

As noted above, the CRA at Section 804(3)(A)-(C) excludes certain APA rules from the CRA's definition of "rule."

The APA's definition of "rule" dates back to the statute's original enactment in 1946. During the subsequent fifty years, Federal agencies and courts have had to address on numerous occasions, and in a wide variety of contexts, the issue of whether a particular agency action constitutes a "rule" under the APA. This determination depends on a fact-specific assessment of the particular action in question, evaluated under the APA's general test for what is a "rule."

In determining whether an agency action constitutes a "rule" under the APA, agencies have sought the advice of their legal staffs, as well as that of the Justice Department. Moreover, agencies have been able to derive guidance from the ever-increasing number of court decisions that address whether a particular agency action constitutes an APA "rule."

Since the CRA's definition of "rule" is based directly upon the APA's definition of "rule," agencies may apply the same principles in identifying "rules" under the CRA as they have applied over the years in identifying "rules" under Section 551 of the APA. In addition, agencies may rely on the same processes for making these determinations. In particular, agencies should consult with their legal

staffs in making the determination of whether a particular agency action constitutes a "rule" under the CRA.

**C. Are agency "orders" subject to the CRA?**

No. The APA defines an "order" as a final action in a matter other than a rulemaking.

**D. Are any other rules exempt from the CRA?**

The CRA exempts rules concerning monetary policy developed by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

## III. THE EFFECTIVE DATE OF "MAJOR RULES" (Sections 801(a)(3) and 808(2)).

**A. What is a "major rule?"**

Section 804(2) defines a "major rule" as a rule that the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) finds has resulted in or is likely to result in:

- an annual effect on the economy of $100 million or more;
- a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The CRA's definition of "major rule" is identical to the definition of "major rule" that was in Executive Order 12291, which was rescinded in 1993 when Executive Order 12866 was issued.

The CRA's definition of "major rule" is similar, but not identical, to the standard set forth in Section 3(f)(1) of E.O. 12866 for identifying "economically significant rules." The main difference is that some additional rules may be captured by the CRA definition that are not considered "economically significant" under E.O. 12866, notably those rules that would have a significant adverse effect on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The CRA exempts from the definition of "major rule" any rule promulgated under the Telecommunications Act of 1996 and any amendments made to that Act. The remaining CRA

requirements apply to these rules.

**B. What is the process for identifying "major rules" under the CRA?**

If the rule is subject to E.O. 12866 review, you should indicate whether you consider the rule as "major" when you submit both the proposed rule and final rule for OMB review. If the rule is not subject to E.O. 12866 review, you should contact your Desk Officer in OMB's Office of Information and Regulatory Affairs (OIRA) in accordance with your established practice.

**C. When do "major rules" take effect?**

"Major rules" generally may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the *Federal Register*, if it is so published, whichever is later.

**D. When can an agency have a "major rule" take effect sooner than 60 days?**

Section 808 provides that, for two categories of rules, the rule "shall take effect at such time as the Federal agency promulgating the rule determines." These exemptions apply to both major and non-major rules. Although such rules may go into effect "at such time as the Federal agency promulgating the rule determines," the agency is not exempt from the reporting requirements in Section 801(a)(1); the agency must submit the report and related information to Congress and GAO, as discussed in Topic I, above.

The first category, in Section 808(1), involves "any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping."

The second category, in Section 808(2), involves "any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

An agency may invoke Section 808(2) in the case of rules for which the agency has found "good cause" under the APA (5 U.S.C. 553(b)(B)) to issue the rule without providing the public with an advance opportunity to comment. Application in other circumstances will be considered on a case-by-case basis.

**E. When can the President have a "major rule" take effect sooner than 60 days?**

A "major rule" may take effect before it otherwise would if the President makes a determination by Executive Order that the rule should take effect because such rule is--

- necessary because of an imminent threat to health or safety or other emergency;
- necessary for the enforcement of criminal laws;
- necessary for national security; or
- issued pursuant to any statute implementing an international trade agreement.

Under this authority the President must submit written notice of the determination to Congress.

**F. How can Congressional action change the effective date of a "major rule?"**

Section 801(a)(3)(B) and Section 801(a)(5) address the effect of congressional action on a joint resolution of disapproval on the effective date of "major rules." The situation addressed in Section 801(a)(3)(B) has not yet arisen, since no joint resolution of disapproval has been passed. However, a joint resolution of disapproval was rejected by one House of Congress (the Senate) in 1996. See 142 Cong. Rec. S10723 (daily ed., September 17, 1996). In such a case, Section 801(a)(5) provides that the effective date "shall not be delayed by reason of" the CRA beyond the date on which the joint resolution was rejected.

**G. What happens if Congress enacts a joint resolution of disapproval?**

If Congress passes a joint resolution of disapproval, it is transmitted to the President for signature. If the President signs the joint resolution of disapproval, the rule cannot take effect. If the rule had taken effect prior to the resolution, it cannot continue in effect and it must be treated as though it had never taken effect.

24722

# Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate ☐ Speaker of the House of Representatives ☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

2. Subdivision or Office

3. Rule Title

4. Regulation Identifier Number (RIN) or Other Unique Identifier (if applicable)

5. Major Rule ○ Non-major Rule ○

6. Final Rule ○ Other ○ _____

7. With respect to this rule, did your agency solict public comments? Yes ○ No ○ N/A ○

8. Priority of Regulation (fill in one)

○ Economically Significant; or Significant; or Substantive, Nonsignificant

○ Routine and Frequent or Informational/Administrative/Other (Do not complete the other side of this form if filled in above.)

9. Effective Date (if applicable)

10. Concise Summary of Rule (fill in one or both) attached ○ stated in rule ○

Submitted by: _____ (signature)

Name: _____

Title: _____

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

10/23/98

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| | Yes | No | N/A |
|---|---|---|---|
| A. With respect to this rule, did your agency prepare an analysis of costs and benefits? | O | O | O |
| B. With respect to this rule, by the final rulemaking stage, did your agency | | | |
| 1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)? | O | O | O |
| 2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)? | O | O | O |
| C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995? | O | O | O |
| D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)? | O | O | O |
| E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995? | O | O | O |
| F. Did you discuss any of the following in the preamble to the rule? | O | O | O |
| • E.O. 12612, Federalism | O | O | O |
| • E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights | O | O | O |
| • E.O. 12866, Regulatory Planning and Review | O | O | O |
| • E.O. 12875, Enhancing the Intergovernmental Partnership | O | O | O |
| • E.O. 12988, Civil Justice Reform | O | O | O |
| • E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks | O | O | O |

• Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)

_____

_____

_____

10/23/98

United States Senate
Committee on Homeland Security and Governmental Affairs
Chairman Joseph I. Lieberman, ID-Conn.

**Federal Regulation: A Review of Legislative Proposals**
Chairman Joe Lieberman
July 20, 2011

This morning we hold the third in a series of hearings to assess the impacts of federal regulations and consider whether legislation is needed in this session to improve the process or substance of rulemaking. In fact, you might say, this is actually the second half of a hearing began last month to focus on some of the pending legislative proposals to make changes to the existing rulemaking system. At that first session, we heard from senators on and off the Committee who are sponsoring reform proposals, and from the Administration. Today we will welcome one more colleague – Senator Whitehouse from Rhode Island – who has two new proposals to improve the regulatory process. Then we will hear from four experts and advocates – including two former directors of the Office of Information and Regulatory Affairs, known as OIRA --with extensive knowledge of the regulatory process and many of the proposed changes.

As I said last time, the question is not whether to regulate but how to weigh the costs and benefits of regulations so that we have the most efficient and effective rule-making. We know that regulations have brought us invaluable improvements in health, safety and environmental quality, and are essential to the financial stability of the private sector. Especially when our economy is under such duress, the regulatory process must be open, rigorous, and accountable, to avoid regulatory excesses that undercut economic health. We must also avoid roadblocks that get in the way of an agency's ability to modernize rules to better protect both the public and the economy."

Newly released OMB figures indicate that for fiscal year 2010 the aggregate benefits of major rules once again greatly exceeded aggregate costs, potentially by tens of billions of dollars. Nevertheless we are also agreed that we must be vigilant in policing the regulatory process and ensuring it does not lead to regulatory excesses that become a drag on economic health. This is particularly urgent now that our economy is under such strain.

I applaud the work of President Obama to strengthen the rulemaking process. His recent executive orders and administrative guidance place ever more emphasis on ensuring rules are cost effective and impose the least possible burden, particularly for small businesses. The so-called "look back" reports mandated by the Administration – which involve a review of existing rules – are already paving the way for significant cost savings and paperwork reductions.

I also commend my colleagues for their attention to this matter, as evidenced by the numerous regulatory reform bills pending before the committee. These proposals include an array of proposed changes, including mandating new economic analyses and "look back" reviews, or requiring explicit Congressional approval of all major rules.

While our shared aim is a more efficient and effective rulemaking process, at our last hearing, OIRA Administrator Cass Sunstein cautioned that some of these proposals – such as expanded judicial review of agency analysis and decision-making --could introduce excessive expense, delay or uncertainty into what is already a complex system. So as we continue our discussion today, I look forward to fleshing out some of those concerns with our panel.



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**Statement of**
**Senator Susan M. Collins**

**"Federal Regulation: A Review of Legislative Proposals, Part II"**

**U. S. Senate Committee on Homeland Security and Governmental Affairs**
**July 20, 2011**

Mr. Chairman, before beginning my remarks, I want to thank you, again, for holding these hearings to examine the breadth of our nation's regulatory system.

It is absolutely critical that we reform that system and reduce the regulatory burden. Data released earlier this month show an economy on the brink of a double-dip recession. Unemployment is up, job creation is down, and the news just keeps getting worse.

Technically, we are in the 24th month of an economic recovery, but it surely doesn't feel that way. Based on past recoveries, we should be adding hundreds of thousands of new jobs every month, and the jobless rate should be dropping briskly. Two years after the end of the 1981 recession, for example, almost 7 million new jobs had been created, and the unemployment rate had fallen from 10.8 to 7.2 percent. Most important, the number of Americans looking for work who could not find a job had dropped by nearly a third below the recession's peak.

But not so in this so-called "recovery." When this recession supposedly ended, in June of 2009, the unemployment rate stood at 9.5 percent. Today, it is 9.2 percent, *and going up*. Incredibly, instead of adding jobs, we have actually lost jobs. More than 14 million Americans are still without jobs, half a million more than just four months ago.



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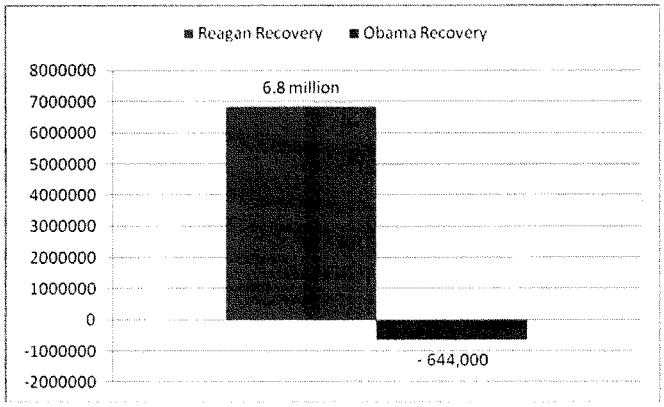
**Job Growth**
**1982-84 vs. 2009-11**




So where are all the jobs?

Well, there is an area of robust job growth - that is in our regulatory agencies. Job growth in the federal regulatory agencies has far outpaced job growth in the private sector.

In the past, we could rely on small businesses - our nation's job creators - to put America back to work. No longer. Instead of helping these small businesses create jobs, agencies have issued a flood of rules that has swamped small business in red tape that has created so much uncertainty that it is impossible for them to plan, grow, or add jobs.

Recently, I received a letter from Bruce Pulkkinen, who runs Windham Millwork, a small business that employs 65 people in Windham, Maine. Bruce's letter describes an attitude in the regulatory agencies that is "undermining the creation of new jobs" and has gone from "helpful and informative to disruptive and punitive."

One example he shared with me is the EPA's proposed "BoilerMACT" rules. Just a few years ago, Bruce's company made a $300,000 investment in a state-of-the-art wood waste boiler that allowed his company to stop using fossil fuels for heat, and to eliminate its landfill waste stream. But the EPA's proposed BoilerMACT rules would have required him to scrap that boiler and install a new one, squandering the investment he made, for miniscule public benefit. What possible sense does that make?



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Even though the EPA has backed off that portion of the rules, Bruce remains concerned that it's only a matter of time before the EPA takes aim again at small boilers.

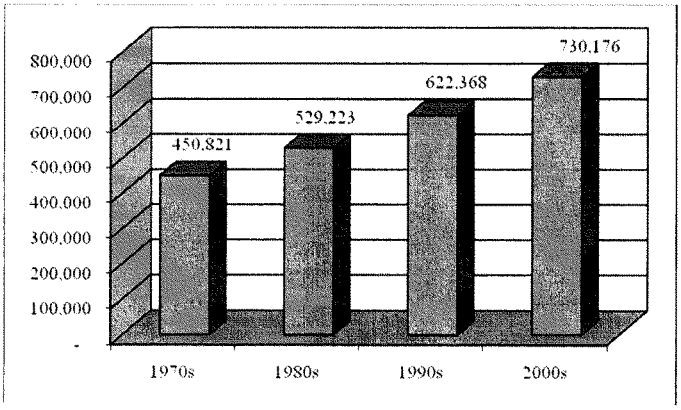
I would like to submit Bruce's letter for the record.

Bruce's experience is not unique, or even unusual. Small businesses all around the country are facing the same pressure from regulators and drawing the same conclusion. Instead of investing and growing, they have to focus on hunkering down just to survive.

Let me share a few statistics to underscore the point: federal agencies are at work on more than 4,200 new rules, 845 of which affect small businesses. Two hundred twenty-four of these rules are major rules, costing more than $100 million each.

One has only to look at the growth of the Federal Register over the past few decades. As the chart on display demonstrates, the Federal Register has grown by almost three-quarters of a million pages in the first decade of this century - a rate of 73 thousand pages per year. That's nearly 40 percent more than in the 1980s, and the trend is *up*.

**New *Federal Register* Pages per Decade**




These regulations do not come without a cost. According to the Crain Study, commissioned by the U.S. Small Business Administration, the annual cost

of federal regulations now exceeds 1.75 trillion dollars. This cost falls disproportionately on smaller businesses: for businesses with fewer than 20 workers, the cost per worker of complying with federal regulations now exceeds $10,500 per year, $2,800 more than the cost per worker faced by big businesses.

I believe regulatory reform requires three elements: *first*, require agencies to evaluate the costs and benefits of proposed rules, including indirect costs on job creation, productivity, and the economy; *second*, make sure agencies don't attempt to go around the rulemaking process by issuing improper "guidance;" and *third*, provide relief to small businesses that face first-time paperwork violations that result in no harm.

I have offered these ideas in my "CURB Act." Many members of this Committee - and others in the Senate - have also offered excellent ideas that deserve careful consideration. I hope that this Committee, working together in a bipartisan manner, can advance legislation that improves the regulatory process to make it less burdensome, more friendly to job creators, and no less protective of the public interest.

I look forward to hearing the testimony of the panelists, and I thank the Chairman again for agreeing to hold this important hearing.



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# WINDHAM MILLWORK, INC.

*Building Partnerships Since 1957*

July 12, 2011

Senator Susan Collins
United States Senate

Re: Regulatory Reform Hearing

Dear Senator Collins:

I am pleased to take this opportunity to add my thoughts concerning your upcoming hearings on regulatory reform. Although I am on the board of the National Association of Manufacturers and serve on several state boards for the Manufacturing Extension Partnership, I am writing you on behalf of something a little closer to home. I am CEO of Windham Millwork, located in Windham, Maine; we are a 54 year-old architectural woodwork manufacturer with some 65 folks employed here in Maine. This company was founded by my father in 1957 and, today, my two sons, BJ and Chad, represent the third generation of Pulkkinen owners.

My concerns and those of small US manufacturers center around the horrible economic environment we are trying to endure; this climate has been promulgated by unclear taxation direction, energy indecision, labor issues relating to OSHA, misguided government health care legislation, and what we have seen as a regulatory system that has transgressed from helpful and informative to disruptive and punitive.

My concern over the survivability of our company in light of the economic conditions and uncertainty brought about by this country's path to even larger government has, quite frankly, killed my entrepreneurial spirit. Despite the rhetoric coming from the White House, the regulatory agencies have taken an attitude that is undermining the creation of new jobs in this country.

OSHA's change to being more aggressive and punitive from educational and helpful has dampened my hiring due to the safety training and constant retraining required to keep them on the job. Although it appears that the proposed change to hearing protection has gone away, we fear that unless it is legislated away, it will rear it's head again. Our company fully complies with today's regulations and we do our yearly-required hearing tests; the results show that what we are doing is working. You know the old saying, "if it isn't broke, don't fix it". That applies to the existing hearing regulations. The proposed change would have cost several hundred thousand dollars to our company, as all machines would need to be enclosed instead of the personal protection we currently utilize.

Another small Maine business recently had a jobsite accident; OSHA inspected, determined that there had been no violations on the part of the company, but due to the severity of the accident

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they fined the company in excess of $7000 anyway, feeling "some violation may have occurred". That is wrong.

The Boiler/MACT proposed Co2 admissions act would be a stepping stone for the EPA. It would have been devastating to those who have emissions exceeding the baseline emission; our company made a $300,000 investment in a wood waste boiler several years ago, eliminating our landfill waste stream and our use of fossil fuels for heat. We installed the latest small boiler technology; if the new regulations were put in place we feel it would only be a matter of time before the EPA took aim on our small boiler. Legislators need to look at the real impacts this type of new regulation will have on jobs and the health of our economy.

The DOT legislation to reduce drive time and on call time would also have a devastating affect on our company. We have one driver and one truck to deliver our goods in New England. Nearly every site we deliver to is within the drive time of the old regulation. If this is reduced, we will more often than not have to purchase hotel rooms for our driver, getting him back late the next day, meaning we could only deliver three days a week. This would cost us thousands of dollars just as it would many small businesses who deliver with their own trucks. Did the regulators think of this impact?

