

**CLEARING THE WAY FOR JOBS AND GROWTH:  
RETROSPECTIVE REVIEW TO REDUCE RED  
TAPE AND REGULATIONS**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON COURTS, COMMERCIAL  
AND ADMINISTRATIVE LAW  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED TWELFTH CONGRESS  
SECOND SESSION

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## **CLEARING THE WAY FOR JOBS AND GROWTH: RETROSPECTIVE REVIEW TO REDUCE RED TAPE AND REGULATIONS**

**THURSDAY, JULY 12, 2012**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS,  
COMMERCIAL AND ADMINISTRATIVE LAW,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 9:35 a.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, Franks, Johnson, and Watt.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; John Mautz, Counsel; Bobby Cornett, Professional Staff Member; Ashley Lewis, Clerk; (Minority) Susan Jensen-Lachmann, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. COBLE. The Subcommittee will come to order.

Good to have you all with us today. I am sure there are some Members on their way, but I don't want to penalize people who are promptly present. I want to give my opening statement and get that beyond us. But it is good to have everybody with us, particularly our three panelists.

Retrospective regulatory review is not a novel concept. There have been multiple good-faith efforts to implement procedures and initiatives for retrospective reviews, but they have not produced sufficient results. This is partly due to the size and rapid growth of our regulatory system. It is also due to the complexity of our regulations and the incentives of regulatory agencies.

That being said, several bills have been introduced on this topic, and I am pleased to turn our attention to it today. Representative Quayle, a distinguished Member of this panel, has, for example, introduced H.R. 3392, which, among other things, requires agencies to perform decennial reviews of existing major rules, including cost-benefit analysis, and to provide recommendations on improving these rules wherever warranted. Others, such as Representative Hultgren and Representative Young, have also introduced bills on retrospective review.

The theme throughout these proposals is consistent. Government should have some responsibility to audit and review its regulations. I believe this sentiment is supported by the prepared testimony

from today's witnesses. Every Member on this panel understands and appreciates that regulations are important for our safety and security and that changing them outside of ordinary procedures for promulgating rules raises significant questions.

At the same time, regulations impose a cumulative burden that is too high, and we should look for creative measures to reduce that burden. I am very interested in learning today what proposals most merit our attention and support. And I am also interested to know of any other suggestions from our witnesses that could assist our Subcommittee as we pursue this matter more thoroughly.

I understand that in addition to requiring agencies themselves to review their regulations, the creation of a legislative commission tasked for the sole purpose of reviewing existing regulations and reporting back to Congress may be a viable suggestion. If so, then what would be the mandate and parameters for such a commission, and what tools would be needed to make it effective?

That being said, I hope today's hearing will be a productive first step—and I am confident that it will be—in making effective retroactive regulatory review a reality. And I look forward to the testimony from our witnesses.

And if you all will bear with me, we are still waiting for a Member from the Democratic side. I presume that someone is en route. So you all just stand easy for the moment, and we will resume this imminently, hopefully.

While we are waiting, let me introduce our distinguished panelists, if I may.

Randall Lutter joined Resources for the Future in 2010 following a long and distinguished career as an economist featuring service in three different Federal agencies under four Presidents. Mr. Lutter's past positions include chief economist and deputy commissioner for policy at the U.S. Food and Drug Administration and senior economist at the Office of Information and Regulatory Affairs, Office of Management and Budget. His teaching experience includes serving as an adjunct professor of economics at American University and as an assistant professor of managerial economics and policy at the State University of New York in Buffalo. Mr. Lutter earned his Ph.D. and M.A. from Cornell University and his B.A. from the University of California at Berkeley.

Dr. Lutter, good to have you with us this morning, as well.

Dr. Michael Mandel is a chief economic strategist for the Progressive Policy Institute and the founder of Visible Economy, LLC, a New York-based news and education company. He is the author of many books and wrote a basic economics textbook for McGraw-Hill. Mr. Mandel also served as chief economist at Businessweek magazine, where he was named one of the top 100 business journalists of the 20th century for his writings on innovation and growth. Mr. Mandel's work at the Progressive Policy Institute focuses on the impact of regulation on innovation. He currently is president of South Mountain Economics, a consulting company, and a senior fellow at the University of Pennsylvania Wharton School's Mack Center for Technological Innovation. Mr. Mandel holds a Ph.D. degree in economics from Harvard University.

Dr. Mandel, good to have you with us, as well.

Professor Levin is a nationally recognized legal scholar who specializes in administrative law and related public law issues. He is a co-author of a casebook on administrative law and has published numerous articles and book chapters on administrative law topics. Mr. Levin previously served as Washington University Law School's associate dean and is currently a public member of the Administrative Conference of the United States. Prior to joining the faculty at Washington University in 1979, Mr. Levin worked as an associate in the Washington, D.C., office of Sutherland Asbill & Brennan. He clerked for Judge John C. Godbold at the U.S. Court of Appeals for the Fifth Circuit. Mr. Levin earned his J.D. degree from the University of Chicago and his B.A., magna cum laude, from Yale University.

As I said before, we are fortunate to have such a distinguished panel.

And we will continue to stand easy until someone joins us.

The gentleman from South Carolina is here.

Mr. GOWDY. Good morning, Mr. Chairman.

Mr. COBLE. A prominent golfer, I have been told. Good to have you, Mr. Gowdy.

Mr. GOWDY. Delighted to be here.

Mr. COBLE. With that in mind, we can commence.

So, Dr. Lutter, why don't you start us off?

If you would, gentlemen, try to confine your comments to within the 5-minute rule, if possible. You have an amber light that will appear after the green light vanishes. That amber light will alert you that you have about a minute to wrap up. Now, you won't be keel-hauled if you violate the 5-minute rule, but we do try to comply with the 5-minute rule.

So, Dr. Lutter, why don't you start us off?

**TESTIMONY OF RANDALL W. LUTTER, Ph.D., VISITING  
SCHOLAR, RESOURCES FOR THE FUTURE**

Mr. LUTTER. Chairman Coble, Members of the Subcommittee, I am pleased to be able to speak to you today about retrospective review and analysis of Federal regulations.

I am Randall Lutter, visiting scholar at Resources for the Future. My testimony today is based partly on a report I recently authored for the Mercatus Center at George Mason University, which I submit for the record, and partly on my experience managing and evaluating Federal regulatory programs to reduce risks. I have served in senior staff and executive positions at the Federal Office of Management and Budget, the Council of Economic Advisers, and the Food and Drug Administration. My work on different regulatory matters appears in a variety of scholarly journals. And my testimony represents exclusively my own views and not necessarily those of any organization.

While the Federal Government offers substantial protections to Americans' health, safety, environment, and financial security, the specifics of Federal regulation deeply frustrate many Americans as they try to read prescription drug labeling or mortgage disclosure forms, board airliners or manage small businesses. Codified Federal regulations today total more than 165,000 pages and have grown at an average annual rate of 2.8 percent per year since 1970.

Concern over Federal regulations has led President Obama to issue three Executive orders on Federal regulatory policy since January of last year. All three spell out policies on retrospective review—the reexamination of extant regulations to identify modifications, including possible elimination as warranted.

My remarks today focus on such review and on the retrospective analysis that can inform such review. Today I emphasize two specific questions; the appendix to my testimony provides supporting information and details.

The first question is how well recent regulatory review efforts have worked.

Fifteen years ago, President Clinton’s National Partnership for Reinventing Government, under the leadership of Vice President Gore, was successful in reducing the number of pages of regulations. The total number of pages in the Code of Federal Regulations fell by 7,000 from 1995 to 1997, leaving it about 14,800 pages below where it would have been if it had instead followed long-term trends.

But a count of pages is not equivalent to regulatory burden or a measure of people’s welfare. Moreover, in a later listing of accomplishments for its first 5 years, the National Partnership makes no mention of any specific reduction in regulatory burden. Were the economic effects of this simplification of rules nil because the changes in rules were simply housekeeping steps, such as the elimination of unnecessary regulations governing buggy whips and horse-drawn carriages, or were there instead genuine efficiency gains as the result of modification or elimination of regulations seen as inefficient with the benefit of hindsight? In fact, it is quite unclear what aggregate economic effects this reinvention initiative had because there was no claim of aggregate effects and I am unaware of any estimate from an independent source.

In the George W. Bush administration, the Federal Office of Management and Budget conducted different regulatory review efforts, including a major push to review existing regulation of the entire manufacturing sector that it began in 2004. I focus briefly on this effort, which OMB described in its 2008 report to Congress on Federal regulations.

Its effort began with 189 nominations that members of the public provided in response to a request in a 2004 draft report to Congress for suggestions for specific reforms to regulation, guidance documents, or paperwork requirements that would improve manufacturing regulations. OMB determined that 76 of the 189 nominations were priorities, and it found that 69 of the 76 reform items were complete as of January 2009.

The items listed in that report are quite diverse and include many actions better characterized as administrative steps rather than modification or elimination of Federal regulations. For example, the OMB report mentions 16 Federal reports, at least 2 of which concluded that no change in existing rules was appropriate. The report also includes four guidance documents, which don’t have the full force and effect of law. They also include actions such as an EPA determination, a response to a petition, a revised reporting policy, the development of an internal issue paper, and one action that appears to substantially precede the retrospective review proc-

ess initiated in 2004, as well as a legislative action regarding taxation.

At least two of these actions, however—EPA’s spill prevention, control, and countermeasures rule and its hazardous waste rules to encourage recycling—likely offered significant savings. Since OMB didn’t offer any aggregate estimates of the benefits and costs of these regulatory changes, however, there is little basis for an overall judgment.

In the interest of time, let me offer a quick sum-up, if I may. A continuing challenge is efforts to measure the actual results of Federal regulations. President Obama stated eloquently in an Executive order in January of last year that the regulatory system must measure and seek to improve the actual results of regulatory requirements. This year, he reiterated that same phrase. In fact, it is very difficult to estimate the actual results, and regulatory agencies have taken only very limited steps in that regard.

So let me stop here and say that I look forward to this opportunity to testify. I am grateful for it. And I look forward to your questions.

Mr. COBLE. Thank you, Dr. Lutter.

[The prepared statement of Mr. Lutter follows:]



## TESTIMONY

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**PERSPECTIVES ON RETROSPECTIVE REVIEW AND ANALYSIS**


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RANDALL LUTTER, PHD<sup>1</sup>

*Visiting scholar at Resources for the Future*

Testimony for the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law  
 Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations  
 July 12, 2012

### I. INTRO

Chairman Coble, Ranking Member Cohen, and members of the subcommittee, I am pleased to be able to speak to you today about retrospective review and analysis of federal regulations. I am Randall Lutter, visiting scholar at Resources for the Future. My testimony today is based partly on a report I recently authored for the Mercatus Center at George Mason University, which I submit for the record, and partly on my experience managing and evaluating federal regulatory programs to reduce risk. I have served in senior staff and executive positions at the federal Office of Management and Budget, the Council of Economic Advisers, and the Food and Drug Administration. My work on different regulatory matters appears in a variety of scholarly journals. My testimony represents exclusively my own views, and not necessarily those of any organization.

### II. BACKGROUND

While the federal government offers substantial protections to Americans' health, safety, environment, and financial security, the specifics of federal regulation deeply frustrate many Americans as they try to read prescription drug labels or mortgage disclosure forms, travel by air, or manage small businesses. Codified federal regulations today total more than 165,000 pages and have grown at an average rate of 2.8 percent per year since 1970.

Concern over federal regulations has led President Obama to issue three executive orders on federal regulatory policy since January 2011.<sup>2</sup> All three spell out policies on retrospective review—the reexamination of extant regulations to identify modifications, including either increases or decreases in stringency, and possible elimination as warranted. My remarks today focus on such review, and on the retrospective analysis that can inform such review.

Today I emphasize two specific questions; the appendixes to my testimony provide supporting information and details.

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1. I gratefully acknowledge the very helpful assistance of Asa Skinner in preparing this testimony.  
 2. Executive Order no. 13563, Code of Federal Regulations, title 3, sec. 3,821 (January 18, 2011), [http://www.reginfo.gov/public/jsp/Utilities/EO\\_13563.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf); Executive Order no. 13579, Code of Federal Regulations, title 3, sec. 41,587 (July 11, 2011), [http://www.reginfo.gov/public/jsp/Utilities/EO\\_13579.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_13579.pdf); Executive Order no. 13610, Code of Federal Regulations.

For more information or to meet with the scholars, contact  
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*The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.*

### III. HOW WELL HAVE RECENT REGULATORY REVIEW EFFORTS WORKED?

As described in my report for Mercatus, President Clinton's National Partnership for Reinventing Government, under the leadership of Vice President Gore, was successful at reducing the number of pages of regulations. The total number of pages in the Code of Federal Regulations fell by about 7,000 from 1995 to 1997, leaving it at about 14,800 pages below where it would have been in 1997 if instead it had followed long-term trends. A count of pages, however, is not equivalent to regulatory burden or a measure of people's welfare. Moreover, in a later listing of accomplishments for its first five years, the National Partnership makes no mention of any specific reduction in regulatory burden. Were the economic effects of this simplification of regulatory policy nil, because the changes in rules were simply housekeeping steps, such as the elimination of unnecessary and obsolete regulations governing buggy whips and horse-drawn carriages? Or were there genuine efficiency gains as a result of the modification or elimination of regulations that were recognized as inefficient with the benefit of hindsight? In fact, it is quite unclear what aggregate economic effects this reinvention initiative had on regulated entities or the public, because there was no claim of aggregate effects, and I am unaware of independent estimates of such effects by analysts outside the federal government.

During the George W. Bush Administration, the Office of Management and Budget (OMB) conducted different retrospective regulatory review efforts. I focus on one started in 2004. In that year, OMB launched a major effort to review existing regulations of the manufacturing sector and reported on this effort in its 2008 report to Congress. Its effort began with 189 "nominations" that members of the public provided in response to a request in a 2004 draft report to Congress for suggestions for specific reforms to regulations, guidance documents, or paperwork requirements that would improve manufacturing regulations. OMB determined 76 of the 189 nominations to be priorities and found that 69 of the 76 reform items were complete as of January 2009.<sup>3</sup> The items listed in that draft report are quite diverse and include actions better characterized as administrative steps rather than modifications or eliminations of federal regulations.

For example, the OMB draft report mentions 16 federal reports, at least two of which concluded that no change in existing rule was appropriate. They include four guidance documents, which do not have the full force and effect of law. They also include actions such as an Environmental Protection Agency determination,<sup>4</sup> a response to a petition,<sup>5</sup> a revised reporting policy,<sup>6</sup> the development of an "internal issue paper,"<sup>7</sup> one action that appears to substantially precede the retrospective review process initiated in 2004,<sup>8</sup> and a legislative action regarding taxation.<sup>9</sup> At least two of these actions, e.g., the Environmental Protection Agency's Spill Prevention Control and Countermeasures rule and its Hazardous Waste rules to encourage recycling, likely offered significant savings.<sup>10</sup> Since OMB did not offer any aggregate estimate of the benefits and costs of these regulatory changes, however, there is little basis for a general judgment. Notwithstanding the paltry evidence of economic effects, this process of retrospective review offers other benefits. In particular, it gives regulated entities, nonprofit organizations, and the general public an opportunity to request changes to extant federal regulations.

These two historical examples suggest that the accomplishments of retrospective regulatory review efforts to date have been modest. One reason for the modest results may be that agencies in charge of developing regulations to achieve statutory missions have difficulty improving their own regulatory programs without specific stimulus

3. U.S. OMB, "Appendix E" in 2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (January 2009).

4. Item #36 in Appendix E to the 2008 report, see also Item #75, to streamline and simplify duty drawback at customs.

5. Item #51.

6. Item #68.

7. Item #116.

8. Item #145, published as a final rule in December, 2004.

9. Item #188.

10. See Item #42 (73 FR 64668) and Items #54–#58 (73 FR 74235) in OMB's draft report.

from outside the agency. While such efforts have been able to reduce the number of pages of extant regulations, and sometimes led to revisions to existing regulations that reduce excess burden, whether they do this in a manner that significantly lowers overall regulatory burden or improves efficiency is hard to say.

#### IV. ARE AGENCIES TAKING ACTIVE STEPS TO IMPROVE MEASUREMENT OF THE ACTUAL RESULTS OF FEDERAL REGULATIONS?

In January of 2011, President Obama, in Section 1 of E.O. 13563, stated eloquently that the regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.”<sup>11</sup> Moreover, in Section 1 of E.O. 13610, on identifying and reducing regulatory burdens, the President reiterated this same phrase. Many economists and analysts would agree that improved measurement of the effects of federal regulation is important. Such measurement could reduce the uncertainty about the effects and the merits of regulatory programs. If coupled to improvements, it could foster confidence that the federal regulatory system is delivering valuable benefits at modest costs. Unfortunately, agencies appear to be taking only very limited steps to improve such measurement.

Key federal agencies are not incorporating efforts to measure actual results of regulations into their major rule-makings. I considered the Federal Register notices for all economically significant proposed, final, and interim final rules issued by four key federal agencies since E.O. 13563 was published, on January 21, 2011. I focused on the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and the independent Securities and Exchange Commission (SEC). I include the SEC even though it is an independent agency because President Obama’s July 2011 E.O. 13579 contains the same language as Section 6 of E.O. 13563, except that it uses the word “should” instead of “shall.”<sup>12</sup> I find that none of these rules issued by any of these agencies—25 in total—mentioned either “must measure” or “actual results.”<sup>13</sup> The word “retrospective” came up only once in the 25 rules examined and this occurrence was not relevant to the ideas in E.O. 13563. This finding indicates that these rules have been drafted without identifiable efforts to measure actual results of regulations, as the president had directed.

This is not to say that the agencies are not implementing the president’s directive to develop plans for retrospective review. In fact, they have issued and even updated such plans. As described in my report for Mercatus, however, such plans, at least for the four key agencies that I focus on, mostly reflect business-as-usual management. There is little discernible new work on the retrospective analysis and measurement called for in the executive order.

It is worth noting that information regarding retrospective estimates of the benefits and costs of federal regulations is quite limited. In a 2011 report to Congress on the benefits and costs of federal regulation, the OMB uses the phrase “benefit-cost ratios” in a discussion of retrospective analysis, suggesting that it has information on both costs and benefits for a set of regulations.<sup>14</sup> In fact, a footnote in an earlier 2005 OMB report that also used ratios acknowledges that this is rarely the case, saying, “A ratio was used [in the OMB analysis] because in most cases benefits were not monetized and, in some cases, unit benefits were not projected for health or environmental improvements.”<sup>15</sup>

In my own review of these retrospective analyses of extant federal regulations, I found very few that provide sufficient information to evaluate whether benefits outweighed costs. The overwhelming majority of retrospective

11. Executive Order no. 13563.

12. *Ibid.*

13. The EPA issued eleven rules, the FDA issued two, the NHTSA issued three, and the SEC issued nine.

14. U.S. OMB, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (June 2011), 64.

15. U.S. OMB, *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (2005), 42.

analyses reviewed by Winston Harrington, the OMB, and later work by David Simpson of EPA provide information only about costs, about a key but incomplete measure of benefits (such as fatalities but not nonfatal injuries), or about both costs and a poor proxy for benefits (such as emissions reductions or the number of acres treated by a pesticide). In reviewing those retrospective analyses, I identified just four regulations, all issued by the NHTSA, for which retrospective studies provided both information about costs and reasonably comparable measures for benefits, expressed either in terms of dollars or in adverse health outcomes avoided. For another five regulations issued by the Occupational Safety and Health Administration, there are retrospective studies of reduced fatalities attributable to regulations. Unfortunately, these retrospective studies provide no estimates of the nonfatal injuries avoided or of the costs of the control technologies. The rest of the retrospective studies provide insufficient information to make judgments about the regulations' economic merit.

