FEDERAL RULEMAKING AND THE REGULATORY PROCESS

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BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

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HOUSE OF REPRESENTATIVES

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FEDERAL RULEMAKING AND THE REGULATORY PROCESS

TUESDAY, JULY 27, 2010

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

The Subcommittee met, pursuant to notice, at 11:12 a.m., in room 2237, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Franks, Smith, and Jordan.

Staff present: (Majority) Carol Chodroff, Counsel; Adam Russell, Professional Staff Member; (Minority) Daniel Flores, Counsel; Richard Hertling, Counsel; and Jennifer Lackey, Staff Assistant.

Mr. COHEN. Well, now that the distinguished Ranking Member of the Subcommittee—of the full Committee—and the distinguished Member has arrived, Mr. Smith of San Antonio, we will commence this hearing with the banging of the gavel.

This hearing of the Committee on the Judiciary Subcommittee on Commercial and Administrative Law will now come to order. Without objection the Chair will be authorized to declare a recess of the hearing. I will now recognize myself for a brief statement.

Each year Federal regulatory agencies create thousands of new rules that affect our lives, including regulations that impact the environment, the economy, and the health and safety of our citizens. Transparency and public participation in the process of issuing those rules and regulations are essential both to the quality of regulations and the legitimacy of regulatory proceedings.

The Office of Information and Regulatory Affairs, here inafter known as OIRA, has played a central role in the Federal rulemaking process for more than 25 years. There are competing views about the nature of Federal rulemaking and OIRA's proper role.

Some argue that Federal rulemaking is essentially presidential in nature and that because OIRA is part of the executive office of the President, it helps to ensure the rules of covered agencies reflect the President's policies and priorities. Other observers view OIRA as having a shared allegiance between the President and the Congress and emphasize that OIRA was created by Congress and has been given a number of statutory responsibilities through the Paperwork Reduction Act and other laws.

With both statutory and executive order responsibilities, OIRA embodies broader tension between Congress and the President for

control of administrative agencies. Of course, Congress also creates courts but Congress has no responsibility or right to deal with the courts. There are things called separation of powers. We remember those.

I look forward to hearing from our witnesses about this delicate balance and the proper role of government within our constitutional framework of a separation of powers that we revere and salute on many occasions and the proper role of OIRA in the Federal rulemaking process.

There have been concerns expressed in previous Administrations about the lack of transparency of OIRA's regulatory reviews. I understand this Administration has been working hard to promote greater transparency and I am interested in learning more about what OIRA is doing and plans to continue doing in this Administration to promote transparency and facilitate public participation in the regulatory process.

I also look forward to hearing about the status of any upcoming changes to the existing executive order or the creation of new executive orders, or memorandum, or other guidance to assist the Federal regulatory process in this Administration. On January 30, 2009, President Obama issued a memorandum to the heads of executive departments and agencies instructing the director of OMB, in consultation with representatives of regulatory agencies, to "produce within 100 days a set of recommendations for a new executive order on Federal regulatory review."

On February 26, 2009, the director of OMB published a notice from the Federal register requesting comments from the public on how to improve the regulatory review process. The director noted that although executive orders are not subject to notice-and-comment procedures and public comments are not normally invited before the reissuance OMB was doing so in this case because there had been an unusually high level of public interest and because of the evident importance and fundamental nature of the relevant issues. Thus, we commend the Administration for its actions.

In response to its request OMB, received 183 comments from the public, including Members of Congress, representatives of public interests and private sector interest groups, academicians, and other individuals. To date, no new executive order has been issued and I am interested in learning more about the status of a new order or other guidance that might be forthcoming.

Finally, I am looking forward to a discussion of the implementation of the Congressional Review Act, which requires Federal agencies to submit all of their final rules to both houses of Congress and the Government Accountability Office before they take effect. I am especially interested in the opinion of our witnesses regarding the proper role of Congress and OIRA with respect to guidance on and implementation of the Constitutional Review Act.

I thank the witnesses for appearing today and look forward to their testimony.

I will now recognize my colleague, Mr. Franks, who knows when to make an entrance, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

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

Mr. Chairman, Federal rulemaking and the regulatory process are, indeed, immensely important topics, and I welcome the opportunity to dedicate our attention to them. First, these topics bring front and center so many of the issues that are most important to Americans and their concerns about government and its process.

During the New Deal the seat of Federal power began to seep more and more away from Americans' elected officials and to the unelected, unaccountable Federal bureaucracy. As the New Deal era began to give way to the Great Society and the regulatory initiatives of the 1970's Congress aggressively abetted this power shift and it did so through statute after statute that garnered public acclaim for Congress but broadly addressed, essentially, national concerns, but also granted the real decision-making power to the Federal agencies. Only when these agencies filled in the content of myriad statutes through the rulemaking process did the Federal Government's full decision emerge in full view.

Now, Ronald Reagan, the conservative movement, and millions and millions of Americans rightly sense the disturbing nature of this trend, which was gradually corroding the core of our constitutional democracy. Through the deregulation and strengthen presidential oversight of the rulemaking process the Reagan administration began to reverse trend. It is on account of this effort that the White House office before us today, the Office of Information and Regulatory Affairs, actually exists in the first place.

This office is the threshing floor on which the White House is supposed to separate sensible Federal regulations from those that serve no sufficient need, produce too little benefit for their costs, or otherwise excessively burden the American people and the American economy. And this brings me to the second most important reason that we return our attention to the regulatory process and particularly to the Office of Information and Regulatory Affairs today.

Perhaps never before has this Nation so needed this office to zealously perform its mission. Growing consensus holds that it is the Obama administration's vast new regulatory activity and uncertainty over how much more and how much more costly regulation is to come that has frozen our economy's ability to create jobs. If businessmen cannot know what future costs will be they cannot rationally invest and create new jobs; the uncertainty is such an enemy to economy.

And I say that, Mr. Chairman, as a former businessman myself.

The Office of Information and Regulatory Affairs is not charged with scaling back the scope of the Administration's regulatory agenda, but it is charged with assuring that any new regulations under this Administration pass a rigorous cost-benefit analysis—that they are cost effective, are least burdensome, and are clear and certain in their terms. Further, it is the job of the Office of Information and Regulatory Affairs to reign in the agencies' regulatory impulses when cold, hard analysis shows that it would be better to have no regulations than the regulations agencies actually propose.

When Administrator Cass Sunstein took charge of the Office of Information and Regulatory Affairs Republicans took some heart. In the past Administrator Sunstein had been a prominent pro-

ponent of cost-benefit analysis and less intrusive Federal regulation. Republicans reached out to the administrator and offered cooperation and efforts to reform the regulatory process.

But the outreach met with no reply, Mr. Chairman.

Moreover, reports have reached us that the Office of Information and Regulatory Affairs is at best halfheartedly performing its core mission of regulatory review. It is ceding power to White House czars, and in short it is doing little to mitigate the cloud of regulation and regulatory uncertainty that hangs over our economy, paralyzing the power of free enterprise to create new jobs so desperately needed today.

And, Mr. Chairman, finally, let me just say that I think sometimes that conservatives are castigated for being so focused on competition in the economy that we overlook the greater substance of the economy that makes it work well, and that is this thing called trust.

If people in the economy—those with capital to risk, those with dreams and hopes to make a business—if they believe that they can trust the regulatory framework of government, if they believe that they can have their contracts enforced, and if they believe that government will not confiscate everything that they earn then there is some motivation for them to go forward in their endeavors. But if they are convinced that they are just shooting in the dark then they are hesitant. And I would just suggest that there is nothing more damaging to our business environment right now than uncertainty and a lack of trust in government.

So with that, I look forward to questions, look forward to talking the Administrator Sunstein about these concerns, and hearing from our distinguished witnesses today.

And thank you, Mr. Chairman. I yield back.

Mr. COHEN. Thank you, Mr. Franks.

I would like to ask if the other Members would like to introduce statements or make statements? And we always entertain statements from the distinguished Member from San Antonio, the home of the Alamo where so many Tennesseans gave their lives to preserve the state of Texas. [Laughter.]

Mr. SMITH. Thank you, Mr. Chairman, for promoting tourism in San Antonio. Appreciate that.

Mr. Chairman, as we near the midpoint of the Obama administration the American economy continues to lose, not create, private sector jobs. There are a number of reasons for this chronic unemployment and the failure of the Administration to create jobs, beginning with the ineffective stimulus bill. That legislation siphoned close to $1 trillion of capital away from the private sector.

The Administration promised it would keep unemployment below 8 percent. Unemployment instead rose to almost 10 percent.

The private sector has lost 2.5 million jobs since the stimulus bill became law. The Federal Government has gained over 400,000 jobs, but those jobs came at the expense of the private sector. After all, the private sector has to spend capital on taxes, not investment, if government jobs are to be funded. Perhaps it is no coincidence that four out of every five jobs the Administration claims to have created or saved are public sector jobs.

Also at the head of the job-killing pack are the regulatory policies of this Administration. Americans ask daily, "Where are the jobs?" but the answer from Washington too often is, "Here are the regulations and there are plenty more coming."

The wave of regulations is killing private sector jobs. Rules adopted by the Administration so far, like the Environmental Protection Agency's carbon dioxide endangerment finding, already tell businesses that their costs will rise.

And rules coming down the pike tell them that their costs will only continue to rise under this Administration. These rules include hundreds due under the health care and financial reform legislation, and may include many, many more feared under pending cap-and-tax legislation and other expansions of the Federal Government's power.

Rules that increase cost kill jobs Americans now hold. Rules that will increase costs still more in the future kill the creation of new jobs. How can businesses make the investments that they will create new jobs if they cannot tell whether a host of new regulations will turn potential profits into certain losses?

The equation is simple. When Washington reduces regulatory overreach and regulatory uncertainty jobs will return.

One part of the White House that unquestionably should listen is the Office of Information and Regulatory Affairs. This White House office assures that Federal agencies do not regulate when they do not need to, regulate only in ways that are cost beneficial, adopt only the most cost effective regulations, do not compound existing problems with unsound regulation, and regulate with consistency across the executive branch.

Yet, according to reports the Office of Information and Regulatory Affairs is missing in action. The number of rules that cross the office's desk is substantially on the rise, yet the amount time the office takes to consider them is considerably on the decline, and the number of rules the office returns to agencies for improvement is minimal to nonexistent. There is no excuse for this as the burden and uncertainty of regulation contributes to a regrettable jobless economy.

Mr. Chairman, I will yield back.

Mr. COHEN. I appreciate your statement, if not—and I would like to—could I ask you one question, sir? Did you say there was $1 billion in the stimulus that is getting out of the private sector? Is that what I——

Mr. SMITH. I said, "close to," that is correct.

Mr. COHEN. Okay. I think it was $787 billion, and I think 35 percent of it was tax cuts——

Mr. SMITH. I think we were rounding to the nearest $1 trillion on that. You are right. [Laughter.]

And that is not including the interest. Thank you——

Mr. COHEN. And just under 40 percent of it was tax cuts, so that went back to the private sector, which leaves—40 percent of $787 billion would leave about $400-and-something billion, which, rounded off to the nearest $1 trillion, would be zero. So we are working on the deficit. The stimulus bill was really no cost.

Mr. SMITH. More harm than good. You are right, Mr. Chairman.

Mr. COHEN. Thank you, sir.

And I now would like to recognize—all other statements can be entered for the record.

We have got a system here that most of you know about that is a lighting system, and when I start this and it is green it means you have got 5 minutes; when it gets to yellow it means you are in your last minute; and then when it gets to red it means you should be finished—or in your case, Mr. Sunstein, we will give you a few extra seconds, but you should be rounding it off.

We will have 5 minutes to ask you questions, and subject to the same 5-minute rule. And then when we finish we can submit other questions to ask you to respond to later. You will never be finished with answering questions; it is part of this Committee's——

Our first witness is Mr. Cass R. Sunstein. Before becoming the administrator for OIRA Mr. Sunstein was the Felix Frankfurter Professor of Law at Harvard Law School.

He clerked for Justice Thurgood Marshall of the United States Supreme Court, and he did not make it into the play but I am sure that was an omission. And he worked as an attorney advisor in the Office of Legal Counsel of the U.S. Department of Justice. He was a faculty member of the University of Chicago Law School from 1981 to 2008 at the period of time in which the Chicago White Sox were victorious.

Mr. Sunstein has testified before congressional Committees on many subjects and he has been involved as an advisor in constitution-making and law reform activities in a number of nations. A specialist in administrative law, regulatory policy, and behavioral economics, Mr. Sunstein is the author of many articles and a number of books.

Thank you, Mr. Sunstein. We will now begin your testimony.

TESTIMONY OF CASS R. SUNSTEIN, ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA), EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET

Mr. SUNSTEIN. I am most grateful to have the opportunity today to discuss some of our work at the Office of Information and Regulatory Affairs.

As you are aware, OIRA is charged with a number of functions, including coordination of statistical policy, information policy, and regulatory review. One of OIRA's most important roles is to ensure compliance with the Paperwork Reduction Act (PRA). Reducing paperwork burdens on the American public and taking advantage of current technological possibilities—note, what just happened—have been high priorities for us. In the last months we have taken numerous steps to promote these goals associated with the Paperwork Reduction Act.

In April we issued a data call to agencies calling for new burden reduction initiatives, and let me underline those words—burden reduction initiatives. We asked agencies to develop new steps to standardize inconsistent processes and requirements, to eliminate duplicative reporting requirements, to eliminate unnecessary complexity, to improve coordination among multiple offices with particular emphasis, by the way, on small business. We also asked

agencies for initiatives that take advantage of electronic filing, increase simplification, and, simply put, reduce burdens.

Regulatory review of significant rules, as the opening comments suggest, may well be the most visible of our functions, and let me spend the rest of my time in these brief remarks on that topic. As I see it, such review—review of regulations—has three key functions. First, it helps to ensure that regulations are consistent with the law, our lodestar, and with the principles and priorities of the President of the United States.

Second, regulatory review promotes coordination among different parts of the executive branch. Some statutes require a consultation among multiple agencies during the development of regulations, and even in cases where statutes don't require such consultation, the positions of one agency are frequently usefully illuminated by the views of other agencies that have relevant experience and expertise.

Third, in a function that picks up on some of your opening remarks, regulatory review helps to improve the analysis that lies behind rules, and thus helps to improve rules. This includes careful attention to both costs and benefits. OIRA oversees a process of interagency review that promotes compliance with these requirements so that agencies look before they leap.

Since I was confirmed in September OIRA, has devoted attention to three topics—special attention to these three. First, promoting open government and transparency, including attention to the views of affected stakeholders; second, improving regulatory analysis so the rules have a solid foundation; third, improving disclosure policies and increasing simplification for the American people.

We have worked very closely in the domain of open government with others in the executive office of the President and with agencies—multiple agencies—to ensure disclosure of data sets that have never been public before. They can be found—thousands of them—on data.gov. We have also worked together with more than two dozen agencies to produce open government plans. We believe that the result of this process—this process that has no predecessors—has been a dramatic increase in openness and transparency both for the American people and for American businesses.

For over 3 decades, through five Administrations starting, as noted, with President Reagan, regulatory impact analysis, including discussion of costs and benefits, has played an important role in the assessment and design of significant rules. As the President said on May 2, "Sometimes regulation fails, and sometimes its benefits do not justify its costs."

In 2009, in our report to Congress, we linked the interests in regulatory analysis and attention to costs and benefits with our interest in open government. We said that openness about costs and benefits helps to reduce the risk of insufficiently justified regulation, imposing serious burdens and costs for inadequate reason. We believe that regulatory analysis should be developed and designed in a way that fits with the commitment to open government.

We have taken our own advice seriously, recently creating a regulatory dashboard which offers a clear and novel, vivid picture of Federal rulemakings under OIRA review. With a very quick glance any American can get a picture of what is under formal review

from a large number. Over two dozen agencies—and have a sense of what is coming, thus promoting the goal of predictability and participation. People have notice of what is coming and participate in its improvement.

This new dashboard is just the beginning, but we hope that it is a step toward greater transparency in a way that unifies our interest in open government with our interests in smart, effective regulation.

I look forward to answering your questions.

[The prepared statement of Mr. Sunstein follows:]

PREPARED STATEMENT OF THE HONORABLE CASS R. SUNSTEIN

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
WWW.WHITEHOUSE.GOV/OMB

Testimony of
The Honorable Cass R. Sunstein
Administrator, Office of Information & Regulatory Affairs

Before the Committee on the Judiciary
Commercial & Administrative Law Subcommittee
U.S. House of Representatives
July 27, 2010

Mr. Chairman and Members of the Committee:

I am most grateful to have the opportunity today to discuss some of our work at the Office of Information and Regulatory Affairs.

As you are aware, OIRA is charged with a number of functions, including coordination of statistical policy, information policy, and regulatory review. One of OIRA's most important roles is to ensure compliance with the Paperwork Reduction Act (PRA). Reducing paperwork burdens on the American public, and taking advantage of current technological possibilities, have been high priorities for us. In the last months, we have taken a number of steps to promote those goals. In April, for example, we issued a "data call" to agencies, calling for new burden reduction initiatives. We asked agencies to develop initiatives to "standardize inconsistent processes and requirements, eliminate duplicative reporting requirements, eliminate unnecessary complexity, and improve coordination among multiple offices that gather information from a common group of stakeholders." We also asked agencies for initiatives that take advantage of electronic filing, increase simplification, and reduce burdens on small business.

To promote the goals of the PRA, we have issued several new guidance documents to agencies. One of these supplies a simple, straightforward "primer" to help answer frequent questions. Another is designed to explain the relationship between the PRA and social media. This guidance makes it clear that in many ways, agencies can interact with the public and, in that sense, promote open government, without running afoul of the PRA.

Regulatory review of significant rules may well be the most visible of OIRA's functions. I shall spend the rest of my opening remarks on that topic.

The basic structure of regulatory review, established by Executive Order 12866, is simple and straightforward. Typically an agency sends a draft of a significant proposed or final rule to

OIRA, which then coordinates an interagency review process. The draft rule is sent to relevant OMB Resource Management offices, Presidential Councils, and Executive branch agencies and departments, which offer comments and suggestions. The usual practice is for OIRA to summarize those comments, together with our own, and to transmit them to the relevant rulemaking agency. Typically the agency will agree with some, but not all, of the comments that it receives. Discussion and deliberation ultimately produce a final product.

Since January 20, 2009, OIRA has used this process to review over 900 significant rules. We have placed special emphasis on ensuring that members of the public will have an opportunity to comment on assumptions and alternatives, so that rulemaking will be informed by the knowledge and perspectives of those who are interested, expert, or likely to be affected.

As I see it, regulatory review has three key purposes. First, it helps to ensure that regulations are consistent with the law and with the President's principles and priorities. Second, it promotes coordination among different parts of the executive branch. Sometimes statutes require coordination or consultation among agencies during the development of regulations, and even in cases where statutes do not so require, the positions of one agency are usefully informed by the views of other agencies with relevant experience and expertise. Third, regulatory review helps to improve the analysis that lies behind rules. Both Congress and the President have imposed important analytic requirements, including careful attention to both costs and benefits (with consideration of factors that cannot be quantified). OIRA oversees a process of interagency review that promotes compliance with these requirements, so that agencies "look before they leap."

It is important to see that when it is working well, regulatory review is sharply disciplined. Both the substance and the structure of regulatory review are limited and guided by Congress. Statutory constraints, time limits, and deadlines must be honored.

Since I was confirmed in September, OIRA has devoted special attention to working with agencies in three areas: promoting open government; improving regulatory analysis; and improving disclosure policies and increasing simplification. The unifying goal is to ensure that regulation is evidence-based and data-driven, and that it is rooted in the best available work in science (including social science). Let me offer a few words on each of these topics.

