

H.R. ____, The Searching for and Cutting Regulations that are Unnecessarily
Burdenome Act of 2014

United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

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*The views expressed here are my own and not those of the American Action Forum.

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear today. In this testimony, I wish to make three basic points:

- Regulatory reform at the executive level has a history that stretches back to President Nixon, but leaving regulatory restraint to one branch of government has failed to slow the pace of new rules;
- Executive Order 13,563, issued by President Obama in 2011, continued the tradition of ensuring new regulatory costs justify benefits, but aside from a handful of retrospective reviews, it has not fundamentally addressed the cumulative impact of regulation, and
- The proposed legislation provides a significant set of improvements to the regulatory process while providing flexibility to agencies so that they can continue to protect health and safety.

Let me provide additional detail on each in turn.

I. Successes and Failures of Previous Regulatory Reform

After enactment of the Clean Air Act and National Environmental Policy Act, President Nixon established the National Industrial Pollution Control Council (NIPCC) to focus on the “cost of increasingly stringent pollution control regulations.”¹ In addition to the Nixon Administration’s Quality of Life Committee, the NIPCC focused on new regulations that could potentially impose substantial costs. These were the first formal attempts to examine the impact of new regulations.

President Jimmy Carter then issued Executive Order 12,044, attempting to ensure “compliance costs, paperwork and other burdens on the public are minimized.”² He established a form of retrospective review, asking agencies to “periodically review their existing regulations to determine whether they are achieving the policy goals of [Executive Order 12,044].”³ In addition, the Carter Administration established the “Regulatory Council,” an interagency group designed to weed out regulatory duplication. Finally, President Carter cemented his regulatory legacy when he signed the Paperwork Reduction Act, creating a way for the administration to track cumulative paperwork burdens and codifying the Office of Information and Regulatory Affairs (OIRA).

These are important legacies, but over time, the nation’s cumulative regulatory burden has steadily increased and retrospective review has withered. Few deny that the federal government has a role to play in protecting the nation’s health and safety, but it has the equally important task of reducing regulatory duplication and promoting economic growth.

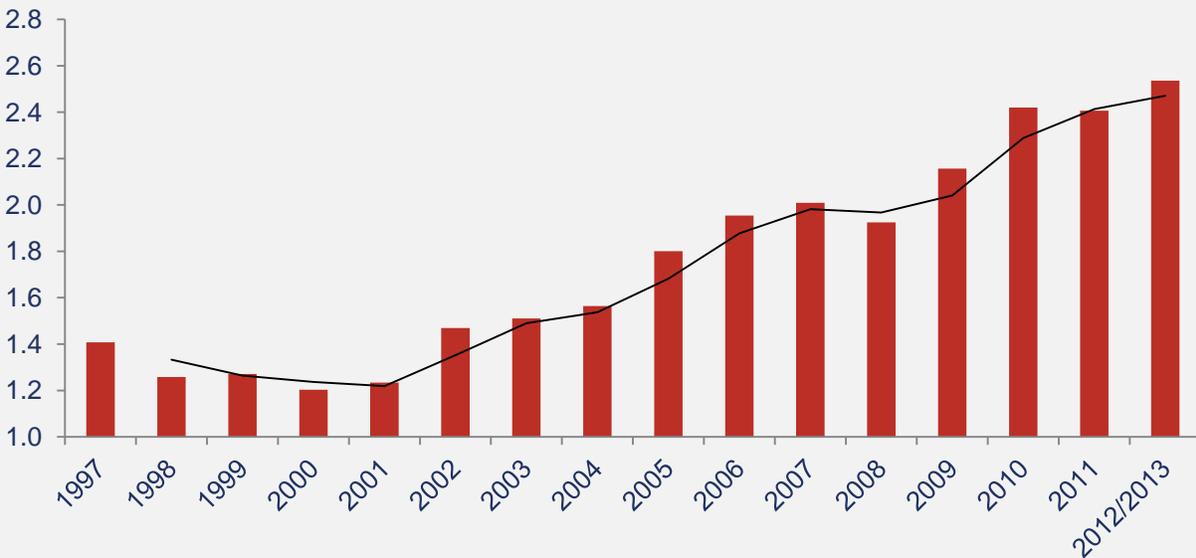
As the chart below reveals, non-tax related paperwork continues to climb, placing burdens on American consumers and businesses. This data removes the drastic fluctuations in Treasury paperwork and displays that the aggregate level of compliance time with federal regulation continues to increase.