The health care legislation as it exists today will bankrupt my company. It already is the single most difficult problem I have today and the "so-called reform" will kill this company, even if we survive this economy today. Instead of passing legislation that would truly open up the system to a true democratic supply and demand system, allow for industry group purchases, allow for across state-line programs, and eliminate the extraordinary litigation issues, our leaders in Washington opted for more beauracracy and a system that is doomed to fail like social security and medicare. Your fellow members need to get this right and get it right soon; small manufacturing will not survive under the health care legislation that everyone admits "no one had a chance to read".

The regulation that continues to be the one that we often overlook is tax regulation, despite the fact that it probably represents the most costly regulation for small business. Due to some very large business leaders and Wall Street crooks, our legislators and regulators have gone overboard on the tax code changes and the requirements put on accounting firms and bank credit risk restrictions placed on small business loans. The result of this is that our accounting costs for our small business have skyrocketed to over $30,000 per year and our bank renewal that should have happened in April is still not in place. We need clear direction and a simplified tax code that spurs business and jobs, not the mystical foggy code we have today. Those banks we all bailed out are sitting on cash, but as a small business I can tell you that the loans have dried up for businesses who are hurting in this economy. Clarify and cut our tax bill and free up the bank regulations so that banks can make loans to good companies and watch the entrepreneurs get this economy back on its feet!

Perhaps one should look at the state of Maine; under its new governor and legislature, real change has begun to try to make this state a better place to do business, to grow jobs for our

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people, and to shrink government and let the private sector prosper. I thank you for your time and wish you well in your battles in Washington to get this country back to what it should be.

Sincerely,

Bruce W. Pulkkinen
Chief Executive Officer

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**Statement of Senator Sheldon Whitehouse**
"Federal Regulation: A Review of Legislative Proposals, Part II"
U.S. Senate Committee on Homeland Security and Government Affairs
July 20, 2011

Chairman Lieberman, Ranking Member Collins, and members of the Committee, thank you for inviting me to testify about my proposals to improve our regulatory system by rooting out and preventing regulatory capture.

Federal regulations touch broad swaths of American life. They are a key reason that highway deaths have fallen to their lowest levels in 60 years, that we have clean drinking water, and that our food producers are held to high safety standards. By preventing injury, illness, and environmental harm, effective and appropriate regulations also save the country money. Cass Sunstein, the administrator of OMB's Office of Information and Regulatory Affairs, recently explained, for example, that in the first two years of the Obama Administration, the net benefit of regulations exceeded $35 billion for Americans.

There are two major hazards to regulation, however. One is unwise or obsolete regulation. The Obama Administration appropriately has begun an effort to target and eliminate such regulations. The other is regulatory capture.

"We the People" pass laws through our democratic and open American process of lawmaking. Regulated industries and other powerful interests then seek to "capture" the agencies that enforce those laws to avoid their intended effect, seeking regulations and enforcement practices that protect their limited private interests. Regulatory capture both violates fundamental principles of the American system of government, and, as we saw in the Gulf, can lead to disaster.

The concept of regulatory capture is well established in economic, regulatory, and administrative law theory, appearing in the research of Nobel Laureate George Stigler, the writings of President Woodrow Wilson, the opinion pages of the *Wall Street Journal*, and innumerable textbooks and hornbooks. Agreement on the subject is broad: during a hearing on regulatory capture that I chaired last year, the witnesses all agreed on each of the following seven propositions. First, regulatory capture is a real phenomenon and a threat to the integrity of government. Second, regulated entities have a concentrated incentive to gain as much influence as possible over regulators, opposed by a diffuse public interest. Third, regulated entities ordinarily have substantial organizational and resource advantages in the regulatory process when compared to public interest groups. Fourth, some regulatory processes lend themselves to gaming by regulated entities seeking undue control over regulation. Fifth, regulatory capture by its nature happens in the dark – done as quietly as possible (no industry puts up a flag announcing its capture of a regulatory agency). Sixth, the potential damage from regulatory capture is enormous. And finally, effective congressional oversight is key to keeping regulators focused on the public interest.

We have seen the devastation in the Gulf of Mexico that occurred after the Minerals and Management Service was captured by the industry it was supposed to regulate. The cost of that disaster in lives and economic well-being, as well as the human toll of what I would contend was capture at the Mine Health and Safety Administration and the SEC, should be a call to action to



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finally address in the political world this problem of regulatory capture. The doctrine has an undeniable basis in academic regulatory theory and in the precepts of administrative law. We've known about it for a hundred years; we've seen it in action; but we have never yet done anything specific to prevent it.

I have introduced the Regulatory Capture Prevention Act to create an office within the Office of Management and Budget that would investigate and report on regulatory capture wherever it may appear. The office would shine a light into neglected corners of the regulatory system, and would sound the alarm if a regulatory agency were showing the symptoms of capture. Its ability to bring scrutiny and publicity to the dark corners where regulatory capture flourishes would strengthen the integrity of our regulatory agencies.

To provide even more sunlight into agency action, a second bill, the Regulatory Information Reporting Act would require regulatory agencies to report to a public website three important pieces of information: first, the name and affiliation of each party that comments on an agency regulation; second, whether that party affected the regulatory process; and finally, whether that party is an economic, non-economic, or citizen interest. This information would inform effective public scrutiny and congressional oversight of who seeks to influence regulatory behavior and who succeeds.

Thank you again for inviting me to testify. I appreciate the opportunity to explain why Congress should pursue efforts to prevent regulatory capture. People may disagree about particular cases, but I hope we can all recognize that powerful special interests have a constant interest in capturing our regulatory agencies and that we have a systemic interest on behalf of ordinary Americans in preventing that capture.



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Statement of Sally Katzen

before the

Senate Committee
on
Homeland Security and Governmental Affairs

on

"Federal Regulation: A Review of Legislative Proposals, Part II"

July 20, 2011

Chairman Lieberman, Ranking Member Collins, Members of the Committee. Thank you for inviting me to testify today. This is the Committee's third hearing on federal regulations and the regulatory process. The subject is critically important to our economy, our society and our nation, and I commend the Committee for undertaking this effort. I have been engaged with, and worked on, these issues during most of my career in private practice, government service and in my teaching and writing, and I welcome the opportunity to discuss these matters with you.

I served as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. After leaving the government in January 2001, I taught administrative law courses at the University of Pennsylvania Law School, University of Michigan Law School, George Mason University Law School, and George Washington University Law School, and also taught American Government courses to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program; this coming academic year, I will be teaching a seminar in advanced administrative law and a first-year course, the Administrative and Regulatory State, as a Visiting Professor at NYU School of Law. I am also a Senior Advisor at the Podesta Group here in Washington. Before entering government service in 1993, I was a partner at Wilmer, Cutler & Pickering, specializing in regulatory and legislative issues, and among other professional activities, I served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988-89). During my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). Since leaving the government in 2001, I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and rulemaking in particular.

Regulations and the process by which they are developed, promulgated, and enforced have gotten a lot of attention in the past year – most of it unfavorable – and



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there have been dozens of bills introduced in the Senate and in the House to "remedy" some of the perceived problems with the process. The proposals are generally well-intentioned and, at first blush, have considerable appeal. But I would urge the Committee to take a step back and seriously consider both the need for and the intended (and unintended) consequences of such legislation at this time.

In this regard, I am influenced by the principles that have governed regulatory actions by the federal agencies for the last several decades. Specifically, one of the first provisions in Executive Order 12866 is that "agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or *are made necessary by compelling need . . . .*" The agency should then "*identify the problem it intends to address* (including, where applicable, *the failures of . . . public institutions that warrant new . . . action)* as well as assess the significance of that problem;" it should "examine whether *existing regulations (or other law) have created, or contributed to, the problem . . .* and whether those regulations (or other law) should be modified to achieve the intended goal . . ."; and it should "identify and assess *available alternatives to direct regulation . . . .*"

I recognize that federal agencies are delegated their authority by Congress and that Congress is not constrained (other than by the Constitution) from enacting legislation. Nonetheless, as a prudential matter, I think that before Congress takes action, it should ask (and answer) the same foundational questions that an agency should confront (and satisfy) before taking action – what is the compelling need, what is the particular problem that should be addressed, what is causing the problem, will the proposed action remedy the problem in an effective and efficient way, what are the other likely consequences of adopting the proposal, etc.

With respect to "compelling need," I do not believe the case has been made for most of the proposed legislation. Much of the support is based on the assumed astronomical cost of regulations, with champions relying on the results of the Crain and Crain study of $1.75 trillion annually. This number has taken on a life of its own even though highly reputable scholars and economists have filled pages of print criticizing both the assumptions and the methodologies used to produce these cost estimates. Administrator Sunstein testified at your last hearing that the $1.75 trillion (and growing) figure is, quite simply, an "urban legend;" in fact, I thought his characterization was an understatement of the unreliability of this figure to support legislation affecting the regulatory process.

Another driver for some of these bills is the numerous complaints from regulated entities about burdensome, costly or inconvenient regulations. Admittedly there are pleas for relief from many quarters, especially small business, but this is nothing new; regulated entities have always resisted being regulated, often claiming that a proposed regulation will bring their industry to their knees or prevent them from providing a product or service that is essential to the nation's well being. I do not doubt the sincerity of their concerns, particularly when they are being encouraged to articulate their grievances with federal regulators. But I think it is instructive to read the report issued by Chairman Issa of the House Committee on Oversight and Government Reform after he



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asked the business community to identify existing regulations that should, in their opinion, be modified or eliminated. It does not provide a rich trove of examples of agency overreach, and many of the regulations cited are regulations that simply do what Congress told the agency to do.

This Committee does not need to be reminded that regulatory agencies are not free agents; they can only do what Congress has authorized them to do, and often Congress is quite specific about what it wants, leaving little or no discretion to the agency. Examples of recent rules where an agency has scrupulously followed the provisions of the authorizing act – virtually no discretion was provided for, or exercised by, the agency -- include the Department of Defense (DOD) rule on "Retroactive Stop Loss Special Pay Compensation" and the Department of Transportation (DOT) rule on "Positive Train Control" (where, because of the underlying statute, the costs of the proposal were 20 times the benefits), both of which resulted in a great deal of criticism of the issuing agency. In the 1990's, the Government Accountability Office (GAO) found that many of the regulations that businesses found most burdensome were required by the terms of the underlying statute; notwithstanding that information about the statutory requirements has been widely known for some time, Congress has not addressed the source of the problem, but continues to complain about agency implementation of their mandates.

In any event, what is missing from this discussion about what is wrong with regulations is an honest recognition of what is right about them. Rarely do we hear that regulations save lives, prevent injuries, reduce risks to our health and safety, provide information to enable more intelligible choices for our lives, promote competition and fair practices in our markets, protect civil rights, just to name a few obvious truths. Congress can enact a law setting forth a goal, but in most cases, it is the regulations issued by the relevant agency that gives effect to Congress' will. The regulations are the means by which the air we breath and the water we drink are clean, the food and medicines we consume are safe, our workplaces are secure, and the products and services we use daily are what they say they are.

I understand that one's views of the merits of a particular regulation may well depend on whether you are the regulated entity or the intended beneficiary of the regulation. Many of the "major" or "economically significant" regulations (those having an annual effect on the economy of $100 million annually) are therefore typically quite controversial, at least within some segments of the population. Consider, for example, the Food and Drug Administration's "Shell Egg" rule dealing with salmonella; the DOT rules on "Reduced Stopping Distances for Truck Tractors" and "Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines;" and, in terms of equities, the Department of Justice (DOJ) rules on non-discrimination on the basis of disabilities. These rules were viewed as unnecessary and burdensome by some, but important to public health and safety, and consistent with our nation's long-held values, by others.



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While many major rules are controversial, there are other important rules that are not controversial. Perhaps the best examples of non-controversial rules that are actually eagerly awaited each year by the regulated entities are those issued by the Department of Interior setting an annual quota for migratory bird hunting under the Migratory Bird Treaty; absent an implementing rule, no one could shoot game birds as they fly to or from Canada. Having been identified as a favored activity during the debate in Congress on regulatory reform during the Clinton Administration, hunting, fishing or camping rules were explicitly exempt from many of the federal statutes enacted in the 1990s, and their preferential status continues to be zealously guarded in the many of the bills in this Congress.

There are, however, other types of non-controversial rules, as well as rules that are actually favored by regulated entities, which are not so protected. It may be counter-intuitive, but it is not unusual for regulated entities to support or even champion certain rules – such as those that level the playing field or provide needed guidance or provide certainty or regularity for operations for the foreseeable future. For example, the automobile companies supported the Environmental Protection Agency (EPA)/DOT joint rules for "Passenger Car and Light Truck Corporate Average Fuel Economy Standards for MY 2012-2016;" industry stakeholders supported the Department of Labor rule updating the Occupational Health and Safety Administration's (OSHA's) "Cranes and Derricks" rule; the same for the Department of Energy's rule on "Weatherization Assistance for Program for Low Income Persons," which, among other things, reduced procedural burdens on evaluating certain housing applications.

There are also rules that specify the structure or eligibility for government programs, such as the Department of Education rule on "Investing in Innovation Fund," and the DOD rule relating to the "Homeowners Assistance Program;" these rules enable the programs authorized and funded by Congress to operate as they were envisioned or modified by Congress, and they are often eagerly awaited by the potential participants in the program. In a similar vein, there are multiple so-called transfer rules (which primarily cause transfers from taxpayers to program beneficiaries as specified by Congress), such as the Department of Agriculture's (USDA's) rules on the "Sugar Program," the "Emergency Loss Assistance and Livestock Forage Disaster Programs," and the "Biomass Crop Assistance Program," as well as the Department of Veterans Affairs' rule on the "Post 9/11 GI Bill." Delay or derailment of these rules would mean delay in starting up or carrying on the programs.

This partial list of recent rules should also demonstrate the very wide variety and diversity of rules issued by federal agencies each year. Simply stated, all rules (even all major rules) are not the same – either in scope or import – which has serious implications for across-the-board, one-size-fits-all reform initiatives.

In any event, while reasonable people may disagree over whether any or all of the above are "good" rules or "bad" rules, there is general agreement on a relatively objective tool for evaluating regulatory proposals – namely, cost/benefit analysis. When someone says "cost/benefit analysis," people tend to look away or their eyes glaze over. The analysis itself – that is, the actual work product -- may be complicated, highly technical



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and often difficult to follow, but the concept is quite simple. It is a way to think about the consequences of a proposed action and then try to translate diverse consequences into the same metric -- typically money – so we can evaluate whether the proposal is, on the whole, good for us or not. We do this every day of our lives, whether it be for something trivial (walk or take a taxi) or significant (purchase a home or launch a new business), with the extent of the analysis roughly commensurate with the importance of the decision we are trying to make.

Requirements for cost/benefit analysis to inform, or in support of, important regulatory proposals adopted through rulemaking have been around at least since President Nixon established a "Quality of Life Review" program for certain high-profile regulations. Beginning in 1981 with President Reagan's Executive Order 12291, all Presidents (both Republicans and Democrats) have required regulatory agencies within the Executive Branch (both Cabinet Departments and stand alone agencies like EPA) to assess the costs and benefits of proposed actions, and, among other things, to the extent permitted by the laws that Congress has enacted, ensure that the benefits of the intended regulations justify the costs. The requirements to undertake this economic analysis and to submit it along with a draft proposed or final rule to OIRA, which are the foundational principles of President Clinton's Executive Order 12866 (recently reaffirmed by President Obama in Executive Order 13563), were designed to make sure that the agency has thought through, in a disciplined and rigorous way, the obvious and the less obvious costs and benefits that are likely to occur if the proposal is adopted and has the force and effect of law.

Over a decade ago, Congress asked OMB to compile the information it had on the costs and benefits of the major regulations issued by federal regulatory agencies in that year and for the preceding ten years, and to provide that information (on an annual basis) to the Congress. OMB's 2011 Report to Congress – the most recent report available to the public – provided data on the cost ($44-$62 billion) and the benefits ($132-$655 billon) of major rules issued by Executive Branch agencies over the most recent ten-year period (FY 2000-2010). Even if one uses the highest estimate of costs and the lowest estimate of benefits (and this is only monetized benefits), the regulations issued over the past ten years have produced *net benefits* of at least $70 billion to our society. This cannot be dismissed as a partisan report by the current administration, because OMB issued reports with similar results (benefits greatly exceeding costs) throughout the George W. Bush Administration (e.g., for FY 1998-2008, major regulations cost between $51 and $60 billion, with benefits estimated to be $126 to $663 billion dollars). And Administrator Sunstein has testified that during the first two years of this administration, the amount by which benefits exceeded costs is greater than at any time in the past, including during my own tenure as Administrator.

What these data make clear is that regulations, at least over the past several decades, have generally benefitted, rather than harmed, our nation. They have improved the quality of our lives in various ways -- some in trivial, some in very significant, ways. They are not an evil to be contained or rendered ineffective. It is therefore critical that any proposed legislation that would further encumber the process, make it more difficult



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to develop regulations, or add additional review or approval steps should be carefully evaluated to ensure that the benefits to be achieved by the legislation justify the cost of delaying or eliminating beneficial regulations as well as the cost of increased uncertainty or unpredictability that will attend the regulatory process.

The legislative proposals before you have a number of common threads which are important to address in some detail. First are those provisions that would codify some or all of the cost/benefit principles of Executive Order 12866 – including, assessing the costs and benefits of a proposed regulation and, to the extent feasible, providing a quantification of those costs and benefits, ensuring that the benefits of a proposed regulation justify its costs, and selecting the alternative that maximizes net benefits – along with the provisions for review of those regulations by OIRA. I understand the impulse behind these proposals, because I am a strong supporter of the Executive Order and especially the provisions for economic analysis and centralized review. In my view, gathering the data and structuring the analysis help the agency staff refine its thinking in drafting the proposal; the presentation of the analysis to the agency decision-makers can reinforce existing assumptions or cause rethinking of conventional wisdom; the review of the analysis by the staff of OIRA provides a dispassionate second opinion and quality control for the analysis; and the availability of the data and the analysis throughout the process enables the various stakeholders, their elected officials and the public generally to evaluate in a more objective way the merits of the regulatory action – what is at stake and for whom? But given the recent reaffirmation of these principles in Executive Order 13653, and the now more than 30-year implementation of these provisions by presidents of both political parties, it is fair to ask why do we need such legislation and will it significantly improve the process?