This observation suggests that a key focus should be on improving the availability of information about costs and benefits, or at least about effectiveness. One approach would be to use more regularly market-based regulatory approaches such as tradable permits. Such permits provide information about the marginal cost of controls through their market prices. A second approach would be to use studies of consumer comprehension, including through the random assignment of surveys of different design, to judge the effectiveness of mandatory information disclosure, an important strategy in both environmental and financial regulation. A more challenging longer-term approach would be to foster a culture of experimentation, so that regulatory agencies have more information about the likely costs, effectiveness and benefits of their actions before promulgating final rules, although such a goal may be attainable only in the relatively distant future.

#### V. RECOMMENDATIONS

I have two general suggestions for policy makers:

1. *Promote impartiality in retrospective analysis and review.* Refrain from asking for self-evaluations and self-review and instead seek review and analysis from independent third parties. Government officials, naturally, have difficulty being objective in the review or analysis of regulations that they or their colleagues earlier developed.
2. *Seriously promote data collection, access, and analysis, either by incorporating them into new regulations being issued or by other means.* Use of market-based approaches can automatically generate information about the marginal costs of controls; well-functioning markets for sulfur dioxide emission controls, for example, provide current information about the incremental cost of reducing such emissions. Studies on consumer comprehension of information being disclosed might reveal that alternative forms are much more effective at promoting comprehension. More generally, greater data collection, access, and analysis can foster improved understanding of regulations and contribute to reducing regulatory burdens and improving their effectiveness.

Thank you for the opportunity to testify today. I look forward to your questions.

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ABOUT THE MERCATUS CENTER AT GEORGE MASON UNIVERSITY

The Mercatus Center at George Mason University is a research, education, and outreach organization that works with scholars, policy experts, and government officials to connect academic learning and real-world practice.

The mission of Mercatus is to promote sound interdisciplinary research and application in the humane sciences that integrates theory and practice to produce solutions that advance in a sustainable way a free, prosperous, and civil society.

ABOUT THE AUTHOR

Randall Lutter, visiting scholar at Resources for the Future, possesses more than 20 years senior experience in the management and evaluation of programs regulating health, safety, and environmental risks. He served at the federal Office of Management and Budget (OMB), the Council of Economic Advisers (as senior economist), and the Food and Drug Administration, where he was deputy commissioner for policy.

Mr. COBLE. Dr. Mandel?

**TESTIMONY OF MICHAEL MANDEL, Ph.D., CHIEF ECONOMIC STRATEGIST, PROGRESSIVE POLICY INSTITUTE**

Mr. MANDEL. Mr. Chairman, Members of the Subcommittee, thanks very much for the opportunity to address the issues with retrospective regulatory review, and alternative mechanisms for reducing the burden of regulation without losing its benefits.

Much of my testimony is drawn from a policy brief published in February of 2011 by the Progressive Policy Institute, where I am chief economic strategist. I am also affiliated with the Mack Center for Technological Innovation at Wharton as a senior fellow.

One of my main concerns as an economist is the link between innovation and regulation. Innovation is the key force propelling growth and creating jobs. On the other hand, regulation is essential for making our economy work smoothly. Unfortunately, if the regulatory burden is too heavy, it can tend to suppress the innovation and entrepreneurial energy that we need. So if we care about the long-term performance and competitiveness of the American economy, we have to focus on periodically lightening the regulatory load.

This is not a new idea, as Dr. Lutter describes. It is not even terribly controversial. Reaching back to Jimmy Carter, every President, Democratic and Republican, has instructed his agencies to reconsider and review existing regulations. Yet, without exception, all of these attempts at retrospective review seem to have produced considerably less than the desired result. One might almost say they have failed.

The question is, why is retrospective review so hard to do effectively? One issue is foot-dragging by agencies, but that isn't the whole story. First, the retrospective review process consists of analyzing the costs and benefits of each regulation individually. The problem is, it is possible for every individual regulation to pass a cost-benefit test while the total accumulation of regulations still creates a heavy burden on Americans. The number of regulations matter, even if individually all are worthwhile. I call this the pebble-in-the-stream effect. Throw one pebble in the stream, nothing happens. Throw two pebbles in the stream, nothing happens. Throw 100 pebbles in a stream, and you have dammed up the stream. Which pebble did the damage? It is not any single pebble; it is the accumulation.

The other issue is the very structure of the regulatory process makes it more expensive and difficult to undo regulations than to create them in the first place. When the original reg is put in place, the agency can use whatever evidence is available. By contrast, after a regulation has been in place for a while, the agency has to do a cost-benefit analysis using real data on actual outcomes and costs, which is expensive and difficult to collect.

So what we need is a process that allows us to tackle the accumulation of regulation without having to fight over each one individually. What PPI has proposed is an independent Regulatory Improvement Commission, modeled somewhat along the successful process set up for the Base Realignment and Closure Commission, or BRAC. The Regulatory Improvement Commission would be

given the task of coming up each year with a package of 10 to 20 regulations to undo, rewrite, or otherwise improve. They can be small regs or large ones. The package is sent to Congress for an up-or-down vote and then, if passed, sent to the President for his signature.

What are the benefits of the Regulatory Improvement Commission over retrospective review? First, it would get us away from agencies reviewing their own regulations. The commission would draw on expertise from different agencies, but it would be able to make an independent decision. Second, if the experience with BRAC is any guide, voting on a package of regulatory reforms would be easier than hand-to-hand fights over individual regs. Third, and perhaps most important, having Congress vote on the package of reforms legally allows us to short-circuit the cumbersome regulatory review process. The Regulatory Improvement Commission would hold hearings, but because the package of reforms would need the approval of Congress, the hearings wouldn't have to be arduous compared to the process that an agency would have to follow by itself.

The bottom line is that the Regulatory Improvement Commission needs to combine efforts of both the legislative and executive branches to be effective. The executive branch by itself cannot get a grip on the problem. That is why retrospective review doesn't work no matter who the President is.

I should note that the February 2011 policy brief lays out some more details about how the Regulatory Improvement Commission could be structured. For example, the scope of the commission could be structured to stay away from environmental regulations or expanded to encompass agencies such as the FCC. The commission could be made temporary like the BRAC Commission so that it regularly has to be reauthorized. The commission could set up a Web site where businesses and individuals could submit suggestions for which regulations to undo or change.

In truth, there are a lot of different ways to make a Regulatory Improvement Commission work. The key is to set up a mechanism which offers a systematic and objective process for identifying a package of regulations to be undone or fixed, while acknowledging that Congress has to be an essential part of the process.

Thank you.

Mr. COBLE. Thank you, Dr. Mandel.

[The prepared statement of Mr. Mandel follows:]



WRITTEN STATEMENT OF MICHAEL MANDEL, PHD

CHIEF ECONOMIC STRATEGIST  
PROGRESSIVE POLICY INSTITUTE

U.S. House Committee on the Judiciary  
Subcommittee on Courts, Commercial and Administrative Law  
"Clearing the Way for Jobs and Growth: Retrospective Review to  
Reduce Red Tape and Regulations"

July 12, 2012

## SUMMARY

How can we reduce the economic burden of regulation without losing its benefits? Many presidents have tried retrospective regulatory review, and the results have always fallen well short of expectations.

This statement draws extensively on a policy brief that I wrote for the Progressive Policy Institute, where I am Chief Economic Strategist. In this statement, I will first explain the reasons why retrospective regulatory review is doomed to failure. I will then describe an alternative approach for lowering the regulatory burden, the Regulatory Improvement Commission.

**STATEMENT**

Mr. Chairman, Ranking Member Cohen, members of the subcommittee. Thank you very much for the opportunity to address the problems with retrospective regulatory review, and alternative mechanisms for reducing the burden of regulation without losing its benefits.

Much of my testimony is drawn from a policy brief published in February 2011 by the Progressive Policy Institute, where I am Chief Economic Strategist.<sup>1</sup> I am also affiliated with the Mack Center for Technological Innovation at Wharton as a senior fellow. Until 2009, I served as Chief Economist at BusinessWeek, where I helped direct the magazine's domestic and international economic coverage. I've written three books on uncertainty, innovation and growth, and one basic economics textbook.

One of my major concerns as an economist is the link between innovation and regulation. On the one hand, innovation is the key force propelling growth and creating jobs. On the other hand, regulation is essential for making our economy work smoothly. This balancing act is crucial in every industry—telecom, Internet, pharmaceuticals, manufacturing. It affects both big companies and small.

Unfortunately, if the regulatory burden is too heavy, it can tend to suppress the innovation and entrepreneurial energy that we need. So if we care about the long-term performance and competitiveness of the American economy, we have to focus on periodically lightening the regulatory load.

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<sup>1</sup>The policy brief "Reviving Jobs and Innovation: A Progressive Approach to Improving Regulation" (Progressive Policy Institute, February 2011) is submitted as an attachment.

This is not a new idea. It's not even terribly controversial. Reaching back to Jimmy Carter, every president, Democrat and Republican, has instructed his agencies to reconsider and review existing regulations.

Yet without exception, all of these attempts at retrospective review seem to have produced considerably less than the desired result. One might almost say that they failed. Certainly none of them succeeded.

The question: Why is retrospective review so hard to do effectively? One issue is foot-dragging by agencies. But that isn't the whole story. In fact, two other problems undermine the usefulness of retrospective reviews.

First, the retrospective review process consists of analyzing the costs and benefits of each regulation individually. Starting with a list of regulations that are candidates for reform, the agency goes down the list one-by-one and asks if the benefits exceed the costs.

The problem is that it's possible for every individual regulation to pass a cost-benefit test, while the total accumulation of regulation creates a heavy burden on Americans. The number of regulations matter, even if individually all are worthwhile.

I call this the 'pebble in the stream' effect. Thrown one pebble in the stream, nothing happens. Throw two pebbles in the stream, nothing happens. Throw one hundred pebbles in the stream, and you have dammed up the stream. Which pebble did the damage? It's not any single pebble, it's the accumulation.

Business people complain about the accumulation of regulations all the time. They say: “I understand why I had to apply for a permit, but why do I need five permits?” Each permit probably makes sense, on its own terms, but in total they create a large drag.

Some may disagree, but in my view it’s hard to point to “bad” regulations—regulations that by themselves are job-destroying or innovation-inhibiting. As a result, a regulatory review process looking to eliminate “bad” regulations will not find many candidates.

The other issue is that the very structure of the regulatory process makes it more expensive and difficult to undo regulations than to create them in the first place. When the original regulation is put in place, the agency can use whatever evidence is available, including small-scale academic experiments. By contrast, after the regulation has been in place for a while, the agency has to do a cost-benefit analysis using real data on actual outcomes and costs. That requires a sizable and expensive data collection effort, which may feel like an additional imposition for the companies affected by the regulation.

The good news is that we don’t need wholesale deregulation, or a complete overhaul of existing regulations. What we need is to scrape away some of the excess accumulation of rules, while leaving the most effective ones alone.

It’s like scraping barnacles off the bottom of a boat. It’s a thankless chore that must be done, or else the boat gradually slows down. When you scrape barnacles off the bottom of a boat, you don’t stop and think about each barnacle individually, you just do it. (The big difference, of

course, is that regulatory 'barnacles' do a lot of complaining.)

So we need a process that allows us to tackle the accumulation of regulation, without having to fight over each one individually. What PPI has proposed is an independent Regulatory Improvement Commission modeled somewhat along the successful process set up for the Base Realignment and Closure (BRAC) Commission.

The Regulatory Improvement Commission would be given the task of coming up each year with a package of 10-20 regulations to undo, rewrite or otherwise improve. They can be very small regulations, or large ones. The package is sent to Congress for an up or down vote, and then if passed, sent to the president for his signature.

What are the benefits of the Regulatory Improvement Commission over retrospective review? First, it would get us away from agencies reviewing their own regulations. The Commission would draw on expertise from the different agencies, but it would be able to make an independent decision.

Second, if the experience with BRAC is any guide, voting on a package of regulatory reforms would be easier than hand-to-hand fights over individual regulations.

Third, and perhaps most important, having Congress vote on the package of reforms legally allows us to short-circuit the cumbersome regulatory review process. The Regulatory Improvement Commission would hold hearings, but because the package of reforms would need the approval of Congress, the hearings wouldn't have to be arduous, compared to the process

that an agency would have to follow.

The bottom line is that the Regulatory Improvement Commission needs the combined efforts of both the legislative and executive branches to be effective. The executive branch by itself cannot get a grip on the problem. That's why retrospective review doesn't work, no matter who the President is.

The February 2011 policy brief lays out more details about how the Regulatory Improvement Commission could be structured. For example, the scope of the Commission can be restricted to stay away from environmental regulations, or can be expanded to encompass agencies such as the FCC. The Commission could be made temporary, like the BRAC Commissions, so that it regularly has to be re-authorized. The Commission could set up a website where businesses and individuals could submit suggestions for which regulations to undo or change.

In truth, there's a lot of different ways to make a Regulatory Improvement Commission work. The key is to set up a mechanism that offers a systematic and objective process for identifying a package of regulations to be undone or fixed, while acknowledging that Congress has to be an essential part of the process.

Thank you.



## Reviving Jobs and Innovation: A Progressive Approach to Improving Regulation

BY MICHAEL MANDEL, PHD

FEBRUARY 2011

Today, the U.S. is suffering from a regulatory paradox: Too few *and* too many regulations at the same time. On the one hand, financial services were clearly under-regulated during the 2000s, making financial reform essential. Similarly, President Obama's healthcare reform bill was a key first step to reining in medical costs.

But in other areas we see an accumulation of rules and regulations over the past decade. The trend started with the vast expansion of homeland security regulation under the Bush administration and continued through the first two years of the Obama administration.<sup>1</sup>

That's why President Obama should be applauded for issuing his executive order "Improving Regulation and Regulatory Review" on January 18. The order asked agencies to pay more attention to promoting innovation as part of the regulatory process. In addition, agencies were directed to

come up with a plan for reviewing their existing significant regulations.

However, the president's executive order did not go far enough. A regulatory 'self-review' process has been tried repeatedly in the past, and it's always fallen far short of expectations. Regulators have a tough time trimming their own regulations, given internal bureaucratic pressures. But don't blame the agencies—neither Congress nor the executive branch has a good way of reviewing and reforming existing regulations, even when they have become outdated or burdensome.

The regulatory system needs a mechanism to address this need for periodic review. We propose a Regulatory Improvement Commission (RIC), an independent body analogous to the BRAC Commissions for evaluating military base closures.<sup>2</sup> This is designed to build on the president's executive order, and in the process improve its effectiveness. The RIC will take a

### About the author

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principled approach to evaluating and pruning existing regulations, gather input from all stakeholders (not just business or just agencies), and do so in a manner that ensures we protect public health, safety, and the environment.

#### THE GOAL OF REFORM

Our goal is to create a positive environment for innovation in the U.S., which is essential for maintaining competitiveness and creating jobs. This pro-innovation goal requires us to take a hard look at the excess accumulation of regulation, which may be slowing down innovation and preventing the U.S. economy from reaching its full potential.

The intent behind the RIC is not to create a mechanism to sidestep Congress and dismantle major substantive regulations...[but] to identify regulations that are not critical to protecting things we value highly but are still burdensome, inefficient, outdated, or duplicative.

That's why we are proposing the creation of a periodic review process centered around appointing experts and stakeholders in a Regulatory Improvement Commission (RIC), which will be charged with identifying a limited number of regulations that can be eliminated, consolidated, or simplified. As such, it's designed as a politically feasible alternative to ideological and indiscriminant deregulation that takes a heavy-handed axe to essential federal agencies, and ends up exposing too many Americans to harm. This process is also a more effective alternative to the president's procedures ordering agencies to evaluate their own regulations, because it will include broader stakeholder input to identify target

regulations and examine the cumulative impact of them across agencies, not just within the silo of a single department or agency's jurisdiction.

The intent behind the RIC is not to create a mechanism to sidestep Congress and dismantle major substantive regulations that are politically controversial, like EPA pollution rules. Instead, we are trying to get beyond business as usual to identify the regulations that are not critical to protecting things we value highly but are still burdensome, inefficient, outdated, or duplicative.

Taken individually, most of these rules and regulations were probably reasonable when they were adopted, and they may still be individually defensible now. But the accumulation of regulations has the potential to hamper innovative and growing sectors, in the same way that a big enough pile of small stones can dam up a stream. Indeed, regulatory drag may be one reason why the past decade has seen few breakthrough products, outside of information technology and communications.<sup>7</sup>

The regulation issue is often wrapped up in ideological debates—big government versus small government, or rapacious private sector versus corrupt public sector. However, to a large degree the problem is a procedural one: Washington has a well-defined process for passing new regulations, but the tools are lacking to address the obvious duplications, inefficiencies, and conflicts of the current system. The result is that businesses and individuals lose faith in the direction that the economy is taking.

Thus, the Regulatory Improvement Commission is designed to address two questions:

- How do we identify existing regulations that are impeding growth and innovation?
- Can we come up with a politically feasible process for implementing **targeted regulatory improvements** (including consolidation, simplification, or elimination of existing regulations), while ensuring that we do not compromise essential protections for public health, safety, and the environment?

This proposal for improving and rolling back some regulations is part of a broader, progressive, forward-looking approach to the economy. Our approach focuses on building knowledge capital, physical capital, and human capital; encouraging innovation and growth; and protecting public goods.

Within this context, we want to make a pragmatic push for regulatory improvements and (where appropriate) reductions, particularly when it comes to industries that are innovative, growing, and generating jobs. In today's global supply-chain economy, companies increasingly have the option of rearranging operations so that more and more production and supervision is done in other countries. That's why it is so important to get the regulatory structure right.

#### A SUMMARY OF THE REVIEW PROCESS

Our proposal for a Regulatory Improvement Commission (RIC) process is based loosely on the successful process set up for the Base Realigning and Closure (BRAC) Commission, but adjusted for today's very different political and economic environment. To summarize the key components of the proposal:

1. **Lay out specific goals for regulatory improvement in the enacting legislation.** This step is absolutely essential, since the RIC is not a policy-making body. We would focus on encouraging innovation, improving competitiveness, reducing compliance costs, fostering growth, protecting public health and safety, and promoting responsible environmental stewardship.<sup>3</sup> Whatever objectives we chose, the important thing is that they are chosen at the front end, so the criteria for decision making are fixed and transparent throughout the process.
2. **Invite suggestions from the public for which regulations to cut, consolidate or simplify.** Think of an open and transparent website, where individuals and businesses can identify problematic regulations, along with specific examples. The RIC would be encouraged to focus on the regulations

which are discussed on the website, which will prevent backroom dealing and promote transparency.

3. **Appoint an independent, politically balanced Regulatory Improvement Commission.** The Commission's credibility and success will depend on having a group of appointed members who are highly qualified and beyond reproach, as well as expert staff seconded from the various agencies, Congress, and independent organizations. The Commission will hear testimony bearing on both positive and negative impacts. All deliberations of the commission must be public. The Commission will vote on a package of 15-20 regulatory changes that meet the original specified goals. The Commission will have a specified time and budget to complete its work, and it will terminate after submitting its recommendation package.
4. **Send the package to Congress for an up-or-down vote, no amendments allowed.<sup>4</sup>**
5. **Following congressional approval, the package must receive the President's signature.** This ensures that any changes will carry the full force of law, avoiding constitutional objections and potential litigation.

The rest of the paper will consider the RIC proposal in more detail. But it's important to note here that the RIC needs the combined efforts of both the legislative and executive branches, because regulation lives in that gray area between legislation and executive action. Neither branch by itself can get a grip on the problem. However, if Congress fails to act in this area, it would also be possible in the meantime for agencies to incorporate elements of this process in the "retrospective analysis" plans they are required to submit to OMB under Section 6 of the new executive order.