First: President Obama has placed a great deal of emphasis on open government. He has quoted the words of Supreme Court Justice Louis Brandeis: "Sunlight is said to be the best of disinfectants."[1] He has explained that "accountability is in the interest of the Government and the citizenry alike." He has emphasized that "[k]nowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge."[2] OMB's Open Government Directive, issued in December 2009, is designed to promote the President's goals by requiring a series of concrete steps to promote transparency, participation, and collaboration.

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[1] Speech by President Obama, Jan. 28, 2009.
[2] Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, President Obama, Jan. 21, 2009.

One of these concrete steps is agency publication of high-value data sets. High-value information is defined to include information "that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation." OIRA has worked closely with others in the Executive Office of the President, and with agencies, to ensure disclosure of such data sets, which can now be found on data.gov. We have also worked together to produce dozens of open government plans. We believe that the result of the process has been a dramatic increase in openness and transparency.

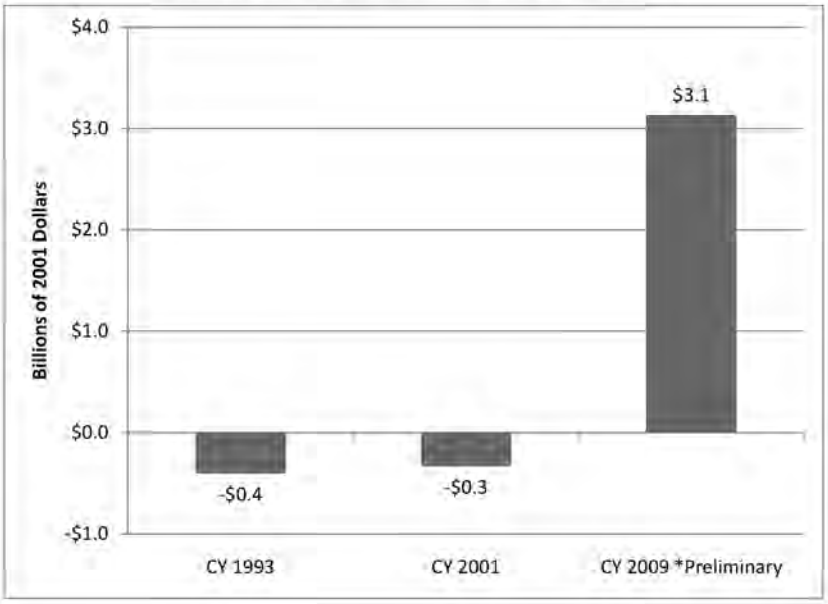
Second: For over three decades, through five administrations under both Democratic and Republican presidents, "regulatory impact analysis," including discussion of both costs and benefits, has played an important role in the assessment and design of significant rules As the President said on May 2, "Sometimes regulation fails, and sometimes its benefits do not justify its costs."

With full recognition of the limits of quantification, efforts to promote an appropriate accounting of both benefits and costs can greatly inform judgments about appropriate courses of action – and can help to increase benefits, decrease burdens, and inspire new approaches and creative solutions. The process of analysis might reveal that a less or more stringent approach is better. Appropriate analysis should attempt to quantify – to the fullest extent that these can be usefully estimated -- relevant variables, to promote cost-effective choices, and to explore and evaluate different alternatives. It is also vital to encourage, through the notice and comment process, public scrutiny and review of agency rulemakings, which allows assumptions to be revealed and errors to be exposed and corrected.

With an emphasis on openness, OMB recommended (in its 2009 Report to Congress on the Costs and Benefits of Federal Regulation) that the best practice is to accompany all significant regulations with (1) a tabular presentation, placed prominently and offering a clear statement of qualitative and quantitative benefits and costs of the proposed or planned action, together with (2) a presentation of uncertainties in the evidence and (3) similar information for reasonable alternatives to the proposed or planned action. With the goal of openness in mind, OIRA has worked hard to promote greater transparency in regulatory impact analysis. By providing the public with information about proposed and final regulations, by revealing assumptions and subjecting them to public assessment, and by drawing attention to the consequences of alternative approaches, transparent analysis can promote public understanding, scrutiny, and improvement of rules. It is worth noting that the quantified benefits of final rules significantly exceeded the quantified costs for the calendar year 2009[3]:

[3] The tabulation include only those rules for which reasonably complete monetized estimates of both benefits and costs are available. Three qualifications are important: (1) the estimates for 2009 are preliminary; (2) the groundwork for a number of regulations finalized in one administration is done in a previous administration; (3) the aggregate estimates of costs and benefits, derived from different agencies' estimates and over different time periods, are subject to methodological inconsistencies and differing assumptions.

Figure 1: Annual Net Benefits of Major Rules
First Calendar Year of an Administration (1/21 to 12/31)



Of course this is only a start. As OMB's 2009 Report to Congress says, "Indeed, careful regulatory analysis, if transparent in its assumptions and subject to public scrutiny, should be seen as part and parcel of open government. It helps to ensure that policies are not based on speculation and guesswork, but instead on a sense of the likely consequences of alternative courses of action. It helps to reduce the risk of insufficiently justified regulation, imposing serious burdens and costs for inadequate reason. It also helps to reduce the risk of insufficiently protective regulation, failing to go as far as proper analysis suggests. We believe that regulatory analysis should be developed and designed in a way that fits with the commitment to open government. Modern technologies should be enlisted to promote that goal."

Third: In recent years, there has been a great deal of empirical work on the topics of disclosure and simplification, with the goal of developing low-cost, low-burden regulatory tools. In implementing statutory requirements, OIRA has been working closely with agencies to explore a number of ways to promote private and public accountability and to inform choices. Examples can be found in our draft 2010 Report to Congress on the Costs and Benefits of

Federal Regulation and in our June 18, 2010 guidance on disclosure and simplification as regulatory tools.

OIRA has recently created its own dashboard, which offers a clear and unprecedentedly vivid picture of the federal rulemakings under formal OIRA review (see reginfo.gov). With a very quick glance, citizens can see what is under formal review from a large number of agencies. Citizens can learn how long rules have been under such review, whether they are economically significant, what they would do, and more. The new dashboard is only a beginning, but we hope that it is a step toward greater transparency, in a way that unifies our interest in open government with our interest in smart, effective regulation.

I look forward to answering your questions.

Mr. COHEN. Thank you, Mr. Sunstein, and I will start the questioning.

My first question, I guess: Who was your predecessor in the previous Administration?

Mr. SUNSTEIN. Susan Dudley is my immediate predecessor, and before that John Graham.

Mr. COHEN. And they both were during the Bush administration?

Mr. SUNSTEIN. That is correct.

Mr. COHEN. What changes have you—have taken place in the office since the change of Administrations?

Mr. SUNSTEIN. If you look at our Web site you will see we have done several things. As noted, under the Paperwork Reduction Act we have issued a data call to try to have burden reduction initiatives, which don't look like—I hope they are consistent with the previous interest in burden minimization, but they don't look like anything that has been seen before.

We have also taken steps to bring the Paperwork Reduction Act into the 21st century, both by making it clear and predictable—by the way, both for agencies and for businesses. There has never been a clear statement of what the Paperwork Reduction Act requires and doesn't require. That is right up there.

We have also had new efforts to introduce clarity with respect to the relationship between the Paperwork Reduction Act and modern technology. So we have guidance to that effect. Of course, the office has operated within the broad framework set by the President of the United States and our approach to regulation is consistent with his, and in that sense you will see some differences.

But you will see something that I think will be noteworthy to those who were concerned about overregulation, which is that in our first year we have actually a better record, in terms of net benefits, than the first year of either the Clinton administration or the Bush administration. They were in the red with respect to net benefit—a few hundred million dollars in the red; we are in the black. We are $3.1 billion positive in 2009.

Mr. COHEN. And why you say net benefits are you—what are you exactly referring to?

Mr. SUNSTEIN. We take account, as some of the opening remarks emphasized, of the costs—the social costs of regulation. So if businesses are facing new costs as a result of our regulations that is something we calculate, we publicize, we try to find ways of working with agencies to reduce those costs, to make sure they are smaller, and then the social costs are calculated as costs.

Then there might be social benefits. Deregulation, for example, can remove burdens. If you save people's lives or if you improve people's health that produces benefits. There are real challenges with monetization, but we try to include everything that we can.

Mr. COHEN. Who came up with those figures?

Mr. SUNSTEIN. In the first instance they come—the cost and benefit figures—from agencies themselves, and then the analysis, like the rules, are subject to an interagency process of review. So the Council of Economic Advisors in the Obama administration—I believe this is true in his predecessors too—plays a significant role in making sure that the cost-benefit figures are accurate. The National Economic Council and other agencies participate.

There is also a great deal of public participation in this calculation, so if it turns out that affected stakeholders or just interested citizens think we don't have the numbers right, we are listening and they will get better.

Mr. COHEN. You mentioned that there are obvious changes with the previous Administration and yours, and I think what you were

saying is in substance in how you look at the different policies and whatever, but how about procedure? Have there been any changes in—since this Administration came in and the procedures of OIRA?

Mr. SUNSTEIN. The major one is external—our dealings with disclosure to the public of what we are all about, and that is the dashboard. So we have now—anyone can see it—a snapshot of what is before OIRA and people can see everything at a glance.

We have also issued, in the domain of transparency, two bits of guidance which you have to be a bit of a geek, I think, to be as excited about as I am, but I think they are kind of exciting. One is, there is—it requires a regulatory identifier number on regulations throughout the process so that people who are interested in a regulation that will affect them, or that matters to them can see it at every stage and not get lost in the bureaucratic process. So we are required that regulatory identifier number to be on all regs at every stage. That is a significant step forward in terms of transparency.

We have also required everything to be up on regulations.gov that can feasibly be up there, so that if businesses are concerned or if environmentalists are concerned about the information on which the agency is relying they get a chance to see it and comment on it. So we are trying to bring, really, the Federal rulemaking process step-by-step into the 21st century with these two, as I say, in my view, significant guidance documents, and there hasn't been anything like them before.

Mr. COHEN. I think I mentioned in my opening remarks that the President called for a review and possible revision of Executive Order 12866. There were comments filed but no executive order has been issued to date. What is the status of that effort and does the Administration plan to revise or offer new guidance on that particular——

Mr. SUNSTEIN. Thank you, Mr. Chairman. You referred to the fact that we received 183 public comments, and we got a great number of helpful suggestions about what to do.

I would put the bulk of the suggestions in the following categories: first, scientific integrity—the centrality of objectivity with respect to scientific findings should be a given in the regulatory process; second, transparency and openness—there was a widespread plea for more clarity with respect to the rulemaking process, and as just noted, we have done a few things; third, there was widespread approval—not universal, but widespread approval of the time-honored function of OIRA in assessing costs and benefits and bringing what is learned to bear on regulatory judgments; fourth, there was not universal but widespread approval of OIRA coordination of a process of interagency review—as noted, we get lots of comments by other agencies on what an agency proposes to do.

We have taken every one of those four themes really seriously, so scientific integrity has been something to which we have been greatly committed in the last months. That is bedrock. We have been taking transparency much further than ever before with the open government directive, which actually was issued by the Office of Management and Budget, and OIRA has played a role in implementing that directive. We have taken cost-benefit analysis very

seriously, as a number of commenters emphasized that we ought to.

With respect to the executive order itself, we are operating under the one that President Clinton and President Bush operated under, and it is up to the President of the United States to decide whether to amend it.

Mr. COHEN. Well, thank you. My time is expired and your questions have been so complete and your statements so complete that I suspect there will be no questions from the other side; therefore, I recognize Mr. Franks, the—— [Laughter.]

Mr. FRANKS. Well, thank you, Mr. Chairman.

And, Mr. Sunstein, I know that you probably were not in the middle of the regulatory bills that just passed the Congress, and so I will try to avoid that. But I do want to say that I think that is like a train coming and business sees it and they are trying to get the heck off the tracks fast. And I think that bodes a pretty grave situation for 2011 for a lot of business interests.

It is, I know, a basic crucible of contention between the two parties as to the impact of regulation and the cost—having a reciprocal impact on the actual hiring of people, but it is mathematical reality that cannot be avoided without repealing the laws of mathematics.

So, Mr. Sunstein, my question first to you, sir: Are you doing everything in your power to minimize the adversity of the Obama administration's agency rules on jobs and job creation?

Mr. SUNSTEIN. The way I would put it, Congressman, is that I spend every day trying to make sure that regulations are first, lawful; second, consistent with the commitments of the President; and third, justified by reference to costs and benefits. So we do everything we can to try to make sure that the benefits are strong enough to justify the costs and to try to reduce the costs if we can consistently with the requirements to which I referred.

Mr. FRANKS. I guess the hard—and I ask you to grant me diplomatic immunity here—the hard and corresponding question is, how many Obama administration agency rules submitted to your office, OIRA—I always say that wrong, OIRA—have you personally rejected because they did not rest on adequate analysis of their impacts on jobs and job creation?

Mr. SUNSTEIN. Well, the way I would put it is when the process——

Mr. FRANKS. Well, I am trying to—forgive me—I am trying to stay out of the metaphysical 12th dimension here. I am just asking you how many have you rejected personally?

Mr. SUNSTEIN. Personal rejections are rare, and——

Mr. FRANKS. All right. Let me shift it. How many Obama administration rules have you or your staff recommended to be rejected because they didn't rest on adequate analysis of their impacts on jobs and job creation?

Mr. SUNSTEIN. Forgive me and tell me if this is a satisfactory answer: We have worked repeatedly with agencies to make sure that regulations are drawn up so that they are compatible with the concerns to which you——

Mr. FRANKS. But have you rejected any of them, even one?

Mr. SUNSTEIN. Well, the word rejected doesn't really fit with how OIRA——

Mr. FRANKS. Well, it does if you are subject to the regulation. I mean, the regulation is either enforced or it isn't, so, I mean, it has a big impact ultimately.

Mr. SUNSTEIN. I take the point. A regulation can take multiple different forms, and the point of the OIRA process standardly is to ensure that it takes the right form.

Mr. FRANKS. All right. Let me see if I can rephrase it. How many of the Obama administration rules have you or your staff personally rejected because they in fact adversely impact jobs and job creation? In other words, make it really clear here. I mean, is there one that you found that you have rejected because it had an adverse impact on jobs and job creation?

Mr. SUNSTEIN. What I can say is that—I wouldn't want to get into a deliberative process, but what I can say——

Mr. FRANKS. Well, that is the problem. We are not very deliberative in government. I mean, I don't meant to be hard on you here, but—and it is okay because I wouldn't want to be in your position. I would probably be pretty inadequate in that situation.

But have you rejected even one Administration rule because it had an adverse effect on jobs and job creation? That is a yes or no.

Mr. SUNSTEIN. We have worked with agencies to make sure that rules are designed in such a way as to be compatible, consistent with law——

Mr. FRANKS. But is that bureaucratic-speak for "no"?

Mr. SUNSTEIN. I hope not. If you look at our Web site you will see, Congressman, that there—most rules do not go out the way they came in. They are approved consistent with change.

And I wouldn't want to attribute to OIRA the change because often it comes from the agency itself, which will decide in the process that we can do it in a less burdensome way, or the Council of Economic Advisors, or some other sibling agency. So if you are asking how many rules are improved with a view toward economic concerns as a result of the deliberative process, it is not zero.

Mr. FRANKS. Well, I won't put you on the spot to ask how many have been improved.

But, you know, Mr. Chairman, I have just got to say—and again, in all deference to Mr. Sunstein—whatever the class, when 100 percent of them pass or get an A-plus rating you might want to start questioning the test. And, you know, in Europe they had some recent regulatory reform where they tried to subject the banks to sort of a stress test to see if they could survive, and ironically, they put this new protocol in place and nearly all of them were fine. And so they began to question the test because we know that that is not the case.

And I guess I just—again, I put it in my words and encourage you to edit them if they are—if I am saying something that is not true. What I am hearing is that there is not one of the Obama administration or regulatory rules that have been put in place that your office thought had enough negative impact on jobs and job creation that it was worth rejecting. And that is putting a lot of faith in an Administration that has—forgive me—shown an arrogance to competency ratio that is catastrophically out of balance.

And I would, you know, as someone that has been in business I have just got to tell you, when regulations and additional costs

come to us it has an impact on who we can hire. And in economy sometimes we get to thinking it is all just numbers, but ultimately it is about people producing goods and services and that is translated "jobs."

And I just feel like we are headed in a terrible direction here with jobs, and I—talking to the regulatory agency, and there is not one regulation that you can say that you have rejected because of a negative impact on jobs. And I find that sort of astonishing.

Mr. SUNSTEIN. Is it helpful to say that a number of regulations have been changed in a way that is attentive to economic concerns and burdens as a result of a process that OIRA oversees?

Mr. FRANKS. Well, I think I am going to have to accept that as the best that can be offered. And again, with great respect for you—due respect for you—I have just got to believe that there would have been one, from this Administration especially, that would have been worth rejecting.

And with that, Mr. Chairman, I am going to yield back.

Mr. COHEN. Thank you, sir.

And the next questioner was high in the middle and round on the ends, Mr. Jordan of Ohio?

Mr. JORDAN. From Ohio, that is right. Thank you, Mr. Chairman.

Mr. Sunstein, let me pick up where the Ranking Member left off. In your testimony you talk about 900 significant rules that your agency has reviewed since taking—since the Obama administration took office.

And let me just be clear on how the process—at least the way I understand the process works. Congress passes a law, President signs the bill, the agency who has got jurisdiction over the bill—let's take the health care bill, so HHS has jurisdiction, they put together a set of rules, those rules then come to you. What is the authority or power that you have?

Can you say, as the Ranking Member was alluding to in his questions, can you say no? Can you just flat out reject them or do you not even have that power?

Mr. SUNSTEIN. There is authority to issue return letters subject ultimately to the President——

Mr. JORDAN. That is a yes. You can flat out say, "This rule does not comply with the intent of Congress, the will of the President when he signed the law, and we think that rule is not consistent at all." So you can do that?

Mr. SUNSTEIN. That is correct.

Mr. JORDAN. Of the 900 rules that you have reviewed since January of 2009, taking office, how many times have you done just what you described you are allowed to do?

Mr. SUNSTEIN. Well, I haven't issued return letters, but if——

Mr. JORDAN. So then the answer is—just to be clear with where the Ranking Member was—the answer is clearly zero. Nine-hundred rules, zero times—no time have you done a letter saying that rule does not comply with the intent of Congress and the will of the President, so zero times you have done that?

Mr. SUNSTEIN. Well, there are two different questions. One question is how many times have I issued a public return letter——

Mr. JORDAN. But just to be clear, that is what you said when I said, "Do you have the power to reject?" you said, "Yes, we can do this type of letter."

Mr. SUNSTEIN. Yes.

Mr. JORDAN. And then the follow-up question was, "Have you done that type of letter?" and your answer was, "No." So the obvious conclusion is zero times—no time have you said the rule does not—have you disallowed a rule——

Mr. SUNSTEIN. The last statement is not false, but if I may I can clarify a little bit. There are rules that come over that are changed significantly as a result of exactly the concerns to which you are pointing, and I wouldn't want to give OIRA the credit or the blame——

Mr. JORDAN. So then how does it work? Do you say, "Hey, this does not comply with what Congress intended, this does not comply with the will of the President, so let's—instead of me doing this let's just work on"—is there an official thing you do or do you just kind of—is it all bureaucratic talking back and forth? How does it work?

Mr. SUNSTEIN. I think it is very much like the way—I defer to you about how your office works, but my good guess is it is very similar to how your office works, where there will be ideas that are floated to you and that you might say, "No, forget about it," but if you trust your staff you are more likely to say, "Well, maybe we can do it this way; maybe this way is better," and then something will emerge from that process of discussion which will produce something you are comfortable with.