The Executive Branch agencies routinely undertake economic analysis as part of the process of developing major rules, and if further analysis is needed, OIRA works with the agency to accomplish that. To be sure, the quality of the work done by these agencies -- how solid or sophisticated is the economic analysis -- is mixed but it has improved over the years. Some scholars have studied selected agencies and given them mediocre (or even failing) grades, but others have been generally complimentary while suggesting areas for improvement. This should not be surprising because agencies are very different from one another, with different cultures and different resources. The latter is particularly important in the case of economic analysis because thoughtful, careful, comprehensive analysis takes time and resources, and the more significant the proposed regulatory action, the more time and resources it should consume. Yet some of the very people who call for more analysis are the first to suggest straight-lining or reducing the agencies' budgets.

Those who support codifying provisions of the Executive Order argue that legislation would be better than an Executive Order in producing more rigorous analysis by the agencies and/or more critical review by OIRA. I am dubious about that proposition, because OIRA is well situated to impress upon Executive Branch agencies in real time the need for compliance with the terms of the Executive Order, whereas legislation is not self-executing. But even if the case were made that legislation is



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somehow superior to an Executive Order, there are serious problems with legislating these principles.

Among other things, the principles (and their application with respect to particular rules) are not simple or straightforward. There are, for example, several different definitions of "costs" in the various proposals. Trying to capture the complexities of cost/benefit analyses in a few sentences (or even paragraphs) is not easy; OMB's Circular A-4, which provides guidance to agencies on how to prepare a regulatory impact analysis, is over 50 single-spaced pages. Moreover, while undertaking economic analysis in the course of developing regulations provides important information that usually affects, for the better, the shape or scope of a proposed regulatory action, it is only an input. Economic analysis is useful and clearly instructive; indeed, I cannot imagine making regulatory choices (or legislative choices for that matter) without a systematic consideration of the intended (and unintended) consequences of a proposed action. But economic analysis, carried out by the most eminent economists according to tried and true methodology, is not and cannot be dispositive. I believe it was Professor Einstein who supposedly had a sign over his desk at Princeton saying: "Not everything that can be counted counts and not everything that counts can be counted." Under the Executive Order (and common sense), costs and benefits that cannot be quantified and monetized are nonetheless "essential to consider." And there are often other considerations that should properly be taken into account, such as disparate effects, or cumulative effects. In addition, as noted above, these bills would apply government-wide to very different agencies facing very different challenges. The Department of Homeland Security (DHS), for example, has its own issues, such as quantifying the reduction in risk of a terrorist attack and making such information public, with which this Committee is undoubtedly familiar. Thus, while cost/benefit analysis is valuable, it is hardly a silver bullet to resolve all issues – you can't just turn it on and declare the job is done.

Moreover, if Congress were to codify the analytical requirements of the Executive Order, it would be amending a host of previously enacted statutes (dating back over half a century or more). At this point, it is unclear how many and which statutes would be amended and what the implications of such amendments would be, for both the regulated entities and the intended beneficiaries of these statutes. I am referring to the fact that under the Executive Order, agencies are required to conduct economic analysis, but in developing regulations the agencies are, in the first instance, bound by their authorizing legislation. Some legislation is silent on the question of the role of costs in the formulation of regulations; others do not permit consideration of such factors. For example, Section 109(b) (1) of the Clean Air Act provides that the Administrator (of EPA) should set standards for certain pollutants at a level "requisite to protect the public health" with "an adequate margin of safety." The Supreme Court (in a unanimous decision written by Justice Scalia) was emphatic that the Administrator cannot lawfully take account of costs in setting the standards. Whitman v American Trucking Associations, 531 US 457 (2001). For that reason, the Executive Order repeatedly prescribes certain practices "to the extent permitted by law."

However, if provisions of the Executive Order were codified, they would become decisional criteria. As a result, a proposed regulation -- even a regulation under a statute



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that does not permit the consideration of costs – could not become effective unless, among other things, the "benefits of the intended regulation justify its costs." And, notwithstanding the terms of the underlying statute, the agency would be required "in choosing among alternative regulatory approaches, [to choose] those approaches that maximize net benefits." Such a super mandate would effectively abrogate previously enacted Congressional decisions; one example that comes to mind is the requirement after 9/11 that airlines reinforce the steel in their cockpit doors. And such a super mandate might well delay such time-sensitive rules as those implementing the Migratory Bird Treaty, which must be issued on an annual basis and for which cost data has never been collected or analyzed. Congress can, of course, rewrite the Clean Air Act or the Occupational Health and Safety Act, or the National Traffic and Motor Vehicle Safety Act, or any other existing authorizing legislation. But it should do so directly, not indirectly by creating a super mandate in the guise of promoting cost/benefit analysis and the consideration of that analysis in developing regulations.

There is one area where I think Congress can and should act to support the use of economic analysis in developing regulations without codifying the Executive Order – namely, extending the requirements for such analysis and centralized review to the Independent Regulatory Commissions (IRCs). The rules proposed by IRCs – those multi-headed commissions, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, the Consumer Product Safety Commission, the Federal Election Commission, the Commodities Future Trade Commission and the Federal Reserve, whose Members do not serve at the pleasure of the President and can be removed from office only for cause –were not subject to the relevant provisions under the Reagan Executive Order or the Clinton Executive Order. In both cases, the legal advisors to the draftsmen concluded that the President had authority to impose these analytical requirements and review the rules of IRCs, and the decision not to do so was essentially for political reasons – namely, out of deference to the Congress.

For several years now, there have been many of us – across the political spectrum – who have urged reconsideration of that decision. Our concern is that the IRCs do not typically engage in the analysis that has come to be expected for Executive Branch agencies. For example, in the 2011 OMB Report to Congress referred to above, it appears that roughly half of the rules developed by the IRCs over a ten-year period have no information on either costs or benefits, and those that do have very little monetization of benefits and costs; of the 17 rules issued during FY2009, none monetized both benefits and costs. This is not a good sign because we are about to see a large increase in regulations from the IRCs; in Dodd-Frank alone, there are over 300 provisions saying that agencies shall or may issue rules, most of them directed at IRCs. Several months ago, Resources for the Future (a centrist think tank) held an all-day conference here in Washington, where various scholars and former government officials (from both sides of the aisle) from five different IRCs explored the status of IRC analysis in rulemaking and the agencies' potential to do more. The materials compiled for that conference would provide a solid foundation for your further consideration of this issue.

While some of the legislative proposals would extend the requirements for economic analysis to the IRCs, there is no provision made for review and critiquing of



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those analyses the way OIRA (and other agencies during the inter-agency process) review the work of Executive Branch agencies. Nothing focuses the mind like knowing that someone will be reading (or listening) to your paper (or presentation). For all practical purposes, the way Executive Branch agencies and IRCs conduct rulemaking is the same, but the differences between the two types of agencies in terms of their structure and their relationship to the President would suggest that the review process or the "enforcement" of any requirement for economic analysis should not – possibly, cannot -- be the same without compromising the independence of the IRCs when they do not acquiesce in OIRA's assessment. Congress confronted this very question in the Paperwork Reduction Act, where it provided for OIRA review of information collection requests (i.e., government forms) from all agencies, Executive Branch and IRCs. The solution adopted there was to authorize OIRA to approve or disapprove paperwork from Executive Branch agencies directly (Sec. 3507(b) and(c)), but when it disapproved paperwork from an IRC, the IRC is able to void any disapproval by majority vote, explaining the reasons therefor (presumably in a public meeting) (Sec. 3507 (f)). A variation on that approach for review of the analysis underlying IRC rulemakings could be that OIRA would provide its views in writing to the IRC, and that document would be presented to the Commission (presumably in a public meeting), where the critiques/suggestions could be discussed and disposed of (accepted or dismissed) per the will of the Commission before final approval of the regulatory action.

As noted above, past presidents have been reluctant to extend requirements for economic analysis and centralized review by OIRA to the IRCs out of deference to Congress. A Sense of the Congress that such a course would be desirable would go a long way to ameliorate any concerns in that regard. Or Congress could designate an entity outside the Executive Branch as the reviewer of the economic analysis undertaken by the IRCs. Two obvious candidates are the GAO and the Congressional Budget Office. The former was given a limited (check the box) role in reviewing and commenting (to Congress) on the regulations issued by IRCs under the Congressional Review Act (CRA), and the latter already has analytical capacity that could be directed to this effort. Neither of these entities has the expertise or experience that OIRA has with reviewing economic analyses, but both have the "virtue" of being identified with Congress rather than the President, which may be important to those who read "independent regulatory commission" as independent of only one and not the other political player.

Apart from requirements for cost/benefit analysis (either codifying the Executive Order or extending the requirements to the IRCs) and centralized review, many of the legislative proposals would impose additional procedural or analytical requirements on the regulatory process -- such as increasing the frequency of retrospective analyses of existing regulations, expanding both the scope and the depth of data to be included in the economic and regulatory flexibility analyses for new rules, specifying the amount of time for the public comment period, and requiring affirmative Congressional approval before rules become effective. The statements from the sponsors or champions cite the relatively slow recovery from the recent economic meltdown (which some commentators attribute to inadequate, rather than too many regulations), the aggregate number of regulations issued each year by federal agencies (the numbers have not in fact increased in the first two years of the Obama Administration) and the total regulatory burden on the



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US economy (discussed above). With rare exceptions, they do not identify what the agency or agencies are doing wrong, or how the legislative proposal(s) would actually improve the regulatory process or the decision-making process to produce better regulations. Have some agencies been less diligent than others in soliciting public input in developing regulations? Have some agencies been less meticulous than others in compiling an administrative record in support of a regulation? Have some agencies been more cavalier than others in responding to public comment?

Perhaps the most important question is what has been (and is likely to be) the effect of President Obama's regulatory reform initiative, which was announced on January 18th 2011 (just six months ago) and is continuing to date (as recently as two weeks ago with another Executive Order affecting the IRCs? President Obama has set in motion a regulatory look-back to determine if there are regulations in stock that are outdated, ineffective or otherwise in need of modification or elimination; having lived through several of these efforts, I sense that this one is being pursued much more aggressively than others. President Obama has also stressed greater public participation in the rulemaking process and the use of technology to empower all those affected by regulations. And his Executive Orders and Memoranda specifically stress the importance of promoting the economy, innovation, competitiveness and job creation. How will these edicts from the President to those who report to him and for whom he is constitutionally accountable play out? Will the results of his efforts at least inform us where we should be focusing our concern, so that we can tailor remedies (and perhaps resources) to where changes will be salutary?

It is worth noting that Congress has imposed a series of process and analytical requirements on the federal agencies over the last 30 years, including the Paperwork Reduction Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, and the Unfunded Mandates Reform Act, to name just a few, without substantially increasing agency funding to carry out the tasks assigned in those statutes. Doing more with the same or less is unsustainable over the long run. Even now, it takes years rather than months for most agencies to dot all the I's and cross all the T's necessary before issuing a final rule; OSHA has several rules that have taken a decade (literally) or more to provide protections for workers. Each of the proposed additional requirements will further encumber the process, if not lead to paralysis by analysis or due process to due death. Perhaps before adding another set of requirements and making it more difficult for even the best rules to be issued, Congress should rationalize the current set and/or provide more resources to the agencies to do what they are already required to do. If there is an implementation problem, Congress should address the source of that directly and not just add another requirement that also cannot be implemented.

Congress also has a host of alternatives to legislation, including hearings and other oversight tools, by which to monitor agency activity, evaluate current practices, spotlight any deficiencies, and bring public pressure to improve agency performance if that is what is called for. Among other things, Congress would then be able to identify the "bad actors" or the rules considered most problematic and determine why those situations exist. Such a targeted response would be far more efficient (and likely more



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effective) than the broad proposals before you that apply across the board to all federal regulatory agencies -- from the USDA and EPA to DHS and DOD -- even though, as mentioned earlier, they have very different missions and very different resources. Clearly a one-size-fits-all proposal would have wildly disparate effects, not only on the different agencies, but also on the different types of rules that are developed by these agencies.

Another critically important issue presented by many of the legislative proposals is judicial review of the various existing and proposed process and analytical requirements; indeed, in virtually all of the bills, judicial review is either provided explicitly or implicitly (by not precluding judicial review). Despite the fact that I am a lawyer who greatly respects our judicial system (or perhaps because I am a lawyer who greatly respects our judicial system), I think that would be a most unfortunate step, especially where it is authorized before final agency action. Even where there is final agency action, consider the costs and the benefits of asking the courts to be yet another check (in addition to OIRA and the Congress) on agency implementation of these analytical requirements.

We are, as you know, a very litigious nation, and there is little disincentive for those who are disappointed at the agency level to take the matter to court if there are any conceivable grounds to do so. Economic analysis will become yet another way to appeal agency rulemakings. Along with the lawyers debating whether the new decisional criteria trump the authorizing legislation, we can expect armies of competing economists with various theories about how to quantify or monetize the diverse effects of a proposed regulation, and there will inevitably be inordinate inquiry into the weight to be accorded to the costs and benefits which cannot be quantified and monetized. With Chevron and the hard look doctrine framing the inquiry, one would expect substantial deference to the agency's determinations, but there will nonetheless be substantial money and time (and the ensuing uncertainty) devoted to litigating whether benefits justify the costs or whether the alternative selected is the one that maximizes net benefits, or other concepts that will inevitably be placed before the court.

I think it important to emphasize the time element and the uncertainty that comes from judicial review. I do so because in private practice and in the consulting work I do, I hear again and again from businessmen who understand (even if they do not like it) that an agency will impose certain requirements on them. They want to do the responsible thing and are willing to comply, but they want to be able to plan rationally and to allocate their capital and human resources in an efficient way. What they often find most objectionable, therefore, is regulatory uncertainty. As noted earlier, it can often be months, if not years, between a proposed rule and a final rule; with additional opportunities for judicial review, we can add another year or two before the issue is finally resolved. And for the intended beneficiary, the delay may well undermine important safeguards of public health and safety or the fair functioning of our markets.

Thank you again for giving me an opportunity to speak to these issues. I look forward to any comments or questions you may have.



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THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON DC
REGULATORY STUDIES CENTER

# Prepared Statement of Susan E. Dudley

Director, GW Regulatory Studies Center
Research Professor,
Trachtenberg School of Public Policy and Public Administration

Hearing on

## Federal Regulation: A Review of Legislative Proposals, Part II

Before the

## Homeland Security and Governmental Affairs Committee
## United States Senate

July 20, 2011



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**Prepared Statement of Susan E. Dudley**
**July 20, 2011**

Chairman Lieberman, Ranking Member Collins, and distinguished members of the Committee, thank you for inviting me to testify today on federal regulations. I am Director of the George Washington University Regulatory Studies Center, and Research Professor in the Trachtenberg School of Public Policy and Public Administration.[1] From April 2007 to January 2009, I oversaw executive branch regulations of the federal government as Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). I have studied regulations and their effects for over three decades, from perspectives in government (as both a career civil servant and political appointee), the academy, the non-profit world, and consulting.

As a long-time student of regulation, I am pleased this Committee is interested in improving how the U.S. government develops regulatory policy. Though regulations affect every aspect of our lives, as a policy tool they rarely reach the attention of voters (and consequently of elected officials) because, unlike their spending counterparts, their effects are often not visible. Like the direct government spending that is supported by taxes, regulations are designed to achieve social goals, but the costs of regulations are hidden in higher prices paid for goods and services and in opportunities foregone.

Over the course of our history, concerns about the effect of regulations have occasionally reached a level of public discourse that led to meaningful efforts at regulatory reform (and even outright deregulation), and my testimony briefly reviews three such periods. It then evaluates the regulatory landscape today, and goes on to examine possible legislative approaches to regulatory reform initiatives.

## I. Previous Efforts at Regulatory Reform

This first part of my testimony briefly reviews three historic periods of regulatory reform, and the conditions that led to them: (A) the Administrative Procedure Act (APA) of 1946, (B) the economic deregulation and increased role for regulatory analysis that began in the mid-1970s, and (C) the statutory regulatory reform efforts of the mid-1990s. It concludes with (D) a review of the pressures that have led the inexorable growth in regulation, despite these reforms.

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[1] The George Washington University Regulatory Studies Center raises awareness of regulations' effects with the goal of improving regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.



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### A. The Administrative Procedure Act of 1946

Until the early part of the 20th century, courts interpreted the separation of powers implicit in Articles 1 through 3 of the U.S. Constitution as prohibiting the delegation of legislative powers to the executive. The Supreme Court expressed in 1892, "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[2] Yet, early cases did uphold delegations of legislative authority as long as the executive branch was merely "filling up the details."[3] And, in 1928, the Supreme Court moved away from a strict interpretation of the non-delegation doctrine when it found that a congressional delegation of power was constitutional because the statute included an "intelligible principle" to guide executive action.[4] Seven years later, the Supreme Court returned to the question of delegation of legislative power when it ruled that the National Industrial Recovery Act (NIRA) was unconstitutional because it provided the President (and private industry associations) "virtually unfettered" decision making power.[5]

This decision led to extensive debate, culminating in the passage of the APA in 1946. According to one researcher, the APA reflected a "fierce compromise":

> The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation's decision to permit extensive government, but to avoid dictatorship and central planning.[6]

The APA has guided executive branch rulemaking for 65 years, and is one of the most important pieces of legislation ever enacted. It established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. As long an agency acts within the rulemaking authority delegated to it by Congress, and follows the procedures in the APA, recent courts have found few constitutional limits on executive branch agencies' writing and enforcing regulations.

### B. Regulatory reform and deregulation in the 1970s and 1980s

Inflation fears in the 1970s raised awareness of the costs and unintended consequences of regulation, leading to bipartisan support for deregulation in traditionally-regulated industries,

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[2] Field v. Clark, 143 U.S. 649 (1892)

[3] Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825)

[4] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)

[5] Schechter Poultry Corp. v. United States, 39 295 U.S. 495 (1935)

[6] George Shepard. Fierce *Compromise: The Administrative Procedure Act Emerges from New Deal Politics.* 90 Nw. U. L. Rev. 1557 (1996)



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such as airlines and trucking. Scholars at the time were in general agreement that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers. Policy entrepreneurs in the Ford, Carter, and Reagan Administrations, in Congress, and at think tanks were able to link this knowledge to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices.[7] This led to successful bipartisan efforts to abolish agencies such as the Civil Aeronautics Board and the Interstate Commerce Commission and remove unnecessary regulation in several previously-regulated industries, with resulting improvements in innovation and consumer welfare.