Note that the RIC proposal is more flexible than cost-benefit analysis, which is often criticized for undervaluing certain benefits (like innovation) which can be hard to quantify.<sup>5</sup>

I also note that the RIC proposal is following the ground opened up by Senator Mark Warner (D-VA) with his regulatory “pay-as-you-go” proposal.<sup>7</sup> In addition, the RIC has some similarities to the Commission on the Accountability and Review of Federal Agencies (CARFA), which has been introduced several times by Senator Sam Brownback (R-KS). But compared to CAREA, the RIC would have a sharper focus on regulation and innovation rather than spending, and would be more sensitive to protecting public health, safety, and the environment.

#### THE RECENT HISTORY OF REGULATION

Before discussing the RIC in more detail, we must understand the regulatory history of the United States over the past fifteen years. During the second half of the 1990s—the New Economy period—it seemed like the U.S. had managed to escape the “hardening of the arteries” that afflicted Japan and Western Europe. The combination of venture capital funding and an openness to innovation and new technology generated a wave of start-ups, jobs, and income. With information technology roaring ahead and the biotech revolution on the horizon, it seemed like nothing could stop the innovation-driven U.S. economy.<sup>8</sup>

During those years, the state of regulation in the U.S. economy didn’t seem like much of a concern. The Internet was mostly protected from regulatory activity, while President Bill Clinton steered a middle ground between active deregulation and greatly increased regulation. From fiscal years 1993 to 2001, employment in the federal regulatory agencies actually fell from 174,000 to 173,000.<sup>9</sup>

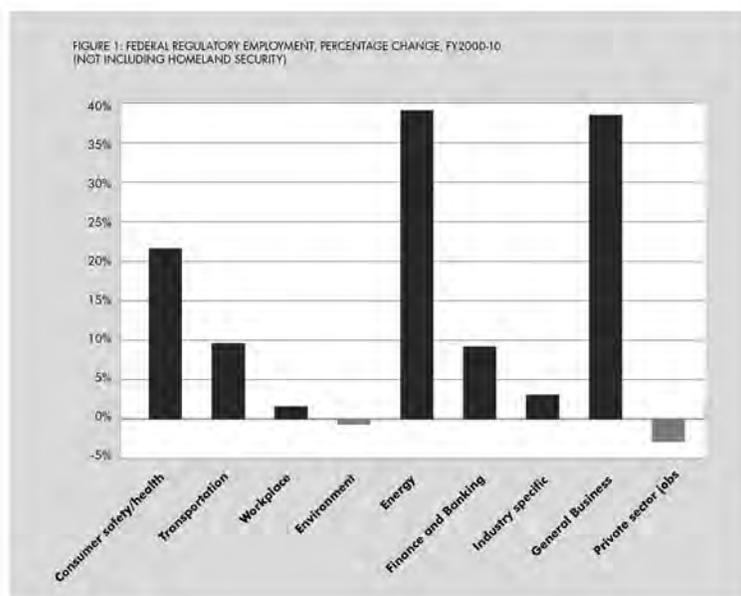
But in the first decade of the 21st century, what had seemed like an economic and regulatory success story came to an end, as four perhaps unrelated events rocked the U.S.:

- The tech bust and the accompanying scandals at Enron, Worldcom, and Global Crossing led Congress to enact a new wave of business regulation. This included the Sarbanes-Oxley Act of 2002 and tighter controls on the use of

stock options, an essential tool of start-up tech companies.<sup>10</sup>

- The terrible events of September 11, 2001 understandably led to a wave of homeland security regulation, including: tighter restrictions on monetary transfers in and out of the U.S., tighter restrictions on foreigners entering the U.S., additional security measures on travel and freight, and additional surveillance both domestically and abroad. (More recently, the Obama Administration proposed that telecom providers configure their most advanced systems to allow wiretapping for law enforcement and anti-terrorism purposes.<sup>11</sup>) While homeland security is not directed towards traditional regulatory ends, security-related rules have much the same effect as economic regulations.
- The broad economic crisis that started in 2007 showed the need for increased regulation of financial services.
- A 30-year upward trend in new drug approvals suddenly and unexpectedly paused in the early 2000s. Despite rapid advances on the scientific research front, including the sequencing of the human genome, much fewer new drugs were approved in the 2000s than in the 1990s. This turned into a vicious circle: fewer “wow” drugs led regulators to become more skeptical, which in turn led them to tighten up the approval process, which in turn has made it more and more costly for drug makers to develop new treatments.<sup>12</sup> Medical devices, too, have run into the same wall of regulatory skepticism.<sup>13</sup>

All four of these trends translated into dramatically increased regulatory activity from 2000 to 2010, a period including President George W. Bush’s entire administration through the first two years of President Obama’s term. However, the increase in regulatory activity was highly uneven. Some key agencies—notably the FDA, the SEC, and the Homeland Security Department—got big bumps in employment and budgets that far exceeded the growth rate of private sector employment. (In the chart above,



Dana Dudley Warren  
Chart: Progressive Policy Institute

the FDA is in the consumer safety health category, while the SEC is found in the general business category). The gain in energy regulatory jobs mostly represents the expansion of the Nuclear Regulatory Commission in preparation for the approval of a new wave of nuclear reactors.

Other areas of regulation— notably environment and workplace—have lagged far behind over this ten year stretch. In addition, though it doesn't show up on this chart, the number of financial regulators shrank between 2000 and 2007 before

expanding again once the crisis started. This shrinkage of financial regulators was in retrospect a great mistake.

#### IMPACT OF REGULATION

The impact of regulation on the economy, pro and con, has been studied extensively since the 1970s. These include microeconomic studies looking at the costs and benefits of individual regulations, and macroeconomic studies that sum up costs and benefits for the entire economy. I'm not going to summarize the literature here, except to

note that it's highly controversial and covers the gamut from intensely anti-regulatory to devoutly pro-regulatory. To just pick one, the 2010 report from the Office of Information and Regulatory Affairs (OIRA) sums up the costs and benefits of individual regulations, and estimates that the benefits of federal regulations far exceed the costs:

The estimated annual benefits of major federal regulations reviewed by OMB from October 1, 1999 to September 30, 2009, for which agencies estimated and monetized both benefits and costs, are in the aggregate between \$128 billion and \$616 billion, while the estimated annual costs are in the aggregate between \$43 billion and \$55 billion.<sup>11</sup>

OIRA's analysis, based on summing up the costs and benefits of individual regulations,

The task of improving, eliminating or simplifying old regulations is similar to scraping barnacles off the bottom of a boat. It's a thankless chore that must be done, or else the boat gradually slows down.

unfortunately misses the point. The big issue in the U.S. is the **accumulation** of regulations. Businesses can adjust fairly easily to any single rule, but they have a much harder time with multiple and overlapping regulations in the same area.

An accumulation of regulations can sometimes create problems, even if every regulation, taken individually, is defensible. Waves of new regulations, without elimination or rationalization of old ones, end up closing off options and raising costs.<sup>12</sup>



The bad news is that regulatory drag can sneak up on us. Even if Washington passes only reasonable and well-intended regulations, we could find ourselves in a situation where economic growth and innovation is being slowed by the accumulation of rules.

However, if this analysis is correct, the good news is that we don't need wholesale deregulation, or a complete overhaul of existing regulations. What we need is to scrape away some of the excess accumulation of rules, while leaving the most effective ones alone.

If Washington can demonstrate that it can take a meaningful step toward getting the regulatory process under control, that will have important symbolic and economic value. That was the importance of getting the deficit under control in the 1990s. In his 2003 book *In an Uncertain World*, Robert Rubin explained:

In important ways, the deficit had become a symbol of the government's inability to manage its own affairs—and of our society's inability to cope with economic challenges more generally, such as our global competitiveness, then much in question.<sup>13</sup>

That's why adopting institutional procedures for improving and pruning existing regulations is so important today: it would restore confidence in government and send a clear signal that we are up to the challenge of managing regulations over the long term.

#### DEFINING OBJECTIVES FOR REVIEW

In some ways, the task of improving, eliminating or simplifying old regulations is similar to scraping barnacles off the bottom of a boat. It's a thankless chore that must be done, or else the boat gradually slows down.

The big difference, of course, is that regulatory 'barnacles' get to do a lot of complaining. Almost everyone agrees that the regulatory structure is too complicated, but they can't agree on which ones need to go.

The question is how to set up a process which is effective, fair, and offers enough political cover to allow legislators to approve it. In recent years, there have been a variety of political mechanisms designed to deal with complicated questions where most agree with the final goal, but the individual pieces get nitpicked to death. For example, 'fast-track trade authority' allows the President to negotiate a trade treaty, which Congress can only vote up or down without amendments. The new Medicare-Independent Payment Advisory Board is an example of a commission-type structure which is designed to allow difficult decisions to make it through Congress.<sup>17</sup>

But it's still true that the BRAC process offers the best model for making difficult decisions. Today, people usually associate BRAC with the idea of an independent commission that comes up with a unified package of proposals, followed by a straight up and down vote. In fact, however, the actual BRAC process was more complicated and interesting.

Starting with the 1991 round of base closings, BRAC began with the Secretary of Defense publicly specifying the criteria for deciding which bases to eliminate or reduce.<sup>18</sup> As one scholar of BRAC notes:

While these were mostly military in nature, they also included economic and environmental considerations. A clear mission (identify bases to be cut) along with guiding criteria (military need, positioned the commission to make empirically defensible choices.<sup>19</sup>

The lesson from BRAC is clear: building clear criteria and guidelines into the enabling legislation for the RIC is essential. Without clear criteria, the RIC would become a policy-making body, which would not and should not be acceptable to Congress.

Ideally these goals or criteria should come from Congress, because ultimately the RIC process requires cooperation from both the legislative and executive branches. One set of clear goals might be:

1. **Reducing compliance costs.**
2. **Encouraging innovation.**
3. **Fostering growth.**
4. **Protecting public health and safety.**
5. **Improving competitiveness.**
6. **Ensuring responsible environmental stewardship.**

Other goals are possible, of course, but they should be specified up front.

#### THE MEMBERSHIP, SCOPE, AND DURATION OF THE COMMISSION

The RIC will be going into uncharted territory, with broad powers. For the Commission to succeed, it must be perceived by the public and policy makers as competent and credible. It should therefore be comprised of a bipartisan collection of stakeholders who have strong qualifications and reputations that are beyond reproach: business executives, entrepreneurs, consumers, economists, politicians, labor leaders, and others. Staff would be seconded from the various regulatory agencies, as well as Congress and independent research organizations, to provide expertise and competency across a range of different areas.

In terms of scope, the RIC should be empowered to consider regulations across all departments and agencies, including independent agencies such as the Federal Communications Commission. That would make it different from the President's executive order, which did not cover independent agencies such as the FCC and the SEC. However, it's worth acknowledging that it may be politically necessary to wall off certain controversial issue areas or major substantive regulations, such as Clean Air Act rules, from the initial rounds of review to assure skeptics that the RIC is not a Trojan horse intended to dismantle entire regulatory regimes that are frequently targeted by industry groups.

To counterbalance the broad powers and wide scope of the RIC, we propose that it should only be authorized for a limited period, say a year or 18 months—long enough to put together one package of 15-20 regulatory changes that meet the specified goals, and submit the package to Congress. This would be following the BRAC example, where each round of base-closings had to be separately reauthorized. That will also help us avoid creating another bureaucratic body.

Of course, if the RIC does its job well, we would hope that it would be re-authorized for additional rounds of regulatory improvements. Then we would have a steady flow of improvements and repeals to regulations that would lift some of the regulatory burden off innovation, while protecting public health, safety, and the environment.

#### IDENTIFYING REGULATIONS OF INTEREST

The next question is how to get the initial list of possible regulations to consider for reduction or improvement. In the BRAC process, the initial proposed list of base closings was generated internally by the Department of Defense.

In the case of the Regulatory Improvement Commission, we'd expect agencies and departments to suggest some regulations that need to be considered. But more likely the best and most interesting suggestions will come from outside—from companies and individuals who have direct experience with

regulations that should be improved, consolidated, or simplified.

For that reason, we propose opening up the process for public suggestions, with one requirement: complete transparency. If someone wants to suggest a regulation for reduction, they have to publicly say who they are and offer their evidence. This is the equivalent of crowdsourcing: relying on affected stakeholders and other interested

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parties to attack or defend specific regulations. The process for identifying regulations has to be transparent, so that businesses and individuals can see how the decisions are made.

Note that our proposed crowdsourcing process is much more open and transparent than the chairman of a congressional committee sending private letters to corporations and trade associations asking them to suggest regulations to undo.<sup>29</sup> Moreover, the RIC process allows us to wall off some progressive values that we won't compromise, and make equal time for other groups and individuals.

#### ACTING ON THE COMMISSION'S FINDINGS

The Commission should sort through the suggestions, examine the evidence in a serious way, and hold public hearings, as the BRAC commissions did. Then it should vote on a package of 15-20 regulatory changes that meet the original specific goals. All deliberations of the Commission must be public, to ensure public confidence in

the specific judgments that the members will ultimately make in recommending regulatory changes.

The package of regulatory changes is then subject to congressional and presidential approval. Ideally, the congressional vote should be a fast-tracked, up-or-down vote, with no room for breaking the package apart. As in the case of BRAC, this will guarantee a single vote for or against regulatory improvement, rather than individual regulations.

#### **WHY AGENCY SELF-REVIEW BY ITSELF IS NOT ENOUGH**

The RUC, designed to improve or repeal existing executive branch regulations which were originally authorized by Congress, is a bit of a hybrid itself. Designing the authorizing legislation and getting it through Congress will not be a simple process. As a result, many people will ask why the process of regulatory improvement can't simply be done within the executive branch.

Indeed, agency self-review is exactly what President Obama calls for in his executive order:

To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outdated, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

In theory, this "retrospective analysis" approach makes sense: the simplest way to identify 'weak' regulations is to redo the original cost-benefit analysis, using actual outcomes and costs rather than anticipated ones. In theory (once again), this analysis should tell us which regulations have outperformed their original expectations and which ones have fallen short.

However, agency self-review has been tried repeatedly for the past 30 years, with limited success. According to a 2007 GAO report:



Every president since President Carter has directed agencies to evaluate or reconsider existing regulations. For example, President Carter's Executive Order 12044 required agencies to periodically review existing rules; one charge of President Reagan's task force on regulatory relief was to recommend changes to existing regulations; President George H.W. Bush instructed agencies to identify existing regulations to eliminate unnecessary regulatory burden; and President Clinton, under section 5 of Executive Order 12866, required agencies to develop a program to "periodically review" existing significant regulations. In 2001, 2002, and 2004, the administration of President George W. Bush asked the public to suggest reforms of existing regulations.<sup>21</sup>

Agency self-review has turned out to be very difficult to do, for a combination of institutional and technical reasons. First, many regulations are directly mandated by Congress, limiting the executive branch's ability to change them.

Second, doing a cost-benefit analysis with actual outcomes and costs requires a sizable and expensive data collection effort. In fact, the cost of a retrospective analysis can be much higher than the cost of the original cost-benefit study.

That limits the number of regulations that can be evaluated in this way. Ironically, one reason why

The RIC will take a principled approach to evaluating and pruning existing regulations ... and do so in a manner that ensures we protect public health, safety, and the environment.

retrospective analysis is so rare and expensive is that it often requires permission from the OMB to collect the necessary data, under the Paperwork Reduction Act of 1980.)

Perhaps most important, it's very difficult for an agency to evaluate its own regulations and come

up with a different conclusion, as the 2007 GAO report found that:

(A)gencies' reviews more often attempted to assess the effectiveness of their implementation of the regulation rather than the effectiveness of the regulation in achieving its goal.

Agency self-review is not a bad idea. But it needs to be combined with an outside review like the RIC process to be truly effective.

#### **CONCLUSION**

The hallmark of a dynamic society is that it is able to take effective action, when necessary. The U.S., through no fault of its own, finds itself heading down the path of slowing innovation and increased ossification. President Obama's executive order is a good first step—but it's time to take steps to reinvigorate the economy while protecting the values that we hold important.

## ENDNOTES

- 1 People don't usually think of the Department of Homeland Security as a regulatory agency, but as part of its mission it has issued new rules for travel, finance, immigration, education, establishing identity, and other areas of the economy.
- 2 We will discuss later in the paper whether RIC should be temporary or permanent.
- 3 See, for example, my policy memo "Why the Jobs Crisis Is Actually an Innovation Crisis," Progressive Policy Institute, March 2010.
- 4 A similar set of criteria (with the notable absence of encouraging innovation) is set forth in the first sentence of President Obama's January 18, 2011 executive order: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."
- 5 This provision differs from the 'silent approval' process of the BRAC recommendations. "Running For Cover: The Brac Commission as a Model for Federal Spending Reform," Jerry Brito, Mercatus Center, May 2010.
- 6 When agencies analyze the costs and benefits of a new regulation, they have historically rarely accounted the regulation's impact on innovation. The problem starts at the top: President Obama's Office of Information and Regulatory Affairs barely mentions 'innovation' in its latest report on the benefits and costs of federal regulations. This might change with President Obama's latest executive order.
- 7 "To revive the economy, pull back the red tape," Mark Warner, Washington Post, December 13, 2010.
- 8 See, for example, my 2004 book *Rational Exuberance*.
- 9 "A Decade of Growth in the Regulators' Budget," Susan Dudley & Melinda Warren, May 2010.
- 10 In 2004, I wrote in *Rational Exuberance*: "A broad-brush action against stock options seems distinctly counterproductive, at a time when the U.S. is concerned about competing against China and India. The phrase 'cutting off your nose to spite your face' comes to mind."
- 11 "U.S. Tries to Make It Easier to Wiretap the Internet," New York Times, September 27, 2010.
- 12 See my forthcoming piece, "Biosciences and the Long-term Economic Recovery."
- 13 A recent industry-supported survey of medical technology companies found that "it takes significantly longer to navigate U.S. regulatory processes than it does to complete European approvals for the same products." "FDA Impact on U.S. Medical Technology Innovation," Josh Makower, Aabed Meer, and Lynn Denend, November 2010.
- 14 "2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Office of Information and Regulatory Affairs.
- 15 To put it another way, the impact of regulation on the economy may be subject to threshold effects.
- 16 *In an Uncertain World*, Robert Rubin, 2003.
- 17 See "The Independent Payment Advisory Board", Congressional Research Service, November 2010, available at [http://assets.opencrs.org/rpts/R41511\\_20101130.pdf](http://assets.opencrs.org/rpts/R41511_20101130.pdf)
- 18 The first base-closing commission, the 1988 Carlucci Commission, was purely a creation of the Department of Defense.
- 19 "Running For Cover: The Brac Commission as a Model for Federal Spending Reform," Jerry Brito, Mercatus Center, May 2010.
- 20 "Darrell Issa asks business: Tell me what to change," Politico, Jan 3, 2011, available at <http://www.politico.com/news/stories/0111/40995.html>
- 21 Government Accountability Office. 2007. *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews* Report No. GAO-07-591.

Mr. COBLE. Professor Levin?

**TESTIMONY OF RONALD M. LEVIN, WILLIAM R. ORTHWEIN  
DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY SCHOOL OF LAW**

Mr. LEVIN. Thank you, Mr. Chairman and Members of the Subcommittee.

As the Chairman mentioned, I am a scholar who specializes in the field of administrative law. And I think you would find a broad agreement among students of my field that agencies don't do as

much reexamination of their existing rules as they should. In any large regulatory program, there are going to be some rules that have outlived their usefulness or need updating or perhaps can now be seen as having been mistakenly drafted from the beginning. So the question is what steps might be taken to identify those rules and how to go about fixing them.