¹ Joe Greene Conley II, *Environmentalism Contained: A History of Corporate Responses to New Environmentalism* 164 (Nov. 2006), available at http://www.thecre.com/pdf/20090423_conley_dissertation.pdf.

² Exec. Order 12,044, available at <http://www.presidency.ucsb.edu/ws/?pid=30539>.

³ *Id.* at 2.

Government-Wide Non-Treasury Paperwork Hours (in billions)



Nations around the globe, and even local governments, have formalized procedures for addressing the cumulative stock of regulations. Moving forward with reform, it is important for the U.S. to take steps to address regulation through a fair and transparent process.

II. Successes and Struggles of Executive Order 13,563

When President Obama issued Executive Order 13,563, he embraced the ideal that the nation’s regulatory system should “protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”⁴ There have been successful strides under Order 13,563 to remove redundant regulations and cut costs, but they are often in fits and starts, without a true “culture of retrospective review.”⁵

To illustrate, in 2013 the federal government added 159.9 million new paperwork hours, according to OIRA’s daily tally of aggregate paperwork.⁶ There have been notable rulemakings that examined past regulations and reduced costs while still protecting public health. For example, the Department of Transportation (DOT) proposed to drastically reduce the amount of paperwork truck drivers file under “Driver-Vehicle Inspection Reports.”⁷ By only requiring reports after an incident, as opposed to a routine trip, DOT plans to save the industry more than \$1.7 billion annually and reduce 46.7 million paperwork burden hours, or roughly 15 percent of DOT’s total burden.

⁴ Exec. Order 13,563, available at <https://www.federalregister.gov/executive-order/13563>.

⁵ OMB Memorandum M-11-19, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf>.

⁶ Inventory of Currently Approved Information Collections, available at <http://www.reginfo.gov/public/do/PRAReport?operation=11>.

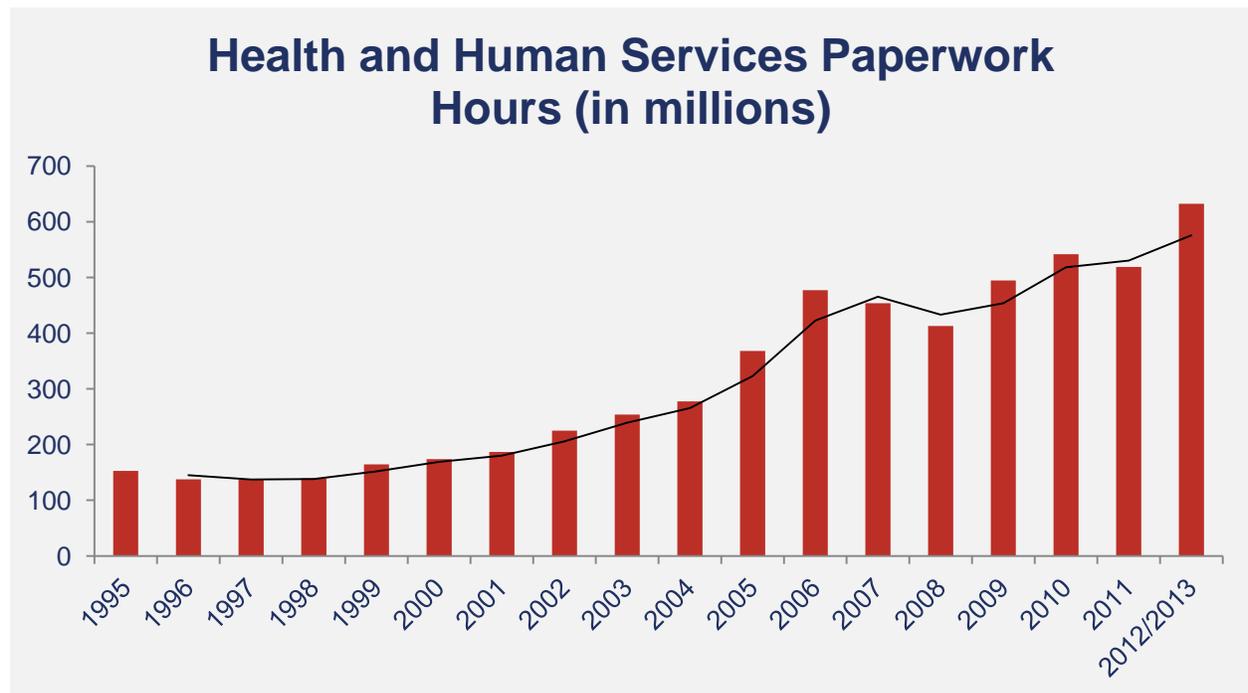
⁷ 78 Fed. Reg. 48,125 (August 7, 2013).