While the legislative and executive branches were eliminating economic regulations in the late 1970s, a new form of "social" regulation aimed at addressing environmental, health, and safety concerns was emerging. (Figures 1 and 2 below, which track the budgetary costs of running the federal regulatory agencies and the pages in the *Federal Register,* where proposed and final regulations are published, illustrate the dramatic increase in social regulatory activity during this period.) Concerns over the burden of these new regulations and other reporting requirements led President Carter (and Presidents Nixon and Ford before him) to create procedures for analyzing the impact of new regulations and minimizing their burdens.[8] They also led to the passage of two significant pieces of legislation in 1980. The Regulatory Flexibility Act (RFA) required agencies to analyze the impact of their regulatory actions on small entities and consider effective alternatives that minimize small entity impacts. The Paperwork Reduction Act (PRA) established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) to review and approve all new reporting requirements with an eye toward minimizing burdens associated with the government's collection of information.

When President Reagan took office in 1981, he continued to pare back economic regulations, and also gave the newly created OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs. The growth in federal regulatory activity leveled off for a brief period in the 1980s, but as inflation fears subsided and the economy improved, concerns over excessive regulation faded and regulatory activity began to increase again. Each subsequent president has continued and expanded OIRA's central regulatory oversight role, if not its budget.[9]

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[7] Susan E. Dudley, *Alfred Kahn 1917-2010,* REGULATION Vol. 34, No. 1 (Spring 2011), *available at* http://www.cato.org/pubs/regulation/regv34n1/regv34n1-2.pdf.

[8] President Carter's E.O. 12044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome. Exec. Order No. 12044, 43 Fed. Reg. 12661 (Mar. 24, 1978).

[9] Figure 3 compares OIRA staffing with regulatory agency staffing over time. See Kathryn Vesey, *OIRA Celebrates 30th Anniversary*, The George Washington University Regulatory Studies Center, Regulatory Policy



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### C. Regulatory reform in the 104th Congress

In 1995, a Republican majority took control of both houses of Congress, having run on a platform that included regulatory reform. By this time, the social regulations that had begun in the 1970s were the focus of concern. In contrast to the consensus on economic regulations, academics and policy makers did not generally support outright deregulation, but rather reforms to make regulations less burdensome and more cost-beneficial. The 104th Congress's ambitious agenda included efforts to codify regulatory impact analysis procedures similar to those required through executive order by Presidents Carter, Reagan, Bush and Clinton, to require compensation for regulatory actions that reduced the value of property rights, to cap the costs of new regulations through a regulatory budget, and to give Congress more control and accountability over the content of new regulations.

These efforts at comprehensive regulatory reform legislation in the 104th Congress were unsuccessful. Opponents of comprehensive reform at the time noted:

> By overreaching on this issue, the Republicans were tagged as anti-environment (anti-clean air and water) and anti-safety (dirty meat) by the mainstream media and the electorate. Both the Administration and the Congressional Democrats benefited politically from their stand against extreme Republican reg reform initiatives.[10]

While comprehensive reform efforts failed to win a majority of votes, some targeted efforts became law, including:

- The Unfunded Mandates Reform Act (UMRA) of 1995, which required executive branch agencies to estimate and try to minimize burdens on state, local, and tribal governments, and private entities,

- The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, which reinforced RFA requirements for small business impact analyses and provided for judicial review of agencies' determinations as to whether regulations would have "a significant economic impact on a substantial number of small entities,"

- The Congressional Review Act (CRA) of 1996, contained in SBREFA, which required agencies to submit final regulations with supporting documentation to both houses of

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Commentary. June 28, 2011, *available at* http://www.regulatorystudies.gwu.edu/images/pdf/20110628_oira_staffing.pdf

[10] White House Memorandum to Erskine Bowles from John Hilley and Sally Katzen, "Regulatory Reform" (Feb. 12, 1997), *available at* http://www.clintonlibrary.gov/_previous/KAGAN%20DPC/DPC%2051-57/3324_DOMESTIC%20POLICY%20COUNCIL%20BOXES%2051-57.pdf.



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Congress, and established expedited procedures by which Congress could overturn regulations within a specified time using a Joint Resolution of Disapproval,

- 1995 Amendments to the Paperwork Reduction Act, which reauthorized OIRA and required further reductions in paperwork burdens, and

- Title II, Section 645, of the 1996 Omnibus Consolidated Appropriations Act, which directed OMB to submit a report to Congress estimating the costs and benefits of major regulations. The 1999 Regulatory Right to Know Act made permanent this requirement for OMB to report to Congress annually.[11]

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12866[12] (issued by President Clinton in 1993 and still in effect today), but rarely do more.[13] While pursuant to SBREFA, courts have overturned regulations that fail to consider impacts on small business,[14] agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."[15,16]

Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace. Though resolutions of disapproval require only a simple majority in Congress (and several have passed one house), they face the threat of presidential veto, which would require a two-thirds majority to override. The conditions surrounding the ergonomics regulation were likely key to its disapproval. It was a "midnight regulation," issued amid much controversy at the end of the Clinton Administration. The resolution disapproving the rule came at the beginning of the Bush Administration (which did not support the rule), eliminating the veto threat.

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[11] The 104th Congress also passed amendments to the Safe Drinking Water Act, directing the Environmental Protection Agency to set standards based on a balancing of costs and benefits. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996).

[12] Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.

[13] See testimony of Susan Dudley and other witnesses before the House Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, February 15, 2011, *available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=1129:qunfunded-mandates-and-regulatory-overreachq&catid=14:subcommittee-on-technology

[14] Northwest Mining Association v. Babbitt, 5 F.Supp. 2nd 9 (D.D.C. 1998), and Southern Fishing Association vs. Daley, 995 F.Supp. 1411 (M.D. Fla. 1998).

[15] American Trucking Assns v. EPA 175 F.3d 1027, 1043 (D.C. Cir 1999)

[16] Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies*, 41 Wm. & Mary L. Rev. 1425 (2000).



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OMB does report annually to Congress on the costs and benefits of major regulations, but a 2001 CRS report observed that OMB's reports, "have been incomplete, and its benefits estimates have been questioned."[17]

### D. Despite these efforts, regulations are increasing

As the attached figures illustrate, despite these efforts at reform, the growth in new regulations continues. The executive and legislative requirements for analysis of new regulations appear to have been inadequate to counter the powerful motivations in favor of regulation. Politicians and policy officials face strong incentives to "do something," and passing legislation and issuing regulations demonstrate action. Whether the regulatory action ultimately produces the desired outcomes may get less attention, partly because those outcomes are not immediately apparent, but also because action simply appears more constructive than inaction. There is no public relations advantage to doing nothing or to averting policy mistakes before they occur.

Often businesses are portrayed as the main opponents of regulation, but the evidence suggests otherwise. For decades, economists who study regulation have observed that regulation can provide competitive advantage, so it is often in the self-interest of regulated parties to support it. During my tenure at OIRA, I saw tobacco companies supporting legislation requiring that cigarettes receive Food and Drug Administration pre-marketing approval, food and toy companies wanting more regulation to ensure their products' safety, and energy companies supporting cap-and-trade for greenhouse gas emissions. Particularly when regulatory demands appeal to popular interests, politicians and policy officials find pursuing them hard to resist.[18]

Thus, legislators and regulators face strong incentives to issue new legislation and regulations, all with noble goals, while requirements to evaluate the outcomes of those policies (the benefits, costs, and unintended consequences) tend to take a back seat.

## II. The Regulatory Landscape in 2011

Like the periods that preceded past regulatory reform efforts, concerns over the burdens of regulations are once again on the minds of American citizens.[19] The pace of new regulatory activity spiked after the terrorist attacks of September 2001, and has been increasing again recently.

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[17] ROGELIO GARCIA, CONG. RESEARCH SERV., IB95035, FEDERAL REGULATORY REFORM: AN OVERVIEW (2001), *available at* http://www.thecre.com/pdf/2002-crs.pdf.

[18] Bruce Yandle, *Bootleggers and Baptists*, REGULATION, May/June 1983

[19] Frank Newport, *Americans Leery of Too Much Gov't Regulation of Business*, GALLUP, Feb. 2, 2010, *available at* http://www.gallup.com/poll/125468/Americans-Leery-Govt-Regulation-Business.aspx.



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Figure 4 shows that executive branch agencies published a record number of economically significant final regulations (defined as having impacts of $100 million or more per year) between February 2008 and January 2009.[20] Since then, executive branch agencies continue to issue regulations at a higher pace than previously, publishing 59 major regulations per year on average between February 2009 and January 2011, compared to an average of 45 regulations published per year during the 8-year terms of the last two presidents.[21] When one includes the independent agencies (over which presidents exercise less direct oversight) the comparisons are similar, with an average of 84 major regulations issued over the last 2 years, a 35 percent increase over the average of 62 per year in the Bush Administration and a 50 percent increase over the 56 per year average in the Clinton Administration.[22]

The most recent *Unified Agenda of Regulatory and Deregulatory Actions* issued earlier this month does not indicate a slow-down in activity. The Agenda lists 4,257 regulatory actions under development by federal regulatory agencies, or over 300 more entries than last year at this time. The regulatory road ahead looks even more ambitious when one focuses on the largest regulations. The Agenda lists 219 economically significant regulations, 28 more than were listed at this time last year and 47 more than in 2009.[23]

Some of this activity is required by new legislative mandates, most notably the Wall Street Reform and Consumer Protection Act (Dodd-Frank), and the Patient Protection and Affordable Care Act (PPACA). Others, including EPA's regulation of greenhouse gases under the Clean Air Act, are based on new judicial interpretations of statutes enacted 20 or more years ago, and do not necessarily reflect the priorities of any recent (or past) Congress. But some are discretionary actions, such as EPA's pending decision to tighten standards for ozone which will impede economic growth in thousands of counties across the United States and impose costs of $20 billion to $90 billion per year (according to EPA's estimates).[24]

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[20] Figure 4 also illustrates the "midnight regulation" phenomenon, where administrations issue significantly more regulations during their final year in office than during previous years.

[21] Analysis of the published economically significant final regulations tracked by the General Services Administration's Regulatory Information Services Center at www.reginfo.gov.

[22] Analysis of major regulations by month in the GAO database, available at www.gao.gov/fedrules.

[23] Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, http://www.reginfo.gov/public/do/eAgendaMain (last visited July 9, 2011).

[24] EPA submitted a draft final regulation to OMB on July 11, 2011. http://www.reginfo.gov/public/do/eoReview. See letter from Andrew Livers to William Daley, chief of Staff to the President. July 15, 2011, *available at:* http://businessroundtable.org/news-center/letter-to-bill-daley-on-ozone-regulations/



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## III. Legislative Efforts

This part of my testimony examines possible reforms and weighs their likely effects. I consider reforms in two categories: (A) changes to regulatory procedures and (B) changes to the decision criteria for selecting regulatory approaches.

### A. Procedural reforms

Possible reforms to the procedures by which regulations are promulgated include (1) requiring a Congressional vote before major new regulations can become effective (the REINS Act), (2) establishing a "regulatory paygo" procedure by which agencies would be required to remove an outdated regulation for every new regulation issued, (3) making procedural amendments to the Administrative Procedure Act, (4) altering the rules for judicial review of agency actions, and (5) establishing a Congressional office to review and evaluate regulations.[25]

#### 1. REINS

The Regulations from the Executive In Need of Scrutiny, or REINS Act, has been introduced in the Senate (S. 299) and House of Representatives (H.R. 10) to "increase accountability for and transparency in the federal regulatory process."[26] It is patterned after the 1996 CRA, providing expedited procedures for evaluating and voting on major regulations, but rather than requiring Congress to enact a "joint resolution of disapproval" to prevent a rule from going into effect, no major rule could go into effect until Congress enacted an affirmative "joint resolution of approval."

Supporters hail the Act as way to "force Members to take responsibility for the laws they pass, and to force Administrations to be accountable for the laws they create through regulation."[27] Opponents argue that current procedures, where Congress delegates regulatory decision-making to agencies, are "consistent with the Framers' intention,"[28] and constrain agencies through (1) the statutes that delegated them power in the first place, (2) the APA public comment process, (3) executive branch review and oversight, (4) the threat of a resolution of disapproval under the

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[25] The Administrative Conference of the United States has conducted studies and provided recommendations on several of these procedural issues that the Committee may find useful, including: 77-1 Congressional Control of Regulation: Legislative Vetoes; 74-4 Judicial Review of Informal Rulemaking; 85-1 Legislative Preclusion of Cost-Benefit Analysis; and 90-7 Responses to Congressional Demands for Information [60 Fed. Reg. 56312 (Nov 8, 1995].

[26] Regulations from the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. § 2 (2011).

[27] Editorial, *The Congressional Accountability Act*, WALL ST. J., Jan. 14, 2011, *available at* http://online.wsj.com/article/SB10001424052970203525404576049703586223080.html.

[28] Posting of Sidney Shapiro to CPRBlog, http://www.progressivereform.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F (Jan. 14, 2011).



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CRA, and (5) judicial review.[29] They also argue that expert agencies are in a better position to make complex regulatory decisions than political officials.[30]

Yet, many federal regulations being promulgated today depend on legislation passed decades ago by different congresses focused on different concerns. The REINS Act would ensure that major regulations based on authority delegated years ago could only be adopted with consent from the current Congress.[31] Further, the Act may strengthen the President's ability to exercise his Constitutional responsibility, by giving him greater control over independent agencies.[32]

While scholars defend the constitutionality of the Act,[33] no one denies that it will change legislators' behavior. How would legislators respond to the responsibility of voting on the 50 to 100 major rules promulgated each year? Would inertia lead to inaction, and the effective disapproval of popular regulations? Or would joint resolutions of approval become routine, with members voting for new regulations with little consideration? Defenders of the Act believe that the expedited procedures will encourage bipartisan debate and minimize opportunities for a minority of members to derail resolutions supported by the majority. If resolutions of approval become routine, at least members would no longer be able to blame agencies and avoid responsibility for regulatory outcomes.[34]

REINS might also alter the incentives of agency staff and interested parties. Would agencies be more likely to chop a regulation into smaller actions to avoid the "major" designation, or might they bundle unpopular regulations with popular ones to compel an affirmative resolution? Would agency staff have incentives to negotiate deals with individual legislators and lobbyists,

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[29] *The REINS Act: Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary* [hereinafter *Hearing*], 112th Cong. (2011) (statement of Sally Katzen), *available at* http://judiciary.house.gov/hearings/pdf/Katzen01242011.pdf.

[30] SIDNEY SHAPIRO, CTR. FOR PROGRESSIVE REFORM, CPR BACKGROUNDER: THE REINS ACT: THE CONSERVATIVE PUSH TO UNDERCUT REGULATORY PROTECTIONS FOR HEALTH, SAFETY, AND THE ENVIRONMENT (2011), *available at* http://www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder.pdf.

[31] Jonathan Adler, The Federalist Soc'y for Regulatory & Pub. Policy Studies, The Regulations from the Executive in Need of Scrutiny (REINS) Act, http://www.fed-soc.org/publications/pubID.2074/pub_detail.asp (2011).

[32] In testimony before the House Judiciary Committee, David McIntosh observed, "If the President disapproves of a rule, he can veto its authorizing resolution; if he endorses it, he can allow it to take effect. Either way, the President is forced to take ownership of the independent agency's action and will be held accountable by the people for his choice." *Hearing*, *supra* note 29, at 51-52 (statement of David McIntosh, Member of Congress, Retired), *available at* http://judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf.

[33] Adler, *supra* note 31; *Hearing*, *supra* note 29 (statement of Jonathan H. Adler, Professor of Law and Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law), *available at*, http://judiciary.house.gov/hearings/pdf/Adler01242011.pdf; *id.* (statement of David McIntosh, Member of Congress, retired), *available at* http://judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf.

[34] Press Release, Rep. Geoff Davis, REINS Act Reintroduced in the 112th Congress (Jan. 20, 2011), *available at* http://www.geoffdavis.house.gov/News/DocumentSingle.aspx?DocumentID=220691.



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inserting special provisions in new regulations in exchange for an affirmative vote on a resolution of approval? How might that affect their willingness to alter proposed regulations in response to public comment, or the President's ability (through OIRA) to hold agencies accountable for selecting alternatives with broad net benefits? This fear is magnified by concerns that enactment of a resolution of approval would constitute a legislative action that might protect faults in the regulation from judicial review.

Cognizant of these potential perverse incentives, REINS Act drafters have included provisions that require agencies to justify their classifications of major and non-major, and to provide information on other related regulatory activities designed to implement the same statutory or regulatory objective. It also explicitly preserves challenges to federal rules in courts of law by clarifying that a joint resolution of approval "does not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule, and shall not form part of the record before the court in any judicial proceeding concerning a rule."[35]

Supporters of the REINS Act recognize that it will make regulatory decisions more like legislative decisions, with the tradeoffs in transparency that involves, but they argue that, in the long run, increasing Congressional accountability for regulations will better serve the American public.

### 2. Examination and removal of unnecessary existing regulations – a regulatory paygo

Most legislative and executive branch reforms have focused on analyzing and improving new regulations, and agencies seldom look back to evaluate whether existing regulations are having their intended effects. Section 610 of the RFA provides for periodic review of regulations for their impact on small businesses, but researchers have found that most agencies "comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the *Federal Register*."[36,37] S. 130 (the FREEDOM Act) would impose budgetary penalties on agencies that fail to conduct such requirements.[38]

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[35] Regulations from the Executive in Need of Scrutiny Act, S. 299, 112th Cong. § 802(g) (2011).

[36] Michael See, *Willful Blindness: Federal Agencies' Failure to Comply With the Regulatory Flexibility Act's Periodic Review Requirement—And Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199 (2006), *available at* http://law2.fordham.edu/publications/articles/400flspub16875.pdf.