The Administration has devised an elaborate lookback program, and the Subcommittee should evaluate its track record, but I am prepared to assume for purposes of today's discussion that Congress will take a serious look at establishing a program of retrospective reviews on its own. The other panelists today have some interesting ideas for setting up external bodies to manage the retrospective review or lookback process, but, at least for purposes of comparison, I intend to explore how Congress might structure a mandate for retrospective review to be administered by agencies themselves, which is the more common pattern and possibly the most workable one.

In my statement, I draw on recommendations issued by the American Bar Association and the Administrative Conference of the United States on the very subject of retrospective reviews. Those are both organizations that I have worked with for years, although I am not speaking for either of them today.

Specifically, in this discussion, I will emphasize four themes that I believe the Subcommittee should take into account as it considers possible legislation on retrospective review. And I call these themes selectivity, affordability, flexibility, and evenhandedness.

As to selectivity, I think priority-setting is essential to an effective scheme. If you direct an agency to review all of its rules, as sometimes has been done in the past, they will do a superficial job on them. So if you want a rigorous examination of a rule's effects, that level of effort should be targeted at particular rules in a well-considered fashion. And the agencies will need discretion to do that.

But when I say "discretion," I don't mean to imply that they should make their selection of rules to be reviewed in isolation from the rest of the world. I think you should have opportunities for input by OIRA, by the White House, by the relevant oversight Committees of Congress, and from the public. And these days, of course, the Internet makes opportunities for the public to participate easier than it ever has been in the past.

The second criterion I offer is affordability, by which I simply mean that rigorous research into the effectiveness of a rule will take real resources. And if Congress wants the agency or anybody else to do it, it will need to provide funding for it. And I know that is not a small consideration these days. Agencies are already, in my opinion, seriously constrained by tight budgets in carrying out tasks that Congress has assigned to them. But these days, many Members have instituted tight curtailment on discretionary spending, and there are proposals to constrain it even more. And there is a tension between that impulse and the goal of promoting careful analysis that hasn't been done in the past.

My third criterion is flexibility. By that I mean the legislation should not be too detailed about how the reviews are to be conducted, because various programs have different structures and dif-

ferent needs. Specifically, the ABA resolution that I mentioned identifies as possible alternative approaches multi-agency reviews, reviews by broad categories of rules or by subjects or by impact on specific groups, like small business or State and local governments, or cleanup reviews to get rid of entirely obsolete rules. I think a statute that governs retrospective reviews might provide a menu of approaches for an agency to follow but it should not try to make one size fit all.

My fourth criterion, fourth and last, is what I call evenhandedness. Some rules become obsolete by being too restrictive, and others become obsolete by being too weak. And a balanced lookback process should facilitate an agency's capacity to repair either type of problem. In my statement, I use the example of pollution standards that EPA has used under a mandate to apply the best technology available. Well, technology evolves, but the agency often doesn't get around to strengthening its rules to bring them into compliance with the statute.

Now, of course, there are going to be disagreements in this body and elsewhere about how much the problem of overregulation compares with the problem of underregulation. But if you want to establish permanent legislation along the lines of the Administrative Procedure Act, it should be politically neutral, and you could then leave it to the political process to determine at any particular time what rules are causing the greatest problem.

With that, I will conclude my oral statement, and I will be happy to respond to any questions you may have. Thank you again for letting me testify.

Mr. COBLE. Thank you, Professor.

[The prepared statement of Mr. Levin follows:]

**Testimony of Ronald M. Levin  
William R. Orthwein Distinguished Professor of Law  
Washington University in St. Louis**

**Before the  
U.S. House of Representatives  
Committee on the Judiciary  
Subcommittee on Courts, Commercial and Administrative Law**

**Hearing on “Clearing the Way for Jobs and Growth:  
Retrospective Review to Reduce Red Tape and Regulations”**

**July 12, 2012**

Chairman Coble, Ranking Member Cohen, and members of the subcommittee, it is a privilege for me to be able to appear before you today to discuss the timely subject of retrospective review of administrative agency rules.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. In this statement, I will draw upon advisory statements that the ABA and ACUS have adopted concerning procedures for retrospective review. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

#### I. BACKGROUND

I agree with what I gather is the fundamental premise that underlies this hearing: that regulatory agencies have a responsibility to engage periodically in a careful evaluation of their existing rules. Retrospective review, also known as the “lookback” process, is an important function, because rules often become obsolete or fail to work out as expected. Often the reasons for this failure could not have been anticipated when the rule was issued. Factual circumstances change, as do legal environments and political realities. In short, the tendency toward obsolescence is, to a large extent, simply a consequence of the complexities of life and the dynamic nature of our society.

Notwithstanding these good reasons to conduct retrospective review, agencies will not always engage in as much review as they should unless some external pressure is brought to bear. Inertia can take hold for a variety of reasons. Agencies are often focused on legal mandates to develop new regulations, or on their leadership’s goals of fulfilling new policy initiatives, and so the less glamorous task of revisiting rules that are already on the books frequently takes a back

seat.

The tendency to shun retrospective review should not be overstated. Even where no external compulsion is involved, agencies do frequently reexamine their regulations and take curative action. Indeed, in 2007 the Government Accountability Office conducted a substantial study of more than 1300 reviews by nine agencies over a six year period and found that voluntarily initiated reviews actually occurred more frequently than mandatory ones (required by statute or executive order or directive).<sup>1</sup> In view of the structural factors that serve to reinforce inertia at the agency level, I do not think the GAO findings entirely undermine the case for an externally imposed program of retrospective reviews, but they would seem to counsel moderation in the design of such a program.

In any event, legislative and executive branch authorities have already taken a variety of steps to encourage agencies to reexamine and eliminate or modify outdated regulations. The Regulatory Flexibility Act requires agencies to review regulations that have a “significant economic impact upon a substantial number of small entities” at least once every ten years.<sup>2</sup> Moreover, presidential initiatives in this area date back at least to the Carter Administration<sup>3</sup> and have been pursued especially energetically during the past four presidential administrations. The first President Bush directed agencies to review all of their rules within a ninety-day period; President Clinton incorporated a retrospective review mandate into his executive oversight order; and the second President Bush solicited nominations from the public of specific rules that were in need of reform.<sup>4</sup>

Beginning in 2011, the Obama administration has pursued a particularly elaborate lookback policy. In Executive Order 13563,<sup>5</sup> the President called on all executive agencies to submit plans for retrospective review of their “significant” regulations to the Office of Regulatory Affairs (OIRA). A subsequent directive, Executive Order 13579, urged *independent* agencies to comply (voluntarily) with a similar process.<sup>6</sup> Finally, Executive Order 13610, which

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<sup>1</sup>Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-79, at 13-15 (2007).

<sup>2</sup>5 U.S.C. § 610 (2006).

<sup>3</sup>GAO Report, *supra* note 1, at 10.

<sup>4</sup>For details, see JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 356-59 (5th ed. 2012).

<sup>5</sup>76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>6</sup>76 Fed. Reg. 41587 (July 11, 2011). OIRA followed up on this order by issuing a guidance memorandum for independent agencies. OMB Memorandum M-11-28. In substance, this memorandum largely repeats the advice and policy positions that OIRA had directed to executive agencies in an earlier document, OMB Memorandum M-11-10. OIRA noted, however, that this guidance was “issued with full respect for the independence of [independent] agencies” and “not meant to be binding.” OMB Memorandum M-11-28 at 1. Both memoranda are available at [http://www.whitehouse.gov/omb/international\\_regulatory\\_cooperation](http://www.whitehouse.gov/omb/international_regulatory_cooperation).

was published two months ago, expanded on the prior orders by directing executive agencies to take “further steps . . . consistent with law, agency resources, and regulatory priorities, to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations.”<sup>77</sup>

In a recent report by the Council of Economic Advisors, the administration has declared that these measures “are meant to ensure regular evaluation of the actual effects of regulatory mandates,” so that “the process of retrospective review should become a standard part of the assessment of federal regulations.”<sup>78</sup> The CEA also asserts that the plans submitted by executive agencies have produced more than 500 reform initiatives and will result in savings in excess of \$10 billion over the next five years, with more savings to come from both executive and independent agencies.<sup>9</sup>

I do not suggest that the subcommittee needs to accept these claims at face value, but the administration’s track record is at least a factor that the subcommittee should weigh carefully as it considers what further steps, if any, are needed. Reasonable minds might differ on the question of whether Congress should build upon these past efforts by enacting a legislative program for retrospective reviews. A statutory scheme would contribute stability and predictability to the process. On the other hand, it could potentially give rise to some of the very problems of obsolescence that I have mentioned in connection with regulations. A flawed legislative scheme is harder to repair than a flawed executive program.

Another reason why Congress might wish to prescribe a program of retrospective reviews is that it could make the requirements applicable to independent agencies, a step that presidential administrations have traditionally refrained from attempting to impose on their own. Even on that score, however, the need for such a requirement is unclear, because the present administration appears to have had a good deal of success eliciting voluntary participation by independent agencies in its recent lookback initiative. According to the CEA report, “By November 2011, approximately twenty independent agencies, including nearly all of the independent agencies with a substantial number of regulations, had responded to the President’s call and released plans for retrospective review for comments by the public.”<sup>10</sup> Again, the subcommittee may wish to make its own appraisal of the independent agencies’ performance. At least at face value, however, the CEA report casts doubt on the premise that a statute could elicit wider participation by independent agencies with significant regulatory missions than has been achieved without one.

<sup>77</sup> Fed. Reg. 28,469 (May 10, 2012).

<sup>78</sup> COUNCIL OF ECONOMIC ADVISORS, SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 2 (2012), available at [http://www.whitehouse.gov/sites/default/files/lookback\\_report\\_rev\\_final.pdf](http://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf).

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 10. For a compilation of the URLs for the independent agencies’ plans, see *id.* at 16-17.

## II. CRITERIA FOR A RETROSPECTIVE REVIEW STATUTE

Regardless of whether a statutory program of retroactive review is needed, I will assume for purposes of today's hearing that lookback legislation is a serious prospect. Accordingly, I will turn to questions about what such a statutory scheme should look like.

In this discussion I will draw on recommendations that the ABA and ACUS adopted in 1995 regarding retrospective reviews.<sup>11</sup> I am attaching the texts of these recommendations to this statement, and I will highlight a few of their key points in my remarks. Again, I am not speaking on behalf of either entity today, but I believe these recommendations contain a host of good ideas on retrospective review and merit careful consideration by the subcommittee. They are consensus pronouncements that reflect the assessments of experienced practitioners, agency personnel, and academics in the administrative law field.

More specifically, in this discussion I will emphasize four themes that I believe the subcommittee should take into account as it considers possible legislation on retrospective review: *selectivity*, *affordability*, *flexibility*, and *evenhandedness*.

### A. Selectivity

In any sound scheme for retrospective review, priority-setting is essential. It is a mistake to require agencies to review all of their rules indiscriminately. As the Administrative Conference observed:

Tight time frames or review requirements applicable to all regulations, regardless of their narrow or limited impact, may prevent agencies from being able to engage in a meaningful effort. It is important that priority-setting processes be developed that allow agencies, in consultation with the Office of Management and Budget and the public (including but not limited to the regulated communities), to determine where their efforts should be directed.<sup>12</sup>

More recently, this insight was borne out by the GAO report that I mentioned earlier. The GAO reported:

Agencies that developed review programs with detailed processes for prioritizing which regulations to review reported that this prioritization facilitated their ability to address

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<sup>11</sup>*Federal Agency Reviews of Existing Regulations*, 120-2 A.B.A. ANN. REP. 48 (1995) (hereinafter ABA Resolution); ACUS Recommendation 95-3, Review of Existing Regulations, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

<sup>12</sup>ACUS Recommendation 95-3, *supra* note 11, pmb1.

time and resource barriers to conducting reviews and allowed them to target their efforts at more useful reviews of regulations that were likely to need modifications. . . . Nonfederal parties that we interviewed also asserted that it is not necessary or even desirable for agencies to expend their time and resources reviewing all of their regulations. Instead, they reported that it would be more efficient and valuable to both agencies and the public for agencies to conduct substantive reviews of a small number of regulations that agencies and the public identify as needing attention.<sup>13</sup>

Indeed, GAO also found that reviews that an agency undertakes voluntarily are far more likely to lead to a conclusion that a rule needs revision than are mandatory reviews.<sup>14</sup>

The GAO report especially highlighted the problems that can develop out of retrospective review schemes in which an agency is expected to revisit all of its rules within a fixed time frame:

To make efficient use of their time and resources, various agency officials said that they consider all relevant factors, including effectiveness and burden reduction, whenever they review an existing regulation. Therefore, when reviews that have predetermined or generic schedules and review factors (such as 10-year Section 610 reviews [under the Regulatory Flexibility Act]) arise, the agency might have already reviewed and potentially modified the regulation one or more times, based upon the same factors outlined in Section 610. The officials reported that, although the subsequent predetermined reviews are often duplicative and less productive, they nevertheless expend the time and resources needed to conduct the reviews in order to comply with statutory requirements. However, they reported that these reviews were generally less useful than reviews that were prompted because of informal industry and public feedback, petitions, changes in the market or technology, and other reasons. Furthermore, agencies expressed concerns about whether predetermined schedules may conflict with other priorities.<sup>15</sup>

These observations ring true.

I do not mean to imply that agencies should make their selections of rules to be reviewed in isolation from the rest of the world. On the contrary, OIRA, the White House, and the relevant oversight committees of Congress should all be able to play a role in the selection process, just as with other policy initiatives. The public should also have opportunities to nominate rules as

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<sup>13</sup>GAO Report, *supra* note 1, at 45-46.

<sup>14</sup>*Id.* at 30-34.

<sup>15</sup>*Id.* at 38. For fuller discussion, see *id.* at 38-39.

candidates for lookback review. The ABA and ACUS agreed with that sentiment,<sup>16</sup> but these organizations, speaking in 1995, could not have anticipated the rise of modern electronic technology. Today, the Internet provides a variety of convenient tools with which agencies can solicit and receive suggestions from members of the public.

Congress might also consider supporting the establishment of a special group to propose rules for review. It could perhaps make use of the existing structure of the Federal Advisory Committee Act<sup>17</sup> in creating such an entity. However, I would think of such a group as serving an advisory function, not as wielding power in its own right. An agency has responsibility for the entire portfolio of programs that it has been charged with administering, and it can be held politically accountable for its performance. But an external group that is concerned only with lookback issues would have no such perspective or accountability.

The law recognizes this idea indirectly by giving agencies broad discretion to decide whether or not to act favorably on a citizen petition for rulemaking. The agency does need to make a serious response to the petition, and its response will be judicially reviewable,<sup>18</sup> but the standard of review is narrow.<sup>19</sup> There are good reasons for the courts to show restraint in this area. As ACUS explained in its recommendation on retrospective reviews, rulemaking petitions

should not be allowed to dominate the agency's agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities, both with respect to the need for new regulations and to review of existing regulations.<sup>20</sup>

Any legislation that Congress may develop to govern the retrospective review process should adhere to this insight as well.

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<sup>16</sup>ABA Resolution, *supra* note 11, ¶ 4(c); ACUS Recommendation 95-3, *supra* note 11, ¶ IV.

<sup>17</sup>5 U.S.C. App. 2 (2006).

<sup>18</sup>*Auer v. Robbins*, 519 U.S. 452, 459 (1997).

<sup>19</sup>*Massachusetts v. EPA*, 549 U.S. 497, 527 (2007).

<sup>20</sup>ACUS Recommendation 95-3, *supra* note 11, pmb1.

### B. Affordability

My second criterion for a retroactive review statute is what I call *affordability*. By this term, I mean that lookback programs must be commensurate with the resources that Congress makes available to the agencies, both directly through its budget decisions and indirectly in terms of other assignments that it asks them to perform. Both the ABA and ACUS recommendations emphasized this linkage.<sup>21</sup> The resources that this exercise requires are not only monetary. They also include the attention that senior policy makers and their staff will have to devote to the review effort. Because I think retrospective reviews are worthwhile ventures, I would like to see Congress take steps to facilitate them, and this could entail an infusion of new budgetary resources to underwrite these ventures.

On the other hand, I would be concerned about the possibility that Congress might augment the agencies' retrospective review obligations as an "unfunded mandate," i.e., without also providing the resources that a serious review process should entail. The potential for painful tradeoffs between affirmative regulation and retrospective reviews is worrisome. For a number of years, agencies charged with protecting the public health, safety, environment, and financial security have been hard put to fulfill their regulatory missions because of budget constraints.<sup>22</sup> And today, of course, the trajectory seems to be headed toward even greater austerity. As all members of your subcommittee well know, last year's Budget Control Act prescribed significant reductions in discretionary spending, and this House has passed a budget plan that envisions much larger cuts. This trend does not bode well for the prospect of ambitious new ventures, other than at a significant cost to current operations.<sup>23</sup> I would consider that cost a very high a price to pay.

### C. Flexibility

My third theme, *flexibility*, relates primarily to the manner in which reviews are conducted, rather than the selection of rules to be reviewed (although the two issues cannot be kept entirely separate, because the scope of the inquiry affects the number of rules that an agency can review). As the organizations from which I have been quoting in this statement have all

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<sup>21</sup>See ABA Resolution, *supra* note 11, ¶ 2 ("Congress should require review programs and, in so doing, should . . . ensure that agencies have adequate resources to conduct effective and meaningful reviews"); ACUS Recommendation 95-3, *supra* note 11, ¶ II ("The nature and scope of the review should be determined by, among other things, the agency's other responsibilities and demands on its resources.").

<sup>22</sup>See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC* 54-71 (2010); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); *For Regulatory Agencies, Intrigue in an Otherwise Bleak Budget*, OMB WATCH, Feb. 12, 2010, available at <http://www.ombwatch.org/node/10762>.

<sup>23</sup>See, e.g., Jonathan Weisman, *In Washington's New Mood of Austerity, Legislating Turns Into a Zero-Sum Game*, N.Y. TIMES, July 4, 2012.

cautioned, designers of a retrospective review program should bear in mind that agencies differ greatly in their structure and responsibilities. A one-size-fits-all approach would be too rigid.<sup>24</sup> This cautionary message would seem to be particularly apt in the case of a proposed *statutory* scheme, which would be difficult to amend if problems with the prescribed template were to develop

The ABA's recommendation, for example, advised that Congress should "avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies."<sup>25</sup> The resolution went on to identify some of the alternatives that might work best in varying circumstances, including "multi-agency reviews, review by broad categories of rules, specific subjects, or the impact on specific groups (such as small businesses or state or local governments), and 'clean-up' reviews which address problems such as outdated references, address changes, and obsolete requirements."<sup>26</sup>

Responsibility for fleshing out the general criteria in lookback legislation may appropriately be vested in the executive branch. One beneficial consequence of doing so is that Congress could thereby enable any given presidential administration to urge agencies to conduct reviews to carry forward the regulatory philosophy of that administration. Indeed, OIRA has already performed this function in the Obama administration's lookback program. As I said in the context of the selection of rules for review, the administration's choices and those of the agencies must be, and in practice surely will be, made in dialogue with the relevant committees of Congress as well as the general public.

#### D. Evenhandedness

Finally, insofar as the subcommittee does consider legislation that would prescribe detailed inquiries for an agency to apply in conducting retrospective reviews, I would hope that those criteria will be evenhanded in nature. Reconsideration of a rule that has been on the books for many years may reveal that the rule is either too broad or too narrow, too restrictive or too lenient. In a balanced lookback process, the agency should be open to uncovering problems that cut in either direction. As OIRA remarked in its guidance on EO 13563:

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<sup>24</sup>See GAO Report, *supra* note 1, at 49 ("To facilitate their reviews, agencies, to greater and lesser extents, have been developing written procedures, processes, and standards to guide how they select which rules to review, conduct analyses of those rules, and report the results. Given the multiple purposes and uses of reviews, we recognize that there is no 'one size fits all' approach."); ACUS Recommendation 95-3, *supra* note 11, pmbl. ("Given the difference among agencies, . . . processes for review of existing regulations should not be 'one-size-fits-all,' but should be tailored to meet agencies' individual needs. Thus, the President, as well as Congress, should avoid mandating standardized or detailed requirements.")