However, there are only a handful of these notable rules, and they are dwarfed by the 3,600 other rules regulators issue annually. Examining the most recent retrospective review reports from the administration reveals that many agencies treat these reports as just another Unified Agenda. Many of the rules fail to look back at past regulatory programs. Instead, they implement parts of the Affordable Care Act (ACA) or other recent legislation. It is no surprise the administration is implementing the ACA, but it should not label these new regulations as “retrospective.”

The Department of Energy (DOE) is another culprit in this exercise. Its most recent retrospective review update contained 19 “retrospective” rulemakings; six of these are new energy efficiency measures that increase costs and impose more paperwork. They do not examine previous regulations, and they do not address redundancy. Combined, DOE’s retrospective report adds more than \$17.7 billion in cumulative costs and 60,200 paperwork burden hours. The agency failed to quantify a single measure that would reduce costs or paperwork.

This story is essentially identical for other agencies. Retrospective review has produced a few notable rules that save businesses and consumers time and money, but on net, the result is higher burdens. HHS has a difficult task implementing the ACA, but its report contains numerous regulations that add costs. There are at least nine ACA regulations in the agency’s recent retrospective report. Despite three notable deregulatory measures from HHS, its report imposes an additional \$6.1 billion in costs and more than 5.8 million burden hours.

The chart below displays the steady growth of HHS paperwork since 1995. Through three administrations, each with similar executive orders on regulatory reform, none has been able to slow the steady rise of new paperwork.



Examining every quantified rulemaking in the retrospective reports, the number of rules increasing costs out-number cost cutting measures by 3.7 to 1. For paperwork, that ratio is 6.7:1. It is clear that regulatory reform through executive order struggles to produce significant results. Fundamental reform that thoroughly examines the cumulative stock of regulations while providing flexibility to agencies is vital to ensuring continued economic success.

III. Benefits of Codifying Retrospective Review

The most obvious benefit of codifying retrospective review and establishing a framework for reducing duplication is permanency. Executive orders are, of course, temporary and could easily whither with new administrations.

In addition, establishing a judicial review component would add the necessary legal teeth, ensuring that agency actions are reviewable by another branch. Executive Order 13,563 makes clear that agencies are immune from judicial review under the directive: “This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States....”⁸ One need only look at the hundreds of annual violations of the Paperwork Reduction Act to conclude that a judicial review component would be an important check on agency behavior.

There are three areas of reform that the proposed legislation addresses: duplication, universality, and regulatory efficiency. Let me provide additional detail on each in turn.

Duplication

All sides in the political and policy debates acknowledge some level of duplication in the federal government. For example, legislators recently established a bipartisan task force to “conduct a comprehensive review of federal regulations and reporting requirements affecting colleges and universities.”⁹ However, this is not a government-wide review and it is not permanent.

From an international perspective, the U.S. falls below the standard when addressing cumulative regulatory burdens. The Organization for Economic Co-Operation and Development (OECD) recommends that all nations “conduct systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives.”¹⁰ The proposed legislation would establish a systematic review with “clearly defined policy goals,” which has been lacking under the current executive order framework.

⁸ Exec. Order 13,563, *available at* <https://www.federalregister.gov/executive-order/13563>.

⁹ “Senate Education Committee Members Announce Task Force to Review Higher Ed Regulations and Reporting Requirements,” *available at* http://www.burr.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=6ccb9f9-0b61-c546-141a-e7bffe57c70.

¹⁰ OECD, “Recommendation of the Council on Regulatory Policy and Governance,” *available at* <http://www.oecd.org/gov/regulatory-policy/49990817.pdf>.