Mr. JORDAN. Does the public know—you talked about this identifier number, you talked about transparency, and that is all, I mean, good; we are glad that is part of the process. Does the public know which route you are taking or do they know, like, "Look, we don't like this. We are asking them to change," short of doing the letter of rejection that you are capable of doing?

Mr. SUNSTEIN. There are a couple of great things I can tell you about that are responsive to that. One is, what really matters within a rule—with a rule—is not how it is proposed but how it comes out, and you will see a number of rules that have already been finalized in the Obama administration that come out, as a result of concerns about economic considerations, very differently from how they were proposed, and that is completely publicly available.

So there are ones just in the last weeks, where the proposals looked very different from the final. And that is a wonderful opportunity for Members of Congress, affected stakeholders, small business.

With respect to OIRA's own process, the public can find—we make available—the difference between how the rule comes in and how it came out. So you can see that.

Mr. JORDAN. Okay. That is at least somewhat positive I think.

Let me change gears a little bit. One of the things I have heard from business owners across the fourth district of Ohio—and frankly, business owners in general; the business roundtable a few weeks ago made some statements about some of the things they see coming from this Administration and this Congress—is the uncer-

tainty that business owners see with what may happen next from Congress.

Are, in fact, there going to be the tax—are the Bush tax cuts, real 103 tax cuts, going to expire? Is, in fact, this health care bill, how it is implemented, what is going to—the uncertainty that is out there—many businesses—this is not Jim Jordan, conservative guy from Ohio making this, this is people talking to me saying, "Look, I am nervous about what may happen next, how all this is going to get implemented, the rules that will come down."

That uncertainty is having, I believe, a direct impact on people's willingness to take risks in our economy, willingness to hire individuals in our economy, willingness to call people back to work who they have had to let go during this tough economic time. So talk to me about if you think that is a valid concern, because I am certainly hearing it, and your thoughts on how that impacts your agency.

Mr. SUNSTEIN. Yes. Well, I do, I think business uncertainty is definitely not desirable, and in fact, Executive Order 12866 refers explicitly—that is the one under which we operate—to the need to minimize uncertainty.

I will tell you some of the things we are doing to try to avoid that. We are relying very heavily on the notice-and-comment process to make sure that members of the public, emphatically including the business community, get a chance to see what is being proposed, including the economic analysis, and get a chance to weigh in and change it. So one thing that has been a very high priority since I have been confirmed is to tee-up, as we say, the various options, the analysis, the possibilities, and to have public discussion so nobody is going to be surprised.

Another thing we are really trying to do is to get in very plain language in executive summaries, in tables, a statement of exactly what is going to be expected of people under the proposal and exactly what we think the burdens are going to be so they can see that——

Mr. JORDAN. Yes.

Mr. SUNSTEIN [continuing]. And correct it. We are also trying to get alternatives proposed so that if—and agencies have been very enthusiastic about this—so if one is going to create uncertainty, impose big burdens, sometimes we will go the other way and we have done that.

Mr. JORDAN. Mr. Chair, if I can—chairman will indulge for one further question, or—are we doing a round two?

Mr. COHEN. Just as long as you induce Ohio work and being upset with your rival Wisconsin and badger the witness. [Laughter.]

Mr. JORDAN. Well, let me just ask this: Obviously you have taken a strategy of not outright rejecting rules. Nine-hundred times it has come to you and you have not once said, "We reject a rule." You have taken a different approach to arrive at what you believe would be the best process and the best outcome.

But is there something to be said for maybe sending a message to the agencies, "No. We flat out reject what you have sent us. There is a new sheriff in town." All the uncertainty that you just described that is out there that I have heard from constituents—

do you think there is ever—maybe the other approach might be better where you say, "Look, this just ain't going to fly and we are telling you outright no right from the get-go; now go back and do it right," and you send that message to the bureaucracy—to the entire Federal bureaucracy?

Mr. SUNSTEIN. Well, it is a good question. The pattern that we have set, which is working with the agencies to try to get it right, emphatically with reference to cost and burden—that is a central concern of ours—that was the pattern basically in the Bush administration and the Clinton administration and the Reagan administration as well. That is the way OIRA normally operates, is through, you know, informal improvement rather than public, "No."

You are correct that previous Administrations have found it occasionally useful to do that, and that was their judgment.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. COHEN. Thank you, Mr. Sunstein. That concludes the questioning and we appreciate your testimony. And if other Members have questions they will submit them to you in writing and we ask that you reply with those in writing in the soonest possible time—they have 5 minutes to do so.

Thank you. We will now empanel the second group.

I am now pleased to introduce the second witness panel to hear the testimony for today's hearing. Our first witness is Ms. Sally Katzen. Ms. Katzen serves as the Podesta Group's executive managing director, a difficult task managing Mr. Podesta. She has testified before Congress 66 times on a broad range of Federal Government activity and has served on panels for the National Academy of Science.

Her career in the Federal Government includes 8 years in the Clinton administration as deputy director for management at the Office of Management and Budget, as Deputy Assistant to the President for Economic Policy and Director of the National Economic Council, and as Administrator of OIRA. Ms. Katzen was the first female partner at Wilmer Cutler & Pickering and is a well respected professor, having taught at George Washington, Michigan, George Mason, Pennsylvania, and Georgetown law schools in addition to Smith College, Johns Hopkins, and the Michigan in Washington program.

Welcome back, Ms. Katzen, and will you please proceed with your testimony?

TESTIMONY OF SALLY KATZEN, SENIOR ADVISOR, PODESTA GROUP, AND FORMER ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA)

Ms. KATZEN. Thank you very much, Mr. Chairman, Ranking Member Franks, Mr. Jordan. I appreciate very much the invitation to testify today. This Committee has been terrific in promoting the integrity of the Federal regulatory process and I thank you for having this hearing to consider how the Obama administration has done in this regard in its first year-and-a-half.

Now, in my written testimony I begin with the regulatory agencies rather than OIRA because it is the agencies to which Congress has delegated the rulemaking authority. And to evaluate how those

agencies are doing I think it is necessary to have a baseline. So where were they in January 2009?

Well, in addition to having been OIRA Administrator for 5 years during the Clinton administration, I was privileged to serve in the Obama-Biden transition with responsibility for the executive office of the President and all regulatory issues. What I saw during the transition was not a pretty picture.

During the preceding 8 years, the regulatory agencies were required to do more research, more analysis, more consultation, more review with fewer resources, fewer—less support. In many regulatory agencies the staff was depleted; in virtually all it was demoralized. It was, overall, a dismal state of affairs.

Now, the Obama administration took office with a renewed dedication to the regulatory agencies' missions and a deep respect for agency folks who do the work, but with very few new resources because of the economic situation—there was not money to make up for the shortfall—and with very few new leaders—the nomination-confirmation process is interminable. Even today, the regulatory agencies do not have confirmed appointees in all of their leadership positions.

Now, that said, I think the regulatory agencies have done quite well, and in—excuse me—in my written testimony I discuss how they dealt with the midnight regs, and at the same time began to move forward.

What about OIRA, which has been charged by both the Republican and Democratic administrations over the last 3 decades to review the regulatory activities? In my written testimony I provide a lot of information about the executive orders that govern and I look forward to any questions you may have on that. I want to use this time to make basically four points about the present and the future.

First, centralized review by OIRA now extends to executive branch agencies. I believe it should be extended to the independent regulatory commissions as well—those multiheaded agencies like the SEC, FCC, FTC, whose members do not serve at the pleasure of the President and can only be removed for cause.

They are not subject to review under the executive orders, either the Reagan or the Clinton executive order, and that was not because of a conclusion that they are—I am now a triple negative. The draftsmen were told by the legal advisors that there was legal authority to extend the review of the IRCs, but the decision not to was made for political reasons.

I would rethink that with the benefit of hindsight, because if you think about the problems that plague this Nation, they do not fit neatly into one agency. Consider the recent financial meltdown, which implicated both executive branch agencies like the Treasury and independent agencies like the SEC and even, shall I say, the Fed. What have we done? We combined two executive branch agencies—the SEC and—and at the same time we created a new agency as a bureau in an independent regulatory commission, the Fed.

Because they go about rulemaking in the same way there should not be a problem with review, but because of the way they are structured, situated with respect to the President, the review—the type of review—might be different. Congress thought about this

under the Paperwork Reduction Act and had a really keen scheme—elegant, quite elegant scheme—and in my written testimony I go through that.

The second point is the orientation of OIRA. All discussion in the preceding panel had to do with review of individual regs. It is a transaction-oriented process. I think that is important—indeed, essential—and would disagree with some of my colleagues who would like to see that diminished.

But it shouldn't be solely transaction-oriented. I think there should be an opportunity for review of areas to create a construct—if you will, a framework—for the review of the regulations in a particular area ensuring a comprehensive and coherent regulatory solution rather than a one-off, and what do we think about this one?

There is a provision in the executive order—section four—which goes to planning. That is the basis for this, and I would encourage that to be pursued.

The third point I want to make has to do with the meetings that OIRA has with respect to outsiders, and there is a provision in the executive order that sets up a process which was the practice during the Clinton administration, and in the Bush administration they started to make changes which have continued and accelerated, and I think Mr. Bass might be able to expand on that.

Finally, I just want to mention e-rulemaking. I was very honored to chair a blue ribbon commission under the auspices of the American Bar Association. We talk a lot about data decision—data-driven decision-making, the value of public participation, the potential for harnessing technology to produce a more efficient and effective government.

I mean, the single most obvious manifestation of the congruence of these in the Federal regulatory process is e-rulemaking. I would urge this Committee to consider having a hearing specifically on that subject because it seems to me it is an opportunity not only to improve the regulatory process but also congressional oversight and the implementation of the Congressional Review Act.

I thank you very much for your kind attention to my comments and look forward to answering any questions.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN

Statement of Sally Katzen

before the
Subcommittee on Commercial and Administrative Law
of the
House Committee on the Judiciary

on
"Federal Rulemaking and the Regulatory Process"

July 27, 2010

Chairman Cohen, Members of the Subcommittee. Thank you for inviting me to testify today on a subject that affects virtually every man, woman and child in this country. Congress makes the law, but it cannot possibly fill in all the details, and therefore it delegates to the regulatory agencies the authority to develop implementing regulations, which then have the force and effect of law. I commend this Committee for convening this hearing to explore the federal rulemaking process, including the role of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB).

As you know, I served as the Administrator of OIRA for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. I am a proponent of centralized review of agency rulemaking, and I was personally involved in the drafting and implementation of Executive Order 12866 which is discussed below. I have remained active in the area of administrative law generally and rulemaking in particular. After leaving government service in January 2001, I taught Administrative Law and related subjects at the University of Michigan Law School, George Washington University Law School, George Mason University Law School, and the University of Pennsylvania Law School, and I also taught American Government seminars to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program. I have written articles for scholarly publications and have frequently been asked to speak on this

subject. With this background, I hope I will be able to provide some historical perspective for considering some of the issues of current concern.

The federal rulemaking process starts, as it must, with the agencies to which Congress has delegated rulemaking authority. The agencies are the repositories of programmatic expertise and experience, and it is their responsibility to set priorities, develop solutions to demonstrated problems, provide supporting analyses, conduct the notice-and-comment (or other required) proceedings, and build a record that would be sustainable not only in court but in the public arena as well. To evaluate how the agencies in the Obama Administration are doing, it is obviously necessary to have a baseline: where were they 18 months ago?

I had the privilege of working in the Obama-Biden Transition, with responsibility for, among other things, regulatory issues. What I saw was not a pretty picture. During the Bush Administration, regulatory agencies had been required to do more research, more analysis, more consultation, and more review, but they were given less support and fewer resources. In many regulatory agencies, the staff was depleted; in virtually all, the staff was demoralized. It was, overall, a dismal state of affairs.

The Obama Administration took office with a dedication to the regulatory agencies' missions, a commitment to carrying out the new President's agenda, and a respect for rulewriters, but very few new resources and virtually no new leaders. The state of the economy did not allow the new Administration to make up for the shortfalls in agencies' budgets over the preceding eight years, and the nomination/confirmation process was seemingly interminable; even today, there are some regulatory agencies that do not have confirmed appointees in important leadership positions.

That said, I believe that the regulatory agencies have done quite well in this Administration. They undertook analysis of the so-called "midnight regs" – the rules put in place in the last days of the Bush Administration – and took what they perceived to be appropriate remedial action (stopping the regulations that were in the pipeline until an Obama appointee could review; determining whether to extend the effective date for those regulations that were final but not yet in effect; and initiating a new rulemaking

proceeding to modify or rescind those regulations that were already in effect). At the same time, the agencies began to tackle the backlogs in developing new rules that Congress had authorized (or required) to be issued. That was a daunting task, but by all accounts most have made considerable progress in addressing outstanding issues and advancing the agencies' missions.

In talking about the federal rulemaking process, the focus inevitably eventually turns from the regulatory agencies to OIRA because, for the last three decades, OIRA has been charged by both Republican and Democratic Presidents to review the regulatory activities of Executive Branch agencies. A little history here may be helpful.

The first steps towards centralized review of rulemaking were taken in the 1970's by Presidents Nixon, Ford and Carter, each of whom had an ad hoc process for selectively reviewing Executive Branch agency rulemakings: President Nixon's was called the Quality of Life Review; President Ford's was focused on the agency's Inflationary Impact Analysis that accompanied the proposed regulations; and President Carter's was through the Regulatory Analysis Review Group whereby proposed rules that were substantial or otherwise important were reviewed by an inter-agency group, which then submitted its critiques (often strongly influenced by economists) on the record to the issuing agency.

In 1981, President Reagan took a significant additional step in issuing Executive Order 12291. That Order formalized a process that called for the review of all Executive Branch agency rulemakings -- both the notice/proposal and the final rule – under specified standards for approval. To conduct that review, President Reagan turned to OIRA, which had been established by Congress for other purposes under the Paperwork Reduction Act of 1980, 45 U.S.C. 3501. Unless OIRA approved the draft notice of proposed rulemaking and the draft final rule, the agency could not proceed. As Jim Miller, the OIRA Administrator under President Reagan, has said, "Under 12,291 OMB did have the power to say 'no,' to say 'stop.' And we did." And he proudly described himself as OIRA Administrator as: "I'm mean as a junk-yard dog."

Executive Order 12291 proved to be highly controversial, with its critics citing three principal concerns. First, the Executive Order was explicitly intended to bring about regulatory "relief," as in rolling back regulations that the business community found costly or burdensome. Second, the Order relied on (and reflected unequivocal faith in) cost/benefit analysis, with an emphasis on the cost side of the equation. Third, the review process was, by design, not transparent; indeed, the mantra was "leave no fingerprints," with the result that disfavored regulations were sent to OMB and disappeared into a big black hole. Executive Order 12291 remained in effect throughout the Reagan/Bush years and into the Clinton Administration.

Eight months into his first term, on September 30, 1993, President Clinton signed Executive Order 12866, changing the charter for OIRA in significant ways. The preface reaffirmed the importance of centralized review and oversight, but it also spoke of the primacy of the regulatory agencies to which Congress had delegated discretion. The new Order limited OIRA review to "significant regulations" – those with a likely substantial effect on the economy, the environment, or on public health or safety, or those raising novel policy issues – leaving to the agencies the responsibility for carrying out the principles of the Executive Order on the vast majority (roughly 85%) of their regulatory actions.

Executive Order 12866 continued to require Executive Branch regulatory agencies to assess the consequences of their proposals and to quantify and monetize both the costs and the benefits to the extent feasible. At the same time, however, the Order explicitly recognized that some costs and some benefits cannot be quantified or monetized but are "nevertheless essential to consider." (Section 1(a)) I believe it was Einstein who had a sign in his office at Princeton to the effect that "not everything that can be counted counts, and not everything that counts can be counted." The process of review of agency proposals remained essentially the same as in the Reagan Order, but time limits were imposed on OIRA review, and Executive Order 12866 included several important provisions to promote transparency and accountability.

Based on the experience of the first two decades of OIRA review, it would be reasonable to assume that Executive Orders do make a difference. The two documents

(President Reagan's Executive Order 12291 and President Clinton's Executive Order 12866) are quite different from each other, and the tone of each clearly carried through to how centralized review was conducted by the Reagan/Bush Administrations on the one hand and the Clinton Administration on the other. They were decidedly different variations on the theme.

President George W. Bush did not, at first, issue a new Executive Order; in fact, Executive Order 12866 remained in effect virtually unchanged for the first five years of his Presidency. (The only changes came two years into President Bush's first term, and they were limited to transferring the roles assigned to the Vice President to the Chief of Staff or the OMB Director.) Nonetheless, centralized review during the Bush Administration was not the same as during the Clinton years. GAO did a very thorough study (GAO-03-929), and numerous articles have been written, confirming that there was a dramatic change in the relationship between the regulatory agencies and OIRA with the change of Administrations. Whereas OIRA functioned more as a colleague or collaborator under the Clinton Administration, Bush's OIRA Administrator characterized himself as a "gatekeeper." And he was true to his word, returning an unprecedented number of proposals to the agencies for revisions before they could be issued.

Perhaps more significantly, during the Bush Administration, OMB and/or OIRA issued a series of guidelines, circulars, or bulletins that modified the regulatory process (and the relationship between the agencies and OIRA) in minor and major ways. On February 22, 2002, OMB issued Information Quality Act (IQA) Guidelines. (67 Fed. Reg. 8452). The IQA itself was three paragraphs attached to a more than 700-page Treasury and General Government Appropriations Act for Fiscal Year 2001, with no hearings, no floor debate and no committee reports. Its objective was "to ensure the quality, objectivity, utility and integrity of information disseminated to the public." OMB's government-wide guidelines created a new construct: now, there would be "information" and "influential information" and different (more stringent standards) would apply to the higher tiers. OMB also required the agencies to issue their own guidelines (subject to OMB approval); establish administrative mechanisms allowing people or entities to seek the correction of information they believe does not comply with

these guidelines; and report periodically to OMB on the number and nature of these complaints. The U.S. Chamber of Commerce thought this "would have a revolutionary impact on the regulatory process" – keeping the agencies from relying on data that industry thought was questionable.

On August 29, 2003, OMB proposed Peer Review Standards for Regulatory Science, which attempted to establish uniform government-wide standards for peer review of scientific information used in the regulatory process. Peer review is generally considered the gold standard for scientists. Yet leading scientific organizations, joined by citizen advocacy groups and former government officials, argued that OIRA's proposal was unduly prescriptive, unbalanced (in favor of industry), and introduced a new layer of OMB review of scientific or technical studies used in developing regulations. The reaction was so strong and so adverse that OMB substantially revised its draft Bulletin to make it appreciably less prescriptive and restrictive.

On September 17, 2003, OIRA replaced a 1996 "best practices" (i.e., informational) memorandum on how to do cost/benefit analysis with OMB Circular A-4. The Circular, almost 50-pages single spaced, was a detailed discussion of the dos and don'ts of virtually every aspect of the documentation that is needed to justify a regulatory proposal. While the term "guidance" was used, agencies that departed from the terms of the Circular did so at their peril (or more precisely, at the peril of their regulatory proposal).