<sup>25</sup>ABA Resolution, *supra* note 11, ¶ 2.

<sup>26</sup>*Id.* ¶ 3.

While systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking. Retrospective review may reveal that an existing rule is needed but has not operated as well as expected, and that a stronger, expanded, or somewhat different approach is justified.<sup>27</sup>

GAO's report on retrospective reviews offers a tangible example of this sort of beneficial updating proposal:

OSHA's review of its mechanical press standard [prescribing safety precautions for the use of mechanical power presses] revealed that the standard had not been implemented since its promulgation in 1988 because it required a validation that was not available to companies. Consequently, OSHA is currently exploring ways to revise its regulation to rely upon a technology standard that industries can utilize and that will provide for additional improvements in safety and productivity.<sup>28</sup>

It is not hard to find other examples of situations in which a vigorous program of retrospective reviews could bring about a desirable strengthening of existing regulations. For instance, in an empirical study published a few years ago in the *Texas Law Review*, Professors Lynn Blais and Wendy Wagner found that the Environmental Protection Agency has frequently been slow to update pollution standards under the Clean Air Act and Clean Water Act to reflect evolving technological progress.<sup>29</sup> By law, these standards are supposed to be based on the best technology available, a benchmark that naturally changes over time. In practice, however, once a standard has been adopted, the agency and the public interest groups that would be inclined to support updating tend to direct their energies and limited resources toward other programs. Industry, on the other hand, typically adapts to the current level of regulation and has both the incentive and resources to resist efforts to reopen proceedings to bring the standards into line with current scientific and engineering knowledge.<sup>30</sup> Professors Blais and Wagner say that this same pattern has apparently been repeated in the context of other programs, including EPA's regulation of pesticides and toxic substances and OSHA's regulation of worker health and safety.<sup>31</sup>

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<sup>27</sup>OMB Memorandum M-11-10, *supra* note 6, at 4-5. OIRA repeated this advice in its guidance directed at retrospective reviews and other analyses by independent agencies. OMB Memorandum M-11-28, *supra* note 6, at 5 (elaborating on EO 13579).

<sup>28</sup>GAO Report, *supra* note 1, at 30-31.

<sup>29</sup>See Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1720-25 (2008).

<sup>30</sup>*Id.* at 1713-14.

<sup>31</sup>*Id.* at 1725-28.

I do not think that the accounts of underregulation that I have just mentioned are in any way incompatible with accounts of overregulation in other settings. Clearly, rules can become obsolete in either respect, or sometimes in both respects at once. I do believe, however, that a fairminded proposal for retrospective reviews should be capable of responding to both kinds of obsolescence. The relevant agency should solicit suggestions of both kinds from the public and interested organizations, and the decisionmaking criteria built into the program should facilitate both kinds of revisions.

In practice, the balance that a given presidential administration strikes between the two kinds of revision will, of course, reflect that administration's regulatory philosophy as well as the background political realities. The underlying legal framework, however, should be neutral, particularly if it is designed to last for many years. An evenhanded approach would, of course, provide the most credible path to attracting broadbased public support for retrospective review legislation.

This concludes my prepared statement, and I would be happy to respond to any questions you may have. Thank you again for the invitation to testify.

**ATTACHMENT**

*RESOLVED*, That the American Bar Association recommends that the following principles should guide the review of existing regulations by federal administrative agencies with rulemaking authority:

1. Whether or not Congress enacts regulatory reform legislation, agencies should commit to a periodic review of their regulations to determine whether they should be revised or revoked with the goals of improving existing regulations, eliminating duplicative, obsolete, and inconsistent regulations, and better coordinating related regulations.
2. Congress should require review programs and, in so doing, should: (a) ensure that agencies have adequate resources to conduct effective and meaningful reviews, and (b) avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies.
3. Agencies should choose from different approaches to review the methods that are best tailored for particular situations. The approaches may include multiagency reviews, review by broad categories of rules, specific subjects, or the impact on specific groups (such as small businesses or state or local governments), and "clean-up" reviews which address problems such as outdated references, address changes, and obsolete requirements.

4. An effective and meaningful review program requires:
  - a. the assignment of a senior level policy official to administer the review program to ensure the commitment of appropriate personnel and resources, the establishment of review priorities as necessary, and the enforcement of appropriate deadlines for considering and completing reviews;
  - b. an internal process for assessing and revising rules that includes obtaining input from agency employees who routinely work with the applicable rules, such as inspectors, investigators, rule writers, policy analysts, and litigators;
  - c. the establishment of methods to measure the success or failure of regulations and to obtain the information necessary to make such assessments, including information on costs, benefits, and changes in technology;
  - d. evaluation of rules in light of legal requirements for review and such considerations as administration policy changes, cost and benefit data, technological and scientific changes, implementation, and enforcement difficulties, litigation, conflict or duplication with other rules, obsolescence, and information from the public such as complaints, rulemaking petitions, and requests for exemptions; and
  - e. the effective involvement of the public, as appropriate, by:
    - (1) reliance on general and specific requests for information, advance notices of rulemaking, electronic bulletin boards, public meetings, advisory committees, appointment of an ombudsman or other contact person to receive concerns or complaints, and other methods of inviting public comment;
    - (2) publication of detailed procedures for the submission of rulemaking petitions, publication of petitions for public comment, and encouraging petitioners to obtain peer review of petitions or to use consensus petitions; and
    - (3) public education explaining how the rulemaking process works and how it can be used to obtain the review of existing regulations.
5. Agencies should adopt regulations that are less likely to become obsolete or require amendment, such as performance standards or other rules that give regulated entities flexibility concerning methods of compliance, consensus standards, and rules that provide standards for automatic adjustments to a change in circumstance. Agencies should also establish formal programs for issuing interpretations to lessen confusion concerning existing rules.

## **Recommendation 95-3**

### **Review of Existing Agency Regulations**

Federal agencies generally have systems in place to develop new regulations. Once those regulations have been promulgated, the agency's attention usually shifts to its next unaddressed issue. There is increasing recognition, however, of the need to review regulations already adopted to ensure that they remain current, effective and appropriate. Although there have been instances where agencies have been required to review their regulations to determine whether any should be modified or revoked, there is no general process for ensuring review of agency regulations.

The Administrative Conference believes that agencies have an obligation to develop systematic processes for reviewing existing rules, regulations and regulatory programs on an ongoing basis. If Congress determines that such a review program should be mandated, it should allow the President and agencies maximum flexibility to design processes that are sensitive to individual agency situations and types of regulations. Thus, such legislation should assign to the President the responsibility for overseeing agency compliance through general guidelines that take into account agency resources and other responsibilities. The obligation to review existing regulations should be made applicable to all agencies, whether independent or in the executive branch.

Given the difference among agencies, however, processes for review of existing regulations should not be "one-size-fits-all," but should be tailored to meet agencies' individual needs. Thus, the President, as well as Congress, should avoid mandating standardized or detailed requirements. Moreover, the review should focus on the most important regulations and offer sufficient time and resources to ensure meaningful analysis. Tight time frames or review requirements applicable to *all* regulations, regardless of their narrow or limited impact, may prevent agencies from being able to engage in a meaningful effort. It is important that priority-setting processes be developed that allow agencies, in consultation with the Office of Management and Budget and the public (including but not limited to the regulated communities), to determine where their efforts should be directed.

Public input into the review process is critical. The Administrative Procedure Act already provides in section 553(e) for petitions for rulemaking, which allow the public to seek modifications or revocation of existing regulations

as well as ask for new rules. The Administrative Conference has in the past suggested some improvements in the ways agencies administer and respond to such petitions. See Recommendation 86-6, *Petitions for Rulemaking*. It suggests, among other things, that agencies establish deadlines for responding to petitions. The Conference reiterates that recommendation and proposes that, if necessary, the President by executive order or the Congress should mandate that petitions be acted upon within a specified time, for example 12-18 months.

Although petitions for rulemaking are a useful method for the public to recommend to agencies changes it believes are important, such petitions should not be allowed to dominate the agency's agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities, both with respect to the need for new regulations and to review of existing regulations. Agencies should also develop other mechanisms for public input on the priorities for review of regulations, as well as on the impact and effectiveness of those regulations.

Properly done, reviewing existing regulations is not a simple task. It may require resources and information that are not readily available. Each agency faces different circumstances, depending on the number of its regulations, their type and complexity, other responsibilities, and available resources. These processes must be designed so that they take into account the need for ongoing review, the agency's overall statutory responsibilities, including mandates to issue new regulations, and other demands on agency resources. Because there are relatively few successful well-developed models available and no widely accepted methodologies, the Conference recommends that agencies experiment with various methods. Such programs might explore different approaches with the aim of finding one (or several) that functions effectively for the particular agency. Agencies may want to look to activities at the state level, as well as the limited federal-level experience.

Review of existing regulations is primarily a management issue. As such, agency discretion must be recognized as important and judicial review should be limited. Agency denials of petitions for rulemaking under the APA are subject to judicial review, but courts have properly limited their scope of review in this context. There is no warrant for Congress to change current review standards, nor should any regularized or systematic program for review of existing regulations be subject to greater judicial scrutiny.

## RECOMMENDATION

I. **Review Requirements.** All agencies (executive branch or “independent”) should develop processes for systematic review of existing regulations to determine whether such regulations should be retained, modified or revoked. If Congress decides to mandate such programs, it should limit that requirement to a broad review, assign to the President the responsibility for overseeing the review process, and specify that each agency design its own program.

II. **Focus of Regulation Review.** Systematic review processes should be tailored to meet the needs of each agency, focus on the most important regulations, and provide for a periodic, ongoing review. The nature and scope of the review should be determined by, among other things, the agency’s other responsibilities and demands on its resources. Sufficient time should be provided to allow meaningful information-gathering and analysis.

III. **Setting Priorities.** Agencies should establish priorities for which regulations are reviewed when developing their annual regulatory programs or plans,<sup>1</sup> and in consultation with OMB and the public. In setting such priorities, the following should be considered:

A. whether the purpose, impact and effectiveness of the regulations have been impaired by changes in conditions;<sup>2</sup>

B. whether the public or the regulated community views modification or revocation of the regulations as important;

C. whether the regulatory function could be accomplished by the private sector or another level of government more effectively and at a lower cost; and

D. whether the regulations overlap or are inconsistent with regulations of the same or another agency.

Agencies should not exclude from their review those regulations for which statutory amendment might be required to achieve desired change. Agencies should notify Congress of such regulations and the relevant statutory provisions.

### IV. Public Input

A. Agencies should provide adequate opportunity for public involvement in both the priority-setting and review processes. In addition to reliance on requests

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<sup>1</sup>See Executive Orders 12,498 (“Regulatory Program” required by President Reagan) and 12,866 (“Regulatory Plan” required by President Clinton).

<sup>2</sup>See (V)(B), *infra*.

for comment or other recognized means such as agency ombudsmen<sup>3</sup> and formally-established advisory committees, agencies should also consider other means of soliciting public input. These include issuing press releases and public notices, convening roundtable discussions with interested members of the public, and requesting comments through electronic bulletin boards or other means of electronic communication.

B. The provisions of 5 USC section 553(e) authorizing petitions for rulemaking also provide a method for reviewing existing regulations. These provisions should be strengthened to ensure adequate and timely agency responses.<sup>4</sup> Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time. Congress should not modify the current limited judicial review standard applicable to petitions for rulemaking.

#### V. Agency Implementation of Regulatory Review Processes

A. Agencies should provide adequate resources to and ensure senior level management participation in the review of existing regulations.

B. As part of the review process, agencies should review information in their files as well as other available information on the impact and the effectiveness of regulations and, where appropriate, should engage in risk assessment and cost-benefit analysis of specific regulations.

C. In developing processes for reviewing existing regulations, agencies should consider:

1. *Frequency of review:* Regulations could be reviewed on a pre-set schedule (c.g., regulations reviewed every [x] years; a review date set at the time a new regulation is issued; regulations subject to "sunset" dates) or according to a flexible priority list.

2. *Categories of regulations to be reviewed:* Regulations could be reviewed by age, by subject, by affected group, by agencies individually or on a multi-agency basis.

D. Agencies should consider experimenting with partial programs and evaluate their effectiveness.

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<sup>3</sup>See ACUS Recommendation 90-2, *The Ombudsman in Federal Agencies*.

<sup>4</sup>See Recommendation 86-6, *Petitions for Rulemaking*.

Mr. COBLE. Thanks to each of you for your testimony.

We have been joined by the distinguished gentleman from Arizona, Mr. Franks, and the distinguished gentleman from North Carolina, Mr. Watt.

And, gentlemen, we try to apply the 5-minute rule to ourselves, as well, so let me get with it.

Dr. Lutter, to what degree have past regulatory review efforts produced few results because the Congress and the White House have lacked sufficient leverage to force more effective reviews?

Mr. LUTTER. The reviews have been modest in terms of their accomplishments. I don't mean to leave the impression that the accomplishments are nil, the ones that have been conducted to date in recent Administrations. But if one looks at the broad scope, the pebbles-in-the-river metaphor of the other speaker, and the full extent of accomplishments of these reviews, one is left with the conclusion that there is a few rules alone which are changed and the vast majority are left unchanged in broad scope.

With respect to your question on the congressional authority, I think the Reg Flex Act already has a provision—if I recall, it is section 306—which requires agencies to conduct a regulatory review on a prescribed basis. This act is widely seen as not especially effective. It is adhered to in the breach, and there is a collection of GAO reports which essentially acknowledge that.

I think the challenge here is between a balance between the agencies, which have substantial expertise in the design and the management of their regulatory programs, and the need to get some independent, outside-the-agency stimulus for the change. And the reason for the independence is exactly the difficulty associated with self-review. People are reluctant to review their own work in an effective way.

Mr. COBLE. Thank you, Doctor.

Dr. Mandel, would it be best to give the commission a mandate to focus on specific sectors? For example, retrospective review of manufacturing regs in year one, environmental regs in year two, communication regs in year three, et cetera?

Mr. MANDEL. That is an excellent point. I think that at least the first year, or the first couple of years, it should have a limited mandate so that people can get used to, sort of, how it works.

In particular—and this may, sort of, disappoint some people—I think that in the first couple years it should stay away from some, sort of, really controversial topics like environment so that people can get used to this idea that we can undo regs in this way. And then over time, as people get used to it, the mandate can be expanded.

Mr. COBLE. I got you. Thank you, sir.

Professor Levin, if Congress were to establish a regulatory review commission, would it be best to frame the commission with a short-term mandate, for example, say, a period of 1 to 5 years?

Mr. LEVIN. My concern about a commission more broadly would be that you have a group of outsiders who don't have the agency's experience in administering a program as a whole. And so, if they identify particular rules to target, they may make the wrong choices. And if, as has been proposed, they are able to put forward their proposal without a record, or an extensive record, the kind

that an agency needs to compile, without a reasoned explanation of why they chose it, they may not make good choices. And if it is really true that all the rules are interconnected, they may, by picking out individual rules, cause disruption to the overall scheme.

So my concern is that the commission might not be a reliable instrument. And if it is given a short-term mandate, as you described, it doesn't even have the chance to develop expertise over time to alleviate that problem.

Mr. COBLE. Would former heads of agencies be desirable for membership on such a commission?

Mr. LEVIN. Oh, I definitely think if you have such a commission, former heads of agencies would be good candidates for appointment. But that doesn't get to the ultimate problem, that they aren't responsible for running the show at the moment.

Mr. COBLE. Thank you, Professor.

I see my amber light is on. I will yield to Mr. Watt, the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman. Thank you for having the hearing.

Dr. Lutter, I believe you testified before the Energy and Commerce Committee or one of their Subcommittees previously, and in that testimony you made the following statement: Quote, "Perhaps surprisingly, there has been relatively little scholarly empirical economic research about the effects of environmental regulations on employment," close quote. And then you cited two studies which had conflicting results on this impact.

I am wondering, since you have testified there, have there been any additional empirical studies confirming that regulations adversely impact job creation?

Mr. LUTTER. Thank you for the question.

I haven't done a survey since that testimony, so I am unaware of any specific new work on that point. I know that people are researching it actively, but I don't know if they have any conclusions to report.

Mr. WATT. Dr. Levin, are you aware of any research in this area, either ongoing or completed?

Mr. LEVIN. Right, my understanding of the research is that the volume of regulations has a fairly weak relationship to employment. I think, these days, the main concern about a lack of employment is lack of demand, and so I don't think the connection with regulations is a strong one. And that is only looking at the cost side. Regulations also have benefits which can improve the economic climate.

Mr. WATT. You alluded to some of those things in your evaluative four criteria. Give me those four, just tick them off for me again quickly, if you can.

Mr. LEVIN. Yes, I mentioned selectivity of which rules to review; affordability of the process; flexibility in designing it; and evenhandedness in choosing which ones to review. And as to the last point, my point is that sometimes a rule is out of date because it needs to be strengthened, other times because it needs to be weakened or repealed.

Mr. WATT. So let's focus a little bit on the selectivity part of this. And I guess I would ask all of the panelists, in assessing a regula-

tion, should avoiding red tape be prioritized over saving lives or should job creation be prioritized over saving lives? What would be your assessment on that? If a regulation saved lives and it was intended to do that, should we be encouraging a reprioritization away from saving lives to either avoid red tape or to promote job creation?

Anybody got any opinions about that?

Dr. Mandel?

Mr. MANDEL. I think that it is quite possible for any particular regulation, that the balance would be in favor of saving lives. But I also think that we have a problem, which is that we could keep accumulating regulations like that, where each individual one makes sense, but then taken together it is too much of a weight on the economy.

Mr. WATT. So it would be a fair thing to assess all of those rather than—

Mr. MANDEL. Assess all of them.

And, actually, let me give you another metaphor. I think about regulations in some sense as barnacles on the bottom of a ship. Okay? You just kind of have to start scraping them off at some point.

Mr. WATT. Uh-huh.

Mr. MANDEL. And if we go looking for bad regulations, it is like looking for the worst barnacle. It is not something that—you know, it is the whole totality of it that we have to worry about.

Mr. WATT. So I assume you agree with Dr. Levin that any kind of retrospective review should be evenhanded.

Mr. MANDEL. When we talk about a Regulatory Improvement Commission, we are very careful. It is not deregulation that the commission is—that the commission would be charged with both undoing regulations but also potentially improving them.

Mr. WATT. Right.

Mr. MANDEL. And one of the reasons why we think that Congress needs to be involved in voting this up or down is because, you know, the fact of the matter is—I wouldn't put it exactly the same way as the professor did, but, in fact, once you start looking at regulations, a package that would be acceptable politically might have to include some tightening as well as some loosening.

Mr. WATT. I think my time is up, but if I could squeeze in one more question, Mr. Chairman?

I assume just like life-saving regulations that are designed to save lives, some regulations can actually encourage innovation, too. Hasn't that been your experience?

Mr. MANDEL. That is right. Potentially—

Mr. WATT. Can you give us a couple of examples of that?

Mr. MANDEL. Potentially some regulations can encourage innovation, though, actually, I generally think that if we are talking about genuine innovation, that the best thing to do is to, sort of, have less regulation rather than more.

Mr. WATT. Give us an example of where a regulation has actually incentivized innovation.

Mr. MANDEL. At this point, I mean, we are very concerned about innovation, we are very concerned about the impact to people. But, in general government, is not the best—

Mr. WATT. You are not answering my question.