[37] Note that S. 474, the Small Business Regulatory Freedom Act of 2011, would reinforce the requirement for periodic review and sunset of existing rules that affect small entities.

[38] See statement of Senator Snowe before this Committee, June 23, 2011, *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6cb07bbd-a858-4495-b820-0726ae7d769b.



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Senator Warner is working with Senator Portman on legislation focused on altering regulatory agencies' incentives to issue new regulations and examine the effectiveness of existing regulations.[39] This legislation "would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add."[40] Under a "regulatory paygo system," regulatory agencies, with oversight from OIRA and either the Congressional Budget Office (CBO) or the GAO, would catalogue existing regulations and develop estimates of their economic impacts. Then, before issuing a new regulation, agencies would be required to eliminate one outdated or duplicative regulation of the same approximate economic impact.

A regulatory paygo shares similarities with a regulatory budget, a concept that attracted bipartisan interest in the 1970s and 1980s, but has not been championed in recent years. In 1980, President Carter's *Economic Report of the President* discussed proposals "to develop a 'regulatory budget,' similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits." The Report noted analytical problems with developing a regulatory budget, but concluded that "tools like the regulatory budget may have to be developed" if governments are to "recognize that regulation to meet social goals competes for scarce resources with other national objectives," and set priorities to achieve the "greatest social benefits."[41]

The analytical problems identified with the regulatory budget are non-trivial, and to some degree would also apply to a regulatory paygo. Since the late 1990s, OMB has been compiling agency estimates of the costs (and benefits) of major regulations with mixed results, as noted above. Estimating the opportunity costs of regulations is not as straightforward as estimating fiscal budget outlays, where past outlays are known and future outlays can generally be predicted with some accuracy. Some regulatory impacts will be harder to estimate than others. What are the costs associated with homeland security measures that reduce airline travelers' privacy? What are the costs of regulations that prevent a promising, but yet unknown, product from reaching consumers? Even regulations whose costs appear to be straightforward, such as corporate average fuel economy standards that restrict the fleet of vehicles produced, depend on assumptions about consumer preferences and behaviors that may not reflect American diversity. EPA and DOT recently estimated that these rules will have large negative costs (even if benefits

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[39] See statement of Senator Portman before this Committee, June 23, 2011, *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6cb07bbd-a858-4495-b820-0726ae7d769b.

[40] Mark Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639_pf.html.

[41] Chairman of the Council of Econ. Advisers, 1980 Economic Report of the President [hereinafter 1980 Economic Report], at 125 (1980), *available at* http://fraser.stlouisfed.org/publications/ERP/page/4569/download/46077/4569_ERP.pdf.



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were zero), because, according to their calculations, the fuel savings consumers will derive from driving more fuel-efficient vehicles will outweigh the increased purchase price. This analysis begs the question of why consumers are not demanding (and manufacturers providing) the fuel-efficient vehicles absent regulation, and ignores other attributes consumers value. It also raises a question of how negative costs would be treated under a regulatory paygo system. Would agencies that estimate negative costs associated with their rules be able to issue even more?

Despite these analytical difficulties, a regulatory paygo has the potential to impose some needed discipline on regulatory agencies, and to generate a constructive debate on the real impacts of regulations. By focusing on the costs of regulations and allowing agencies to set priorities and make tradeoffs among regulatory programs, it might remove some of the contentiousness surrounding benefit-cost analysis. How it would affect agencies' incentives for estimating costs is uncertain. In developing a baseline estimate of the costs of existing regulations, they may have incentives to overstate costs, particularly for regulations they may want to trade in exchange for new initiatives. Furthermore, Congress would probably need to establish regulatory burden baselines in new authorizing legislation. Providing an entity outside of the executive branch (CBO or GAO) the resources and mandate to (1) estimate the regulatory costs associated with executing new legislation, and (2) evaluate and critique agency estimates of regulatory costs could be critical to a regulatory paygo's success. While it will never be possible to estimate the real social costs of regulations with any precision, a regulatory paygo should provide incentives for agencies, affected parties, academics, Congressional entities and non-governmental organizations to improve upon the rigor of regulatory impact estimates.

### 3. Procedural changes to the APA

The APA describes two types of rulemaking – formal and informal. Most executive branch regulation is conducted through informal, or notice-and-comment rulemaking. As long as an agency acts within the rulemaking authority delegated to it by Congress, and follows the procedures in the APA, courts have ruled that it can write and enforce regulations subject to an "arbitrary and capricious" standard of review.

Formal rulemaking is generally used only by agencies responsible for economic regulation of industries, and only when a statute other than the APA specifically states that rulemaking is to be done "on the record."[42] Formal rulemaking involves trial-like hearings, where rules of evidence apply, and parties may both subpoena and cross-examine witnesses. Decisions must address each of the findings presented and be supported by "substantial evidence." Sections of the Occupational Safety and Health Act (OSHA) and Toxic Substances Control Act (TSCA) require a hybrid approach, in which the agencies propose rules and standards through notice and comment, but at the request of interested parties must hold a hearing.

[42] United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).



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To improve the empirical accuracy of factual determinations and the rigor of agencies' justifications for the most significant regulations they issue, legislators might consider amending the APA to expand the use of formal rulemaking procedures, and/or apply the substantial evidence test to informal rulemakings. Legal scholars argue that formal rulemaking procedures would be especially useful to ensure scientific integrity, and to address concerns that agencies sometimes do not take public comment seriously, but instead provide inadequate, perfunctory explanations for selecting one alternative over another, or for dismissing public concerns.[43] Critics are concerned that formal rulemaking procedures will slow down the issuance of new regulation, and impose unnecessary costs on regulating agencies,[44] but supporters offer examples of such rulemakings being completed expeditiously, and of notice-and-comment rulemakings that have taken more than a decade.[45]

The substantial evidence standard directs a reviewing court to set aside an agency action unless the record provides "such relevant evidence as a reasonable person would accept as adequate to support a conclusion."[46] It is arguably a more exacting standard than "arbitrary and capricious," which grants considerable deference to agency expertise. Substituting a substantial evidence test could motivate agencies to develop and provide better scientific and technical data and analysis in support of regulations.[47] Some argue that the substantial evidence test used as part of an informal (or even hybrid) regulatory proceeding would differ very little from an arbitrary and capricious test, however.[48,49]

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[43] JEFF ROSEN, AM. BAR ASS'N, FORMAL AND HYBRID RULEMAKING: TIME FOR A REVIVAL (2010), *available at* http://new.abanet.org/calendar/6th-annual-administrative-law-and-regulatory-practice-institute/Documents/Jeff%20Rosen%20PowerPoint.pdf.

[44] *Hearing on Executive Order 13422, 72 Fed. Reg. 2763 (January 23, 2007), President Bush's recent amendments to Executive Order 12866, Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007) (testimony of Peter L. Strauss, Betts Professor of Law, Columbia Law School), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/strauss_testimony.pdf.

[45] ROSEN, *supra* note 43.

[46] Mareno v. Apfel, 1999 U.S. Dist. LEXIS 8575 (S.D. Ala. Apr. 8, 1999) ("more than a scintilla but less than preponderance").

[47] EE Bachrach, Case for a Substantial Evidence Amendment to the Informal Rulemaking Provision of the Federal Food, Drug, and Cosmetic Act, 55 Food & Drug L.J. 293 (2000).

[48] Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677 (D.C. Cir. 1984) (Scalia, J., writing for the majority) ("In review of rules of general applicability made after 'notice and comment' rule-making, [substantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness."), *available at* http://openjurist.org/745/f2d/677/association-v-board.

[49] Matthew J. McGrath, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541 (1986).



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### 4. Provide for judicial review of influential information

The Information Quality Act (IQA) attempts to ensure the "quality, objectivity, utility, and integrity" of information disseminated to the public, and provides procedures by which affected parties can petition agencies to correct information that does not meet those standards. The IQA does not explicitly provide for judicial review of agency denials of requests for correction, and to date, courts have chosen not to try cases that have been brought. Congress may consider amending the IQA to make agency decisions reviewable.[50]

### 5. Create a Congressional regulatory oversight body

The Truth in Regulating Act of 2000[51] required the GAO independently to evaluate agencies' regulatory impact analyses supporting final regulations, but this requirement was contingent upon the GAO receiving yearly appropriations of $5,200,000. These funds have never been appropriated.[52]

A non-executive branch agency responsible for reviewing regulations would have several benefits.[53] Most importantly, it would serve as an independent check on the analysis and decisions of regulatory agencies and OMB. A 1999 GAO report evaluating OMB's annual reports to Congress on the benefits and costs of regulation observed,

> It is politically difficult for OMB to provide an independent assessment and analysis of the administration's own estimates in a public report to Congress. If Congress wants an independent assessment of executive agencies' regulatory costs and benefits, it may have to look outside of the executive branch or outside of the federal government.[54]

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[50] For different perspectives on this issue, see James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J. L. & PUB. POL'Y 521 (2003), *available at* http://www.law.ku.edu/publications/journal/pdf/v12n3/conrad.pdf; Sidney A. Shapiro, RENA STEINZOR & MARGARET CLUNE, CTR. FOR PROGRESSIVE REFORM, OSSIFYING OSSIFICATION: WHY THE INFORMATION QUALITY ACT SHOULD NOT PROVIDE FOR JUDICIAL REVIEW (2006), *available at* http://www.progressivereform.org/articles/CPR_IQA_601.pdf.

[51] P.L. 106-312, 114 Stat. 1248-1250 (2000).

[52] Representative Donald Young introduced H.R. 214 on January 7, 2011 "to establish a Congressional Office of Regulatory Analysis, to require the periodic review and automatic termination of Federal regulations, and for other purposes." H.R. 214, 112th Cong. (2011), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:h214ih.txt.pdf.

[53] See Testimony of Robert W. Hahn and Robert E. Litan before the House Government Reform Committee, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, March 2003, *available at:* http://www.brookings.edu/testimony/1999/04_righttoknow_litan.aspx

[54] U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-59, ANALYSIS OF OMB'S REPORTS ON THE COSTS AND BENEFITS OF FEDERAL REGULATION (1999), *available at* http://www.gao.gov/archive/1999/gg99059.pdf.



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A Congressional office would be able to devote resources to areas OMB cannot, such as examining the effects of regulations issued by independent regulatory agencies. Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation. This would be particularly important if Congress enacts some of the other procedural changes being discussed, such as the REINS Act or a Regulatory Paygo.

### B. Decision Criteria

Members of both houses have introduced legislation designed to improve upon the decisional criteria by which regulatory alternatives are evaluated by (1) codifying the decision requirements currently embodied in executive order and extending them to independent agencies, (2) ensuring that significant guidance documents receive a similar level of analysis and public input as rulemaking, (3) expanding the coverage and effectiveness of UMRA, and (4) amending the RFA to require agencies to consider indirect effects of their regulations.

#### 1. Codify Requirements for Regulatory Impact Analysis

The executive branch has generally taken the lead on decisional criteria for analyzing and developing new regulations. For over thirty years, presidents of both parties have issued executive orders articulating nearly identical regulatory analysis principles to guide regulatory decisions, and at least since 1980, there have been attempts to codify these executive requirements in statute.[55] Several such bills have been referred to this Committee this year.[56]

Though the creation of a statutory obligation for meeting these regulatory impact analysis standards is probably not necessary to ensure future presidents continue to endorse them, codifying the requirements could have several advantages. First, such legislation would lend Congressional support to these nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit to Americans.[57] Second, legislation could apply these requirements to independent agencies

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[55] *See* 1980 Economic Report, *supra* note 41, at 123.

[56] For example, S. 602 and S. 358.

[57] Section 1(a) of Executive Order 12866 states the regulatory philosophy as follows:

> Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative



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(which Administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President).[58] The former OIRA administrators of both parties gathered at the 30th Anniversary conference hosted by the GW Regulatory Studies Center agreed on the importance of engaging independent regulatory agencies in regulatory analysis and oversight.[59] Third, Congress could make compliance with them judicially reviewable. Judicial review could be valuable, not because the courts have a particular expertise in regulatory analysis, but because agencies tend to take more seriously aspects of their mission that are subject to litigation. Like executive and Congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis.

The 112th Congress could consider legislation that simply adopts Executive Order 12866 (first issued by President Clinton in 1993) or even President Obama's recent Executive Order 13563, which incorporates E.O. 12866 by reference.[60] In my view, Congress should not limit legislation to codifying the requirement for benefit-cost analysis, but rather should capture the broader philosophy and principles articulated in E.O. 12866. For example, legislation should require that regulatory decisions be based on the identification of a compelling public need, an objective review of alternatives (including the alternative of not regulating), and an understanding of the distributional impacts of different approaches.

Additionally, legislation might emphasize certain features that members have found lacking in regulatory analyses (such as indirect effects, impacts on employment, risk assessment, analysis of non-regulatory alternatives, etc.).[61] It might also combine decisional criteria with procedural ones; for example, requiring that if certain decisional criteria are met (such as effects above a threshold), a rulemaking would follow a different procedural path (such as an advance notice of proposed rulemaking, or a formal hearing).[62]

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measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

[58] President Obama took an important step last week in an executive order that encouraged independent agencies to comply with the spirit of Executive Order 13563 and prepare public plans for evaluating existing regulations. However, this action did not require regulatory analysis, nor subject independent regulatory agencies to OIRA oversight. http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies

[59] Information and videos from the conference are available at www.RegulatoryStudies.gwu.edu.

[60] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

[61] For example, S. 1219 would require a "jobs impact statement," and Senator Roberts testified before this committee that his bill, S.358, would "strengthen and codify" Executive Order 13563. Statement available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6cb07bbd-a858-4495-b820-0726ae7d769b.

[62] For example, S. 1292 would require EPA to hold hearings on regulations that displace more than 100 jobs.



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### 2. Subject significant guidance documents to regulatory review and notice requirements

The CURB Act (S. 602) would take codification of regulatory analysis requirements one step further and apply them to guidance documents that have the effect of regulation. It would codify the 2007 Good Guidance Practices Bulletin to ensure that significant guidance documents are subject to OIRA regulatory review as well as public notice and comment requirements. This could be an important reform, as various authorities have raised concerns that agency guidance practices are sometimes used to circumvent rulemaking procedures, and recommended that they should be more transparent, consistent and accountable.[63]

### 3. Expand UMRA's coverage and accountability

The analytical requirements of Title II of UMRA are similar to those in Executive Order 12866. They both ask executive branch agencies to "assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector," and "select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule." But UMRA's coverage is much more limited than that of the Executive Order, so that, according to a recent CRS report,[64] 72 percent of the economically significant rules covered by the Executive Order are not covered by UMRA.[65] This limited coverage is compounded by the fact that UMRA's requirements for analyzing the effects of proposed regulations are largely informational and judicial review does not impose meaningful consequences for noncompliance.

Several bills before Congress would broaden UMRA's coverage. For example, S. 817 would amend it to include independent regulatory agencies (which are not currently bound by those Executive Orders) and broaden its coverage to align with that of Executive Order 12866 and President Obama's recent Executive Order 13563. It would make compliance with these requirements judicially reviewable under the APA, so that an agency's failure to justify not selecting the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," could be grounds for staying, enjoining, invalidating or otherwise affecting such agency rule. To make the executive branch more accountable for the goals of

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[63] Office of Management and Budget Bulletin No. 07-07, "Final Bulletin for Agency Good Guidance Practices." Footnote 2. Available at: http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf

[64] US CONG RESEARCH SERVICE, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES, Robert Jay Dilger and Richard S. Beth, 7-5700, R40957. (August 2010), *available at:* http://assets.opencrs.com/rpts/R40957_20100813.pdf

[65] Executive Order 13132, "Federalism," also guides agencies to consider impacts on state and local governments in developing regulations, but the ADMINISTRATIVE CONFERENCE OF THE UNITED STATES recently found that "compliance with these provisions has been inconsistent, and difficulties have persisted across administrations of both political parties," *available at*: http://www.acus.gov/wp-content/uploads/downloads/2011/01/Final-Recommendation.pdf



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UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies' actions.

Another approach would be to make a procedural change, so that unfunded mandates in federal regulations would not be effective until they received a joint resolution of approval by Congress, or were adopted by the affected state, local, or tribal government. Just as on-budget programs typically require both authorization and a specific appropriation by the legislature before they can spend public funds, it would be reasonable to ask federal agencies, not just to cite some broad delegated regulatory authority, but also to secure specific legislative approval before they mandate a substantial expenditure of public funds.[66]

### 4. Expanding the coverage of the RFA

The small business community has been frustrated that courts have interpreted the RFA's requirements to assess economic impact as applying only to direct compliance costs. They argue that agencies should consider reasonably foreseeable indirect economic impacts on small entities, such as increases in input prices (e.g., electricity or transportation) or state-level regulations issued pursuant to federal rules. This latter issue is particularly important for environmental regulations, where the "duty of regulating is passed on to the states without any corresponding analysis or requirements for states to consider less burdensome alternatives for small business."[67] Several current bills (including S. 1030) would amend the RFA to explicitly include indirect impacts.

S. 1030 would also require small business review panels for all agencies, rather than just EPA and the Occupational Safety and Health Administration, as required by SBREFA. It and S. 128 would provide penalty relief for small businesses under certain circumstances.

### 5. Should criteria supersede other statutes?

An important decision regarding all of these cross-cutting decisional criteria will be whether they supersede or are subordinate to the decision criteria expressed in individual authorizing statutes, such as Section 109 of the Clean Air Act, which has been interpreted as precluding the consideration of any factors other than human health in the setting of primary national ambient

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[66] This concept, which applies REINS-like approval procedures to unfunded regulatory mandates, is explored further in a commentary by GW Regulatory Studies Center Visiting Scholar, Brian Mannix *available at* http://www.regulatorystudies.gwu.edu.

[67] *Hearing on Legislation to Improve the Regulatory Flexibility Act Before the H. Comm. on Small Business*, 110th Cong. (2007) (testimony of Thomas Sullivan, Chief Counsel for Advocacy, Small Business Administration), *available at* http://archive.sba.gov/advo/laws/test07_1206.html.