OIRA also proposed a Risk Assessment Bulletin (January 9, 2006) to govern risk assessments produced by the federal government. There were six standards specified for all risk assessments and a seventh standard, consisting of five parts, for risk assessments related to regulatory analysis (i.e., to be used in rulemaking). In addition, using the terminology from the IQA Guidance, OIRA laid out special standards for "Influential Risk Assessments" relating to reproducibility, comparisons with other results, presentation of numerical estimates, characterizing uncertainty, characterizing results, characterizing variability, characterizing human health effects, discussing scientific literature and addressing significant comments. Again the reaction from the agencies and the public was so negative that OMB decided to ask the National Academies of Scientists

(NAS) to comment on the proposed Bulletin. The NAS panel (on which I served) found the Bulletin "fundamentally flawed" and recommended that it be withdrawn. OIRA ultimately issued a revised, greatly toned-down memorandum on the subject.

This was quite a record, and it had a real effect on the agencies, consolidating and strengthening authority in OIRA vis-à-vis the agencies. For present purposes, however, the significant thing is that these changes were made without any changes to the operative Executive Order. And when President Bush ultimately did amend Executive Order 12866 with Executive Odder 13422, it was for other reasons and he still did not codify any of the changes discussed above. OMB memorandum, guidelines, circulars and bulletins do not have the same status as an Executive Order, but they are treated as if they did by the federal agencies. Stated another way, changes to the federal regulatory process are not solely dependent on changes to the applicable Executive Order.

I raise this because there has been discussion over the last year about the status of President Obama's executive order on the regulatory process and considerable speculation as to why it is taking so long and what it will ultimately include (or exclude). The origins of this trace back to shortly after President Obama's inauguration, when he revoked the Bush Executive Orders modifying Executive Order 12866 -- returning the Clinton Order to its original text. (Executive Order 13497) – and the same day, January 30, 2009, issued a Memorandum directing OMB, in consultation with Executive Branch regulatory agencies, to produce "a set of recommendations for a new Executive Order on Federal regulatory review." He listed eight areas of interest: the relationship between OIRA and the agencies; disclosure and transparency; public participation; the role of cost/benefit analysis; distributional, fairness and inter-generational considerations; undue delay in the review process; the role of behavioral sciences; and best tools for achieving public goals through the regulatory process.

Thereafter, OMB solicited feedback from the public, posting a Notice in the Federal Register (74 Fed.Reg. 8819) and on the Internet. It received over 180 comments from regulated entities, public interest groups, academicians, and other interested individuals. It is now well over a year, and there is no new executive order. On the

other hand, as I noted earlier, there can be changes in the regulatory process and in the relationship between OIRA and the agencies without changes in the executive order.

So it is worth looking not only at the words on a piece of paper (albeit the words of the President), but also at OIRA's actions during the past year and a half. Based on the material in the testimony for this hearing of President Obama's OIRA Administrator, Cass Sunstein, as well as several of his speeches and memoranda, it appears that OIRA is doing very well on many of the subjects/issues listed by President Obama in his January 30, 2009, Memorandum. Most significantly, there have been remarkably few stories of any tensions between the regulatory agencies and OIRA; the few that have appear to be based on genuine policy differences rather than disaffection with the process of centralized review.

Notwithstanding the high marks I would give the current OIRA, there are a few areas where changes could be made to make a good program even better. First, as noted above, ORIA reviews the rulemakings of Executive Branch agencies. I now believe that centralized review should be extended to the independent regulatory commissions (IRCs). Several commenters who responded to OMB's Notice regarding a new executive order addressed this issue, with comments both in support and in opposition. Some background here may be helpful. The rules proposed by IRCs – those multi-headed agencies, such as the SEC, FCC, FTC, FEC, etc., whose members do not serve at the pleasure of the President and can be removed only for cause –were not subject to review by OIRA under the Reagan Executive Order, nor under the Clinton Executive Order. In both cases, the legal advisors to the draftsmen concluded that the President had authority to review the rules of IRCs, and the decision not to do so was essentially for political reasons.

With the benefit of hindsight, I would rethink that decision. The problems that plague our nation do not fit neatly into one agency. Consider the recent financial meltdown, which implicated multiple agencies, including both Executive Branch agencies (e.g., Treasury) and IRCs (e.g., Federal Reserve, SEC); indeed, one of the measures included in the recent legislation was to combine two Executive Branch agencies and create a new one (the Consumer Financial Protection Agency) as a Bureau

within the Federal Reserve. While the way Executive Branch agencies and IRCs conduct rulemaking is for all practical purposes the same, the differences between Executive Branch agencies and IRCs in terms of their structure and their relationship to the President would suggest that the process of review need not – possibly, cannot -- be the same. Congress confronted this very problem in the Paperwork Reduction Act, where it provided for OIRA review of Information Collection Requests (i.e., government forms) from all agencies, Executive Branch and IRCs. The elegant solution it adopted was to authorize OIRA to approve or disapprove paperwork from Executive Branch agencies directly (Sec. 3507(b) and(c)), but to allow IRCs to void any disapproval by majority vote, explaining the reasons therefor (presumably in a public meeting) (Sec. 3507 (f)).

A variation on that approach could be used for regulatory review, whereby OIRA would provide its views in writing to the IRC, which would then be subject to a vote by the full Commission or Board (again, presumably in a public meeting) before final approval of the regulatory action. This is only one of several plausible ways to reconcile the competing interests involved. While some may see this as a power play for OIRA, I firmly believe that the end result would be better coordinated and coherent regulatory actions, and ultimately better decision making. In this regard, it is instructive to note that IRCs do not typically engage in the rigorous analysis that has come to be expected (and generally accepted) for Executive Branch agencies; indeed, in the 2010 OMB draft report to Congress (Appendix C), it appears that roughly half of the rules developed by the IRCs over a ten-year period have no information on either costs or benefits, and those that do have very little monetization of benefits or costs. Such analysis is critical, I believe, for developing and evaluating regulatory actions.

Another topic for consideration relates to the orientation of OIRA, which traditionally has focused virtually all of its time and resources on the review of individual regulatory actions developed by the agencies – one at a time (except where two or three arrive in close proximity to one another). A few critics of OIRA have suggested that OIRA cease and desist from this function. I strongly disagree. I think such reviews are essential for all the reasons that proponents of centralized review traditionally assert – namely, it is the last step to ensure consistency with the President's policies and

priorities; to coordinate regulatory policy within the Executive Branch (conducting the inter-agency review is one of the most important – and least acknowledged --aspects of centralized review); and to offer a dispassionate and analytical "second opinion" on an agency's regulatory actions.

At the same time, I think OIRA should do more than just one-by-one reviews. As noted above, the issues plaguing our country do not fit neatly in one agency; nor are they likely to be solved by one regulatory action. Whether it be clean air, worker safety, food purity, energy efficiency, or a host of other issues that are of concern, it is often essential to look beyond the specific proposal du jour and consider the broader picture – in effect, construct a framework for addressing the problem, allocating resources, and ensuring a coherent and comprehensive regulatory solution.

The mechanism for embarking on and developing such an approach is already in place – Section 4 of Executive Oder 12866, "Planning Mechanism." Under sub-section (c), "The Regulatory Plan," both Executive Branch agencies and IRCs are to send to OIRA (for OIRA review and circulation to other affected agencies) a document that includes a statement of the agency's regulatory objectives and priorities as well as a summary of "the most important significant regulatory actions that the agency expects to issue in proposed or final form in that fiscal year or thereafter." These materials are published in the semi-annual *Unified Regulatory Agenda,* but the process itself has become more of a paper exercise than an analytical tool. This is not new; before, during and after my tenure at OIRA, the focus was on the transactions. But it does not have to be that way. Professor Peter Strauss and others have called for OIRA to put meat on the bones of this planning process. I encourage those who are interested in improving the federal regulatory process to join this effort.

Another area where there is a divergence between the intent underlying the text of Executive Order 12866 and the practices that have developed over time relates to the provisions regarding meetings with outsiders (Section 6(b)(4)). Again, some history may be helpful. Under President Regan's Executive Order 12291, there were no provisions for promoting openness, accessibility and accountability. Time and again, complaints were lodged with Members of Congress (and in the press) that the OIRA process was

totally opaque, and there was considerable suspicion that OIRA staff were meeting with outsiders (presumably representatives of industry) and then acting as conduits to accomplish at OMB what could not be accomplished at the agencies.

Executive Order 12866 sought to rectify the situation by spelling out the disclosure requirements that would govern OIRA review, including, among other things: that representatives from the issuing agency would be invited to any meeting that OIRA personnel had with persons outside the government; that information about such meetings would be publically disclosed; and that all written communications between OIRA and such persons would be forwarded to the issuing agency. Importantly, the very first provision of this section of the Executive Order specified: "Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review." (Section 6(b)(4)(A))

The intent of this provision was straightforward – namely, except in unusual circumstances (such as recusal, etc.), the OIRA Administrator (a presidentially appointed, Senate confirmed individual) would participate in these meetings. That was the practice during the Clinton Administration, and OIRA staff were virtually never authorized to meet with outsiders without the Administrator. This began to change when President George W. Bush's OIRA Administrator was sworn in, and the practice of staff-only meetings has accelerated over time so that now it appears that the presence of the OIRA Administrator at such meetings is a rarity rather than the norm. I have heard that this has resulted in a significant diminution of requests for meetings from the public interest community. Gary Bass, Executive Director of OMB Watch, appearing on the panel today, has more direct knowledge of this issue, and I understand he will be addressing it in his testimony. For my part, I recognize that the concerns that existed in 1993 may have been ameliorated or changed in nature; that the mechanism selected in 1993 to address those concerns may have had unintended consequences that undercut its practicality or desirability; and that, in any event, the regulatory review process is not, and should not be, frozen in time. Nonetheless, I hope that OIRA leadership will reexamine current practices with all these considerations in mind.

There is one other area of OIRA activities that I would like to mention -- e-Rulemaking. The Obama Administration (and OIRA in particular) has devoted considerable energy to its Open Government Initiative and has talked about the use of data for decision-making, the value of public participation, and the potential for harnessing technology to produce a more efficient and effective government; the single, most obvious manifestation of the congruence of these objectives in the federal regulatory process is e-Rulemaking. I will admit to a certain bias here, because I was honored to chair a blue-ribbon Committee on the Status and Future of Federal e-Rulemaking, convened under the auspices of the American Bar Association. We produced a series of recommendations (for both the Administration and the Congress) which were endorsed by a wide range of organizations.

I believe that OIRA should be taking the lead in implementing some/most of these recommendations. While it has taken some steps, those who worked on the Committee's report are, frankly, disappointed that OIRA has not been as aggressive as we think it should be. This may be a topic for another (different) hearing, for e-Rulemaking has the potential not only to transform the rulemaking process but also to enable Congress to more effectively carry out its oversight responsibilities.

This Subcommittee has been ever vigilant in promoting the integrity and legitimacy of the federal regulatory process. I thank you for that effort and for your kind attention to my statement. I look forward to answering any questions you may have.

Mr. COHEN. Thank you, Ms. Katzen.

And our next witness will be Dr. Bass, and Dr. Gary Bass is the founder and executive director of OMB Watch, a nonprofit research and advocacy organization that promotes greater government accountability and transparency and increased citizen participation in public policy decisions. Prior to founding OMB Watch—not to be confused with Timex—Dr. Bass was president of Human Services Information Center, where he wrote two books and numerous articles on human service issues.

He also serves as director of liaison for the International Year of Disabled Persons, worked as a consultant on several projects in special education and the mental health of children and youth, and served as a special assistant to Wilbur Cohen, then chair of Michigan's Governor's Task Force on the Investigation and Prevention of Abuse at Residential Institutions.

Thank you, Dr. Bass.

TESTIMONY OF GARY D. BASS, Ph.D., EXECUTIVE DIRECTOR, OMB WATCH

Mr. BASS. Thank you, Mr. Chairman and other Members.

Much of the conversation today has focused on one type of stakeholder, which is the business community. I would like to talk about it from the perspective of people who benefit from the regulations and give a little bit of a backdrop.

We have gone through nearly almost a decade—8 years—of really a weakening of our regulatory apparatus within government. People who came in to oversee the regulatory agencies had often come from agencies—from companies—and now were regulating those same industries or companies creating sort of a foxes in the henhouse kind of model.

Those regulations that did make it out were weaker and benefited mostly the regulated industries. Those regulations that were in place, the enforcement was greatly reduced and made minimal. It was almost a wink and a nod.

When the Obama administration took over they had to largely address this kind of weakening of the regulatory agencies. They have put in place excellent people—very qualified, very skilled. They have begun building the regulatory apparatus, and they have begun thinking about how to strengthen enforcement.

I raise this because it is in this context of a weakening regulatory environment that the country and the people in this country have faced situations where workers and the public have died, where people have been displaced in terms of their economic and livelihood—general social livelihood—and I am referring to a whole series of major crises that have been occurring, whether it is the collapse of mines with the Massey Energy situation in West Virginia, whether it is the problem of Toyota recalls, whether it is the issue of the disaster of the BP Deepwater Horizon. Or you could look around to daily newspapers and see both food and consumer products daily having many problems.

It is in this context that we now see, if you will, a further agenda from the business community to deregulate—and, I should say, in the context of jobs, as we have been talking about today. It is rather surprising that the business roundtable put out, if I will, a hit

list of more than 200 rules in the last 2 weeks that should be deregulated covering virtually every aspect of our lives, whether it is environment, whether it is worker protections, whether it be financial reform—all of these were in the list. U.S. Chamber of Commerce followed that and made the threat of moving jobs offshore if the Administration did not deregulate.

On top of that, minority leader John Boehner came out and endorsed a 1-year moratorium on most new regulations. All of this is in the context where people's lives are at stake.

What we need is just the reverse. We need a strong Congress and we need a strong Administration to put in place the rulemaking apparatus that will protect the public.

On top of it, this discussion about harm to jobs and job creation, I would like to see some data on that. We also have data that show otherwise.

There is not a rule that has been in place in the past years where the business community didn't scream bloody murder that it would hurt, and in the end there has been adaptive technologies and adaptive ways to live with those rules and make the economy go. I am just thinking of the Clinton years, for example, where the business community complained bitterly that the Clinton administration was the regulatory presidency and yet the economy just rolled along swimmingly.

Okay, so in that context, moving back to OIRA, I have four suggestions. One is that what we need to do is—I would disagree with Ms. Katzen around the centralized review. Notwithstanding that, I do agree 100 percent with her comment about the transactional reviews.

We need the OIRA administrator to focus on these big-picture problems; we need to connect the dots. We need to get this regulatory machine working in a way that is respectful of business and respectful of the beneficiaries of the regulations. By focusing on transactional reviews we will never get to that point of seriously looking at the regulatory problems in this country.

The second thing I would recommend is, to the extent that these transactional reviews are occurring the administrator needs to be involved in meetings with public stakeholders. The history on this was to ensure that the civil service staff that work at OIRA are not the ones meeting with the public because of all the politics that are involved in that.

Over the years, particularly starting in the Bush administration, that has shifted so that the administrator has not been meeting but the staff have been meeting. We need to shift that direction. What has happened today is many in the public interest community no longer even request meetings.

The third point I would make—Administrator Sunstein talked a great deal about transparency, and he should be congratulated as well as the Administration should be congratulated for all they have done. I would encourage more.

An example would be, to the extent that the kind of dialogue that was discussed between OIRA and the agencies occurs even before formal review happens the agencies should be disclosing that kind of communication. The dashboard that he was describing—that Administrator Sunstein was describing—should have bench-

marks so the public can know how to assess whether or not the Administration is moving in the right direction.

My final point is, congratulations to you, Congress, and to you, Mr. Chairman, for hosting this hearing today. I think much more needs to be done. The issues I have described, which are catastrophic—the public demands and wants protections and needs Congress to step in to think through the right way to make that happen, albeit with the balance of business interests and the public interest.

So I thank you for hearing me out today.

[The prepared statement of Mr. Bass follows:]

PREPARED STATEMENT OF GARY D. BASS

Statement of

Gary D. Bass
Executive Director
OMB Watch

before the
Subcommittee on Commercial and Administrative Law
of the
House Committee on the Judiciary

on
Federal Rulemaking and the Regulatory Process

July 27, 2010

Thank you for the opportunity to testify before you today. I am Gary Bass, Executive Director of OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy organization promoting an open, accountable government responsive to public needs. Founded in1983 to remove the veil of secrecy from the White House Office of Management and Budget (OMB), OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public. OMB Watch does not receive any government funding.

OMB Watch has monitored OMB's Office of Information and Regulatory Affairs (OIRA), rulemaking agencies, and their interactions for more than 25 years. Our efforts to advocate for changes to the regulatory process are colored by our impressions of the balance of power among the agencies, OIRA, the regulated community, and the public, and our belief that government can and should play a positive role in protecting public health, safety, and the environment.

The majority of my testimony focuses on assessing the Obama administration's record on regulatory issues to date. I address how President Obama and OIRA have sought to make much needed improvements to a badly broken regulatory process and provide a status update on reform efforts. I also discuss regulatory policy at the agency level, including challenges agencies face and the progress they have made in the rulemaking arena, with an emphasis on OIRA's role in their day-to-day activities.

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I. Developing Recommendations to Fix a Broken Regulatory Process

OIRA was created by the Paperwork Reduction Act (PRA) of 1980[1] to serve as the clearinghouse for federal information collection requirements and address other information resources management issues. OIRA reviews and approves any agency attempt to collect information from ten or more people. Since then, OIRA's responsibilities have expanded. Building on the centralized review frameworks of previous presidents, President Ronald Reagan was the first to require rulemaking agencies to submit all regulations to OIRA for review and approval, a power Congress did not give OIRA in the PRA.

The current regulatory review framework was established in 1993 when President Bill Clinton signed Executive Order 12,866.[2] E.O. 12,866 requires agencies to submit to OIRA drafts of proposed and final significant rules. By focusing only on significant rules, OIRA was able to dramatically cut its workload while maintaining its ability to oversee the most important of agencies' regulations.

President George W. Bush's administration continued to operate under E.O. 12,866; but under President Bush, OIRA took a more aggressive posture with respect to both the regulatory process at large and the individual, rule-by-rule review of agency draft proposed and final rules. Led by administrator John Graham, OIRA invented new ways to tighten its hold on agency regulation. Graham imposed rigorous guidelines for cost-benefit analyses and peer reviews, for example. Under Graham, OIRA also began commenting on agency drafts earlier in their development, before the agency had officially submitted them for review. These changes added a new level of political control over both regulatory information and the development of individual rules. They also biased the system toward the administration's policies and priorities, which in turn tilted the regulatory playing field in favor of the regulated interests.

In January 2007, President Bush amended E.O. 12,866 when he signed Executive Order 13,422.[3] The changes made by E.O. 13,422 were controversial: agencies' regulatory policy officers, who many feared could be easily influenced by OIRA, were imbued with the authority to quash new rulemakings through their unilateral power to initiate or kill regulations, a power that had formerly rested with appointed agency heads; and for the first time agency guidance documents (voluntary, often interpretive statements of an agency's stance on a particular issue) were systematically swept into OIRA's centralized review.[4]

Over time, other stipulations have been placed on rulemaking activities, some through law, some through administrative edicts. As a result, agencies must assess regulations' potential impacts on numerous different sectors and interests. Agencies are often required to perform analyses for impacts on small businesses, federalism, the energy supply, and environmental justice, just to name a few. This unwieldy development has created a process with competing, sometimes contradictory values and, just as importantly, one that takes far too long to navigate.

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[1] 44 U.S.C. § 3501 *et seq.* Available at: http://ombwatch.org/files/regs/library/pra.pdf.
[2] William J. Clinton, "Executive Order 12866 of September 30, 1993, Regulatory Planning and Review," The White House, Sept. 30, 1993. Available at: http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.
[3] George Bush, "Executive Order 13422 of January 18, 2007, Further Amendment to Executive Order 12866 on Regulatory Planning and Review," The White House, Jan. 18, 2007. Available at: http://edocket.access.gpo.gov/2007/pdf/07-293.pdf.
[4] For more information, see "A Failure to Govern: Bush's Attack on the Regulatory Process," OMB Watch, March 2007. Available at: http://ombwatch.org/node/3228.