Mr. MANDEL. No, because—

Mr. WATT. If you are aware of situations where innovation has actually been promoted by regulation, that is the question I am asking. Are there specific examples? It is not a catch-22—

Mr. MANDEL. No, it is not a—and I am trying to answer the question genuinely here, is that I am really not aware of regulation—

Mr. WATT. Okay. Well, that is a fair answer. And I can't push you, but no reason to waste time answering questions other than that, which is—

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

Mr. WATT. I yield back.

Mr. COBLE. The distinguished gentleman from South Carolina is recognized.

Mr. GOWDY. I thank the gentleman from North Carolina, the Chairman.

The President, Mr. Chairman, in the State of the Union, said that we should have no more rules or regulations than would be necessary for the health, safety, and welfare of the American people.

Can either of you three name some major rules and regulations that would violate the President's standard, in hopes of maybe giving some of these agencies a jump-start on their retrospective review?

Not all at once.

Mr. MANDEL. I would be happy to take a shot at this. And, I mean, I have been asked this question many times before, okay? And my response is always the same: that the problem is the accumulation of regulations rather than any particular bad one.

And so I basically refuse to, sort of, identify one. I said, look, we have too many regulations. But to, sort of, say any particular one needs to be removed, it actually doesn't reflect what the truth is. If we go looking for bad regulations, sort of, the ones that are job-killing, okay, we are not going to find them.

Mr. GOWDY. Well, again—and I may have misapprehended what the President was saying. I thought he said he had identified 500 himself. And I figure, with all the various restraints he has on his time—no offense to the three of you, but you are all experts in the field—that you would be able to come up with a whole lot more than 500, given the amount of time you are able to dedicate to the topic. I don't think, in the interest of time, you can list 500. I think the Chairman would gavel me down. But you can give me a couple, can't you?

Mr. LEVIN. My answer would be that it is probably not a matter of saying that certain regulations should simply cease to exist. I think the President's point is that, in drafting particular regulations, even ones we need, you should structure it in such a way that it does not go further than is necessary to promote its objectives. And so I don't think of it as an either/or question, and I suspect he did not either.

Mr. GOWDY. Am I pronouncing your name correctly, Dr. Lutter? Is that correct?

Mr. LUTTER. Yes, sir.

Mr. GOWDY. Maybe you could help me. The President says he can come up with 500. Even Cass Sunstein, the noted professor and regulatory expert, says there are some. Humor me. Give me a couple.

Mr. LUTTER. Well, I will go out on a limb.

I think, first of all, there is a clarification about what we mean by regulation. And the language I like to use is regulatory program versus rules. And the way that many of the specialists use rule or regulation is a particular action as published in the Federal Register, which is a specific rule. But that is not always the common usage. I am going to talk about regulatory programs rather than specific rules.

At the Food and Drug Administration, many people believe that the regulations to reduce the risk of spread of bovine spongiform encephalopathy, commonly called "mad cow," are addressed at something that is a really, really small risk. And that is not to say zero risk; it is simply a risk which is widely seen by specialists as very, very small. So one can't say that this has no effect on health or safety. It is simply that the effect would be small, if balanced against the costs of that regulation, including the costs of administering it, which is borne by the Federal purse.

Secondly, there has been a collection of estimates over many years, including those funded by the EPA in the late 1990's, evaluating the Superfund program as a whole. And that is not to say any specific rule associated with the Superfund program but, instead, its effect on the whole. And the valuation is usually expressed in terms of dollars of total compliance costs relative to cancer cases averted. And similar work that is more up to date on that program by Michael Greenstone, looking at other metrics other than cancer cases averted, also appears to suggest that it is relatively high cost per unit health improvement.

Among specialists who work on environmental actions, the Resource Conservation Recovery Act has a collection of regulations which are often thought of as relatively high cost per unit health improvement or per unit gain in environmental protection.

So I would nominate these three, not necessarily as ones to be revoked, but as ones that would merit the consideration of the commission that has been discussed earlier today.

Mr. GOWDY. I am out of time, but if the Chairman would allow me to ask one more question, I would be forever grateful.

Mr. COBLE. Without objection.

Mr. GOWDY. Thank you, Mr. Chairman.

Can you each give us, briefly, your perspective on the REINS Act, which passed the House, and, concomitantly, what role, if any, you would give the judiciary with respect to review of our regulatory apparatus, which role the judiciary should have that it doesn't currently have? So the REINS Act and judicial review.

Mr. LEVIN. I think the REINS Act is one of the worst ideas I have ever heard of, because I think it would lead to gridlock not only in the enactment of laws but also in the implementation of laws. It would mean that a major rule couldn't be implemented unless you had the concurrence of all the branches of government, and that is frequently not going to be possible. And so I would stay away from it.

As far as the judiciary's role is concerned, I think it plays a very important role today in reviewing rules, basically a sound role. And so I think it works in a way probably more or less as it should, and so I would not make major changes in it.

Mr. MANDEL. I am going to pass on this question. Thank you.

Mr. LUTTER. I have not researched the REINS Act, so I think I lack the expertise to comment on it.

Mr. GOWDY. How about judicial review? Do you have expertise to comment on that? Additional judicial review, retrospective judicial review.

Mr. MANDEL. I am much more comfortable with the idea of a retrospective review done by a commission which is the joint product of Congress and the Administration. Okay? Because I think, ultimately, regulations are the product of the public will. Okay? And the undoing of regulations or the improvement should be viewed by the bodies, by the branches of government that are the expression of public will, as well.

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

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. COBLE. Thank you.

Dr. Lutter, I mispronounced your surname earlier. I apologize for that.

The distinguished gentleman from Georgia is recognized for 5 minutes.

Mr. JOHNSON. Yes. Thank you, Mr. Chairman.

Professor Levin, would you say what you were getting ready to say in response to that last comment that Dr. Mandel posed?

Mr. COBLE. Oh, I didn't mean to cut you off, Professor.

Mr. JOHNSON. Well, if it doesn't apply to my time, if he could answer it.

Mr. LEVIN. Just now I was going to speak to the issue of judicial review in relation to retrospective review, if that is what you have in mind.

What I was going to say is that anytime somebody thinks that a rule is out of date, an interest group, a person can file a petition to rescind it with the agency. The agency needs to respond to it. And if you are not satisfied with the response, you can go to court and challenge the decision as an arbitrary decision.

And so we do have a mechanism in place by which a rule that seems obsolete can be challenged and the agency can be forced to come to terms with it.

Mr. JOHNSON. So there is no need to muck up the process, bringing politics into the fray, in terms of the utility of a particular rule?

Mr. LEVIN. I don't think you need another layer of review with respect to the retrospective review process itself.

Mr. JOHNSON. All right. Thank you.

I would like to know, Dr. Mandel and Dr. Lutter, do you think that American businesses and the U.S. economy would be better off without the Clean Air Act and its associated regulations? Do you think we would be better off without it?

Nobody wants to answer the question?

Mr. LUTTER. The Clean Air Act is a very important act. There has been, actually, a retrospective study, which you may be aware

of, sir, under section 812 of the Clean Air Act, evaluating the costs and the benefits of the act—

Mr. JOHNSON. Well, do you think that it is better that we would be—we would not have a Clean Air Act? Is it your opinion that we shouldn't even have that act?

Mr. LUTTER. The—I—

Mr. JOHNSON. Yes or no?

Mr. LUTTER. We are better off with the act than with no act, sir.

Mr. JOHNSON. What about the Clean Water Act? Do you think we would be better off without that?

Mr. LUTTER. I haven't studied that in enough detail to know, sir.

Mr. JOHNSON. What do you think about it, Dr. Mandel?

Now, that is a very important act that—you know, it is one of the things that people most, in industry, one of the acts that people most challenge. And you are not familiar with that act?

Mr. LUTTER. My training and my experience, sir, is always to focus on certain provisions of certain rules or certain acts.

Mr. JOHNSON. All right. I got it.

Mr. LUTTER. And in that sense, to evaluate it in its whole is really difficult, because one has to ask what is the alternative—

Mr. JOHNSON. And I realize that you are an economist and not a lawyer, so please forgive me. Thank you.

Dr. Mandel?

Mr. MANDEL. I think we are better off with the Clean Air Act.

Mr. JOHNSON. What about the Clean Water Act?

Mr. MANDEL. I think we are better off with the Clean Water Act. Now, we could—

Mr. JOHNSON. Now, what acts can you cite right now that we would be better off without in their entirety?

Mr. MANDEL. Now, remember, what I started—

Mr. JOHNSON. Well, no, no—

Mr. MANDEL [continuing]. Off by saying was that we could throw pebbles in the stream and it wouldn't dam up the stream.

Mr. JOHNSON. All right. Okay.

Mr. MANDEL. So I am worried about the totality.

Mr. JOHNSON. Well, let's talk about the pebble-in-the-stream effect. Throwing one pebble into the stream doesn't do anything, 2 is okay, 3 is okay, 100 dams up the stream. Which pebble did the damage? Is it important that we discover that?

Mr. MANDEL. It is a hard question. And so, at that point—

Mr. JOHNSON. And it is a hard question to answer. Is it better for the regulatory rulemaking authorities and the affected industries to have dialogue and try to reform and refashion the rules in that way? Or is it better just to throw it into the legislative branch and let us muck it up and bog it down in politics and Koch brothers' money, soft money, hard money, whatever money? Do you think it is better to just put it into that system that we are dealing with now?

Mr. MANDEL. My response is, historically—

Mr. JOHNSON. Yes or no?

Mr. MANDEL. The answer is that I think retrospective review hasn't worked. Okay? That it sounds good, but it hasn't worked. And so, therefore, we are looking for an alternative to that.

Mr. JOHNSON. All right.

Professor Levin, if you would.

Mr. LEVIN. Right, so one concern I would have is that if you give an independent body jurisdiction over 15 different dams, they may tinker with each of them and remove parts of the dam that may not be effective in terms of the overall purpose of the dam. So I think you do need the specialized perspective of an agency with respect to each one.

Incidentally, I support the Clean Air Act and Clean Water Act.

Mr. JOHNSON. All right. Well, I kind of assumed that you did. I do, too, if anybody was curious about it.

Do the Federal agencies—

Mr. GOWDY. [Presiding.] Would the gentleman like an extra 30 seconds?

Mr. JOHNSON. I would. Well, I would like a minute, if you could spare it.

Mr. GOWDY. Well, I had given you a minute before I asked if you wanted 30 more seconds. But how long would the gentleman from Georgia, the distinguished gentleman from—

Mr. JOHNSON. I just have one more question.

Mr. GOWDY. Absolutely. Without objection.

Mr. JOHNSON. Thank you, Mr. Chairman.

Do the Federal agencies, particularly in this era of slash-and-burn budget-cutting, have the resources that they need to undertake their regulatory reviews, their retrospective regulatory reviews?

Mr. MANDEL. Absolutely not. And that is partly why I would like to see it moved to an independent commission. Because I don't want the agencies to have to use their scarce dollars to do the retrospective reviews.

Mr. JOHNSON. That sounds like a recipe for efficiency and perhaps even just wholesale review, not a careful review, but a wholesale, politically charged review.

Mr. LUTTER. May—

Mr. JOHNSON. Dr. Lutter?

Mr. LUTTER. May I also answer your question? I think the answer is no. And I think that is one of the challenges why the agencies as a group have done so little careful retrospective analysis of the existing rules.

Mr. JOHNSON. So you disagree with the Republican slash-and-burn ethic of the 112th Congress. Is that a fact?

Mr. LUTTER. I am not sure what that ethic is, sir.

Mr. JOHNSON. Well, it is to cut regulations and make it easier for business—

Mr. GOWDY. The gentleman is now into his third minute of what in soccer they call extra time, I believe. So, with that—

Mr. JOHNSON. Well, could he just answer that question?

Mr. GOWDY. Well, you keep asking new questions after the last one, as any good lawyer would. And you are and were.

But, Dr. Lutter, if you would like to briefly—I emphasize for effect and pause—briefly answer that question, you may.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. GOWDY. Yes, sir.

Mr. LUTTER. May I ask to have the question repeated?

Mr. JOHNSON. I am a little too old for that now, Dr. Lutter. We can—with that, Mr. Chairman, I will yield back.

Mr. GOWDY. I thank the gentleman from Georgia.

And, with that, on behalf of Chairman Coble and all of us on the Committee, we want to thank our witnesses for their testimony today, for their collegiality and comity, not just with the Members of the Committee but also with one another.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again, I thank all of our witnesses, and this hearing is adjourned.

[Whereupon, at 10:27 a.m., the Subcommittee was adjourned.]



A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD

**THE HONORABLE HOWARD COBLE  
STATEMENT  
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE  
LAW  
OVERSIGHT HEARING ON RETROSPECTIVE REGULATORY REVIEW  
JULY 11, 2012  
2141 RAYBURN  
9:30 A.M.**

Retrospective regulatory review is not a novel concept. There have been multiple good faith efforts to implement procedures and initiatives for retrospective reviews but they have not produced sufficient results. This is partly due to the size and rapid growth of our regulatory system. It is also due to the complexity of our regulations and the incentives of regulatory agencies. That being said, several bills have been introduced on this topic, and I am pleased to turn our attention to it today.

Representative Quayle, a distinguished member of this panel, has for example introduced H.R. 3392, which among other things requires agencies to perform decennial reviews of existing major rules, including cost benefit analysis, and to provide recommendations on improving

these rules wherever warranted. Others, such as Representative Hultgren (IL) and Representative Young (AK), have also introduced bills on retrospective review.

The theme throughout these proposals is consistent. Government should have some responsibility to audit and review its regulations. I believe this sentiment is supported by the prepared testimony from today's witnesses. Every member on this panel understands and appreciates that regulations are important for our safety and security and that changing them outside of ordinary procedures for promulgating rules raises significant questions. At the same time, regulations impose a cumulative burden that is too high and we should look for creative measures to reduce that burden.

I am very interested to learn today which proposals most merit our attention and support. I am also interested to know of any other suggestions from our witnesses that could help our subcommittee

fashion a results-oriented approach for retroactively reviewing existing regulations.

I understand that, in addition to requiring agencies themselves to review their regulations, the creation of a legislative commission tasked for the sole purpose of reviewing existing regulations and reporting back to Congress may be a viable suggestion. If so, then what would be the mandate and parameters for such a commission and what tools would it need to be effective?

With that being said, I hope that today's hearing will be a productive first step in making effective retroactive regulatory review a reality, and I look forward to the testimony from our witnesses.

**Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law**

From what I can tell, there appears to be general agreement that periodic retrospective review of existing regulations is a good thing. This makes sense as it is difficult to argue with the idea that agencies should keep track of the effectiveness of the rules that they issue and take appropriate action when necessary.

But beyond this basic notion, there is a range of views on everything from what the ultimate purpose of retrospective review should be to how such review should be carried out by agencies and the appropriate roles of Congress and the President in mandating and crafting a process for such review.

I infer from both the title of this hearing and the testimony of the Majority witnesses that in some of my colleagues' view, the main purpose of retrospective review is to ensure repeal at least some existing rules.

Retrospective review, however, should not necessarily lead to rescinding existing rules. Sometimes, reviews may require promulgation of new rules or the expansion of existing ones. Indeed, a comprehensive review may result in no changes at all to existing rules.

Any of these outcomes is a legitimate result of a properly conducted retrospective review, and no process for retrospective review should start with the premise that a rule must be rescinded after such review.

Something else we ought to keep in mind is that Congress must proceed cautiously before imposing a legislative mandate on agencies to conduct retrospective review.

One consideration is whether the President's efforts regarding retrospective review alleviate the need for Congress to craft a general legislative mandate for retrospective review.

Some of our witnesses dismiss the notion that a retrospective review conducted pursuant to Executive Order can ever be effective.

I believe this judgment to be a bit harsh. Whatever the results of past presidential efforts to require retrospective review of existing rules, President Obama's Executive Orders on the subject are the most extensive ones yet issued to address retrospective review.

And they are fairly new, so we ought to give them a chance to fully take root before coming to any conclusions about the effectiveness of his initiatives.

If Congress chooses to impose a retrospective review process on agencies, it must be written in broad terms and be flexible enough to accommodate the differences among agencies. As both the American Bar Association and the Administrative Conference of the United States recognized, Congress should avoid standardized or detailed review requirements.

Finally, we should be mindful of the fact that conducting retrospective reviews can be very draining on agency resources, in terms of money, time, and staff. In 2007, the Government Accountability Office issued a report concluding that the "most critical barrier" for agencies to conduct retrospective reviews was "the difficulty in devoting the time and staff resources required for reviews while also carrying out other mission activities."

There does seem to be some rough agreement, at least among our witnesses, that it might be useful to have a neutral, third-party entity in charge of conducting retrospective reviews of existing rules.

I would suggest that, should Congress choose to go down this path, it should consider assigning the task of retrospective review to an existing entity like the GAO rather than creating a new entity, particularly given present budgetary and political constraints. Perhaps we could start with a pilot program along those lines.

There are a host of other matters to consider in designing a retrospective review process. I will leave it to our witnesses to elaborate on these considerations. I look forward to their testimony.

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**Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary**

This is the fourteenth hearing on regulations that we have held during the 112th Congress.

And, as with the previous hearings, the title trumpets a favorite theme of conservatives—that regulations somehow depress job creation.

This is unfortunate because the focus of the hearing is supposed to be on the need for retrospective review of existing regulations, a topic that is worthy of a thoughtful discussion.

In principle, retrospective review of existing regulations is not a bad idea. It is hard to argue against the notion that agencies ought periodically to assess whether the rules they have promulgated are as good as they can be or whether they are even necessary in light of changed circumstances.

Nonetheless, there are certain considerations that we must keep in mind as we proceed with today's hearing.

**As an initial matter**, there is absolutely *no* credible evidence establishing that regulations have any substantive impact on job creation, and discussion of such a link in the context of retrospective review is unhelpful.

Last year, the Majority's own witness testified before this Subcommittee that the "focus on jobs . . . can lead to confusion in regulatory debates" and that "the employment effects of regulation, while important, are indeterminate."

The truth is that regulations can, in fact, lead to job creation. And, here are just a few examples:

- A pending regulation limiting the amount of airborne mercury will not just reduce the amount of seriously toxic pollutants, but create as many as 45,000 temporary jobs and possibly 8,000 permanent jobs, as the *New York Times* noted.
- Heightened vehicle emissions standards have spurred clean vehicle research, development and production efforts that, in turn, have already generated more than 150,000 jobs at 504 facilities in 43 states across the U.S.

It should, therefore, not come as a surprise that Bruce Bartlett, a former senior Republican Advisor in the Reagan and George H.W. Bush Administrations, says that there is "no hard evidence" that regulations stifle job creation and that it's simply being "asserted as self-evident and repeated endlessly throughout the conservative echo chamber."

If anything, it was a *lack* of adequate regulation of the financial services industry and the mortgage industry that led to the 2008 financial crisis and the tremendous job losses that followed.

The purported link between regulations and jobs is unsupported, and we ought to stay away from it when discussing retrospective review.

**Another point to keep in mind** is that President Obama has already taken a series of significant steps towards instituting regular retrospective reviews by agencies, and that Congress should not jump the gun in seeking to mandate retrospective review legislatively.

To date, he has issued two Executive Orders outlining steps that federal agencies must take to formulate plans for retrospective review of their regulations on an ongoing basis.

And he has issued a third Executive Order encouraging independent regulatory agencies to take similar steps to plan for ongoing retrospective reviews of their rules.

So far, more than two dozen executive agencies and almost 20 independent regulatory agencies have submitted retrospective review plans pursuant to these Executive Orders.

Altogether, these plans have identified almost 500 different ways to reduce redundancy and inconsistency among existing regulations.