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air quality standards.[68] Rather than creating a "supermandate," which has detractors, Congress may want to amend statutes that ignore or explicitly prohibit analysis of tradeoffs and lead to regulations with questionable benefits that divert scarce resources from more pressing issues.

Only Congress can address aspects of legislation that preclude reliance on sound decisional criteria or hinder APA procedures (such as requirements that agencies issue interim final regulations that limit public comment).

## IV. Conclusion

For over a century, legislators have delegated authority to executive branch agencies, and the volume and reach of regulation have grown. Like government spending programs, funded by taxes and deficits, regulations are designed to achieve popular social goals. However, there is no regulatory equivalent to the fiscal budget—no transparent accounting of spending priorities proposed by the President and appropriated by Congress. Americans are often unaware of regulations' impacts because their costs are hidden in higher prices paid for goods and services, reduced competitiveness, and in jobs and other opportunities foregone.

From time to time, concerns about the cumulative impact of regulations have reached a level that led to meaningful regulatory reform. Now may be such a time. This Committee is considering several bills that would reform the procedures by which regulations are issued, clarify the decision criteria agencies use to develop regulations, and take responsibility for the content of individual regulations promulgated pursuant to statutes. I appreciate this Committee's interest in measures to improve regulatory outcomes and respectfully encourage the Committee to treat these as nonpartisan. Like the bipartisan regulatory reform efforts of the 1970s and 1980s, which brought about unexpected innovation, higher quality and lower prices in previously regulated industries, bipartisan reforms today could spur economic growth and improve the welfare of American families, workers and entrepreneurs.

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[68] The Administrative Conference of the United States has conducted studies and provided recommendations on applications of these decision criteria that the Committee may find useful, including: 79-4 Cost-Benefit Analysis in Regulatory Decision-Making; 85-2 Regulatory Analysis of Agency Rules; 88-9 Presidential Review of Agency Rulemaking [60 Fed. Reg. 56312 (Nov 8, 1995)]; and Paul Verkuil, *A Critical Guide to the Regulatory Flexibility Act,* Duke L.J. 213 (1982).



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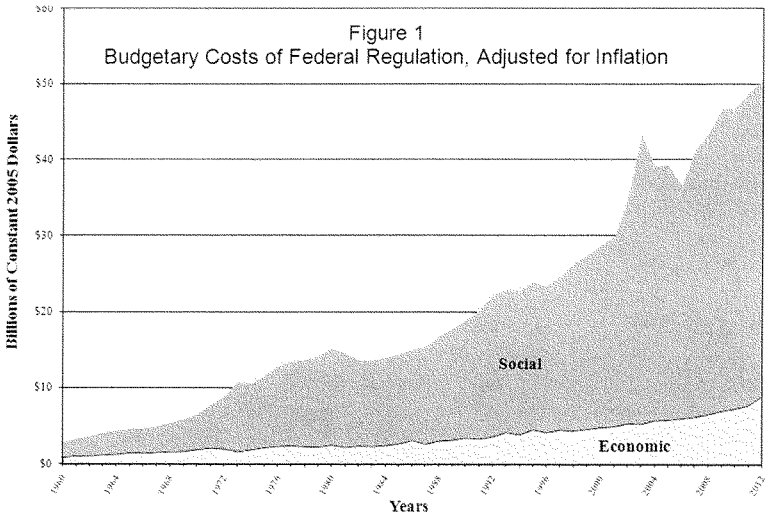
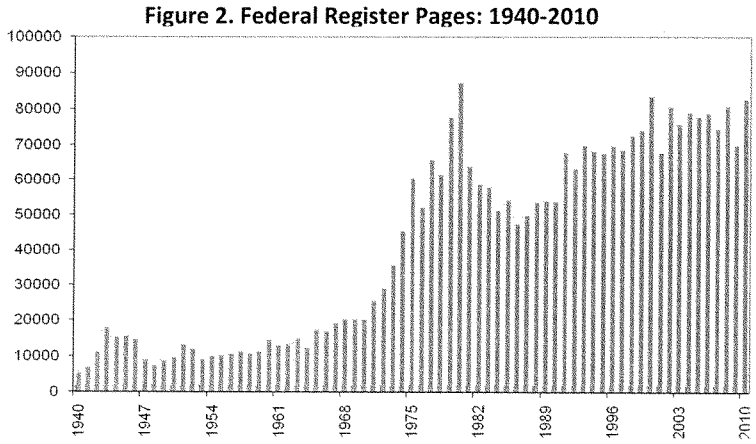



Source: Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center. Derived from the *Budget of the United States Government* and related documents, various fiscal years.



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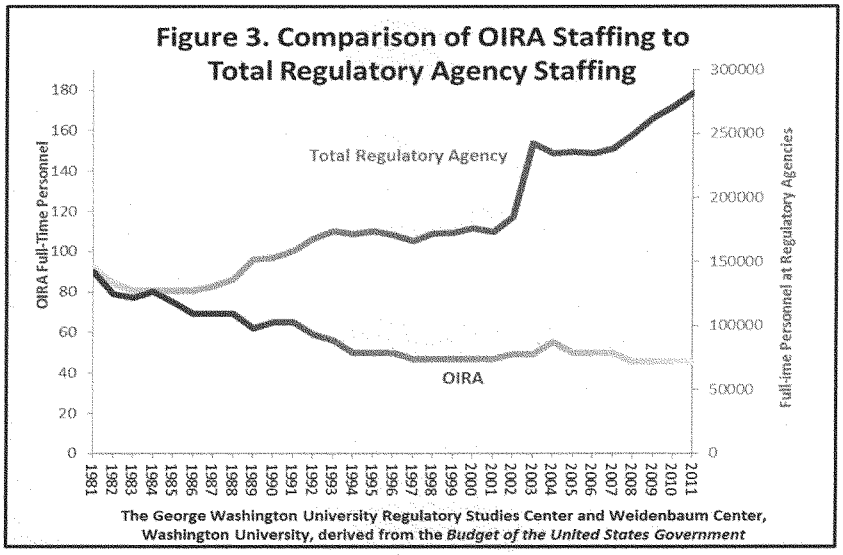


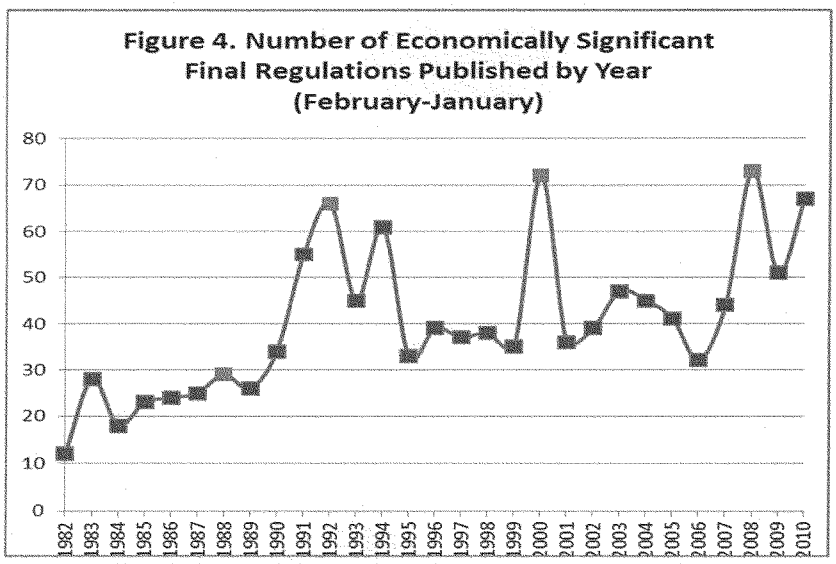


Red points signify "midnight" years (the last year of a president's term). Source: www.RegInfo.gov



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David Goldston
Director of Government Affairs
Natural Resources Defense Council

Testimony before the Senate Homeland Security and Government Affairs Committee

July 20, 2011

Mr. Chairman, Senator Collins and Members of the Committee,

Thank you for inviting me to appear before you today. This hearing concerns a range of bills, but all of them would have a similar impact – they would all further complicate the regulatory process, with an eye toward making it harder for agencies to carry out their legal mandate to protect the public.

With that in mind, I'd like to start by asking everyone 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 the 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 burdens on small business, 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.

Regulatory agencies, like all human institutions, are imperfect, but it's not clear what fundamental problem the bills before this Committee are trying to solve. The public is unlikely to gain from the duplicative analyses, additional lawsuits, creative accounting and elaborate procedures contemplated in these bills; it's not even clear business would gain from adding potentially costly new loops in an already highly elaborated process. But it is clear that there will be opportunity costs if agencies need to focus all their resources on additional process rather than on protecting the public.



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The closest anyone ever seems to come to describing the problem that these bills are intended to solve is a general lament that the nation is "over-regulated." But the appropriate response to that claim is, "Compared to what?" We are certainly over-regulated compared to some kind of Messianic state in which everyone would have complete liberty with the knowledge that it would never be abused. We are over-regulated compared to what would be needed in an 18th century society of small towns and farms.

It's not so apparent that we are over-regulated given the actual world we live in today, with its global corporations and industrial pollutants, and problems that individuals have little capability to counter and that corporations have limited incentive to address. That said, even Adam Smith recognized in 1776 that markets have their limits and that the visible hand of government was sometimes needed to keep the market system afloat.

We certainly have ample experience of late seeing what can happen in a world that is under-regulated. In that world, banks can blithely decide that housing prices can never fall, bringing the economy to its knees; eggs can spread salmonella to households throughout the country; and oil wells can spew massive amounts of petroleum into fertile seas with companies not having so much as a workable response plan.

The problems that pending regulations are designed to address are every bit as real as the ones we casually and catastrophically ignored not so long ago. And many of them are coming forward now not because of some paroxysm of regulatory fervor on the part of the Obama Administration, but because of the continuous working of underlying statutes and court rulings enforcing them.

In many ways, the bills before the Committee are really "work-arounds," efforts to monkey with regulatory procedure rather than debating whether the statutes underlying regulation are doing their jobs. Perhaps this is because the public would be far more alarmed by efforts to undermine fundamental protections for clean air, clean water and the like, than they are by seemingly benign and arcane changes in regulatory process.

The bill that takes this approach to its logical extreme is the REINS Act (S. 299), which would block any major safeguard from moving forward unless Congress approved it within 70 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



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to make Congress the arbiter of each and every regulatory call in an effort to shut down the system.

The other bills before the Committee are not as radical as the REINS Act – that would be hard to achieve – but they share its purpose of making it harder for agencies to carry out their legislative mandates in an attempt to advantage corporate interests.

These bills presume a broken regulatory system when study after study has found the benefits of regulation to far outstrip the costs (and it is the proponents of these bills who want to elevate the significance of cost-benefit analysis). Studies have also found repeatedly, and unsurprisingly, that in most cases the expected costs of regulation are greater than what the actual costs turn out to be, often by a large margin. Moreover, studies have found the impact of regulation on jobs to be neutral to positive.

So, 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.



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TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

# NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business.®

**United States Senate Committee on Homeland Security and Government Affairs**

on the date of

July 20, 2011

on the subject of

A Review of Legislative Proposals, Part II

Dear Chairman Lieberman and Ranking Member Collins:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the U.S. Senate Committee on Homeland Security and Government Affairs hearing entitled "A Review of Legislative Proposals, Part II."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

NFIB and the small business owners it represents commend this Committee for examining legislative solutions to help grow the economy by reducing overly burdensome regulation. NFIB believes it is vitally important to the nation's economy to achieve regulatory reform now, especially when there is momentum to do so in the 112th Congress. Various proposals have been introduced or discussed that would improve current law. We hope the Committee takes the needed steps to act in a bipartisan way and pass these important provisions.

The burden of regulation on small business has been among small business' top ten concerns for years. The NFIB Research Foundation's Problems and Priorities, which has been conducted every four years since 1982 and is designed to establish the relevant importance of small business concerns, has found "unreasonable government regulations" to be a top ten problem for small businesses for the last two decades.[1]

Overzealous regulation is particularly burdensome in times like these when the nation's economy remains sluggish. Unfortunately, the regulatory burden on small business has only grown. A recent study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy found that the total cost of regulation on the American economy is $1.75 trillion per year.[2]

If that number is not staggering enough, the study reaffirmed that small businesses bear a disproportionate amount of the regulatory burden. The study found that for 2008,

[1] Phillips, Bruce D. and Wade, Holly, "*Small Business Problems & Prioirities*", June 2008, at Table 5.
[2] Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms*, 2010. http://www.sba.gov/advo/research/rs371tot.pdf



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small businesses spent $10,585 per employee on regulation, which amounts to 36 percent more per employee than their larger counterparts.

Job growth in America remains at recession levels. Small businesses create two-thirds of the net new jobs in this country, yet those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007, according to the Bureau of Labor Statistics.[3] Moreover, for the first six months of 2011, 17 percent of small businesses responding to the NFIB Research Foundation's *Small Business Economic Trends* cite regulation as their single most important problem.[4] Thus, reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

NFIB believes that Congress must take actions like those proposed in the legislative proposals, which are the subject of this hearing to level the playing field. NFIB believes that the following ideas would help improve regulatory conditions for small businesses.

**Expansion and oversight of SBREFA**

The Small Business Regulatory Enforcement and Fairness Act (SBREFA) — when followed correctly — can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. NFIB supports reforms, like in S. 1030, the "Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act of 2011," introduced by Senator Olympia Snowe, which would expand SBREFA's reach into other agencies and laws affecting small businesses. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts small businesses, and how the agency can develop simple and concise guidance materials.

Furthermore, Congress should take steps to require independent agencies to follow SBREFA requirements. Last year, Congress took an important initial step to do this by requiring the new Consumer Financial Protection Bureau to conduct SBAR panels on the rules that will affect small businesses. Now more than ever, the rules promulgated by independent agencies have a considerable impact on small businesses. Congress should hold these independent agencies accountable for their effect on the small business economy.

In reality, small business owners are not walking the halls of federal agencies lobbying about the impact of a proposed regulation on their businesses. Despite great strides in regulatory reform, too often small business owners find out about a regulation *after* it has taken effect. Expanding SBAR panels and SBREFA requirements to other agencies would help regulators learn the potential impact of regulations on small business before they are promulgated. In addition, it would help alert small business owners to new regulatory proposals in the first instance.

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[3] http://www.bls.gov/bdm/
[4] NFIB Research Foundation, *Small Business Economic Trends*, July 2011.



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While SBREFA itself is a good first step, in order for it to provide the regulatory relief intended by Congress, the agencies must make good-faith efforts to comply. As an example, the Environmental Protection Agency's (EPA) proposed Boiler MACT rule from last year failed to heed the recommendation of its SBAR panel to adopt a health-based standard and instead proposed a much higher standard that is virtually impossible to attain at any reasonable cost. This higher standard provided little, if any, additional benefit to the public over the health-based standard. Moreover, EPA is now revising its rule because the standard it proposed is too expensive and not practically attainable. If the agency had followed the SBAR recommendations in the first instance, it would not have to jump through these additional hoops.

Committees with oversight authority should hold agencies accountable to the spirit of the law, and the Office of Advocacy should uphold its obligation to ensure that agencies consider the impacts of their rules on small businesses. There are instances where EPA declined to conduct an SBAR panel despite developing significant rules, or a rule that would greatly benefit from small business input.

Congress should require agencies to perform regulatory flexibility analyses. Agencies should also be required to list all of the less-burdensome alternatives that they considered, and in the final rule, provide an evidence-based explanation for why they chose a more-burdensome alternative versus a less-burdensome option — or why no other means were available to address a rule's significant impact. In addition, agencies should address how their rule may act as a barrier to entry for a new business.

SBREFA contains a process known as Section 610 review, which requires agencies to periodically review existing rules and determine if they should be modified or rescinded. NFIB supports this requirement, but believes it could be improved — since all too often it is disregarded by agencies. NFIB supports legislation that would ensure agency compliance with 610 reviews.

Finally, when SBREFA was enacted it required all agencies to perform a one-time report on how they had reduced penalties for violations from small businesses. NFIB believes that Congress should explore making such reports an annual requirement. Many of the original reports occurred at least a decade ago. Congress should investigate ways to make agencies provide updated information and require that information on an annual or biannual basis.

**Indirect costs in economic impact analyses**

Regulatory agencies often proclaim indirect benefits for regulatory proposals, but decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. As an example, environmental regulations have particularly high costs. Whether a regulation mandates a new manufacturing process, sets lower emission limits, or requires implementation of new



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technology, the rule will increase the cost of producing goods and services. Those costs will be passed onto the small business consumers that purchase them. Does that mean that all environmental regulation is bad? No. But it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals. Following are recent examples of the indirect cost of regulation on small business:

- NFIB would like to thank Senator Collins for ensuring more small business owners had a chance to learn about and be certified under EPA's lead renovation and repair rule. Although the rule took effect in April of last year, Senator Collins was successful in pushing the effective date back to October 2010. That rule, however, continues to negatively impact small business. NFIB member Jack Buschur, of Buschur Electric in Minster, Ohio, recently testified that because of the time and financial costs of EPA's lead renovation and repair rule he will no longer bid on residential renovation projects.[5] Because he will no longer bid on these projects, Mr. Buschur will not be hiring new workers at his company of 18 employees, down from 30 employees in 2009.[6]

- NFIB member Hugh Joyce, James River Air Conditioning, Inc., Richmond, Virginia, projected in testimony that new greenhouse gas regulations will add 2 percent to 10 percent in consulting costs to his projects.[7] This is particularly telling because Mr. Joyce is committed to doing business in an environmentally-friendly manner. He is a member of the U.S. Green Building Council and conducts LEED certified green housing projects.

Reforms like those in S. 602, the "Clearing Unnecessary Regulatory Burdens Act" or "CURB Act," and S. 1030 would be a great start in ensuring that agencies make public a reasonable estimate of a rule's indirect impact. This requirement exists if agencies follow the Regulatory Impact Analysis (RIA) mandate contained in Executive Order 12866 signed during the Clinton Administration. Congress should hold agencies accountable and clarify the agencies' responsibility for providing a balanced statement of costs and benefits in public regulatory proposals.

**Strengthen the role of the Office of Advocacy**

The Office of Advocacy plays an important role within the government to ensure that federal agencies consider the impact of regulations on small businesses. This role was further strengthened by executive order 13272. This order required agencies to notify the Office of Advocacy of any draft rules that may have a significant impact on small businesses, and "[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule."