Even the Government Accountability Office (GAO) has made a specific set of recommendations to address duplication. Last spring, GAO released its annual report on federal “Fragmentation, Overlap, and Duplication.”¹¹ The report found 17 areas of duplication, including renewable energy and veterans’ employment, and based on these findings, researchers at the American Action Forum replicated GAO’s methodology for overlap in paperwork requirements. The spending equation of government duplication totals approximately \$200 billion, according to Senator Tom Coburn, but regulatory duplication also has a price.¹² Based on the 17 areas of duplication, we found 642 million paperwork hours, \$46 billion in costs, and 990 forms of federal overlap. For example, ten different agencies are involved in renewable energy programs and produce 96 related forms.¹³

This duplication has real implications for Americans interacting with government every day. In a well-documented failure, there are more than 400,000 veterans waiting on benefit claims. These wait times are not only a result of the surge in veterans applying for benefits but also the maze of paperwork in the current system. Analysts at the American Action Forum found more than 600 different forms relating to veterans’ claims, imposing millions of paperwork burden hours.¹⁴ Some veterans undergo briefings on the application process, with the expectation that benefits will not arrive promptly.

There must be a systematic program in place to address this duplication, and based on the data, the executive order approach has not delivered on its promised reforms. Sorting through more than 9,100 paperwork requirements and 174,000 pages in the Code of Federal Regulations (CFR), including a 21 percent increase in the CFR during the past ten years, is indeed an ambitious process. Appendix 1 provides just a two-year snapshot of the CFR regulatory activity.

From Appendix 1, it is clear that certain titles of the CFR receive more activity than other titles. Excluding routine airworthiness directives, “Banking” (Title 12) and the “Environment” (Title 40) received the highest number of regulations. For total costs, “Environment” led all titles, with \$16.8 billion, while “Public Health” (Title 42) imposed more than 34.6 million new paperwork burden hours. Of course, beyond these topline figures, the proposed Commission will have to determine which regulatory programs to amend, cut, or remain in place.

Title II of the legislation, “Regulatory Cut-Go,” specifically addresses the accumulation of regulation. By ensuring a regulatory neutral approach to costs, the cut-go procedure could stem the tide of regulatory growth, while still allowing agencies to fulfill their statutory objectives.

The idea of cut-go is similar to the United Kingdom’s One-in, One-Out (OIOO) system for regulation, which has now been expanded to One-In, Two-Out (OITO). The cut-go idea is also similar to a reform I proposed last year, a paperwork budget that would only apply to new

¹¹ Government Accountability Office, “2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits,” available at <http://www.gao.gov/assets/660/653604.pdf>.

¹² Senator Tom Coburn, Letter to Deputy Director Jeffrey Zients, available at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=feba26e1-7102-4a0f-bb55-a91e7477d98f.

¹³ American Action Forum, “Weeding Out Regulatory Duplication,” available at <http://americanactionforum.org/topic/weeding-out-regulatory-duplication>.

¹⁴ American Action Forum, “Red Tape Challenges to America’s Veterans,” available at <http://americanactionforum.org/topic/red-tape-challenges-america%E2%80%99s-veterans>.

collections of information.¹⁵ The cut-go plan improves on both of these reforms because it is more comprehensive than a paperwork budget, and it provides agencies more flexibility than the OITO system.

Universality

Fundamental regulatory reform must also incorporate independent agencies to be successful. Since 1981, OIRA has formally reviewed significant actions from cabinet departments, but independent agencies are largely exempt from regulatory review.

Although these agencies are subject to the Congressional Review Act, Congress has never rescinded an independent agency action. In addition, the Paperwork Reduction Act merely tracks their paperwork requirements, and has not proven to be an effective check on independent agency action. For example, aggregate paperwork burdens at the Securities and Exchange Commission, the Federal Communications Commission, and the Federal Trade Commission have increased 63 percent during the last ten years.

Furthermore, since 2012, Titles 12 and 17 (“Banking” and “Commodities and Securities”) of the CFR have produced 113 final rules. Combined, they will add \$12.7 billion in costs, all with little oversight. Comprehensive reform must address independent agency actions in a way that analyzes the costs and benefits of new regulation, and addresses the cumulative impact of past rules.