From 2007 to 2008, anticipating the change in administration, OMB Watch convened a group of regulatory process experts to consider the administrative state and develop ideas for reform. The group's discussions and recommendations were informed not only by recent experiences with the Bush administration, but by the long-brewing troubles many observers had grown frustrated with: the complexity of the process, the length of the typical rulemaking, access by special interests, the difficulty the public faces in engaging in the process, and the integrity and quality of regulatory decisionmaking.

The group of 17 experts produced a final report, *Advancing the Public Interest through Regulatory Reform.*[5] The authors, of which I am one, presented this report to the Obama transition team and then the new administration. The report contains specific recommendations for five major issues: improving the quality of regulations, integrity and accountability, implementation and enforcement, transparency, and public participation. Additionally, the report recommended action that both the incoming administration and the 111th Congress could take within their first 100 days. A copy of the report is available at http://ombwatch.org/node/4196.

OMB Watch's assessment of the Obama administration and, in particular, OIRA, has largely been conducted in light of the *Advancing the Public Interest* report and its recommendations. My testimony will at times reflect the stances and recommendations of the report.

II. Reforming the Regulatory Process

The Obama administration waded into regulatory issues on its first day in office. On Jan. 20, 2009, White House Chief of Staff Rahm Emanuel issued a memo setting the Obama administration's strategy for reviewing regulations left over from the Bush administration. Emanuel targeted two categories of regulations: those still in the pipeline, which were to be halted until Obama administration appointees were in place, and those final but not yet in effect. The memo instructed agencies to "consider extending for 60 days the effective date" of those rules that were finalized but were not in effect as of Jan. 20.[6]

However, the Emanuel memo does not cover the majority of the so-called midnight regulations the Bush administration had completed in its final months in office. These regulations had drawn criticism from every corner of the public interest community. The midnight regulations had targeted environmental protections, workers' rights, and women's freedom to discuss contraception and abortion with their health care providers, among other issues.

All recent presidents have tried to enact regulations in the last days of their administrations, and newly elected presidents have issued memos reviewing those last minute regulations from the previous administration. Unfortunately, the Bush administration had shrewdly plotted their rulemakings to allow sufficient time for the rules to take effect, handcuffing the incoming administration from quickly undoing them. As a result, the only options that remained were congressional disapproval or rule-by-rule review, revision, and, if appropriate, rescission, by the Obama administration.

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[5] Gary D. Bass, Michael Byrd, Caroline Smith DeWaal, et al., "Advancing the Public Interest through Regulatory Reform: Recommendations for President-Elect Obama and the 111th Congress," OMB Watch, November 2008. Available at http://www.ombwatch.org/files/regulatoryreformrecs.pdf.
[6] Rahm Emanuel, "Memorandum for the Heads of Executive Departments and Agencies: Regulatory Review," The White House, Jan. 20, 2009. Available at: http://www.ombwatch.org/files/regs/midnightregfreezememo.pdf.

President Obama continued to attempt to right the regulatory ship on Jan. 30 when he revoked E.O. 13,422.[7] Revocation of E.O. 13,422 was an easy and welcome step which OMB Watch fully supported and which was recommended in the *Advancing the Public Interest* report. The president's action fully reinstated the Clinton executive order, E.O. 12,866.

However, OMB Director Peter Orszag maintained the requirement that OIRA was to continue to review agency guidance documents. On March 4, 2009, Orszag issued a memo that states, "[S]ignificant policy and guidance documents [...] remain subject to OIRA's review."[8]

President Obama's most significant foray into regulatory reform also came on Jan. 30 when he called for a reconsideration of E.O. 12,866. In a memo, President Obama directed the OMB Director to produce within 100 days recommendations for a new executive order covering the regulatory review process.[9] President Obama identified eight issues he wanted addressed in the recommendations:

- The proper relationship for OIRA and rulemaking agencies;
- Disclosure and transparency;
- Participation;
- The role of cost-benefit analysis;
- The role of distributional considerations and fairness and the need to consider future generations;
- Methods for avoiding unnecessary delay;
- The role of behavioral sciences; and
- Methods for achieving public goals.

On Feb. 26, 2009, OIRA took the remarkable step of requesting public comment on the development of the recommendations for a new regulatory review order.[10] More than 160 organizations and individuals submitted comments. President Obama's willingness to tackle the revision of the regulatory review process and the issues he focused on were exactly the right approaches. Just as important was OIRA's call for public comments on ways to reform the process, a highly unusual step and one that had never been done when it comes to the regulatory review process. It proved to be a healthy exercise in democracy with thoughtful, but differing, perspectives presented.

Despite early indications that President Obama would make regulatory reform a high priority, progress on both major and minor regulatory process initiatives has slowed or not been started.

A. The New Regulatory Review Executive Order

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[7] Barack Obama, "Executive Order 13497 of January 30, 2009, Revocation of Certain Executive Orders Concerning Regulatory Planning and Review," The White House, Jan. 30, 2009. Available at: http://edocket.access.gpo.gov/2009/pdf/E9-2486.pdf.

[8] Peter R. Orszag, "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies: Guidance for Regulatory Review," Office of Management and Budget, Executive Office of the President, March 4, 2009, M-09-13. Available at: http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-13.pdf.

[9] Barack Obama, "Memorandum of January 30, 2009, Regulatory Review, Memorandum for the Heads of Executive Departments and Agencies" The White House, Jan. 30, 2009. Available at: http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.

[10] Kevin F. Neyland, "Federal Regulatory Review," Office of Management and Budget, Feb. 26, 2009. 74 FR 8819. Available at: http://www.reginfo.gov/public/jsp/EO/fedRegReview/OMB_FR_Notice_on_Regulatory_Review.pdf.

President Obama's new regulatory review order has yet to come to fruition. Presumably, OMB has developed a set of recommendations as instructed under the Jan. 30, 2009, memo, but these recommendations have not been released to the public. OMB has not publicly spoken of any progress on the recommendations or the order. For example, there has been no summary of the comments it has received. The Obama administration continues to operate under E.O. 12,866.[11]

OMB Watch had hoped that President Obama's order would mark the beginning of a new era for the regulatory process. OIRA has for too long been a lightning rod for criticism and controversy and needs to be reoriented. We have long believed that OIRA ought to end rule-by-rule, transactional review of regulations. Instead, OIRA should play a coordinating role in helping agencies with their regulatory work, including sharing comments from other agencies and raising questions for agencies to consider. But the OIRA yes/no authority on each rule should end.

Even for those who do believe OIRA should continue transactional review, there should be no doubt that OIRA has become *too* transactional. The office spends too much time and energy wading deep into the technical and scientific waters of agency drafts. Instead, OIRA should provide vision on major regulatory issues and guidance for agencies looking to improve their rulemaking practices. OIRA could also highlight unregulated risks that agencies may wish to prioritize.

While transforming the regulatory process is a daunting challenge, its implications for public health and welfare and economic stability make it a challenge worth addressing. In the *Advancing the Public Interest* report, we advocated for several significant changes, many of which could be reflected in a new executive order.

The current process is burdened with too many analytical requirements. Some of these requirements are statutorily imposed, but many others are a result of administrative directives. According to the recommendations, President Obama "should start by considering the removal of all such requirements from the process and then the addition of requirements deemed essential to efficient, effective, and timely rulemaking."

The balance of power between rulemaking agencies and OIRA has, over time, increasingly tilted in OIRA's favor. Particularly during the Bush administration, it appeared at times that OIRA authority superseded agency expertise and statutory intention. President Obama should work to restore agency primacy in part by ending the transactional, rule-by-rule review OIRA currently engages in. Agencies have the technical and scientific expertise to develop the complex rules Congress mandates, OIRA does not.

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[11] Similarly, an effort to craft scientific integrity principles for federal agencies has also fallen by the wayside. President Obama directed the White House Office of Science and Technology Policy to present him with recommendations by July 2009. The White House has yet to release any recommendations or principles. See Barack Obama "Memorandum for the Heads of Executive Departments and Agencies: Scientific Integrity," The White House, March 9, 2009. Available at: http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/.

The recommendations from the regulatory experts also call for changes in the way the administration applies cost-benefit analysis. Critics, including OMB Watch, have long fought against cost-benefit analysis because it is inherently unable to properly value some of the most critical benefits of regulation, such as environmental preservation, injuries and illnesses avoided, and even lives saved, and because it has often been used as a tool of anti-regulatory special interests to smear agency proposals. A critical factor for OMB Watch is that cost-benefit analysis has increasingly become one of the most important considerations in determining whether to regulate, instead of just one tool to consider. Nonetheless, cost-benefit analysis can be appropriate if proper limits are placed on its use. For example, cost-benefit analysis should not be used as a determinative tool, it should be one of many sources of information, and it should include qualitative assessments of costs and benefits, not just monetized costs and benefits.

Current OIRA Administrator Cass Sunstein is a long-time proponent of the use of cost-benefit analysis in regulatory decisionmaking, but he has advocated for reforming the way it is applied. In public remarks, Sunstein has asserted that the Obama administration does indeed view cost-benefit analysis differently than its predecessors. Sunstein has emphasized the application of "humanized" cost-benefit analysis that places a premium on distributional considerations and impacts on future generations, in addition to more traditional factors.[12] He has also emphasized the relationship between cost-benefit analysis and transparency, calling cost-benefit analysis "part and parcel of open government."[13]

In a speech earlier this year at American University's Washington College of Law, Sunstein indicated agencies are beginning to implement his ideas for humanizing cost-benefit analysis. He described the Transportation Department Passenger Protection Rules that addressed trapping passengers on planes while waiting to take off. According to Sunstein: "there's an effort to be disciplined about everything we're gaining from that regulation, before we go forward with it, and its out there for the public to see." In the airplane rule:

> "The basic idea is if you're flying domestically, and you can't be kept on the tarmac for more than three hours, and you get food and water and medical care if you need it within two hours. That rule is accompanied by an extremely disciplined analysis of its cost and benefits. If we're imposing financial burdens on airlines, we want to catalog them as best we can, and make sure the benefits justify the action."

While few would dispute Sunstein's logic, it does raise a question about how agencies – or the public – know about changes from the Bush-era methods for doing cost-benefit analysis. If this "humanizing" approach is being implemented now, clarity about what the methods entail is needed.

Yet OIRA has not publicly issued to agencies any guidance detailing Sunstein's views on cost-benefit analysis or expectations for changes in the analyses agencies submit to OIRA for review. There have been no publicly available policies instructing agencies to consider equity factors or transparency although it appears OIRA has begun to assert these values in individual

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[12] Cass Sunstein discussed cost-benefit analysis at American University's Washington College of Law on Feb. 16, 2010. An audio recording of his remarks is available at http://www.federalnewsradio.com/?nid=35&sid=1890426.

[13] Cass Sunstein discussed open government at the Brookings Institution on March 10, 2010. A transcript of his remarks is available at http://www.brookings.edu/events/2010/0310_open_government.aspx.

rulemakings. Agencies are still operating under the cost-benefit guidelines in OMB Circular A-4 written by John Graham.

B. Transparency and Public Participation

In addition to reforms that affect the speed and quality of regulatory decisionmaking, the *Advancing the Public Interest* report also calls for transparency and participation reforms. OMB Watch expected to see any number of transparency and participation initiatives early in President Obama's tenure, given his strong statements on those topics during the campaign and his first few weeks in office. Indeed, we have seen numerous efforts, including a FOIA policy that favors disclosure and an Open Government Initiative that is a long term effort to address transparency, participation, and collaboration in the agencies. Although OIRA has a leadership role in this openness agenda, its own actions often lag behind other agencies.

1. E-Rulemaking

On the participation front, the Obama administration has made only scant progress in reforming e-rulemaking – the term used to describe websites and systems that allow agencies to manage rulemaking dockets, allow users to access those dockets, and provide tools for the public to submit comments to agencies. The American Bar Association (ABA) has submitted to the administration a report calling for an overhaul of the current e-rulemaking system, both the "backend," the Federal Docket Management System (FDMS), and the online public portal, Regulations.gov. The report represents the consensus opinion and recommendations of a diverse group of e-rulemaking experts and advocates (chaired by former OIRA Administrator Sally Katzen and including myself). The report calls for dedicated funding for e-rulemaking, a distributed systems approach, and an improved public interface, among other recommendations.[14] To date, minor changes have been made to the functionality of Regulations.gov, some consistent with the report's recommendations, but significant change has yet to occur.

Funding for e-rulemaking efforts is a particular problem. E-rulemaking is currently funded through the equivalent of a pay-per-use system. The U.S. Environmental Protection Agency (EPA), which manages the system, asks agencies to contribute to e-rulemaking from their existing budgets. The fees go up the more an agency uses the services (e.g., more regulations and more public comments). Obviously, this can serve as an unintended disincentive for agency rulemaking or for encouraging public comments – thereby undermining a core tenet of our democratic framework. Additionally, the lack of a dedicated funding source discourages system improvements and innovation. The ABA report calls for the establishment of a line item appropriations for e-rulemaking. Yet, to my knowledge, the administration has not moved in that direction.

Although EPA manages FDMS and the Regulations.gov interface, OIRA, as the coordinator of regulatory policy for the federal government, must lead the way. Without White House support, a new direction for e-rulemaking is unlikely, particularly on the issue of funding.

OIRA has taken one discrete but significant step to improve e-rulemaking practices. On May 28, Sunstein issued a memo that urges federal agencies to make their paper-based and electronic

[14] Committee on the Status and Future of Federal e-Rulemaking, "Achieving the Potential: The Future of Federal E-Rulemaking," American Bar Association, November 2008. Available at: http://ceri.law.cornell.edu/documents/report-web-version.pdf.

rulemaking dockets consistent with each other.[15] To date, many agencies have had more complete paper dockets available to the public in agency reading rooms physically located at the agencies. The memo also says agencies should make their dockets more complete by including additional, supporting materials, not just copies of proposed and final rules, and should do so in "a timely manner."

But in the absence of a broader directive from the White House, agencies wishing to reform their own e-rulemaking practices have been left to chart their own courses. For example, the Department of Transportation (DOT) is piloting Regulation Room, an interactive website designed to inform and engage users on high-profile DOT rulemakings. Even EPA, the host or Regulations.gov, has launched its own agency-specific interface, called the Rulemaking Gateway. Efforts like these are innovative and hold the potential to generate more robust participation. However, it remains unclear whether or how they fit into a larger, government-wide e-rulemaking agenda.[16]

2. OIRA Transparency

It is uncertain how OIRA fits in to one of the White House's major transparency initiatives, the Open Government Directive (OGD), which OMB Director Peter Orszag issued Dec. 8, 2009.[17] OIRA has a leadership role in implementing the directive throughout the government, but as part of OMB, OIRA also is required as an agency to comply with the requirements. The OGD requires federal agencies to maintain open government webpages and open government plans. OMB's open government plan has not yielded significant gains as it relates to regulatory issues. The OGD requires agencies to release new, high-value data sets, but the data released on behalf of OIRA was already available and downloadable on a separate government website.

OIRA should take advantage of the opportunities presented by the OGD and create a new era in transparency. For example, neither OIRA nor agencies typically make available the communications or edits that occur during the review of a draft proposed or final regulation. Unless an agency chooses to disclose its dealings with OIRA in the online rulemaking docket, it is nearly impossible for the public to determine what impact OIRA, or other agencies participating in the interagency review, have had on the rule. We urge the administration to consider implementing the many transparency recommendations it has received.

OIRA has continued the Bush administration's practice of posting on the White House website a list of individuals with whom OIRA and rulemaking agencies have met while agencies' rules are under review. However, little information is provided about the substance of the meeting. This is another area ripe for increased disclosure.

Notwithstanding these criticisms, OIRA has taken a small but helpful step to improve public access and understanding of its activities. In February 2010, OIRA launched a regulatory review

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[15] Cass R. Sunstein, "Memorandum for the President's Management Council: Increasing Openness in the Rulemaking Process – Improving Electronic Dockets," Office of Management and Budget, Executive Office of the President, May 28, 2010. http://www.whitehouse.gov/omb/assets/inforeg/edocket_final_5-28-2010.pdf

[16] For more information, see "At Agencies, Open Government and E-Rulemaking Go Hand in Hand," OMB Watch, April 20, 2010. Available at: http://ombwatch.org/node/10935.

[17] Peter R. Orszag, "Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive," Office of Management and Budget, Executive Office of the President, Dec. 8, 2009, M-10-06. Available at: http://www.ombwatch.org/files/m10-06.pdf.

"dashboard" on RegInfo.gov, the site that displays information on current and past OIRA reviews. OMB Director Orszag billed the site as a tool that "democratizes the data."[18] The increased use of graphics and sort functions has expanded usability of the site, but no new data has been added. While these changes are helpful, they are not enough.

We are also unclear what makes the redesigned RegInfo.gov a "dashboard." In other areas, such as the IT dashboard (http://it.usaspending.gov/) dashboards include some measures or metrics of government's performance. Although we recognize that there is no standard definition for a dashboard, RegInfo.gov does not include performance information about OIRA's actions. This is not to say that the new graphics that are provided are not helpful – they are. They would be far more useful if they told the public whether OIRA was meeting its own standards for performance.

We acknowledge that this is an important step towards greater transparency. We also appreciate OIRA's willingness to listen to and respond to criticism. Yet we also would suggest this is but a small step. OIRA should also consider integrating regulatory information that currently resides on several different sites. OIRA could easily incorporate information on meetings held during review periods, mentioned above, and may consider linking the RegInfo.gov site with Regulations.gov so that RegInfo.gov visitors could more easily access rulemaking dockets and means of participation.

OIRA has acknowledged the integration issue. On April 7, Sunstein issued a memo asking agencies to more consistently use Regulatory Identifier Numbers, or RINs, to tag rulemaking documents.[19] The instruction may help agencies to better organize documents within their dockets and integrate documents across websites. The previously mentioned May 28 memo on rulemaking dockets furthers this goal by instructing the agencies that manage RegInfo.gov and Regulations.gov to consider integrating information between the two sites.

More generally, the OGD had required OIRA to review, by April 7, existing OMB policies "to identify impediments to open government." As of July 22, 2010, OIRA has issued at least six memos under this instruction, including the April 7 RIN memo and May 28 dockets memo previously mentioned, three memos related to the Paperwork Reduction Act, and a memo on disclosure and simplification in regulations, discussed later in my testimony.[20]

3. OIRA Review Meetings

OIRA has long engaged in the practice of meeting with outside stakeholders to discuss rules under review. OIRA has discretion over with whom it meets and when. Under E.O. 12,866, OIRA is required to invite a representative of the rulemaking agency to attend the meetings, though the agency is not obligated to accept. OIRA is to disclose all written communications exchanged during the meetings as well as a description of relevant information about oral communications. "Only the Administrator of OIRA (or a particular designee) shall receive oral

[18] Peter R. Orszag, "OIRA Dashboard Goes Live," Office of Management and Budget, Feb. 16, 2010. Available at: http://www.whitehouse.gov/omb/blog/10/02/16/OIRA-Dashboard-Goes-Live/.
[19] Cass R. Sunstein, "Memorandum for the President's Management Council: Increasing Openness in the Rulemaking Process – Use of the Regulation Identifier Number (RIN)," Office of Management and Budget, Executive Office of the President, April 7, 2010. http://www.whitehouse.gov/omb/assets/inforeg/IncreasingOpenness_04072010.pdf.
[20] For more information, see the White House Office of Information and Regulatory Affairs website at http://www.whitehouse.gov/omb/inforeg_default/.

communications," the order states. This last policy was first put forward in an agreement between Sen. Carl Levin and then-OIRA Administrator Wendy Gramm. Levin pushed for the policy to address criticism that career staff were involved in actions that should have involved political appointees.