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[5] Testimony of Jack Buschur, before the House Committee on Oversight and Government Reform, "Regulatory Impediments to Job Creation," February 10, 2011.
[6] Id.
[7] Testimony of Hugh Joyce, before the House Energy and Commerce Subcommittee on Energy and Power, "EPA's Greenhouse Gas Regulations and Their Effect on American Jobs," March 1, 2011.



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Despite this executive order, agencies frequently fail to give proper consideration to the comments of the Office of Advocacy. In addition, there is no mechanism for resolving disputes regarding the economic cost of a rule between the agency and the Office of Advocacy.

NFIB believes that the Office of Advocacy needs to be strengthened. The Chief Counsel for Advocacy should have the ability to issue rules governing how agencies should comply with regulatory flexibility requirements. This will help ensure that agencies fully consider the views of the Office of Advocacy.

**Increase judicially reviewable agency requirements within SBREFA**

As this committee well knows, SBREFA provided important reforms to the Regulatory Flexibility Act (RFA), including providing that agency decisions are judicially reviewable once a rule is finalized and published in the *Federal Register*. However, waiting until the end of the regulatory process to challenge a rule creates uncertainty for the regulated community — which directly stifles employment growth. Under the current system, an agency could make a determination of no significant impact on a substantial number of small entities on its initial regulatory flexibility analysis that may be years before the rule is finalized.

In addition, we have had the experience of filing a lawsuit when a rule is finalized, won the case, yet received a resolution that was of no benefit to small business. About a decade ago, the U.S. Army Corps of Engineers (USACE) issued a rule on what it considers a wetland pertaining to its Nationwide Permits (NWP) program. The USACE performed no regulatory flexibility analysis and instead pushed through the rule using a "streamlined process." After four years of legal battles, we emerged victorious – a federal court ruled that the agency had violated the RFA. Yet, instead of sending the rule back to be fixed, the court only required that the USACE not use its streamlined process in the future. Small business owners affected by the NWP rule realized no relief.

NFIB supports S. 1030, which allows small business advocates judicial review during the proposed rule stage of rulemaking.

**Codify Executive Order 13563**

NFIB supports legislation, like S. 358, the "Regulatory Responsibility for our Economy Act of 2011," which would codify Executive Order 13563 and strengthen the cost benefit review of regulation. Among other things, this legislation would statutorily ensure that agencies are examining the true cost of regulations, tailoring regulatory solutions so that they are least burdensome and most beneficial to society, encourage public participation in the regulatory process, promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and periodically review significant regulatory actions.



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**Waiver for First-Time Paperwork Violations**

Additionally, Congress should pass legislation, which would waive fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because of a lack of specialized staff, mistakes in paperwork will happen. If no harm is committed as a result of the error, the agencies should waive penalties for first-time offenses and instead help owners to understand the mistake they made. We appreciate that Senator Collins and Senator Vitter have introduced legislation to add a first time waiver protection in law, and we look forward to working with them toward finding an effective solution.

**Agency focus on compliance**

NFIB is concerned that many agencies are shifting from an emphasis on small business compliance assistance to an emphasis on enforcement. Unfortunately, the evidence in this area is plentiful. Both of the five-year strategic plans released last year by EPA and the Department of Labor strongly emphasized increased enforcement. In OSHA's FY 2011 budget request, it proposed shifting 35 staff members from compliance assistance to enforcement activities. Most recently, OSHA has proposed significant changes in its On-site Consultation Program that would reduce incentives for small businesses to participate and identify potential workplace hazards. Small businesses rely on compliance assistance from agencies because they lack the resources to employ specialized staff devoted to regulatory compliance. Congress can help by stressing to the agencies that they need to devote adequate resources to help small businesses comply with the complicated and vast regulatory burdens they face.

With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burden on small businesses. NFIB is hopeful that the 112th Congress can pass regulatory reforms that would improve current law and level the regulatory "playing field" for small business.

NFIB looks forward to working with you on this and other issues important to small business.

Sincerely,

Karen R. Harned

Karen R. Harned, Esq.
Executive Director
NFIB Small Business Legal Center



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# CORE VALUES

## We believe deeply that:

Small business is essential to America.

Free enterprise is essential to the start-up and expansion of small business.

Small business is threatened by government intervention.

An informed, educated, concerned, and involved public is the ultimate safeguard for small business.

Members determine the public policy positions of the organization.

Our employees and members, collectively and individually, determine the success of the NFIB's endeavors, and each person has a valued contribution to make.

Honesty, integrity, and respect for human and spiritual values are important in all aspects of life, and are essential to a sustaining work environment.

**NFIB**

The Voice of Small Business.

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AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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**LEGISLATIVE ALERT!**

(202) 637-5057

July 19, 2011

The Honorable Joseph Lieberman
Chairman
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

Dear Senators Lieberman and Collins:

In conjunction with the Senate Homeland Security and Governmental Affairs Committee July 20, 2011 Hearing on "Federal Regulation: A Review of Legislative Proposals: Part II," I am writing to express the views of the AFL-CIO on regulatory process and on regulatory reform legislation that is under consideration by the committee.

Our country's system of regulations is the product of many decades of effort to ensure a basic level of protection and fairness for our nation's citizens. These regulations implement the laws passed by the Congress to protect our environment, ensure safety of workers, protect consumers from dangerous products, prohibit discrimination, secure our financial system among other things. Many of these laws were enacted in response to catastrophes or crises that caused great harm, and a determination made that government action was needed to stop abuses by corporations, employers and other.

These laws and regulations have been successful. Our air and water are cleaner, our workplaces are safer, and there is less discrimination. But as evidenced by the BP Gulf Coast oil spill, the Massey Energy mine explosion, the financial collapse and more, abuses continue and significant problems remain that must be addressed.

Unfortunately, some in Congress and many in the business community are promoting legislation that would impede or even cripple the regulatory process making it difficult if not impossible for the government to act to issue needed protections. This legislation includes S. 1030, the "Freedom from Restrictive Executive Demands and Onerous Mandates Act," S. 358, the "Regulatory Responsibility for Our Economy Act," S. 128, the Small Business Paperwork Relief Act," and S. 299, "Regulations from the Executive in Need of Scrutiny (REINS) Act," to name a few.

These bills vary in their reach and requirements. Some would impose new requirements for additional analyses of draft or proposed rules, add requirements for review under the Small Business Fairness Enforcement Act (SBREFA), provide for judicial review of agency analyses and proposals that is in addition to and separate from judicial review for final rules, penalize agencies that fail to conduct proper analyses or strip them of their regulatory authority, and require agencies to conduct extensive look backs and reviews of existing rules. Others would limit agency enforcement actions. And one measure – the REINS Acts – would radically alter the regulatory system by requiring Congressional action and approval of all individual major rules before they could go into effect. All of these bills would add layers of bureaucratic red tape and additional requirements to the rulemaking process, give greater power and opportunities for regulated interests and opponents of regulation to block or delay needed rules. We urge the committee to reject this legislation and instead focus on how the regulatory process can be improved and strengthened to better protect citizens from harm.

It is the AFL-CIO view and experience, based on decades of involvement in the development of federal regulations, that the biggest problems with the current regulatory system is that it is cumbersome, bureaucratic, slow and fails to produce protections in a timely manner. In addition to complying with the requirements of their organic statutes, agencies are required to conduct and prepare regulatory flexibility analyses at the proposed and final rule stage to assess impacts on small businesses (which is defined broadly) and to attempt to lessen those impacts, prepare regulatory analyses on significant rules under Executive Order 12866, and submit them for OMB review at draft proposed and draft final stages, estimate paperwork burdens on proposed and final rules. Three agencies – EPA, OSHA and now the new Consumer Financial Protection Bureau – must convene special small business panels, in conjunction with the Small Business Administration, to seek input from small business groups on the draft regulatory text and preliminary economic analysis of rules with significant small business impacts before rules are even proposed. These and other requirements, which have been layered on over the years have added significant costs and delays to the issuance of needed rules.

In the worker safety area, where the AFL-CIO has extensive regulatory experience, it now takes the Occupational Safety and Health Administration (OSHA) six to ten years to develop and issue a rule on a major safety or health hazard, even when the rule is not controversial. For example, in 2002 OSHA began rulemaking on a cranes and derricks in construction rule in response from requests from industry groups. A negotiated rulemaking committee comprised of representatives from industry, labor and the government produced the text of a draft proposed rule in 2004. Despite unanimous support from the committee, the rule still had to go through all the steps and analysis - SBREFA, Regulatory Flexibility Analysis, EO 12866 regulatory impact analysis and review, and the OSHA rulemaking process, which includes public hearings. The final OSHA cranes and derricks rule was not issued until August 2010, more than 8 years after the process began and 6 years after the committee made its recommendation. The delays in the rulemaking had real costs – both in lives and in dollars. According to OSHA's regulatory analysis on the rule, the six year delay resulted in 132 unnecessary deaths and 1,050 preventable injuries. The net cost of failing to implement the rule for those six years was $331.2 million. During the six years it took to finalize the rule, there were several high profile incidents in New York City, Miami and Las Vegas where cranes on construction sites in collapsed leading to worker deaths that could have been prevented.



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Similarly, OSHA is currently in the process of developing a new health standard on crystalline silica, a long-recognized serious occupational health hazard that causes disabling, sometimes fatal lung disease and lung cancer. The present silica standard is more than 40 years old and does not protect workers from disease. An estimated 280 workers die annually in the United States from silicosis and thousands more develop disabling disease. The current silica rulemaking to protect workers from silica was initiated in 1997, more than 14 years ago. The required SBREFA review on the draft rule was completed in 2003, but years of foot dragging by the Bush administration stalled progress on this rule. The draft proposed silica rule was sent to OMB for review in February, 2011 but OMB has extended its review, causing further delays and there is no indication as to when OSHA's silica rule will be proposed let alone issued in final form so that workers can be protected from this well-known hazard.

It is the view of the AFL-CIO that a regulatory process which takes 7 to 10 years – or even longer – to develop rules on well-recognized workplace safety and health hazards is not working and failing to protect workers. Much of this delay is due to requirements that have been added by overarching regulatory reform statutes, executive orders or other similar requirements that have been imposed without additional resources or evaluated for an assessment of impact on the ability of the government to protect the public from harm.

Numerous reviews have and are being conducted of the impact of rules, individually or in the aggregate, on regulated parties and the economy. But no reviews or analyses have been conducted of the costs, impact, utility or effectiveness of all the additional requirements that have been added to the regulatory process over the past 30 years.

The AFL-CIO believes it would be useful for this committee to examine in detail the actual operation of the regulatory process at various agencies and how they are working or not working, and develop recommendations on how the regulatory system can be improved to better protect the public. We look forward to working with the committee to this end.

The AFL-CIO appreciates the opportunity to present our views to the committee and requests that this letter be entered into the record of the July 20 hearing.

Sincerely,

William Samuel, Director
Government Affairs Department

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July 19, 2011

The Honorable Joseph Lieberman
Chairman
Senate Homeland Security and Governmental Affairs Committee
U.S. Senate
Washington, DC 20510

The Honorable Susan Collins
Ranking Member
Senate Homeland Security and Governmental Affairs Committee
U.S. Senate
Washington, DC 20510

Dear Senators Lieberman and Collins:

The American Sustainable Business Council through its members represents more 100,000 businesses. They and other businesses care about their environment and fair regulation as well as their profits. We are writing to urge you to take great care when considering the current set of legislative proposals that would impact our nation's system of protections.

Many small business owners have lived their entire lives in the communities where they work, and their livelihoods and the quality of their lives are directly related to the quality of life of their communities. They have what is called a triple bottom-line philosophy of seeking profits and prosperity, but also operating a successful business that wants to support the environment and has a social responsibility to their employees and communities.

We certainly believe that there is the need to identify non-functioning or wasteful rules that are unnecessary and can burden businesses or agencies. However, we advocate for responsible reform that leaves in place and ensures proper enforcement of the many hard-won regulations that protect the health and safety of Americans and support the growth of a vibrant economy.

The fact is that time and again, the country feels the impact of lax regulations more broadly – from the cost of a near-depression to the cost of environmental clean-up. This is not good for most businesses or the economy. In the short run, regulations require investment, but that does not translate into a drag on the economy – in fact, analyses show that the economic benefits of smart regulation greatly outweigh their costs.

The Office of Management and Budget (OMB) studied all the major regulations issued between 2001 and 2010 and found that compliance costs of $44 billion to $62 billion were dwarfed in comparison to the $136 billion to $651 billion of annual benefits that those rules created. OMB, in part, calculates the economic benefits of regulations by assigning monetary values to the human lives saved. We would like to think that saving those lives alone would be reason enough to applaud, rather than scorn, the government's regulatory efforts.

Those investments also create jobs. And, if companies began investing earlier, they would reduce overall costs, benefit from early compliance and be in a position to spread out the cost of regulations over a longer period of time, thus dampening any economic impact.

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Additionally, our businesses understand the preference of consumers for companies and products that do not have negative impacts, particularly on their families, health and the environment. Meeting those and other related criteria have been meant increased sales and profitable businesses.

Instead of focusing on dismantling important health and safety regulations, we encourage Congress to focus its energy on jump-starting the economy in other more productive ways. We suggest that there are many more opportunities that would better support business growth:

- Increasing capital access to small business and entrepreneurs to create jobs;
- Incentivizing new forms of energy, clean transportation and other technologies that will help us lead in the 21st century instead of lagging behind our worldwide competitors;
- Passing legislation that would encourage greater use of non-toxic chemicals, which help save companies compliance dollars, increase worker safety and reduce costs to state and local governments; and
- Leveling the playing field by precluding companies from escaping their corporate tax obligations by using tax havens outside the United States.

Many of our businesses have proven that we can thrive in a world that encourages a balance in meeting environmental goals, employee goals and profit. We urge Congress to move away from dismantling of sound regulations that protect our citizens and toward more effective strategies to grow our economy.

We must work toward real, forward-thinking regulatory reform that helps us innovate and build a new, stronger economy.

Sincerely,

David Levine, Co-founder, Executive Director

COALITION FOR SENSIBLE SAFEGUARDS

July 20, 2011

**Proposed Legislation Will Slow or Shutdown Agency Rulemaking Process**

In the 112th Congress, Senators have put forth legislative proposals that they claim will reform a broken regulatory process. Rather than improving the regulatory process that has resulted in so many critical public protections and safeguards, these proposals would slow or entirely shutdown the agency rulemaking process. The Coalition for Sensible Safeguards believes that the following legislative proposals are unnecessary and would harm consumers and working families:

- S. 299 Regulations from the Executive in Need of Scrutiny Act (REINS) Act: Introduced by Sen. Rand Paul
  - This bill would require both Congress and the President to affirmatively approve any 'major' rule within 70 legislative days. It would allow political considerations in Congress to trump agency expertise in highly technical matters. Under this bill, Congressional or Presidential inaction would spell doom for important rules that agencies spent enormous time and resources crafting. This will in turn discourage agencies from undertaking lengthy rulemakings at the outset.
- S. Amdt. 390 Small Business Regulatory Freedom Act: Introduced by Sen. Snowe
  - This bill would lead to more litigation and regulatory uncertainty by allowing for increased judicial intervention in regulatory process, delaying rulemakings significantly as a result. It would also require agencies to engage in a wasteful and highly speculative determination of indirect costs on small business, and force agencies to expend limited resources on review of existing rules rather than their proper mission of putting forth new rules to protect the public.
- S. 602 Clearing Unnecessary Regulatory Burdens Act: Introduced by Sen. Collins
  - This bill would needlessly codify Executive Order 12,866, which would push reluctant courts to second-guess highly technical agency analyses, require agencies to discern vaguely defined "indirect effects" when analyzing costs of a rule, undermine independent regulatory agencies by expanding executive authority over them, and extend the lengthy full rulemaking process to non-binding agency guidance documents geared towards resolving regulatory uncertainty.

*www.SensibleSafeguards.org*



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- S. 358 Regulatory Responsibility for Our Economy Act: Introduced by Sen. Roberts
    - This bill selectively codifies Executive Order 13563 by limiting agency consideration of a rule's qualitative benefits regarding human dignity, fairness, and distributive impacts thereby disproportionately emphasizing the role of costs in an agency's cost-benefit analysis. A rule's essential but hard to quantify benefits, for example the benefit to a disabled veteran's dignity of having handicapped restroom access, would be ignored when an agency decides if a rule's benefits justify its costs.
- S. 128 Small Business Paperwork Relief Act: Introduced by Sen. Vitter
    - This bill allows businesses that qualify as small businesses but employ workforces up to 1500 employee in some industries to escape fines for paperwork violations. The Office of Information and Regulatory Affairs already provides paperwork relief for small businesses under the Paperwork Reduction Act.
- S. 1189 Unfunded Mandates Accountability Act: Introduced by Sen. Portman
    - This bill would tie agency hands, including independent regulatory agencies, by forcing them to adopt rules based on their cost rather than their effectiveness. Agencies must adopt the "least costly" regulation and must always conduct cost-benefit analyses, even when the authorizing statute does not permit it (i.e. Clean Air Act). In addition, the bill would make agency selection of "least costly" regulation and cost-benefit analyses judicially reviewable, placing reluctant courts in the difficult position of judging highly technical agency science.



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*Leading the Fight for Safe and Healthy Workplaces!*

July 19, 2011

The Honorable Joseph Lieberman
Chairman
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

Dear Senators Lieberman and Collins:

We ask you to oppose legislation that would hobble the regulatory system by weakening strong safeguards and preventing the effective enforcement of regulations.

Over the course of the past 40 years, we have seen how regulations issued by the Occupational Safety and Health Administration and the Mine Safety and Health Administration have saved the lives of literally thousands of working people and likely prevented tens of thousands of serious injuries. Regulations from these and other federal agencies, which implement the statutes passed by Congress, are a critical way to protect people from harm. Not only have they saved the lives of workers, but they have also protected Americans from polluted air and water, fatal products, and tainted food. We need protections for Americans to ensure that those who work hard and play by the rules are not disadvantaged in the marketplace by those who skirt those same rules. Regulations need to be strictly enforced. The BP oil spill, the Massey Energy mine explosion, and other recent disasters, were caused by inadequate regulations—not overzealous enforcement. Congress needs to work hard to *strengthen* the rulemaking process—not make it more complicated and burdensome.