Regulatory Efficiency

The hallmarks of retrospective review should be more than just cutting costs and burden hours. It is also important to study what regulations have worked well in the past and what rules could be improved. Using successful regulatory programs as a model for future regulation could reduce the likelihood that a new rule imposes unnecessary costs or leads to unintended consequences.

If the proposed Commission is successful, it will identify a range of regulatory programs, and more than likely, a few rules that are duplicative and need to be amended. As then-Administrator Cass Sunstein noted, retrospective review should also focus on “modernizing rules” and consider “the combined effect of their regulations.”¹⁶

The proposed legislation has the advantage of providing flexibility to agencies. Instead of agencies expending staff time and resources conducting a retrospective review of their entire regulatory slate, the proposed Commission will suggest several rules for action. This approach is more flexible than the United Kingdom’s OITO program, which forces regulators to remove two regulations for every new rule. The proposed Commission would handle the process and resources of retrospective review, while agencies would continue to implement statutory directives, subject to Section 201 of the proposed legislation.

¹⁵ American Action Forum, “Can a Paperwork Budget Trim Red Tape,” *available at* <http://americanactionforum.org/research/can-a-regulatory-budget-trim-red-tape>.

¹⁶ OMB Memorandum M-11-10, *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

In sum, the proposed legislation addresses cumulative regulatory burdens without constraining the current work of agencies. The Commission would handle the time, resources, and method of retrospective review, and agencies would have the freedom to choose from a range of regulations in the cut-go pool.

IV. Conclusion

Regulatory reform has always been a bipartisan exercise, and so have the executive orders. The Paperwork Reduction Act passed with only 13 “no” votes in the House of Representatives; the Unfunded Mandates Reform Act received 28 “no” votes. Recently, Indiana passed a bill codifying retrospective review for all rules three years after implementation. The legislation won unanimous support in Indiana’s Senate.

From Indiana, to the United Kingdom, to current Executive Order 13,563, there is widespread support for the principle of retrospective regulatory review. Given the historical level of regulatory growth and lack of true “look backs,” the current executive order approach has not sufficiently enshrined a “culture of retrospective review.” A flexible approach that addresses the cumulative stock of rules would usher the regulatory state into a new era and reduce uncertainty from one administration to the next.

Appendix 1

Regulation by Industry: 2012-2013

<u>CFR Title-Industry</u>	<u>Regulations</u>	<u>Cost (in millions)</u>	<u>Hours</u>
7-Agriculture	10	\$3,530	32,610,034
8-Immigration	4	\$801	976,669
9-Animals	6	\$49	27,270
10-Energy	11	\$7,659	174,912
12-Banking	61	\$307	11,059,631
13-Business Assistance	2	\$0.4	929
14-Aeronautics	373	\$3,389	7,859
15-Commerce, Trade	3	\$0	20,971
16-Commercial Practices	7	\$69	755,158
17-Commodities, Securities	52	\$12,451	36,823,011
18-Conservation	21	\$118	2,855,093
19-Customs Duties	4	\$0	51,200

20-Employees' Benefits	5	\$350	16,780
21-Food and Drugs	6	\$722	1,378,250
22-Foreign Relations	3	\$9	72,920
23-Highways	2	\$1	25,436
24-Housing	8	\$22	1,925,983
25-Native Americans	2	\$0	108,975
26-Internal Revenue	17	\$0	10,786,022
27-ATF	2	\$12.95	446,638
28-Judicial Administration	1	\$0	0
29-Labor	14	\$4,883	16,015,817
30-Mineral Resources	4	\$205	704,425
31-Treasury	3	\$0.03	88,013
32-National Defense	1	\$0	1,775
33-Navigable Waters	2	\$284	99,678
34-Education	6	-\$162	-3,572,970
37-Patents, Copyright	4	\$1,049	1,363,734
38-Pensions, Bonuses	1	\$0	32,689
40-Environment	45	\$16,847	3,044,352
41-Public Contracts	2	\$1,865	13,362,497
42-Public Health	36	\$10,132	34,605,668
45-Public Welfare	22	\$10,079	8,432,908
46-Shipping	5	\$233	56,098
47-Telecommunication	40	\$209	33,743,315
48-Federal Acquisition	2	\$0	122,807
49-Transportation	26	-\$273	2,813,500
50-Wildlife and Fisheries	2	\$0.23	47,481
Multiple Titles	13	\$158,090	3,177,055