Accelerating a pattern started during the Bush administration, the Obama White House has liberalized the requirement that the administrator be present for all meetings. John Graham and Susan Dudley, OIRA administrators under President Bush, did not personally attend many of the meetings held during their tenures, preferring to send a designee. Sunstein has gone even further: I am unaware of any meeting Administrator Sunstein has personally attended regarding a rule under review.

While the "or a particular designee" parenthetical grants a certain amount of latitude, forgoing most or all review meetings runs counter to the spirit behind the order's requirement. The ultimate authority for communicating with stakeholders should not lie with the career staff, it should lie with OIRA's sole Senate-confirmed appointee, the administrator. The administrator's presence at the review meetings ensures a level of accountability otherwise absent.

C. Paperwork Reduction Act

On Oct. 27, 2009, OIRA published a notice in the *Federal Register* asking for public comment on ways it could improve implementation of the Paperwork Reduction Act, the law that gives OIRA the authority to review agency information collection requests, as well as the responsibility for managing federal information policy more broadly, including information dissemination, information resource management, and statistical policies.[21]

OIRA's notice focuses almost solely on information collection request review and management with a decided emphasis on ways to reduce burdens imposed on the public, particularly small businesses. In comments, OMB Watch urged OIRA to expand its view and use its authority under the PRA to make more data and information available to the public, and to make it available in the most usable form. The PRA was written long before the development of the Internet and modern computer technologies, and its implementation, and the law itself, must be brought into the 21st century.[22] We urge Congress to consider a substantial revision of the PRA, refocusing it to be about managing information resources.

The information collection request review process carries significant implications for issues affecting the public in many ways. For example, the U.S. Election Assistance Commission (EAC), which oversees election administration and conducts audits on the use of funds distributed under the Help America Vote Act, among other activities, cannot easily conduct surveys to identify potential problems immediately after elections because it must first receive clearance from OIRA for its information collection activities. If the EAC wants election information from different states, it may need to have a different survey for each state, adding to the clearance hurdles.

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[21] Cass R. Sunstein, "Improving Implementation of the Paperwork Reduction Act," Office of Information and Regulatory Affairs, Office of Management and Budget, Oct. 27, 2009. 74 FR 55269. Available at: http://edocket.access.gpo.gov/2009/pdf/E9-25757.pdf.

[22] "OMB Watch Comments on Improving Implementation of the Paperwork Reduction Act," OMB Watch, Dec. 26, 2009. Available at: http://ombwatch.org/files/regs/PDFs/pracomments122609.pdf.

Scientists inside government have pointed to PRA issues that have implications for scientific integrity. A survey of federal scientists conducted by George Washington University's Project on Scientific Knowledge and Public Policy found that many government scientists consider the PRA clearance process to be "excessively burdensome."[23] The surveyed scientists believed there is not only political interference in their work but that they faced a series of obstacles that delay the study and dissemination of scientific information that affects the public everyday. The survey was completed as Obama took office, but a follow up survey was sent in the summer of 2009. The response to the survey indicated that not much had changed since Obama took office, and scientists thought it would be challenging to create meaningful change. Many of these delays come from OMB review of each information collection request as well as unclear policies within agencies on publication and media policies.

While OMB Watch urges OIRA to look at the PRA beyond simply the information collection review process, including its potential as a dissemination vehicle, OIRA can and should immediately reduce the number of information collection requests it requires agencies to submit for review. Under the PRA, OIRA has the authority to exempt certain classes of information collections from review. It should utilize this authority to streamline agencies' information collection efforts.

OIRA has taken small steps in that direction. On April 7, Sunstein issued a memo to agencies that relaxes agency obligations to seek White House approval for certain web-based technologies.[24] The memo says that voluntary social media and other web-based forums – for example, blogs, wikis, or message boards – will not be considered information collections under the PRA. The memo is intended to stem concern that agencies need to comply with the PRA before including comment sections on their websites or using online services like Facebook and Twitter. Sunstein issued another memo on May 28 reminding agencies that they may seek "generic clearances" from OIRA.[25] The use of generic clearances may expedite the clearance process for information collections that are voluntary, uncontroversial, or easy to produce, and may address the EAC example mentioned above.

D. Disclosure and Simplification

On June 18, Sunstein issued a memo to agencies titled, "Disclosure and Simplification as Regulatory Tools" reflecting some of his perspectives on rulemaking.[26] The memo does not appear to impose any concrete requirements on agencies. Like other Sunstein memos,

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[23] Susan F. Wood, Ruth W. Long, Liz Borkowski, et al., "Strengthening Science in Government: Advancing Science in the Public's Interest," The Project on Scientific Knowledge and Public Policy at The George Washington University School of Public Health and Health Services, March 2010. Available at: http://defendingscience.org/newsroom/upload/Scientists_in_Government_Report_030310.pdf.

[24] Cass R. Sunstein, "Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act," Office of Management and Budget, Executive Office of the President, April 7, 2010. http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

[25] Cass R. Sunstein, "Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Paperwork Reduction Act – Generic Clearances," Office of Management and Budget, Executive Office of the President, May 28, 2010. http://www.whitehouse.gov/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf.

[26] Cass R. Sunstein, "Memorandum for the Heads of Executive Departments and Agencies: Disclosure and Simplification as Regulatory Tools," Office of Management and Budget, Executive Office of the President, June 18, 2010. http://www.whitehouse.gov/omb/assets/inforeg/disclosure_principles.pdf.

including those on the PRA, it appears to leave agencies with an appropriate amount of flexibility and more than agencies had under the previous administration.

The first part of the memo encourages agencies to consider rules that use disclosure mechanisms as a complement to or replacement for more traditional regulatory options. By addressing market failures related to information access, disclosure can induce better decisionmaking among the public, the memo says. The memo provides examples of existing and salutary disclosure policies, including nutrition labels and cigarette warnings.

The second part of the memo, regarding simplification, encourages agencies to consider "default" rules, where affected citizens or sectors are opted into a regulatory option pre-determined to be most advantageous. Where default rules are inappropriate, the memo asks agencies to consider "active choosing" where the government does not set a default but does require consumers or other end users to make an explicit choice or state a preference among options.

The memo is Sunstein's most significant to date. It applies to all agencies, and, though it does not impose requirements, OIRA will likely check draft rules to ensure agencies are taking the memo under advisement. In this way, the memo marks the first change, albeit a subtle one, in the way OIRA reviews regulations under the Obama administration.

The memo may also signal the death of the revised regulatory executive order, discussed above. While the White House continues to remain quiet on the order's status, outside observers have commented that Sunstein's memo includes principles that were expected to be included in a new order.[27] It also seems unlikely that OIRA would issue a memo referencing E.O. 12,866, which Sunstein's does, if a new order was on the horizon.

III. Agency Challenges

In attempting to carry out a regulatory agenda, the Obama administration, like any administration, faces external events and internal pressures. To fully understand the regulatory process and the reforms necessary to improve its inner workings, one must look not only at OIRA and the cross-cutting policies that govern the system but at the agencies' ability to carry out the tasks asked of them. In this section, I will discuss four major issues rulemaking agencies have faced and continue to face under the Obama administration.

A. Crises

Over the past number of years, the government's ability to respond to and be reflective of public need has greatly diminished. Public protections were rolled back and new hazards went unaddressed. Agencies' capabilities to enforce regulations were strained. Presidents appointed agency leaders with ties to regulated industries, the proverbial foxes in the henhouse.

Early on, the Obama administration seemed willing to address some of these problems and attempt to right the regulatory ship. Just as experts were put in place in the agencies and they began to re-invigorate the rulemaking process, unforeseen disasters and events have dramatically impacted the Obama administration's regulatory agenda. The most significant of these events has been the BP-Deepwater Horizon oil spill disaster. Other crises, including the

[27] Gabriel Nelson, "Obama Overhaul of Regulatory Reviews Now Seen as Unlikely," *Greenwire*, July 14, 2010. Available at: http://www.nytimes.com/gwire/2010/07/14/14greenwire-obama-overhaul-of-regulatory-reviews-now-seen-45978.html.

explosion at Massey Energy's Upper Big Branch mine in West Virginia that killed 29 miners in April and the recall of millions of Toyota vehicles for various defects, have similarly budged the administration from its path. For better or for worse, the administration's responses to these events are shaping its record on regulation.

Links among these seemingly unrelated events begin to emerge when examined through a regulatory lens. In each of these cases, unscrupulous businesses outmaneuvered under-resourced regulators. Warning signs were missed, and improper relationships between regulators and those they regulate went uncorrected. It wasn't until after disaster struck that the President, Congress, and the public began to question the status quo and ask for reform.

These events also have similar impacts on agencies and highlight how regulation fits in to government's overall role in society. Consider, for example, the oil spill. The disaster has impacted numerous federal agencies. The Department of the Interior and its agencies, tasked with leasing, permitting, and overseeing drilling operations has been the most heavily scrutinized. Its failures, particularly in the areas of environmental and emergency-planning review, have been well chronicled. The U.S. Coast Guard has been the primary authority among government agencies in the clean-up of the spill. Other agencies have been involved as well, including the Occupational Safety and Health Administration, the U.S. Environmental Protection Agency, and the Centers for Disease Control and Prevention, to name only a few. The spill has forced these agencies to divert resources and attention from other priorities.

President Obama has been criticized for struggling to exhibit strong leadership in the wake of the spill. Agencies are addressing the spill and its effects within their respective jurisdictions and with the aid of their expertise, but the White House has not adequately portrayed itself to the public as coordinator, overseer, and leader.

While by no means the sole relevant player among White House offices, OIRA is the logical home for the coordination of regulatory responses to crises such as the oil spill. OIRA has established relationships with regulatory agencies and experience as interagency coordinator.

But OIRA has not been a public presence in the wake of the oil spill. To observers, it has maintained its day-to-day function as reviewer of agency draft regulations and information collection requests. While some of these agency submissions surely relate to the oil spill, OIRA appears to have remained myopically focused on the transaction, not on the opportunity to present regulation as a coordinated or unified front in the administration's battle against the spill and its effects. It is possible that OIRA does not have the resources, energy, or appetite to adapt and prioritize after a crisis.

Congress, too, must more thoughtfully consider its role in the wake of crises like the oil spill. Congress's typical pattern – regret, respond, repeat – is not serving the public well. Instead of being reactive, Congress must be proactive in identifying and preventing major risks.

B. Attacks on Regulation

Despite the tragedies in the Gulf and in West Virginia, as well as less publicized tragedies such as foodborne illness, unhealthy air and water, and other problems affecting Americans, the campaign *against* regulation is heating up. Industry leaders and lobbyists have been critical of the Obama administration for what they perceive to be too much regulation. Minority Leader John Boehner recently joined the chorus, endorsing a one-year moratorium on most new

regulations. They say that regulation is too much of a burden on the economy and hurts the job market, though they provide little or no evidence to support their claims.[28]

Representatives from the Business Roundtable, a coalition of U.S. corporate executives, have met with senior White House officials to air their grievances. They have provided OMB Director Orszag with a hit list of regulations, taxes, and other policies they want to see rolled back. The list leaves no stone in the regulatory field unturned: greenhouse gas emissions standards, worker rights, regulations implementing landmark financial and health care reform laws, pending food safety and auto safety legislation, government contractor responsibility measures, and even oil spill prevention rules are all targeted by the list.

The U.S. Chamber of Commerce issued its own list of rollbacks, threatening that U.S. businesses will move jobs offshore unless the Obama administration reduces regulation. We've seen these attacks before. During the Clinton administration, Speaker of the House Newt Gingrich made rolling back regulation a core component of his Contract with America. During the George W. Bush administration, the attacks came from within: political appointees perverted regulatory science, slashed existing protections, and undermined enforcement of the protections that remained.

The anti-regulatory progress has been significant enough to create a system that keeps the consumers, workers, the environment, and the economy in an endless cycle of risk and uncertainty. Whether it's an oil spill that affects a region or a lead-laced toy that affects just one child, the consequences of the anti-regulatory movement have been wrought, and they are very real.

Now, in a struggling economy, businesses are once again using regulation as a scapegoat, and political leaders like Boehner see an opportunity to score political points by mimicking business' stance. The Obama administration will be challenged to pursue a regulatory agenda in such a hostile environment.

C. Agency Resources

Regulatory agency budgets have been one casualty of the campaign against regulation. Budget shortfalls have left many agencies unable to adequately fulfill their missions. New regulations are left unfinished. Existing regulations go unenforced.[29]

Many have urged President Obama and OMB to make funding for regulatory agencies a high priority. The situation has improved in recent years, in part because of a renewed commitment to spending for domestic programs. However, much work remains.

Budgets at the Food and Drug Administration (FDA), EPA, and Consumer Product Safety Commission (CPSC) have enjoyed substantial increases in recent years. From FY 2008 to FY 2010, FDA received a 30 percent budget increase. EPA has seen similarly large increases over levels that persisted for most of the Bush administration. From FY 2007 to FY 2010, CPSC's budget approximately doubled, and is near its highest level in agency history.

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[28] For more information, see Gary D. Bass, "Another Shameful Attack on Our Public Protections," *The Huffington Post*, July 21, 2010. Available at: http://www.huffingtonpost.com/gary-d-bass-phd/another-shameful-attack-o_b_653975.html.

[29] For more information, see the OMB Watch article series "Bankrupting Government." Available at: http://www.ombwatch.org/node/4171.

Going forward, regulatory agency budgets are likely to remain tight. For the remainder of his term, President Obama has proposed freezing the overall level of non-defense, non-security discretionary spending. The freeze could hurt some agencies like EPA: President Obama proposed almost $300 million in cuts to EPA's budget for FY 2011 after an approximately $2.7 billion increase the year before.

However, because President Obama has proposed an overall freeze and not a line-item-by-line-item freeze, spending could be transferred to other areas to reflect administration priorities. For example, for FY 2011, President Obama proposed a $14.5 million, or 2.6 percent, increase for the Occupational Safety and Health Administration including a shift in funding from compliance assistance to rulemaking. The president's budget pledges to "[build] on the 2010 Budget policy of returning worker protection programs to the 2001 staffing levels, after years of decline."[30]

D. Bush Midnight Regulations

As mentioned earlier, Bush administration agencies attempted to leave an administrative legacy by finalizing during its waning days in office dozens of rules that reflected a conservative, sometimes anti-regulatory ideology. These midnight regulations favored regulated industries and conservative causes – they eliminated existing protections for the environment, workers, consumers, and patients. The Bush administration's success was largely a result of timing: agencies finalized many of these rules in November and December of 2008, leaving enough time for them to take effect before President Obama took office. Had these rules not yet taken effect, Obama administration agencies could have delayed their effective dates to buy themselves more time to address the substance of the rules.

The Obama administration did not shy away from this challenge, and it deserves great credit for simultaneously looking forward and looking back – credit that largely applies to new leadership at rulemaking agencies. Several Bush-era regulations have been rescinded or neutered, including a regulation that demoted scientists' role in endangered species decisionmaking and a regulation that limited Medicaid beneficiaries' access to outpatient services.

However, other midnight regulations remain on the books. Despite early pledges that it would change a controversial regulation allowing health care providers to refuse to discuss reproductive health issues with their patients, the Department of Health and Human Services has done nothing and now considers changes to the regulation a "long-term action." Other regulations, including ones that limit air and water quality protections at factory farms, remain in effect as well.[31]

IV. Reviving Agency Rulemaking

[30] For more information, see "For Regulatory Agencies, Intrigue in an Otherwise Bleak Budget," OMB Watch, Feb. 12, 2010. Available at: http://ombwatch.org/node/10762.

[31] For more information on the Bush administration's midnight regulations campaign, see Reece Rushing, Rick Melberth, and Matt Madia, "After Midnight: The Bush legacy of deregulation and what Obama can do," Center for American Progress and OMB Watch, January 2009. Available at: http://www.americanprogress.org/issues/2009/01/pdf/midnight_regulations.pdf. For more information on the Obama administration's efforts, see "Turning Back the Clock: The Obama Administration and the Legacy of Bush-era Midnight Regulations," OMB Watch, October 2009. Available at: http://ombwatch.org/files/regs/PDFs/turning_back_the_clock.pdf.

The day-to-day activities of both OIRA and rulemaking agencies also illustrate the Obama administration's attitude toward and record on regulatory issues thus far.

Based on both quantitative and qualitative information, OIRA has remained active in reviewing agency rulemakings, but has played a somewhat less interventionist role than in prior administrations.

OMB Watch analyzed the draft proposed and final rules and other notices OIRA reviewed during President Obama's first year in office, and compared them to those reviewed during President Bush's first year in office.[32] The results reveal a more industrious OIRA under President Obama.

OIRA has approved rules at an average rate of 37.2 days, compared to 44.4 days under President Bush. Economically significant rules, those expected to have economic costs or benefits exceeding $100 million per year, have been approved at a slightly slower rate – 30.5 days for President Obama's OIRA compared to 29.4 days under President Bush.

OIRA reviewed 14 percent more rules than President Bush's OIRA staff, and 56 percent more economically significant rules in its first year. OIRA under President Obama has reviewed 549 total rules, 111 of them economically significant. During President Bush's first year, OIRA reviewed 483 total rules and 71 economically significant rules.

What numbers cannot show is the substance and quality of the rules reviewed. Generally speaking, rules proposed and finalized under the Obama administration, regardless of agency or issue area, have reflected a renewed desire to use regulation as a tool to protect the public.

To be certain, OIRA has at times interceded in agency business in ways that have raised concerns. OIRA has seemed particularly focused on the EPA. This is not surprising because EPA has been quite active in the regulatory arena.

OIRA's review of EPA's proposal to regulate coal ash has been its most controversial to date. After a review that lasted more than six months, documents showed that the published proposal was weaker than EPA's original submission and that industry comments may have influenced the decisionmaking process.

In response to a major coal ash spill in Kingston, TN in 2008, EPA pledged to regulate the disposal of coal ash, a toxic byproduct of coal combustion. The agency prepared a proposed rule and submitted it to OIRA for review on Oct. 16, 2009.

OIRA did not approve the proposed rule until May 4, 2010. The review lasted 200 days, far exceeding OIRA's self-imposed 120-day limit. During the review, OIRA and EPA met with outside stakeholders on at least 43 different occasions. 30 of those meetings were with representatives of a variety of industries opposed to or fearful of coal ash regulation.

Internal documents released to the public after the review show that EPA had been swayed from its original plans. EPA's original submission proposed regulating coal ash as a hazardous waste. The published version actually contains two proposals – one to regulate coal ash as a hazardous waste, the other to regulate it as solid waste. While the former would impose cradle-

[32] All data was acquired from RegInfo.gov.

to-grave restrictions for waste management, the latter would set standards similar to those required for simple household garbage.[33]

Additionally, EPA and OIRA considered, and appear to have taken, comments from the Tennessee Valley Authority (TVA), a quasi-governmental electric utility given a draft copy of the proposal during OIRA's review. TVA is the owner of the Kingston facility where the coal ash dam-break occurred in 2008 and would be subject to EPA's coal ash regulations.[34]

Because the original proposal is still one of the options, the change may prove insignificant. However, environmental advocates fear that elevating the second option may alter the debate during the public comment period. At the very least, the protracted review, industry presence, and addition of a more lenient regulatory option raise concerns that public health may not be the administration's primary concern.

We have observed three other instances when OIRA review of EPA policy has stoked controversy:

- Under the Endocrine Disruptor Screening Program (EDSP), EPA is seeking health effects information on pesticides suspected of having adverse effects on the human endocrine system. Before collecting data from pesticide manufacturers, EPA was required to seek OIRA approval.