Before Congress considers imposing a legislative mandate regarding retrospective review, it should ensure that the President's efforts have been thoroughly evaluated and have had a chance to fully take root.

**Finally**, we must keep in mind the strain that a mandate to conduct retrospective review can have on already-limited agency resources.

The Government Accountability Office noted in a 2007 report that one of the barriers to an effective retrospective review process is the fact that most agencies have limited time and staff resources to conduct a proper review while also carrying out their other functions, including issuing new rules mandated by Congress.

If Congress intends to impose a comprehensive retrospective review process on agencies, then it must be prepared to provide the funding for additional staff and other resources for agencies to conduct such review.

Without additional resources, agencies could be placed in an impossible position of having to comply with competing Congressional mandates for retrospective review, on the one hand, and to issue new rules, on the other.

Effectively, a mandatory retrospective review regime could become another back-door way of stifling agency rulemaking and enforcement actions, as agencies shift time and resources to retrospective review at the expense of fulfilling these other duties.

The question of whether Congress should mandate retrospective review of existing rules is an important one and deserves serious, substantive, and nuanced discussion.

I am afraid that the signal sent by the hearing's title suggests that today's discussion may be otherwise. I hope this is not the case and that we can have a helpful conversation on this important topic.





**U.S. CONSUMER PRODUCT SAFETY COMMISSION**  
 4330 EAST WEST HIGHWAY  
 BETHESDA, MD 20814

**COMMISSIONER NANCY NORD**  
 and  
**COMMISSIONER ANNE NORTHUP**

**Joint statement before the  
 Subcommittee on Courts, Commercial and Administrative Law of the  
 Committee on the Judiciary, United States House of Representatives**

July 12, 2012

Government agencies should review their rules regularly to ensure that those rules impose the lowest reasonable burden on Americans consistent with fulfilling the agency's statutory objectives. This principle applies to independent agencies like the U.S. Consumer Product Safety Commission as much as any agency. We were, therefore, pleased when President Obama issued Executive Order 13579, which asked independent agencies to use cost benefit analysis and to conduct such retrospective reviews to identify and fix or repeal rules that are ineffective or too burdensome.<sup>1</sup>

The Consumer Product Safety Commission should use this process. We regulate over 15,000 products worth billions of dollars to the American economy each year. As good regulators, it is incumbent upon us to consider the costs and benefits of the rules we adopt. Unfortunately, at the CPSC, we are barely giving a head nod to the President's directive. Prior to the current vacancy, a majority of Commissioners affirmatively rejected using cost-benefit analysis, even for major regulations. With respect to the retrospective review process, our efforts have been focused on minor fixes that are not in the spirit of the Executive Order.

As directed by the Executive Order, the agency developed a draft review plan and in October 2011 put that plan out for public comment. In April, staff gave the Commission a draft review plan. Commission consideration has been repeatedly delayed. It does not appear that the draft plan adequately focuses on identifying and addressing the most important rules that need to be examined. Instead, it focuses on rules that qualify as "minor housekeeping," at best. Here is what we have done so far:

- **Toy cap guns.** This past June, the CPSC proposed to repeal toy cap gun regulations. However, this action would repeal a regulation that had been subsumed by another regulation which went into effect in 2009. Other than cleaning up the Code of Federal Regulations, we question what effect this action has.

<sup>1</sup> See Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011).

- **Animal testing.** Our other response has been to propose updating and codifying our animal testing policy to say again something we have already said—that animal testing should not be used where it is not necessary.

Both of these proposals fall into the “housekeeping” category, not the kind of review envisioned by the Executive Order. Yet these are our only responses to the Executive Order so far.

Here are some rules that deserve greater attention:

- **Bicycles.** The bicycle safety regulations were written many years ago and are so out of date that modern adult bicycles do not, and cannot, comply with the regulation. Yet these regulations remain on the books, unchanged.
- **Fireworks.** The fireworks safety regulations were most recently updated in the 1980s. To determine if a firework is overloaded with explosives, someone has to listen to how loud its explosion is. If it sounds too loud, it fails. The only testing equipment is our tester’s ear. This subjective test should be replaced with an objective one that can be replicated in the field. This rule languishes, yet with more than 9,000 injuries every year, we should find some time to work on this issue more effectively.
- **Mattresses.** We have two safety standards dealing with mattress flammability issues, put in place at different times. One standard deals with smolder hazard from cigarettes and the other standard deals with small open flame hazard from candles, lighters, and similar small flame sources. Two standards means two different sets of tests and two sets of testing costs. One flammability standard for mattresses could reduce costs and testing burdens while preserving a high level of safety.

These are just three examples of significant rules that warrant review but are not contemplated by our plan. We could provide others. However, the best example of a rule that should be thoroughly reviewed deals with the testing and certification required by the 2008 Consumer Product Safety Improvement Act. The rule, which passed by a three-to-two vote, imposes enormous burdens and costs on the global supply chain but was adopted with no cost-benefit analysis. A request for such an analysis of this rule was specifically rejected by the majority. The rule is so burdensome that Congress had to intervene and directly told us to review ways to reduce the costs associated with this rule.<sup>2</sup> We expect to see staff recommendations for reducing the cost burdens of this rule before the end of the summer. However, had the Commission done the hard work of honestly analyzing ways to reduce costs and enhance the benefits of this rule, congressional intervention would not have been necessary. Even our staff’s

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<sup>2</sup> See Pub. L. No. 112-28, § 2, amending Consumer Product Safety Act § 14(i), 15 U.S.C. § 2063(i).

recommendation that the cost reduction analysis be done before the finalization of the testing rule was overridden by the majority.

In summary, the CPSC and other independent agencies need to perform cost benefit analysis when drafting rules and retrospectively review existing rules as much as other government agencies. The President's Executive Order directing them to do so was welcome, but we fear that the CPSC's retrospective review activities will focus on minor revisions instead of the major review that would be in the spirit of the order. We should not mistake tinkering edits for substantial fixes. The Commission's plan should be an "ambitious and unprecedentedly open process for streamlining, improving, and eliminating regulations," to use the words of Cass Sunstein, director of the President's Office of Information and Regulatory Affairs. The end of this process should be a regulatory regime that protects the public's health and safety while ensuring that American consumers, employers, manufacturers, and innovators face the lowest reasonable burden.





UNITED STATES  
 CONSUMER PRODUCT SAFETY COMMISSION  
 4330 EAST WEST HIGHWAY  
 BETHESDA, MD 20814

July 23, 2012

The Honorable Howard Coble  
 Chairman  
 Subcommittee on Courts, Commercial and  
 Administrative Law  
 Committee on the Judiciary  
 U.S. House of Representatives  
 517 Cannon House Office Building  
 Washington, DC 20515

The Honorable Steve Cohen  
 Ranking Member  
 Subcommittee on Courts, Commercial and  
 Administrative Law  
 Committee on the Judiciary  
 U.S. House of Representatives  
 1005 Longworth House Office Building  
 Washington, DC 20515

Dear Chairman Coble and Ranking Member Cohen:

We write to respond to a July 12, 2012, Joint Statement provided to the Subcommittee by Commissioners Nancy Nord and Anne Northup regarding the U.S. Consumer Product Safety Commission's (CPSC) regulatory reform activities. In the Joint Statement, Commissioners Nord and Northup attack an April 2012 regulatory review draft presented by CPSC staff as not using the retrospective rule review process recommended in Executive Order 13579 and focusing on "rules that qualify as 'minor housekeeping,' at best." These assertions are untrue and without merit.

At the outset, it is very important to make clear that the Commission staff proposed a rule review process more comprehensive than the reviews contemplated by the Regulatory Flexibility Act (RFA) and the President's Executive Orders (EO) 13579 and 13563. The staff draft did not limit our evaluation to regulations that have a significant economic impact on a substantial number of small entities nor did it limit it to significant regulatory actions, as defined by EO 12866.

Rather, the staff plan embraced the President's Executive Orders, and went even further to create a defined method and schedule for identifying and reconsidering any Commission rules that are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or ineffective, or that otherwise require modification without sacrificing the safety benefits of those rules. It is designed to encourage public input and participation and find the right balance of priorities and resources given the small size of the agency.

The plan details a set of criteria to be used when determining which existing rules should be reviewed. Specifically, the plan calls out the need to consider whether the rule is fulfilling the agency's mission to prevent or reduce deaths and injuries and whether the costs imposed by the rule are out of balance with the rule's impact on product safety, given that the cost impact of a rule can change over time.

The Honorable Howard Coble and Steve Cohen  
July 23, 2012  
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Commissioners Nord and Northup also allege that the Commission staff package does not propose a cost-benefit analysis in accordance with their notion of what that analysis should look like for its testing and certification rules in 16 CFR 1107 and 1109. In making this charge, they invoke the requirements contained in Public Law (P.L.) 112-28, which largely reaffirmed the landmark Consumer Product Safety Improvement Act of 2008 (CPSIA). In doing so, they ignore what P.L. 112-28 actually directs the agency to do—and the fact that the staff package meets and exceeds the requirements of this recent law. In fact, the staff package clearly contemplates doing the review mandated by Congress in P.L. 112-28 and proposes additional burden reduction work well beyond the requirements of P.L. 112-28. As noted in the staff proposal:

Rather than operate parallel regulatory reviews with nearly identical goals, this Plan acknowledges the interdependencies of these efforts and includes the assessment of the impact of third party testing as part of the review covered by this Plan.

Notably, P.L. 112-28 only requires the Commission to seek and consider comments on the ways to reduce the cost of third party testing. It did not change the underlying requirement for the Commission to issue a rule requiring periodic testing to ensure continued compliance. In accordance with our unchanged Congressional mandate to issue this rule, the Commission issued it on October 19, 2011. The staff has been diligently working for close to a year to find ways to reduce the burden of the testing rule while still complying with the Congressional mandate to ensure that representative samples of all children's products have been tested periodically and to ensure consumers find products on the store shelves that are safe.

Recognizing that the Commission's budget and resource constraints precluded any additional rule review beyond the ongoing review of the cost burdens of the testing and certification rule,<sup>1</sup> CPSC staff proposed the two relatively minor fixes on toy cap guns and animal testing regulations mentioned by Commissioners Nord and Northup, in addition to the effort dedicated to the testing and certification rule review activity. This is also explained by the staff in the briefing package, which stated: "We are basing our initial selection of rules on our assessment of staff resources available for the balance of this fiscal year." Indeed, the selection of those two regulations had already been specified in the 2012 budget, which all four Commissioners voted unanimously to approve.

We find it disappointing that Commissioners Nord and Northup have omitted these important and relevant facts from their testimony, making it appear as if the entire scope of the staff's proposed rule review plan was focused on two relatively minor regulatory fixes. This is

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<sup>1</sup> Resource constraints matter a great deal to CPSC. We note for example that, as Acting CPSC Chair in 2008, Commissioner Nord halted completely the CPSC's retrospective rule review, citing the agency's limited resources. Although passage of the CPSIA has provided us with some additional resources, we remain a very small agency with a tiny budget.

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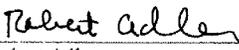
simply not true.<sup>2</sup> As outlined by staff in the proposed plan, the majority of our resources dedicated to rule review for this fiscal year are being allocated to review the testing rule, which is the most recent and significant regulation passed by the Commission in many years.

Commissioners Nord and Northup may believe additional resources should be allocated to the significant amount of resources already dedicated to the agency's rule review efforts. If so, they have had every opportunity to do so since April 25, when the staff's plan was due for a Commission vote. We have been prepared to approve the staff's plan since then, but have not done so because we have been engaged in good faith negotiations with our colleagues. To date, they have failed to make a persuasive case that we should not adopt the recommendations of our professional staff. After an exhaustive review, staff believe their plan has struck the proper balance between agency resources dedicated to burden reduction activities with no inherent public safety value and the amount of agency resources dedicated to fulfilling our core health and safety mission. We stand by them, and support their decision.

We hope this information helps clarify the record. Should you or your staff have further questions or concerns, please do not hesitate to contact us.

Sincerely,

  
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Inez M. Tencnbaum  
Chairman

  
\_\_\_\_\_  
Robert Adler  
Commissioner

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<sup>2</sup> Moreover, we are even more disappointed—and puzzled—that they have proposed rules (bicycles, fireworks, mattresses) to Congress for retrospective review that they have never proposed to us.

Subcommittee on Courts, Commercial and Administrative Law  
Hearing on  
“Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and  
Regulations,”  
July 12, 2012

Questions for the Record

**Questions from Subcommittee Ranking Member Steve Cohen for Randall Lutter**

1. In assessing a proposed regulation, should avoiding red tape be prioritized over saving lives?

Answer: Single-minded prioritization of specific goals, such as either the avoidance of “red tape” or the “saving” of lives, tends to be inconsistent with the development and implementation of sound, empirically based regulatory policy. Some record-keeping requirements are essential for fair enforcement of regulations while some efforts to reduce mortality risk achieve little meaningful risk reduction. Moreover, identifying optimal levels for record-keeping and other documentation and for the stringency of measures to reduce mortality risk requires careful economic analysis, tailored to the specifics of the policy choices at hand. Economists have traditionally recommended that regulations be designed to maximize net benefits, a notion reflected in a variety of executive orders. For example, Executive Order 12866, Section 1, states, “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.” Section 1 also directs agencies to regulate only after making a “reasoned” determination based on the “best reasonably obtainable scientific, technical, economic and other information” about the effects of the intended regulation. This language, and that of related provisions, is adequate to lead to good regulatory policy, provided it is carefully interpreted and consistently applied to all major regulations.

2. In assessing a proposed regulation, should job creation be prioritized over saving lives?

Answer: Regulating to protect health, safety or the environment is a typical strategy to reduce mortality risk, but designing such regulations to try to create jobs is generally relatively ineffective and inefficient. The level of aggregate employment in the economy at any one time is primarily a macroeconomic phenomenon that can be influenced through sound monetary and fiscal policies, and to some extent by labor market regulations, but not directly by health, safety and environmental regulations. Incorporating the costs of job displacement—i.e., retraining, search, lost wages—into benefit-cost analyses of federal regulations would likely lead to analytic results that are more informative, and yield better regulatory outcomes.

3. Is there any empirical evidence confirming that the promulgation of regulations adversely impact job creation?

Answer: Michael Greenstone of MIT, studied differences in economic activity between plants located in counties that met the national ambient air quality standards and those located in counties that did not. In a 2002 paper, he reported that during the first 15 years after the Clean Air Act Amendments became law, the counties that were out of attainment and subject to more stringent regulations, relative to the other counties, lost approximately 590,000 jobs, \$37 billion in capital stock, and \$75 billion (1987 dollars) of output in polluting industries.<sup>1</sup> This paper did not address, however, the extent of any shift in jobs or other measures of economic activity toward the attainment areas—areas of cleaner air and less stringent regulation.

Recently, the federal Office of Management and Budget summarized research evaluating the effects of regulation on labor markets. It reported that, “Acemoglu and Angrist find that the Americans with Disabilities Act resulted in no decrease in relative wages of disabled people but a decrease in employment levels.”<sup>2</sup> The OMB also acknowledges scholarly research identifying adverse effects of regulations on wages, but not on employment. It reports that Gruber finds that regulations that require employers to provide comprehensive coverage for childbirth in health insurance plans result in a decrease in women’s wages but have no effect on their employment levels.<sup>3</sup>

Work by my colleagues at Resources for the Future, Morgenstern, Pizer, and Shih, using data for 1991 and earlier years, focused on four industries subject to environmental regulations and examined the association between higher abatement costs and employment.<sup>4</sup> The authors noted that the effects of pollution control spending on employment in an industry do not need to be negative and could be positive. For example, if demand does not fall very much with increases in price, and if new spending to reduce pollution is relatively labor intensive, then employment in the regulated industry would rise and not fall with mandatory increases in pollution control spending. The authors find that in their dataset, increased pollution control expenditures are not associated with a statistically significant effect on employment.

4. You have previously testified as follows: “Indeed the controversy over the effects of regulations on employment suggests there is value in having an independent nonfederal entity convene experts to develop consensus standards for such analysis.” Accordingly, you recommend that OMB should issue guidelines about how agencies should conduct a credible regulatory analysis of the effects of regulations on employment, but “only after soliciting and considering public comment and genuinely independent expert advice.”

<sup>1</sup> Greenstone, M. 2002. “The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufactures.” *Journal of Political Economy*. 110(6):1175-1219.

<sup>2</sup> Acemoglu, Daron and Joshua D. Angrist. 2001. “Consequences of Employment Protection? The Case of the Americans with Disabilities Act.” *Journal of Political Economy*. 109(5): 915-957.

<sup>3</sup> Gruber, Jonathan. 1994. “The Incidence of Mandated Maternity Benefits.” *American Economic Review*. 84(3), 622-641.

<sup>4</sup> Morgenstern, Richard D., William A. Pizer, and Jih-Shyang Shih. 2002. “Jobs Versus the Environment: An Industry-Level Perspective.” *Journal of Environmental Economics and Management*. 43, 412-436.

Are you familiar with the Administrative Conference of the United States?  
Would the Conference be an appropriate entity to draft this guidance?

Answer: I am familiar with ACUS and believe it would not be a good choice to draft this guidance. It is my understanding that ACUS tends to focus on procedural aspects of rulemaking, rather than on analytical issues, such as identifying and defining what is best practice in economic analysis or regulations. In addition, ACUS lacks the technical expertise required to draft or issue standards on how to conduct economic analysis of the effects of regulation on employment.

5. Do you agree with Dr. Mandel's statement "that we don't need wholesale deregulation, or a complete overhaul of existing regulations"?

Answer: The meaning of "wholesale deregulation" is not sufficiently clear for me to agree or disagree. I agree that a "complete" overhaul is not needed since some federal regulations may not need repairs, renovations, revisions or adjustments, the definition of "overhaul" provided by Webster's online.<sup>5</sup> I agree with Dr. Mandel's statements that

"A regulatory 'self-review' process has been tried repeatedly in the past, and it's always fallen far short of expectations. Regulators have a tough time trimming their own regulations, given internal bureaucratic pressures."

As a result, I believe that it would be worthwhile to develop a new approach to identify and then modify or even eliminate significant sections of existing federal regulations.

6. Do you concur with Prof. Levin that the retrospective review should be evenhanded, i.e., that such review should "bring to light situations in which regulations should be strengthened instead of being weakened or eliminated"?

Answer: While any new process for retrospective review of existing regulations should bring to light situations where regulations should be strengthened in addition to areas where they should be relaxed, Federal agencies already issue regulations with increased stringency fairly regularly. There is a need for a new process to evaluate and review existing regulations, based on review and analysis of how they work in practice.

7. Your testimony refers to two appendices, but they are not attached. Could you kindly supply them to the Subcommittee?

Answer: I am attaching the working paper I authored for Mercatus on retrospective analysis and review and also a commentary "Financial Regulation Sans Analysis", that I co-authored with Joe Aldy and Art Fraas for Politico on 6/20/12. That commentary is also available at <http://www.politico.com/news/stories/0612/77644.html>.

<sup>5</sup> See <http://www.websters-online-dictionary.org/definitions/overhaul>.

Subcommittee on Courts, Commercial and Administrative Law  
Hearing on  
“Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and  
Regulations,”  
July 12, 2012

Questions for the Record

**Questions from Subcommittee Chairman Howard Coble for Michael Mandel, Ph.D.**

1. Small businesses bear a disproportionately high share of regulatory costs, yet they create the most new jobs. How could retrospective regulatory review particularly help to reduce the regulatory burden on small businesses?

**The legislation that sets up a “Regulatory Improvement Commission” would give the commission a certain set of specific goals. One of those goals could be reducing the regulatory burden on small business, if Congress so desires.**

2. Would the use of a retrospective regulatory review commission offer particular advantages in the reduction of regulatory burdens on small businesses?