Your June 23 hearing gave several Senators the opportunity to discuss their legislative proposals to radically restructure the regulatory process. We urge this committee to reject these bills. Instead of streamlining the regulatory process, they will add new, unnecessary bureaucratic hurdles that will delay regulations that protect public health, safety, and the environment. Some expand judicial review, potentially leading to more litigation that will cause regulatory delay. Others cater to special interests, including big corporations that disguise themselves as small businesses. Some, like the REINS Act, would tip the balance of power between Congress and Executive branch inappropriately in favor of Congress, further politicize the rulemaking process, and prevent important regulations from taking effect. And others mandate unnecessary studies of regulations with

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*Leading the Fight for Safe and Healthy Workplaces!*

COSH

the intention of postponing them. For example, the TRAIN Act, which recently passed two key committees in the House of Representatives, could delay proposed standards for ozone, which could save up to 12,000 lives and result in 2.1 million fewer school absences every year. We strongly oppose these bills.

In order for America to once again be a government of, by, and for the people, we need our government to work for *us*—not special interests. For these reasons, we urge you to oppose these bills in the strongest possible terms.

We look forward to working with you to improve the regulatory system.

Sincerely,

Thomas A O'Connor

Thomas O'Connor

Executive Director

**National Council for Occupational Safety and Health**
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July 20, 2011

The Honorable Joseph Lieberman
Chairman
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

Dear Senators Lieberman and Collins:

Dēmos is a non-partisan, non-profit policy research organization with the goals of creating a more robust democracy, greater economic opportunity, and a more capable and effective public sector. Through our efforts to shape and pass the Wall Street Reform and Consumer Protection Act of 2010, as well as our current collaboration with the Coalition for Sensible Safeguards, we have conducted research and advocacy in support of good rules to protect the American economy.

After careful consideration of the legislative proposals discussed before the Homeland Security and Government Affairs Committee in your June 23rd hearing on regulatory reform, **we have concluded that these reforms would weaken essential safeguards, and so we urge you to reject them.**

Throughout American history, good rules have protected us from polluted air and water, fatal products, tainted food and irresponsible speculation in our banking system. The BP oil spill, the Massey Energy mine explosion, and the near collapse of our economy in 2008 and 2009, to name just a few of the recent disasters we have witnessed, were all caused by inadequate regulations—not by unchecked regulators. Congress needs to work hard to *strengthen* the rulemaking process—not make it more complicated and burdensome for federal agencies to safeguard the American people.

The legislative proposals discussed at your June 23rd hearing would radically restructure the regulatory process. We urge the committee to reject these proposals. Instead of streamlining the process, they would add new, unnecessary hurdles that would delay the enforcement of regulations to protect the public.

Some of the proposals would needlessly expand the already robust levels of judicial review available during the regulatory process. This will lead to more litigation and regulatory delay. Others mandate unnecessary studies of regulations with the intention of delaying their enforcement. For example, the TRAIN Act, which recently passed two key committees in the House of

Representatives, could delay proposed standards for clean air, specifically ozone. These proposed standards would save up to 12,000 lives and result in 2.1 million fewer school absences every year.

The worst of the proposals, the REINS Act, would make it nearly impossible for rules to be promulgated by agencies in the timely manner demanded by congressionally passed legislation. We strongly oppose these proposals, and urge you to reject them.

For more information from Dēmos and our coalition partners on regulatory issues, please see the following: The Cost of Regulatory Delay, Good Rules

Please do not hesitate to contact me with questions or comments at hmcghee@demos.org or 202-559-1543 ext. 105.

Sincerely,

Heather C. McGhee
Director, Dēmos Washington Office
1710 Rhode Island Avenue NW
12th Floor
Washington, DC 20036

*Small business owners. Small business values.*

July 19, 2011

The Honorable Joseph Lieberman
Chairman, Senate Homeland Security and Governmental Affairs Committee
Washington, DC 20510

The Honorable Susan Collins
Ranking Member, Senate Homeland Security and Governmental Affairs Committee
Washington, DC 20510

Dear Senators Lieberman and Collins,

On behalf of the Main Street Alliance, I wish to take this opportunity to comment on the important role of standards in protecting small businesses and promoting the long-term stability and vitality of the U.S. economy. As a network of small business groups, the Main Street Alliance supports common sense standards and safeguards that protect small businesses, their employees, and the local economies that sustain them.

Fair regulations serve the critical function of establishing rules of the road that support and encourage responsible business practices. Reasonable standards and safeguards prevent "race to the bottom" decision-making that ends up hurting all parties involved, including small businesses that want to do right by their customers and their local communities.

Indeed, responsible rules and regulations help level the playing field for our small business members, giving them a basic level of protection against abuses of market power and allowing them to compete on even terrain. Such rules do this in two main ways.

First, when responsible small businesses seek to compete in the marketplace, safeguards ensure that businesses that take their responsibilities to their employees and their communities seriously will not be left at a steep disadvantage by competitors who would shun those obligations if given the chance.

Second, when small businesses are customers of larger corporate actors, responsible rules help prevent abuses of market power that shift costs onto small businesses. Out-of-control health insurance premiums, debit card swipe fees that average 44 cents (approximately 10 times the actual cost of a debit transaction), and polluting practices that lead to thousands of preventable ER visits and millions of lost work days are all examples of cost-shifting resulting from inadequate standards and abuses of market power. Prior approval of health premium rate increases, new limits on debit swipe fees put in place by the Fed, and environmental rules that

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protect public health are all examples of prudent standards and regulations that directly benefit small businesses.

In addition, effective regulations can help create certainty for businesses. Reasonable, uniform standards throughout the country help businesses know what to expect when it comes to preventing pollution, ensuring food safety, and keeping employees safe at work, no matter where they set up shop.

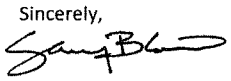
Bills that would add new layers of review at agencies and delay sensible safeguards would only make the rulemaking process more complicated and exacerbate uncertainty. The Main Street Alliance opposes such bills. For example, we've gone on record opposing a specific piece of so-called "reform" legislation known as the TRAIN Act. This bill would require redundant analyses of key U.S. Environmental Protection Agency rules designed to save lives, prevent costly medical emergencies such as heart attacks, and improve the health of all Americans.

Despite the lip service paid to benefit calculations in the most recent version of the bill, the TRAIN Act's analyses would likely gloss over an important fact: a true cost-benefit analysis shows that these rules make economic sense for small businesses and for the economy as a whole. We urge you not to waste small business owners' tax dollars on legislation like the TRAIN Act.

If Congress is truly interested in lending a hand to small businesses, it should stand in support of reasonable rules and regulations that promote a level playing field, not undermine those rules and leave small businesses at the mercy of market-dominating special interests. For these reasons, the Main Street Alliance urges you to oppose ill-advised regulatory "reform" bills. These bills may be sold in the name of small business, but in reality they do nothing but sell small businesses down the river.

We look forward to working with you to improve the regulatory system and create the level playing field America's small businesses deserve.

Sincerely,



Sam Blair
Network Director
The Main Street Alliance



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July 19, 2011

The Honorable Joseph Lieberman
Chairman
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

Dear Senators Lieberman and Collins:

OMB Watch is a nonprofit, nonpartisan research and advocacy organization that promotes an open, accountable government responsive to public needs. We have been advocating for improvements in the regulatory process for nearly 30 years. We believe that an essential role of government is to set standards and protections to safeguard public health, safety, and the environment. I write to urge you to stop legislative proposals that would delay and undermine existing regulatory protections.

Establishing environmental and energy standards spurs businesses to innovate and creates the kind of forward-looking industries we will need to compete in the future. Food, consumer, and workplace protections keep American workers and families safe from harm. They save lives and reduce health care costs. Strong financial regulations could prevent risky Wall Street behavior and another economic collapse. We need protections for Americans who work hard and play by the rules to build a better future for themselves and their children.

Your committee has been debating numerous bills on the federal regulatory process. Rather than improving the system, these proposals would further obstruct an already complex process, and could do real harm. Some would expand judicial review to pre-decisional points within the already complex regulatory process, resulting in more litigation and more costly delays. Other bills grant more favors to large corporations at the expense of small businesses. Yet others, such as the REINS Act, would second-guess the work of scientists and other experts, further politicize the rulemaking process, and mire important regulations in gridlock. OMB Watch strongly opposes these bills.

The failure to effectively regulate the financial system cost our nation over a trillion dollars and more than 8 million jobs. The BP and Yellowstone River oil spills, the Massey Energy mine explosion, and ongoing food safety crises attest to the need for Congress to put its energy into streamlining and strengthening – not subverting – the rulemaking process.

The American people need you to stand up to the special interests behind this onslaught of anti-regulatory legislation. Streamline and speed rulemaking for real small businesses, but please

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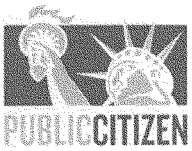
don't cave in to the demands of the U.S. Chamber of Commerce and corporate interests. Americans want stronger enforcement of existing safeguards, not fewer protections.

We look forward to working with you both to improve the regulatory system.

Sincerely,

Katherine McFate
Executive Director
OMB Watch

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July 20, 2011

The Honorable Joseph Lieberman
Chairman
Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

Dear Senators Lieberman and Collins:

We write regarding the hearing entitled Federal Regulation: A Review of Legislative Proposals, Part II on July 20, 2011. On behalf of more than 225,000 Public Citizen members and supporters, and as co-chair of the Coalition for Sensible Safeguards, a broad array of groups committed to protecting consumers, worker's rights, public health, safety, and the environment, we urge you to oppose legislative proposals that claim to reform a broken regulatory process, but in fact make it more difficult for our government to pursue its essential mission of protecting the American public from harm. We would like to submit this letter to the record.

Rather than streamlining the regulatory process, the current proposals before this Committee would stymie federal agencies' efforts to provide fundamental public protections, and, in the process, do the bidding of special interests that would like to escape much-needed regulation. The REINS Act, for example, subjects major rules to congressional vote, allowing Congress to interject political considerations into decisions that should be based principally on sound science. Other bills purport to provide regulatory "relief" for small businesses, but contain exceedingly broad provisions that extend well beyond small businesses. Many bills expand judicial review in the regulatory process, opening the door to costly and senseless litigation, breeding more instead of less regulatory uncertainty by delaying rules indefinitely.

These proposals all share the same misguided premise: that the regulators are running amok, operating on little more than their whims, uninformed by market realities. Nothing could be further from the truth. The regulatory process currently allows for robust participation by the public at multiple stages, and affords thorough consideration of regulatory impacts on small businesses in particular. Businesses and industry associations not only participate in the process, but generally participate more than the public or advocates for the public interest. Major rulemakings routinely take several years to complete, largely because agencies must take the time to consider and incorporate public input in the final rule. For example, it took the Food and Drug Administration 11 years to finalize rules to keep our



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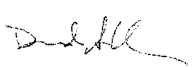
food safe from salmonella. Likewise, the Occupational Safety and Health Administration has been unable to finalize a rule lowering the exposure of workers to silica dust, even though silica dust was classified as a human carcinogen over 15 years ago. Lost in the rush to overburden agencies with more procedural hurdles is the real cost to our society when life-saving regulations are delayed.

The lessons of the recent financial catastrophe, British Petroleum oil spill disaster, Massey Energy mine explosion, and food and consumer product safety crises are clear: members of Congress who wish to improve the regulatory process should support proposals to strengthen the government's ability to protect the public, not weaken it. For example, Senator Whitehouse has shown leadership in crafting proposals intended to curb the influence of special interests in the regulatory process.

Critics of regulation resort to misrepresentation and distortion in arguing that regulation is too costly to our economy, routinely citing a thoroughly discredited report that Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, called "an urban legend." Official estimates from the Office of Management and Budget reveal that the annual benefits of major rules amount to between $132 billion and $655 billion, dwarfing annual costs of between $44 billion and $62 billion. Beyond the numbers, Americans see these benefits every day in everything from the clean air and water they breathe and drink to the safe environments in which they work and the safe consumer products they buy.

We look forward to working with you to improve the regulatory system. If you have any questions or would like further information, please contact our Regulatory Policy Advocate, Amit Narang, at (202) 454-5116 or by e-mail at anarang@citizen.org.

Sincerely,



David Arkush
Director

Amit Narang
Regulatory Policy Advocate

Public Citizen's Congress Watch Division

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW

BOB KING, President DENNIS WILLIAMS, Secretary-Treasurer

VICE PRESIDENTS: JOE ASHTON • CINDY ESTRADA • GENERAL HOLIEFIELD • JIMMY SETTLES

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July 20, 2011

The Honorable Joseph Lieberman
Chairman
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

The Honorable Susan Collins
Ranking Member
Senate Homeland Security and Governmental Affairs Committee
Washington, D.C. 20510

Dear Chairman Lieberman and Ranking Member Collins:

This week, your Committee is expected to hold a hearing on regulatory reform. The UAW urges you to oppose any legislation that would weaken the federal regulatory system. In our view, having strong national safeguards is critical, and attempts to slow down or prevent the effective enforcement of regulations would be detrimental to our members and to the American public.

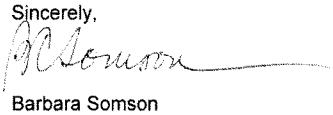
The UAW has a long and successful history of working with Congress, our members, and employers whose workers we represent to reduce workplace injuries and illnesses. Regulations promulgated by the Occupational Safety and Health Administration at the Department of Labor have been critical in this effort. We have also supported federal regulations to protect our food supply, drugs, our drinking water, and the air we breathe. In short, we believe that regulations are a critical way to protect people from harm and to ensure that corporations who do the right thing are not disadvantaged in the marketplace by those who fail to adequately address worker and the public's health and safety. We feel strongly that many regulations need to be *strengthened*—not weakened. We learned from the BP oil spill, the Massey Energy mine explosion, and other recent disasters that inadequate regulations and lax enforcement are too often contributory factors in such tragedies.

On June 23, your Committee held a hearing that gave several Senators the opportunity to present their legislative proposals to radically restructure the regulatory process. We urge your committee to reject these bills. Instead of streamlining the regulatory process, we submit that these bills would add new, unnecessary bureaucratic hurdles that would delay regulations that protect public health, safety, and the environment. Some of these proposals would expand judicial review, potentially leading to more litigation that will cause regulatory delay. Others would cater to special interests, including big corporations that disguise themselves as small businesses. Some, like the REINS Act, would tip the balance of power between Congress and executive branch inappropriately in favor of Congress, further politicizing the rulemaking

process, and preventing important regulations from taking effect. Still others mandate unnecessary studies of regulations with the intention of postponing them. We believe each of these legislative proposals is misguided and would be detrimental to the common good.

For these reasons, we urge you to oppose previously introduced bills in the strongest possible terms. Thank you for considering our views on this important issue, and we look forward to working with you to improve the regulatory system.

Sincerely,



Barbara Somson
Legislative Director

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**Union of Concerned Scientists**
Citizens and Scientists for Environmental Solutions

Senator Joseph Lieberman
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
706 Hart Senate Office Building
Washington, DC 20510

Senator Susan Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate
413 Dirksen Senate Office Building
Washington, DC 20510

July 20, 2011

Dear Senators Lieberman and Collins:

For the past two generations, bipartisan Congresses have passed laws that require federal agencies to ensure our access to clean air and water, safe drugs and devices and untainted food. Federal regulatory agencies make the rules that implement these laws.

While Congress enacts laws establishing broad policy mandates, it is up to federal regulatory agencies to make the rules that implement those laws. The Union of Concerned Scientists believes that federal agencies contain deep scientific expertise. As the world has become increasingly complex, technologically based and sophisticated, we rely on that expertise more and more, particularly when it comes to making the rules that implement our laws. A thoughtful, science-based rule not only protects, it often drives innovation.

Our organization, which has more than 350,000 members and supporters across the country, strongly urges that this committee refrain from supporting any legislative proposal that would hamper this appropriate role for agencies, or that would increase the potential for corporate and political interference in the work of federal agency scientists.

The rulemaking process already has evolved to give great consideration to non-scientific issues. The current process offers opportunities for public comment. It requires special attention to burdens on small businesses, including the cost of complying with reporting requirements. It requires agencies to estimate the costs and benefits of a proposed rule, and to consider less onerous alternatives. Any rule with a significant economic impact must be reviewed by the Office of Management and Budget.

The problem has not been lack of input from special interests. Indeed, the current process makes agencies vulnerable to corporate influence.

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We at UCS have witnessed what can happen under the current rules when agency heads have ties to corporate interests, or when an administration simply resists enforcing the law. Our surveys of federal scientists have consistently shown that those who work at our regulatory agencies now feel inappropriate political or corporate pressure to distort or suppress their scientific findings. Indeed, as recently as 2010, when we surveyed food safety employees at the Food and Drug Administration and the US Department of Agriculture, we found that that nearly 40 percent of respondents (621 employees) agreed that "public health has been harmed by agency practices that defer to business interests." One-quarter of respondents reported that they had personally experienced "situations where corporate interests have forced the withdrawal or significant modification of [an agency] policy or action designed to protect consumers or public health."

The legislative proposals discussed at the committee's June 23 hearing would make the current situation even worse. They would radically change the regulatory process in ways that would needlessly increase the hurdles agencies must face before implementing badly needed rules, wasting untold millions of dollars in agency staff and resources.

The most extreme proposal, the Regulations from the Executive in Need of Scrutiny (REINS) Act, would require any major rules to get an affirmative vote in the House and Senate, and the approval of the President, all within a time-frame of 70 legislative days. If Congress fails to act, agencies cannot move forward.

Proposals that make it more difficult for agencies to use scientific information to develop well-thought-out rules harm all of us. Scientists have the unique expertise to develop rules that fulfill their congressionally-imposed mandate to protect public health, safety and the environment.

We strongly urge the Committee to oppose any regulatory proposal that would complicate an already complex regulatory process and subject it to more special-interest influence.

Sincerely,

Francesca Grifo
Director and Senior Scientist
Scientific Integrity Program
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