  In its original submission, EPA wanted to emphasize fresh testing designed to detect effects on human endocrine systems, but manufacturers could also submit existing studies if appropriate. When OIRA approved the request, it instructed the agency to consider existing studies "to the greatest extent possible." The caveat concerned scientists and public health advocates who say most currently available studies were not conducted with the goal of determining a chemical's effect on the endocrine system and did not study low-dose exposures.[35]

  The incident created a public outcry with most complaining that OIRA was interfering in agency scientific actions despite clear messages from the president about the need to restore scientific integrity. In response to a letter from Rep. Edward Markey, OMB Director Orszag pledged that OMB would not interfere in the EDSP and reaffirmed that "OMB fully supports the EPA's sole authority to make the scientific decisions related to this effort."[36]

- OIRA inserted itself in EPA business again in November 2009, this time over an EPA proposal to tighten the national air quality standard for sulfur dioxide. While it does not appear OIRA had any impact on the standard itself, an email exchange between EPA and OIRA employees shows that OIRA attempted to persuade EPA to inflate its estimates of the costs of sulfur dioxide regulation. The e-mail exchange took place Nov.

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[33] For more information, see "Commentary: White House Misadventures in Coal Ash Rule," OMB Watch, May 18, 2010. Available at: http://ombwatch.org/node/11001.
[34] For more information, see "Commentary: Changes to Coal Ash Proposal Place Utility's Concerns above Public Health," OMB Watch, June 2, 2010. Available at: http://ombwatch.org/node/11041.
[35] For more information, see "OMB Role in EPA Chemical Program Questioned," OMB Watch, Oct. 28, 2009. Available at: http://ombwatch.org/node/10511.
[36] Peter R. Orszag, letter to The Honorable Edward J. Markey, Nov. 16, 2009. Available at: http://markey.house.gov/docs/markeyedspletter.pdf.

19, three days after the draft proposed regulation was approved by OIRA and sent back to EPA.[37]

- OIRA interceded in a different air quality standard in January 2010. While reviewing EPA's draft final rule for nitrogen dioxide exposure, OIRA persuaded EPA to change its criteria for the placement of air pollution monitors. The change occurred just days before EPA faced a judicial deadline to publish the rule. Though the change was made late in the process and at OIRA's behest, EPA credits OIRA for improving the rule. EPA said the change will actually strengthen the monitoring network for nitrogen dioxide, granting regulators more discretion to place monitors in vulnerable communities.[38]

Although some of these examples may appear to contradict the claim that OIRA has played a less interventionist role under President Obama, it should be noted that there is no apparent pattern to OIRA's interference, as there has been during past administrations.

OIRA's willingness to play a less interventionist role is not the sole or even primary reason rulemaking agencies have succeeded in reviving moribund rulemakings and addressing new hazards: there is no replacement for qualified political appointees and their staffs with a commitment to public health and welfare. However, without OIRA's support, or at the very least its willingness to stand aside, certain successes, including some of those named below, may have been dulled or thwarted.

EPA has likely been the most active rulemaking agency. The agency has finalized improved air pollution standards for both sulfur dioxide and nitrogen dioxide. Perhaps most significantly from a public health perspective, the agency proposed strengthening the air quality standard for ozone, or smog.

EPA has been particularly active on climate change regulation. After the Bush administration had spent years dodging a 2007 Supreme Court ruling that said EPA could regulate greenhouse gas emissions under the Clean Air Act if they were determined harmful, current EPA Administrator Lisa Jackson proposed an endangerment finding for greenhouse gases in April 2009. EPA finalized the endangerment finding on Dec. 15, 2009.[39]

The endangerment finding was a step EPA needed to take to set the stage for regulation of greenhouse gas emissions. EPA, in partnership with the Department of Transportation, set standards limiting vehicle greenhouse gas emissions and strengthening vehicle fuel economy. EPA has also set greenhouse gas limits for stationary sources such as power plants.

Consumer safety also appears to be a priority for rulemaking agencies under the Obama administration. In July 2009, FDA finalized a rule intended to reduce the risk of salmonella in eggs. FDA estimates the regulation will prevent 79,000 illnesses and 30 deaths every year, at a

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[37] For more information, see "New OIRA Staffer Calls Attention to Office's Role," OMB Watch, Dec. 8, 2009. Available at: http://ombwatch.org/node/10621.
[38] For more information, see Matthew Madia, "Last-Minute Changes Will Improve Air Pollution Monitoring, EPA Says," OMB Watch, Feb. 17, 2010. Available at: http://www.ombwatch.org/node/10770.
[39] Lisa P. Jackson, "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," Environmental Protection Agency, Dec. 15, 2009. 74 FR 66496. Available at: http://www.epa.gov/climatechange/endangerment/downloads/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf.

cost of less than a penny per dozen.[40] Enforcement at FDA has accelerated as well.[41] CPSC has been busy implementing the requirements of the Consumer Product Safety Improvement Act passed by Congress in 2008, many of which targeted toys and other children's products. Most recently, CPSC proposed new standards for cribs including a ban on drop-side cribs, a style that has been implicated in infant deaths.

Department of Labor agencies have remained on the periphery of rulemaking activity. Agencies within the department seemed particularly hard hit by the difficulties of the nomination process. Assistant secretaries for the Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration were not confirmed until the fall of 2009. President Obama's nominee to lead the Wage and Hour Division, enforcer of wage and leave standards and child labor laws, withdrew amid Republican objections. President Obama has yet to nominate a replacement.

V. Conclusion

In terms of both process and rulemaking, much work remains to be done. The White House needs to reform the regulatory process and establish its vision for the role of regulation. Despite the administration's progress, there are countless more hazards in need of agency attention. But early successes indicate that the Obama administration is serious about regulatory reform, and we hope they will continue to look for ways to improve the process.

Thank you for the opportunity to testify today.

[40] Jeffrey Shuren, "Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation," Food and Drug Administration, HHS, July 9, 2009. 74 FR 33030. Available at: http://edocket.access.gpo.gov/2009/pdf/E9-16119.pdf.
[41] For example, see Lyndsey Layton, "FDA warns 17 food companies of misleading claims on labels," The Washington Post, March 4, 2010. Available at: http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030303119.html.

Mr. COHEN. You are welcome, Dr. Bass. I appreciate your testimony.

Our next witness will be Dr. Richard Williams, who was, I think, somewhat ill and is now in good health, and we appreciate and are thankful for that, at the time of our last hearing, which had to be

put off. Dr. Williams is the managing director of the regulatory studies program and government accountability project at the Mercatus Center.

Prior to joining the Mercatus Center he served as director for social science at the Center for Food Safety and Applied Nutrition of the Food and Drug Administration for 27 years. Serves as advisor to the Harvard Center for Risk Analysis and taught economics at W&L.

Dr. Williams is an expert in benefit-cost analysis, risk analysis, particularly associated with food safety and nutrition. He is published in Risk Analysis and the Journal of Policy Analysis and Management. He has addressed numerous international governments including United Kingdom, South Korea, Yugoslavia, and Australia.

Thank you, Dr. Williams.

TESTIMONY OF RICHARD A. WILLIAMS, Ph.D., MANAGING DIRECTOR, REGULATORY STUDIES PROGRAM AND GOVERNMENT ACCOUNTABILITY PROJECT, MERCATUS CENTER AT GEORGE MASON UNIVERSITY

Mr. WILLIAMS. Thank you, and thank you for the invitation to testify before the Committee today. I am retired from the Federal Government, first in the U.S.—with the U.S. Army in Vietnam and then for 27 years in the Food and Drug Administration working in regulatory policy, in particular dealing with economics and risk analysis.

I think the goal of everybody here today is to discuss how we can get the best possible regulations. My concern, however, is that we may be regulating in haste, and without sufficient oversight by OIRA the outcome will be to repent at leisure.

According to the evidence the Administration has put forward there has been both a reduction in the number of economic analyses produced by the agencies and diminished oversight by OIRA. For example, compared to 2007, in which every single economically significant regulation had a regulatory impact analysis, in 2009 one in five had no analysis.

Meanwhile, OIRA has reduced the amount of time they are spending on reviewing individual regulation, down about 35 percent in 2009 from the previous 2 years. And finally, as has been mentioned, after having reviewed 900 regulations since taking office they have decided that not one rule needs to be returned to the agency.

The problem is that if agencies are failing to do the analyses or are doing a bad job of them we will have rules that fail to achieve their objectives. There are three reasons why we need strong oversight from OIRA.

First, we want agencies to focus and make rules based on their area of expertise, and in fact they do. My focus at FDA since 1980 was to try and understand the risk and economic issues associated with food safety and nutrition. But we didn't, for example, consider how our rules would affect international competitiveness, job loss, or unintended consequences outside of our agency's purview, and it could be argued that no one did.

Over time, however, as OIRA began to play a larger role in oversight, these concerns began to be addressed. They would push back on us to ensure that our decision-makers knew the opportunity costs of, for example, making food a little bit safer relative to other social investments, and also to make sure that we had a solution that actually worked. In fact, OIRA pushed us to promulgate one of the most cost-beneficial rules we had ever done, requiring that food manufacturers label trans-fatty acid.

A second reason we need OIRA to provide oversight is that agencies can become captive to special interests, either the industries they regulate or activists with narrow agendas. By ensuring that agencies have carefully examined the benefits and costs of their actions OIRA can make sure that when these forces are at work our regulations are wise investments that benefit the entire American public, not just the special interests.

Finally, my research and my own experience shows that too often agency decision-makers either ignore the findings of regulatory impact analyses or worse, direct the outcomes to support a premature decision. Returning a rule to an agency has an amazing ability to correct this type of behavior.

Our research at Mercatus has shown that good regulatory analysis can improve regulations, but it has also shown that these analyses have uneven quality and do not rise to a standard of excellence specified by President Clinton's economic executive order. In fact, one of the biggest problems we have uncovered so far is that even for economically significant regulations agencies are often unable to articulate a systemic problem that they are trying to solve.

Too often, the agencies appear to be content just to recite anecdotes or offer legal authority. The problem is, if you don't know what problem you are trying to solve it doesn't give you much ability or confidence that you will actually solve anything.

Mr. Sunstein's vast scholarship supports better analysis producing better rules, as does the President's call for a dispassionate and analytical second opinion on agency actions. We need those second opinions now more than ever at a time when American businesses are uncertain about whether or not to invest their capital in the United States because they fear a vast new slate of regulations.

And part of that uncertainty may be that OIRA is not ensuring that new regulations are subject to critical economic analysis. A vigorous OIRA can reduce that uncertainty and ensure that we are producing effective rules that advance our national interests; however, they must be allowed to take the time necessary to do the job thoroughly and return rules that do not measure up.

[The prepared statement of Mr. Williams follows:]

PREPARED STATEMENT OF RICHARD A. WILLIAMS

MERCATUS CENTER
GEORGE MASON UNIVERSITY

Written Testimony of
Richard A. Williams, Ph.D., Director, Regulatory Studies and Government Accountability
Mercatus Center at George Mason University

Submitted to the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
July 27, 2010

Mr. Chairman and Members of the Committee:

Thank you for the invitation to testify today on federal rulemaking and the regulatory process. I am an economist and the Director for the Regulatory Studies Program and the Government Accountability Project at the Mercatus Center, a 501(c)(3) research, educational, and outreach organization affiliated with George Mason University.[1] For over three decades, I have been involved with the federal regulatory process at multiple levels. Previously, I worked as the Director of Social Sciences for the Center for Food Safety and Applied Nutrition in the Food and Drug Administration (FDA). In that capacity I worked on regulations for 27 years at FDA with the exception of a three month detail in the Office of Information and Regulatory Affairs (OIRA). I also served for three years in the Army and had a tour of duty in Vietnam.

My testimony focuses on the essential role that effective checks and balances play in the pursuit of high-quality, effective and economically efficient regulations. James Madison in Federalist No. 51 said, "If men were angels, no government would be necessary… you must first

enable the government to control the governed; and in the next place oblige it to control itself." Absent regulators being angels, it is imperative that we apply effective checks and balances to regulatory agencies.

U.S. government agencies implemented the first federal regulations nearly 140 years ago. Since then, regulations have become a large part of how the federal government functions. Today, according to Regulations.gov, we are implementing nearly 8,000 regulations per year at a cost that may exceed $1 trillion.[2] With so many regulations under development or being implemented, who is exercising oversight to assess their quality and effectiveness? With the courts giving deference to agencies in their interpretations of federal statutes and Congress virtually never exercising its authority to review and overturn rules, that leaves the small Office of Information and Regulatory Affairs (OIRA) as the sole bulwark for independent regulatory oversight. Yet, OIRA's recent record indicates that it may not be fulfilling its critical duties. OIRA's website shows that they are spending much less time reviewing very expensive rules and, under the current administration, the office has not returned a single proposed rule to its authorizing agency.

So why should we be concerned about regulatory checks and balances? We should be concerned primarily because they have a direct impact on our nation's economy and international competitiveness. Current news stories report that businesses are afraid to invest in new enterprises in the United States because of uncertainty about new taxes and regulations, including regulations related to greenhouse gas emissions, health care, and financial markets.[3] Adding to the uncertainty is OIRA's apparently weak role in ensuring that the agencies thoroughly analyze regulatory policies and pay proper attention to benefits, costs, and unintended

consequences. This uncertainty forces people to reconsider investment decisions, including whether they should invest in the United States or move their capital abroad.

Our research at the Mercatus Center shows why weak checks and balances lead to dangerous trends in regulation that deter economic efficiency and growth. We find that agencies do an uneven and overall mediocre job in preparing regulatory impact analyses (RIAs), which are vital to understanding the likely economic effects of rules. Agencies clearly need to improve the quality and consistent use of these analyses.

In terms of regulatory reform, the Obama Administration has announced its intent to improve analysis and procedures by: (a) humanizing analysis, (b) using rigorous science, and (c) advancing open and transparent government, particularly "democratizing data." My testimony examines how the following key factors will affect the potential success of these proposals:

- The value of benefit-cost analysis and analysis of values;
- Using behavioral economics in the development of regulations;
- Ensuring OIRA's role in the use of rigorous science by federal agencies; and
- Using transparency to try to solve the knowledge problem.

Finally, I outline how OIRA can assist federal agencies in improving the quality, effectiveness, and efficiency of their regulatory regimes.

1. The Value of Benefit-Cost Analysis and Analysis of Values

The two types of analysis that agencies use the most extensively in evaluating regulations, particularly those that affect health, safety, the environment and security, are regulatory impact analyses and risk assessments. Regulatory impact analyses are comprehensive analyses of proposed and final rules that contain: (a) statements of the need for rule, *i.e.*, what systemic problem the rule intends to solve; (b) a review of multiple options to solve the problem;

and (c) an assessment of the benefits and costs of each option. For health, safety, and environmental rules, benefits are based on intended reductions in risk. Estimates of risk are taken from risk assessments that examine both the exposure to and the potency of (dose-response) of risky compounds and practices. Risk assessments come in two forms: (a) safety assessments, which define "safe" doses, and (b) actual risk assessments, which estimate levels of risk at various exposures. Only the latter is useful in a benefit-cost analysis. Both types of analysis assemble facts in a useful manner for decision makers and neither is, or at least neither is supposed to act as, a substitute for decisions.[4]

I would like to focus attention on why regulatory impact analyses, in particular, the benefit-cost analysis component in RIAs, continue to be important in the regulatory process. The key value of an RIA is often the result of asking questions that otherwise would not be asked during the development of regulations, such as:

- What systemic problem/risk does this rule attempt to address?
- What are all of the relevant ways in which it might be solved (including a determination of whether people are likely to solve the problem without regulation in the near future)?
- For each potential solution, what is the actual mechanism for solving the problem and what is the proof it will be effective?
- How are people and institutions likely to respond to various legal regulatory options?
- What is the cost of each option?
- What might happen that is not part of the rule but is an unintended effect, *i.e.*, a risk/risk issue?

An example of a risk/risk trade-off might be a decision to regulate the manufacture of infant formula, often the sole source of nutrition for infants. Such a regulation would increase the price of infant formula causing a substitution effect. In this instance, surveys have shown that when the price of powdered infant formula increases, less wealthy consumers try to extend it by adding more water. The risk from watering down infant formula (decreased nutrient intake) may exceed any reduced risk from improved manufacturing practices. An RIA should identify

effects like these so that decision makers have a much better understanding of the consequences of their decisions.

By identifying the problem accurately, finding the least restrictive and least costly way to solve the problem, and ensuring the identification of all unintended consequences, thorough economic analysis can help decision makers make better informed decisions. However, all of that begins with agency economists who prepare these analyses, and OIRA plays an extremely important role in whether or not these analyses are done well and are used to inform the rulemaking process.

Benefit-cost analysis, the primary component of RIAs, has its foundations in microeconomics and has been used in by federal government agencies since the 1960's. The general acceptability of the principles and use of benefit-cost analysis can be seen by the fact that the last six administrations have adopted it for general use by federal agencies via executive order. In fact, President Clinton's Executive Order 12866 did not significantly alter the requirements of President Reagan's Executive Order 12291. One of the modifications made to Executive Order 12291 by the Clinton Administration was to add more focus on identifying distributional effects. The Obama Administration has proposed to humanize analysis by incorporating the findings of psychology and behavioral economics into analysis and focusing on distributional fairness and intergenerational concerns.

While these concerns are indeed important, it is critical that policymakers refrain from treating these issues as components of benefit-cost analysis. Distributional fairness and intergenerational concerns can be highly subjective issues. Subjective weights should not be used to calculate what is fair or equitable in benefit-cost analysis as it would be theoretically improper and would result in arbitrary values that would be misleading to decision makers.

For example, there are different definitions of fairness. Some people believe it is fair if every firm has to comply with all regulatory requirements equally, often referred to as a "level playing field." The Regulatory Flexibility Act and its amendment, the Small Business Regulatory Enforcement and Fairness Act, define fairness differently. It may be *unfair* to make a small business purchase the same type of capital equipment, whose costs must be covered by a smaller sales base, as that required for a larger competitor. The smaller sales base means that the small business has to raise its prices much higher than the large business to cover the cost of the equipment. That puts the small business at a competitive disadvantage, which seems unfair. Using this theory, a regulation that requires every firm, no matter what size, to purchase the same equipment to level the playing field is not fair.

While it is important in many instances to consider what is fair or equitable, these considerations fall largely outside of benefit-cost analysis. Certainly, as required by Executive Order 12866, analysts are supposed to identify who will bear the costs and who will enjoy the benefits. In many cases, this is critical information decision makers will want to know, and I would argue that regulatory analysis should always provide this information in case decision makers might find it useful. In some cases, such as regulations that outline how federal agencies will spend money, the agency uses tax dollars to produce an outcome that benefits a specific target population. Benefit-cost analysis can help us understand how cost-effectively the regulation helps the intended beneficiaries.

That is different, however, than counting a transfer from one person to another as a net social "benefit" in a benefit-cost calculation. There is no generally accepted economic theory that could, for example, assign a quantitative benefit to a regulatory option that is more "fair" or more equitable. Fairness is not included in the microeconomic foundations of benefit-cost

analysis because it is purely a value judgment. A judgment about whether a transfer of benefits from one group to another is "fair" is simply a judgment based on the decision maker's values, not economic analysis. Different decision makers may make different value judgments about whether a regulation is fair based on their own political and ethical philosophies.

Beyond identification of who gains and who loses, there is nothing more that analysts can (or should) add. Economists serve their most useful role advising decision makers as to which regulatory option has the greatest difference between benefits and costs, *i.e.*, "maximizing net benefits" or, in colloquial terms, "the biggest bang for the buck."