**Small businesses face a heavy regulatory burden, in part, because they have to meet regulations from different agencies which do not coordinate. For example, one agency might want one form, another agency might want roughly the same information on a different form.**

**A Regulatory Improvement Commission would have the authority to ‘look across’ the different agencies and coordinate requirements, or pare down the duplicative regulations. By contrast, the same goal could not be easily accomplished by retrospective review within a single agency, which would only be focused on that agency’s regulations.**

3. You have suggested that retrospective review of regulations could help decrease impediments regulations pose to innovation. Could you please explain your view in more detail?

**When a company faces too many regulations, money and human resources go into meeting the regulations rather than innovating. In addition, innovation—a high-risk activity—becomes less appealing if there are too many costly regulatory barriers to cross.**

**Conversely, selectively paring back unnecessary regulations can improve the environment for innovation. That doesn’t mean deregulation or getting rid of all regulations—it means simply reducing the number.**

4. What specific standards might be used in retrospective review to help focus a commission or agencies on, not just individual regulations, but also cumulative regulatory burdens?

**Currently the Progressive Policy Institute is working on answering precisely this question: How can we measure cumulative regulatory burden? We expect to present a paper on this issue in 2013.**

5. What can be done to assure that independent agencies effectively carry out retrospective review? For example, could one benefit of a regulatory review commission be that it could help assure better retrospective review of independent agencies' regulations?

**There should be no obstacle to the Regulatory Improvement Commission considering regulations adopted by independent agencies such as the FCC, since the package of proposed improvements has to be voted on by Congress and signed by the President. However, it would be better if the commission was specifically directed to cover these agencies.**

#### **Questions from Ranking Member Steve Cohen for Michael Mandel**

1. In your review of the impact of regulations on businesses, did you differentiate between the impact of federal as opposed to state regulations?

**We principally focused on the impact of federal regulations. However, state regulations—and the interaction between federal and state regulations—can be very burdensome as well.**

2. Are small businesses mostly impacted by federal or state regulations?

**I'm not aware of any study that compares the differential impact of federal and state regulation on small business. It's clear though that state and local regulations do have a big effect.**

3. You note that regulations singularly may have little impact. To use your analogy, it's like throwing a few pebbles in a stream.

How does one identify the tipping point when the cumulative effect of all such regulations is problematic?

**I believe that we have reached a problematic level of regulations in many industries, where the cumulative impact is slowing innovation. That offers us an opportunity to selectively pare back regulations while retaining the ones that we really want and need.**

4. You state in your prepared testimony that “it’s hard to point to ‘bad’ regulations – regulations that by themselves are job-destroying or innovation inhibiting.”

Are you aware of any empirical evidence establishing a direct adverse impact on job creation caused by the promulgation of regulations?

**Cleaning up the regulatory system would be easier if we could identify ‘bad’ regulations: One where the benefit to society or to consumers is clearly much less than the costs, whether measured in dollars, jobs, or foregone innovation. Unfortunately, it’s hard to identify ‘bad’ regulations. First, almost every regulation has its defenders, who can clearly state the harm that the regulation averts. Second, businesses usually have enough leeway to change their practices to reduce or ameliorate the impact of a single regulation.**

**Having said that, I believe we need more research to establish the effect on innovation and jobs of “too many” regulations which interact with each other.**

5. You note in your prepared statement “that we don’t need wholesale deregulation, or a complete overhaul of existing regulations”?

Would you therefore oppose a moratorium on major regulations that would last until the unemployment rate drops below 6%?

**I would not support a total moratorium on major regulations, even given the weak economy. For example, Dodd-Frank was an essential piece of legislation given the excesses in the financial sector.**

**I would, however, support a temporary moratorium on regulatory initiatives aimed primarily at innovative and growing industries, such as the broad communications sector. It doesn’t make sense to place additional constraints on growing sectors at a time when we need all the growth that we can get.**

**This type of moratorium is an example of ‘countercyclical regulatory policy’—that is, the notion that regulatory policy should be sensitive to the business cycle. This idea was initially proposed and discussed in a 2010 paper from the Progressive Policy Institute entitled “The Coming Communications Boom?: Jobs, Innovation and Countercyclical Regulatory Policy.”**

6. How would your “Regulatory Improvement Commission” be funded?

**The objective is \*not\* to create another big agency or layer of bureaucracy. We would anticipate keeping the Regulatory Improvement Commission quite small in terms of employment. In addition, most of its staff would be temporarily on loan**

**from other agencies, in order to provide the necessary expertise. As a result, not much funding would be needed.**

7. Could the Government Accountability Office or some other existing entity perform the function of your proposed Commission if it was adequately funded and staffed?

**New legislation would be needed whether the Regulatory Improvement Commission is set up separately or part of an existing structure. The legislation would have to specify the process by which a package of regulatory changes would be subject to a single up-or-down vote in Congress, and then be sent to the President for approval. In the end, it might be better to set up a separate commission with a clear mandate.**

8. As you may know, several bills have been introduced this Congress that would mandate some type of retrospective review. One of these would require agencies to perform decennial reviews of their existing major rules identifying the costs and benefits of each rule; identifying each amendment to the rule that would accomplish the same statutory objectives but result in different costs and benefits; and analyzing the costs and benefits of repealing each rule.

What are your thoughts about this approach?

**I believe that this approach—an internal agency-by-agency retrospective review—will be expensive and not produce the desired results. First, doing a cost-benefit analysis of an existing regulation is expensive and quite intrusive, since it's necessary to collect data from the companies affected by the regulation. Second, an agency which approved a regulation the first time around is unlikely to come to a different conclusion the second time. Third, many of the biggest issues are due to multiple layers of regulation, rather than problems with a single regulation. So it's possible for every regulation to pass a retrospective review and still impose a burden on innovation and job creation.**

**I'd suggest that a Regulatory Improvement Commission can accomplish more than agency-by-agency retrospective review, and at a lower cost.**

8. Do you concur with Prof. Levin that the retrospective review should be evenhanded and that such review should “bring to light situations in which regulations should be strengthened instead of being weakened or eliminated”?

**The Progressive Policy Institute called our proposal a Regulatory Improvement Commission, not a Regulatory Reduction Commission. There may be cases where it makes sense to improve or even strengthen regulations. However, I believe that the commission should be mostly mandated to pare the burden of regulation on innovation.**



Subcommittee on Courts, Commercial and Administrative Law  
Hearing on  
“Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and  
Regulations,”  
July 12, 2012

Questions for the Record

**Questions from Subcommittee Ranking Member Steve Cohen for Ron Levin**

- 1. Dr. Lutter recommends that OMB should issue guidelines about how agencies should conduct a credible regulatory analysis of the effects of regulations on employment, but “only after soliciting and considering public comment and genuinely independent expert advice.”**

**What are your thoughts about his suggestion?**

**Would the Administrative Conference of the United States be an appropriate entity to draft this guidance?**

I cannot speak for the Administrative Conference, but I think that, if such guidelines were going to be written, the Conference could provide at least general advice. However, the strength of ACUS lies primarily in areas of process and procedure. With regard to technical issues of economic and public policy analysis, I would hesitate to say that the Conference holds a comparative advantage over OMB itself.

As I understand Dr. Lutter’s position, he emphasizes the benefits of entrusting the actual performance of retrospective reviews to an external body, which might take a more detached view than the issuing agency itself does. He also endorses detailed analysis of broad regulatory programs as opposed to individual rules. I share his appreciation for rigorous evaluation of ongoing programs, but these proposals also implicate, to my mind, the “selectivity” theme in my own testimony. The in-depth analyses that he discusses cannot feasibly be pursued government-wide (as I believe he would agree). They require agencies to make judgments about areas that are most in need of examination, and cost factors must also be considered.

Dr. Lutter also favors asking agencies to make a regular practice of asking regulated persons to compile data about the effects of rules over time. This practice would, I agree, tend to facilitate subsequent retrospective reviews of those areas, but it too should be used only selectively. After all, a major statute, the Paperwork Reduction Act,<sup>1</sup> embodies the insight that the public objects to recordkeeping requirements except where a clear benefit from imposing them can be shown. In some instances, that showing could likely be made; in others, probably not.

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<sup>1</sup> 44 U.S.C. § 3501 et seq.

**2. You note that repeated reviews of the same rules will have declining payoffs. Please elaborate.**

The point I would make here is simply that, after an agency has reviewed a rule and confirmed to its satisfaction that the rule is working satisfactorily, or at least that its benefits justify its costs, repeated reassessments of the rule consume finite resources that might be better spent on examining other rules that have a less well-defined track record.

**3. Dr. Mandel recommends the establishment of a BRAC-like entity to conduct retroactive reviews.**

**What are your thoughts about his proposal?**

**Could the Government Accountability Office or some other existing entity perform this function if it was adequately funded and staffed?**

Dr. Mandel says that his goal is to eliminate excessive or outdated regulations while preserving key protections for the public. I am sympathetic to this objective, but I see several reasons to question his method of pursuing it.

The BRAC model worked because the political system had largely agreed on a goal, namely to reduce the number of military bases, but it also recognized that ordinary decision processes made it difficult to achieve that goal (because advocates for particular localities could derail the inclusion of their particular bases on the “hit list”). Dr. Mandel’s policy brief<sup>2</sup> declares that his proposed Regulatory Improvement Commission (RIC) model would likewise “[l]ay out specific goals for regulatory improvement.” He identifies these goals as “encouraging innovation, improving competitiveness, reducing compliance costs, fostering growth, protecting public health and safety, and promoting responsible environmental stewardship.”<sup>3</sup> To my eye, however, this list of goals would require the commission to confront fundamental value tradeoffs at nearly every turn. Conflicts between business interests and the protection of health, safety, and the environment run deep in our society, and the establishment of an “independent” commission of private citizens would not cause those conflicts to disappear.

More particularly, I question whether the commission would be in a good position to resolve those conflicts. The members are to be “a bipartisan collection of stakeholders who have strong qualifications and reputations that are beyond reproach.”<sup>4</sup> The assumption that the political leadership would allow the selection of such a panel without compromising these idealistic criteria seems optimistic, but I will accept it for the sake of discussion. Even on that assumption, one needs to bear in mind that the members would not be specialists in the specific areas being considered. A commission with, say, two dozen members might have four or five members with deep experience in regulation of air pollution, two or three with experience in

<sup>2</sup> Progressive Policy Institute, *Reviving Jobs and Innovation: A Progressive Approach to Improving Regulation* (Feb. 2011).

<sup>3</sup> *Id.* at 3, 7.

<sup>4</sup> *Id.* at 2, 7.

communications regulation, two or three with experience in regulation of energy production, and so forth. In any given subject area, therefore, most members would be newcomers to the issues under examination.

This circumstance would militate against the credibility of the RIC's recommendations. After all, in many instances the question would not be whether the rule should be rescinded completely, but how it should be revised. The details of the issues could be quite technical and challenging for people who do not know the area well. Furthermore, these members would not be politically accountable for the value choices they make – value choices that should be subject to effective accountability (as to which an up-or-date vote in Congress on the entire package would not be, in my judgment, a sufficient response). The same critique would apply to the GAO or a similar body.

In addition, Dr. Mandel himself pointed out in his testimony that the rules in many regulatory programs are elaborately interconnected. I agree. As a result, decisions about which rules to rescind or revise would depend on knowing how those rules relate to others. It is not clear that the RIC would have the broad perspective needed for such decisions.

Finally, I am concerned about the fact that, under Dr. Mandel's proposal, the RIC would be authorized to forward its recommendations to Congress with far less of a record and written justification than one would expect a regulatory agency to furnish in taking similar actions. Yet those procedural requirements have been instituted precisely in order to ensure that the agency's reasons will be factually grounded, rigorously analyzed, and consistent with the legal regime that the agency is required to implement.<sup>5</sup> The RIC's recommendations would be less reliable, because they would not be subject to these safeguards. In my view, checks and balances that can counteract unwise decisionmaking are an essential part of the administrative law system, and I do not share Dr. Mandel's readiness to dispense with them, even if we assume the commission members will be thoughtful and conscientious about pursuing general public interests (which, as I said, might be too generous an assumption).

**4. Are you aware of any empirical evidence establishing any adverse impact on job creation by the promulgation of regulations?**

No, I am not. I recognize that your Committee has actively examined this issue on multiple occasions during the 112th Congress, including its reports on the Regulatory Accountability Act<sup>6</sup> and the Regulatory Freeze for Jobs Act.<sup>7</sup> I essentially agree with the dissenting views expressed in those reports and will not rehash the analysis presented there. It may suffice to note that, like the dissenters, I do not believe that empirical studies that estimate only the costs of regulation, without also estimating their benefits, come close to establishing that agency rules have a *net* adverse impact on the nation's economy. Regulations that bring about cleaner air and water, safer skies, a healthier population, trustworthy markets, fair competition,

<sup>5</sup> This Committee's report on the Regulatory Accountability Act contains a very apt and accurate account of the development of these requirements. H.R. Rep. No. 112-294, at 15-18 (2011).

<sup>6</sup> Id. at 10-12 (majority), 71-76 (dissent).

<sup>7</sup> H.R. Rep. No. 112-294, at 3-6 (majority), 24-28 (dissent) (2012).

etc. have important social and economic benefits that cannot be credibly omitted from the equation.

I have a similar view regarding retrospective reviews in particular. If any empirical studies show, or purport to show, that an active program of retrospective reviews would yield substantial net benefits in terms of job creation, I am not aware of them.

**5. Why should Congress avoid prescribing detailed instructions for the manner in which retrospective reviews should be conducted? Won't this give agencies too much license to just do as they wish and maintain the status quo?**

In my written statement I referred to recommendations by the ABA, ACUS, and GAO that advocated flexibility. I will amplify on that material a bit here. The report of the ABA Section of Administrative Law and Regulatory Practice, supporting the ABA recommendation discussed in my statement, identified some of the objections to a highly prescriptive approach:

[A] standardized approach does not take into account that some agencies have thousands of existing regulations, while other agencies have far fewer rules. [T]he time necessary for a review may vary from agency to agency because different review methods are used. [Moreover,] the time necessary for an effective review may vary depending on the difficulty or ease of acquiring the necessary information, or on the degree of interest and involvement of stakeholders.<sup>8</sup>

The ACUS recommendation makes a similar point:

Each agency faces different circumstances, depending on the number of its regulations, their type and complexity, other responsibilities, and available resources. These processes must be designed so that they take into account the need for ongoing review, the agency's overall statutory responsibilities, including mandates to issue new regulations, and other demands on agency resources. Because there are relatively few successful well-developed models available and no widely accepted methodologies, the Conference recommends that agencies experiment with various methods.<sup>9</sup>

In addition, the GAO report casts doubt on the effectiveness of statutory specifications for retrospective reviews where they have been tried:

[W]e observed that, for cases where agencies reported modifications to regulations, these actions were most often attributed to factors that agencies addressed at their own discretion, such as technology changes, harmonization efforts, informal public feedback, and petitions. For example, although EPA officials reported that they have many mandatory regulatory review requirements, our review of proposed or completed modifications to existing regulations reported in the December 2006 Unified Agenda

<sup>8</sup> ABA Section of Administrative Law and Regulatory Practice, *Report No. 103*, 120 No. 2 ABA Ann. Rep. 341, 344 (1995).

<sup>9</sup> ACUS, Recommendation 95-3, Review of Existing Regulations, 60 Fed. Reg. 43,109, preamble (Aug. 18, 1995).

showed that 63 of the 64 modifications reported were attributed to reasons associated with agencies' own discretion. [O]ther agencies within our review had similar results.<sup>10</sup>

Aside from these institutional pronouncements, I would suggest that Representative Cohen's question assumes too sharp a dichotomy between "detailed instructions" and "giv[ing] agencies too much license to just do as they wish." A middle ground could be found. See my answer to Question 6 below, regarding the criteria in Representative Quayle's bill.

6. **As you may know, several bills have been introduced this Congress that would mandate some type of retrospective review. One of these, introduced by Rep. Quayle, would require agencies to perform decennial reviews of their existing major rules identifying the costs and benefits of each rule; identifying each amendment to the rule that would accomplish the same statutory objectives but result in different costs and benefits; and analyzing the costs and benefits of repealing each rule.**

**What are your thoughts about this approach?**

I have three main concerns about H.R. 3392, Representative Quayle's bill on retrospective review of agency rules.

First, it provides that *every* major rule issued by an agency must be reviewed at least once per decade. § 553a(b). The fact that the bill would apply to *major* rules, not *all* rules, makes a good start in the direction of tailoring the scope of the requirement to the resources that are likely to be available to fulfill it. However, I believe that it still fails to afford sufficient flexibility to agencies to select the targets of their examination. As I discussed in my written statement (p. 5), the GAO found that mandatory reviews tend to produce markedly fewer actual changes than reviews of rules that agencies have voluntarily concluded deserve examination.

Second, the bill's criteria for evaluation of any given rule are too constraining, although this problem may not be apparent at first blush. Sections § 553a(b)(1)-(3) of the bill would direct the agency to "identify the costs and benefits of the rule," "identify each amendment to the rule that would accomplish the same statutory objectives but result in different costs and benefits," and "identify the costs and benefits of repealing the rule." If this language were read in isolation, it might well be acceptable. It could be interpreted to do nothing more than to instruct the agency to consider the pros and cons of the existing rule and its alternatives (although it would be better to require the agency to examine "a reasonable range of regulatory alternatives," rather than *each* alternative). However, § 553a(j) of the bill goes on to define the key terms of that obligation in a way that makes the specifications more confining:

For purposes of this section:

- (1) The term 'cost' means, with respect to a rule, the cost of that rule, including direct, indirect, and cumulative costs and estimated impacts on jobs, economic growth,

<sup>10</sup> Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-79, at 32-33 (2007).

innovation, and economic competitiveness, to each person who is significantly affected by the rule.

(2) The term 'benefit' means, with respect to a rule, the benefit of that rule, including direct, indirect, and cumulative benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness, to each person who is significantly affected by the rule.

In my judgment, this requirement to analyze “direct, indirect, and cumulative” costs and benefits with respect to *each* significantly affected person, as well as the more specific impacts mentioned in the definitions, would amplify the scope of the required § 553a(b) review much too broadly, because it fails to take account of significant differences among agencies’ regulations. See my response to Question 5 above.

Third, § 553a(h) of the bill would provide that, “[n]otwithstanding any other provision of law, each determination by an agency under this section shall be subject to judicial review under [the APA].” In this respect, H.R. 3392 differs from the retrospective review programs instituted by President Obama’s executive orders, which expressly exclude judicial review. The review programs instituted by previous Presidents were the same in that regard.

In practice, the provision for judicial review may make little or no difference, because it is not clear how anyone could have standing to sue over an alleged violation of this legislation. However, if judicial review did become freely available, it would substantially alter the usual nature of retrospective review programs, and not for the better. If an agency knew that “each” determination it made in the review process (a term that apparently would include subsidiary determinations as well as the agency’s ultimate conclusion) could become the subject of litigation, it would have no practical alternative but to build a factual record that could survive judicial scrutiny of any of these determinations. The effect would be the expenditure of a great deal of effort on issues that were, in fact, not destined to be particularly controversial.

As I testified in response to a question by Representative Johnson (Tr. 36), a more constructive way to involve the courts is through the petition process, as current law allows. Anyone who believes that an existing rule is obsolete or unwise has the right to petition the agency to revoke or revise it. If the agency denies the petition, it must give reasons, and the denial is appealable to the courts. The petition and the response frame issues effectively for judicial consideration. In this way, the administrative law system is self-regulating, because it induces the agency to focus its retrospective review efforts on rules that have actually been drawn into controversy. This is decidedly more efficient than the across-the-board judicial monitoring envisioned by H.R. 3392.