Given that there are so many different regulations, sooner or later, everyone will receive benefits from some regulations. Given that, agency decision makers should explain the reasons for their decisions: why, for example, they chose an option that did not maximize net benefits or a decision that favored certain groups at the expense of others. These explanations would be consistent with the goal of transparency.

Regulatory decisions that have a time component to them often have benefits that occur much later than costs and are addressed in benefit-cost analysis by what is known as the social rate of time preference, or the discount rate. A discount rate enables the economist to present to decision maker information that makes all benefits and costs comparable at the same moment, usually today. Choice of the social discount rate has a huge impact on how benefits or costs are valued in the future. A low discount rate says that society places more value on future events; a high one means we value immediate things more. People make their own time trade-offs constantly on such things as a decision to buy a car now versus saving the money for the future or choosing to enjoy tasty yet unhealthy food versus a stricter diet that preserves health for the future. Economists try and measure these trade-offs, the rate at which people discount the future

in favor of present consumption, and use these rates in their analysis. These calculated values can be used to advise decision makers. While the values employed in the analysis should be based on theoretical and empirical data, the decisions that implicitly value future versus current consumption belongs to decision makers, who need to make those decisions transparent. Again, the distinction should be made between economic valuation data that goes into economic analysis and actual decisions that reflect multiple considerations beyond the analysis. In no case should decision makers characterize a value-based decision as an economic analysis; rather they should provide a clear rationale for their decisions.

2. Using Behavioral Economics in the Development of Regulations

Cass Sunstein, the current administrator of OIRA, has offered a number of provocative ways of applying behavioral economics to solve significant regulatory problems in the book Nudge, which he coauthored with economist Richard Thaler.[5] The basic theory Sunstein and Thaler advance is that the government can help people make better choices by fashioning the decision "architecture" to nudge them in the right direction, what they called, "libertarian paternalism." They argue that, instead of intrusive command and control types of regulation, less intrusive means of regulation, such as information provision, can be used to nudge people into making the right decisions.

Suggestions to use less intrusive means to accomplish regulatory goals go back at least 35 years to OIRA's predecessor, the Council on Wage and Price Stability (CWPS). The guidance to choose less restrictive options has not changed much from CWPS to OIRA but it has been routinely ignored. In our comments submitted to OIRA concerning a new Executive Order on RIA standards (which has not been issued), several colleagues and I pointed out that agency regulators seem to suffer from "the status quo bias," the tendency to continue to do things the

same way you always have done them. In an interview paper I conducted with senior regulatory economists prior to leaving government, one economist described the problem this way: "*We do what we always do, just trotting out the same old thing. That's why we don't come up with better regulations; we just come up with the same regulations in different areas.*"[6] In our comments to OIRA, we suggested that one way to cure this problem was to "nudge" the agencies to do a better job by requiring more analysis when they were choosing more restrictive options.

The nudge theory seeks to formulate regulatory policy based on human decision errors that have been identified in the psychological and behavioral economic literature over the last several decades. This literature addresses how people use shortcuts to make decisions, some of which are to their advantage while others appear not to be in their best interests. Applying this knowledge would prove valuable to structuring regulatory remedies that are less intrusive than command and control remedies.

However, in order to gain insight into human decision errors, researchers have used experimental studies that ask people what choices they would make under certain conditions. The researchers then compare those choices to "rational choices." But as a recent Nobel Prize winner in economics Vernon Smith pointed out, the verbal behavior that individuals exhibit "strongly contradicts what their actual behavior achieves."[7] That is, in order to predict what individuals will do, as opposed to what they say, you would need to replicate the market experience, which is very difficult to do. This is why you cannot assume people will make mistakes in markets just because they give the "wrong" answers to survey questions. By interacting with others, rational outcomes are achieved in markets much more readily than experimental tests based on questions alone.

Market outcomes are adversely affected, however, by an excessive number of rules. OIRA could explore how people and organizations react to excessive rules by focusing on rule multiplicity as well as rule prioritization to see what effect they have on achieving the intended benefits. Findings from behavioral economics and psychology may help to uncover problems in this area. The examples provided below that are not intended to be conclusive. They simply suggest that having too many rules and not knowing which ones are important can defeat the original congressional intent of regulations.

For example, the availability heuristic (salience) might imply that regulated entities will spend most of their time complying with the most recent rules or rules that have recently been brought to their attention. The problem with this behavior is that the rule-du-jour may not be as important as rules passed 30, 60, or 100 months or even years ago. Generally, agencies do not prioritize rules, and they rarely take rules off the books even if they are no longer beneficial. All are treated, at least theoretically, equally. The very first OMB Report to Congress identified the problem: "Some regulations are critically important (such as safety criteria for airlines or nuclear power plants); some are relatively trivial (such as setting the times that a draw bridge may be raised or lowered). But each has the force and effect of law and each must be taken seriously."[8] As benefits and costs are directly related to the distribution and emphasis of compliance with rules, this only adds to the uncertainty of their effect. OIRA should encourage agencies to prioritize existing rules and remove those that are no longer relevant.

In addition to the problem of a lack of rule priority, there is the problem of too many rules. Is it really possible for an individual company to maintain focus on thousands of rules that it? Studies in numerous fields document the adverse effects from having too many rules. One author notes, "While generally there is an understanding that rules are useful guides for safe

behavior, there is also an increasing concern that an incremental build-up of too many rules will not create a good system to help human actors do the right thing, especially in states of abnormal operation where they would need strong but flexible guidance."[9] It may be that too many rules are a special case of too much information. Hwang and Lin report that "if information load keeps increasing and finally exceeds the capacity of decision makers, information processing will cease being increased. Instead, decision makers will decrease information processing as they experience a phenomenon termed 'information overload.'"[10]

Hale examines the general approach of adding more and more rules:

> "The second line of defense in many systems, if the human could not be eliminated, has been to try to turn the human into a robot by specifying rules and imposing them rigidly. The railway industry has been one of the main protagonists of this approach, alongside the nuclear, and to lesser extent, the chemical industries. Accidents were then analyzed up to the point where it became clear that someone had broken a rule (at which point discipline was appropriate) or that there was no rule for this eventuality (in which case a new one was made). In this way rulebooks continually grew and never diminished. This rules-fix is also a hankering after certainty. Ultimately we get a rule for everything and safety is seen as something which [sic] requires no thinking any longer, but simply good training, a prodigious memory, a large safety manual or computer to refer to, and an iron discipline. Management does not need to do any more thinking or planning, because it is all fixed in the rule system. Reason (1990, 1997), among others has shown clearly how this approach ossifies an organization and forces its staff into being habitual and professional violators of rules, just to get their work done."[11]

Another author identified a problem with additional rules in the nuclear power industry identified: "Regulators and industry officials come to view conformity or compliance with the rules rather than actual performance indicators as the measure of safety. So much time and attention are devoted to these surrogate measures of safety ('complying with the regulations') that the larger goal of such regulation is frequently neglected."[12]

Academics who have studied classroom rules come to a related conclusion: "Too many rules result in rules that are not enforced. The ones that are not enforced become targets of abuse

that erode the effectiveness of the others."[13] For accounting, Nelson finds that adding rules to increase precision "can increase the complexity of the standard, thereby creating communication problems that offset the communication benefits provided by increased precision."[14] One conclusion of this study is that "a key to accurate communication is striking the right balance between providing enough rules to communicate clearly and not so many rules that practitioners are overwhelmed."[15]

Knowing how excessive rules affect firm behavior is essential information that Congress and the public should have before policy makers commit to adding more rules to the complex web of current regulations. In fact, one crucial question that never seems to be asked is "when are there enough rules?"

3. Ensuring OIRA's Role in the Use of Rigorous Science by Federal Agencies

The Obama administration, to its credit, has placed a high value on creating and using rigorous science in the regulatory process. OIRA plays several roles in this regard. First, OIRA is supposed to be the arbiter for science disputes between agencies, and this Administration has emphasized that role. An on-going dispute between EPA and FDA on the risks associated with methyl mercury suggests that such emphasis is long overdue. In this case, EPA has written a 60-page public letter describing the failures of a draft risk assessment done by FDA on the risks of methyl mercury.[16] FDA has suggested a much more holistic, risk-benefit approach than that taken by EPA. This issue has been left open for over a year while FDA considers how to deal with these and other comments. When two agencies publicly disagree about whether or not a compound is risky at current levels of exposure, OIRA's job is to resolve that dispute and, in this case, it should be done sooner rather than later as the current joint advisory between FDA and EPA may be misleading women of childbearing years.

On another front, the current administration has embraced the Data Quality Act, which is an excellent start to ensure that the science used to make decisions is of the highest quality.[17] However, it is not clear yet whether the objective of using the best science will be achieved, given the limited appeals, both legally and administratively, in the Act.

The quality of RIAs in the federal government has long been a concern to many economists in the regulatory field, yet RIAs are only tangentially addressed in the Data Quality Act. A new project underway at the Mercatus Center at George Mason University seeks to address this concern by conducting an on-going evaluation of RIAs for all economically significant rules published since 2008. First, although we are not officially giving letter grades, when we analyzed all economically significant rules published in 2008, no RIA would receive above a "C" grade on a typical grading scale. Second, in many RIAs we found fundamental errors, such as the inability to articulate a systemic problem that the rule addressed. In the future, we hope that, by making these evaluations of proposed rules early and within the comment period, we will help stakeholders to comment more effectively and agencies to improve their analyses.

As I mentioned earlier, I conducted a qualitative survey of senior agency economists to get their thoughts on why their analyses might not be as effective as they believed they should be. There were several themes that came out of that survey. One was that economists are often managed by non-economists who place a big premium on getting the analysis done and done on time, often at the expense of quality. Another, perhaps more important, problem was simply a lack of appreciation by decision makers for the analysis. Some economists said that decision makers were not interested in their results or thought that economics was not a science, only "common sense." My own experience at FDA was similar to the sentiments expressed in the

survey. I found that the tendency for most decision makers is to identify a solution and then request science, including and particularly economics, to support that decision. In some cases, it is clear that RIAs are completed well after decisions have been made.

As one economist put it, "*Everyone knows that life will be easier…if you just go along with the program office.*" This pressure does not just cause discomfort; it can affect the careers of staff economists. [18] I once was told on a Friday that if I did not lower the costs estimates in an RIA that I should not return to work on Monday, *i.e.*, I would be fired. I did lower the costs and subsequent investigation by academic economists showed that our original (higher) estimates were correct. I cannot make this point too strongly: often jobs of agency economists are to analyze their bosses' decisions. Those are unenviable tasks in any circumstance, but federal agencies make those jobs harder, and civil servants probably get fewer honest analyses when they treat economists (and other scientists) as hired-gun consultants who are supposed to gin up support for decisions that have already been made for other reasons. In this instance, decision makers will certainly not get what the President has requested, "a dispassionate and analytical 'second opinion' on agency actions." Beyond the solution offered below, it would be helpful to locate economists as far away organizationally from program office decision makers as possible.

You might ask what OIRA has to do with all of this as it does not see the RIAs until the agencies have completed these analyses. The answer is a lot if OIRA is doing its job correctly. There are two ways that OIRA can do its job. One is working collaboratively with agencies - what I call the "caring and sharing" model. The other is acting as the president's quality control officer to ensure that RIAs are done correctly and used appropriately. OIRA has historically been perceived as a "black box" to both those outside of government and even for many within the regulatory agencies. When I asked a branch chief at OIRA to describe what the agency does,

he told me that 90% of the job is to make sure that RIAs are done correctly and 10% is passing along decisions from the White House to the agencies. (This did not include all of the other assigned work like reports and special jobs for the White House). That focus on ensuring that RIAs are done correctly can go a long way toward solving the problem that plagues agency economists. If agency decision makers are either not interested in using analyses, or are instructing economists on what the analyses should conclude, it is unlikely that a collaborative relationship between OIRA and the regulatory agencies will correct this problem. OIRA's ability to return a rule based on bad analysis can help protect the integrity of the analysis and the related rulemaking process.

One example of this may be illustrative. At one point during the Clinton administration, I was asked to do a benefit analysis on a rule that addressed botulism in smoked fish. There had not been a botulism problem in this industry for 30 years as the industry had made substantive changes in their processing after problems arose in the 1960's. I told the program office that I really could not come up with any quantified benefits that would help the rule to get through OMB. I said this despite the fact that OIRA had not yet returned any rules to agencies in that administration. The rule went to OIRA anyway. My understanding was that the smoked fish rule ended up being the first one that then Administrator Sally Katzen returned to any agency.

The Obama administration has said that it is interested in using rigorous economic analysis as one way to make the impact of regulations transparent to the public. Quoting from the 2009 Report to Congress:

> "Regulation should be data-driven and evidence-based, and benefit-cost analysis can help to ensure a careful focus on evidence and a thorough consideration of alternative approaches. Properly understood, such analysis should be seen as a pragmatic tool for helping agencies assess the consequences of regulations and thus to identify approaches that best promote human welfare."

I would suggest that the way to accomplish that is to enforce the requirements on the agencies to do high quality analysis by returning rules accompanied by RIAs that do not measure up to standards articulated by the Executive Order 12866 and Circular A-4. While collaboration may also be useful in instances, given the nature of regulatory agencies to focus almost exclusively on their primary missions, a strong quality control role is a must for OIRA to be a truly effective oversight agency.

It is also important that that OIRA analysts be given sufficient time to do their job correctly. DATA.GOV shows the amount of time OIRA analysts take to review rules going back to 1981. The chart below shows the review times for OIRA staff.

OIRA Review Days

	2007	**2008 (until Jan. 20, 2009)**	**2009**
Economically Significant	50	52	33
Not Economically Significant	64	62	41

From the chart, it appears that OIRA staff has spent 35% less time reviewing rules in 2009 than in the previous two years. Some rules were cleared very quickly. For example, the proposal to control green houses gases for light duty vehicles was cleared in just 20 days and a proposal for energy efficiency standards for general service fluorescent and incandescent lamps was cleared in four days. This may understate the true problem if in fact the current administration has also eliminated OIRA's informal reviews. Is there an implied goal that the Administration has set for OIRA analysts to reduce review time? If the goal is to minimize

review time, that is likely to conflict with a goal of conducting high quality reviews in order to achieve better RIAs and better rules.

Having said that, I recognize the difficulties that confront this small agency as there are only about 40 analysts charged with reviewing about 500 significant regulations each year. My experience suggests however that most of the analysts in OIRA fulfill the requirements that President Kennedy requested when he called for the "best and the brightest" to join the government. Focusing this small number of talented people on thorough rule review and returns when necessary should be a goal for this Administration.

Finally, I will point out that there is another mechanism in government that can help with the quality of RIAs - the Interagency Economic Peer Review Group. This is a group of federal economists within different agencies who have agreed to provide peer reviews of RIAs from other agencies at the request of the originating agency. OIRA support for this function may help the agency to do its job better. In the interest of full disclosure, I started this group prior to leaving government service.

4. Advancing Open and Transparent Government, Particularly "Democratizing Data"

Certainly one of the commendable hallmarks of the Obama administration is its keen focus on transparency with respect to the regulatory process. This continues an uneven trend started in the previous administration, and unfortunately, it continues to be uneven. Nevertheless, the President's call for a "presumption in favor of disclosure" is a welcome sentiment and it is hoped that the Administration will continue to try and meet this challenge. In fact, the Mercatus Center had a project for the last ten years in which we evaluated the transparency efforts of the Executive Branch agencies in their performance and budget requests. Over that time, we saw agencies improve in their transparency. We emphasized in our

evaluations that agencies should publicize outcome-based goals, as opposed to input-based goals. An example might be a reading program where the goal was measured by the quantity or quality of increased reading skills, not by the number of books that students received. Those are goals that people care about. Those are also the goals for which agencies should be held accountable, another goal of the current administration.

However, achieving these results is necessarily difficult. In his book, Governments End, Jonathan Rausch details at great length how each government program builds a constituency that fights any decreases in funding for that program with great tenacity.[19] As the costs of the program are widely distributed among taxpayers, those that want the program continued usually win. The result is that the ineffective programs remain and the government grows.

The same thing is true for regulations as for government programs. Often industries and activists want certain regulations to further their own ends. They then support the regulatory decisions of agencies that are regulating for their own purposes.[20] Those who do not want the particular regulations end up outgunned as agencies tend to give much more deference to those who agree with them. As the government seeks a more open and transparent process, agencies must find a way to give equal weight to those who argue the regulation will harm them.

Besides transparency and accountability, there are two other core values that the current administration has adopted for which they should be commended: participation (government actively soliciting expertise from outside Washington) and collaboration (working together with other government officials and citizens to solve national problems). One way these are being implemented is by "democratizing data," *i.e.*, by sharing more government datasets and information about government operations than has been done previously. A reason given for doing this goes back to the words of Justice Louis Brandeis, "sunlight is the best disinfectant."

This kind of activity is certainly likely to help provide sunlight, and the IT Dashboard and DATA.GOV are two excellent examples. A key goal for each is to lower the cost of participation and collaboration and to reach out for innovative ideas. The themes that the current administration has embraced include:

a. Promoting accountability,
b. Providing information people can "readily find and use," and
c. Taking advantage of dispersed information.[21]

While these activities and themes are certainly likely to help, it is important not to over claim what they can accomplish. The current administration asserts that seeking "dispersed information" through both putting information out for comment and by actively seeking citizen participation, can solve the problem identified by Nobel Prize winning economist Friedrich Hayek over fifty years ago. The "knowledge problem," identified by Hayek is that no central authority can ever gather sufficient information to replace dispersed private decision-making. As Hayek put it, "[K]knowledge . . . never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess."[22] The claim that outreach techniques that use sophisticated computers and the internet solves this problem misunderstands both what the knowledge problem is and the fact that it can never be solved. As most technology and management professionals will readily acknowledge, "Data is not knowledge." If the knowledge problem is not properly understood, the limitations of government are improperly understood and that can lead to decisions that will adversely affect citizens.

Let me review some of the issues associated with the knowledge problem that cannot be solved by these initiatives.

a. The Nature of Knowledge. While some knowledge is explicit, Hayek identified a category of knowledge that cannot be shared with anyone, including government. This is the knowledge that every individual has, but generally cannot easily articulate to others. It is knowledge that is "local" to them, knowledge of time and place, and it cannot be aggregated. Such knowledge drives the decisions people make and the actions they take every day. For example, while you know what kind of car you drive and perhaps have some idea of the gas mileage your car gets, you are probably not aware of why you choose one product over another. Even if you try to explain this to someone else, it is sometimes very difficult to put into words. Furthermore, each time you make a decision, the context changes, which changes the trade-off. It is impossible for people to convey continually to government or anyone else the highly individualized contexts for each type of decision they make every time they make one. Some people may decide whether to order a dessert in a restaurant based on whether they plan to work out the next day while others may focus on caloric content, price, or whether the restaurant smells bad. They may or may not be able to articulate what caused them to make that decision but that context most likely would only be valid for that particular decision at that time. That is not information that the government can obtain through a survey.

What's more, in a survey government must aggregate information and doing so causes it to lose all context. Context is not just important; it is crucial. For example, even after the election of Scott Brown in Massachusetts it is impossible to understand all of the trade-offs that people made when voting for him. What's more, it seemed to be very difficult to know at the time what was happening in a timely manner and it is likely that,

as perceptions changed, people were changing their minds. Finally, even after the fact there seemed to be no general agreement on what people were thinking when voting. This example illustrates why surveys will always be an imperfect tool for gathering information and contingent valuation surveys will be just as problematical.

b. Gathering Information. There are a number of reasons why this is a much bigger problem than just actively soliciting input. First, many people may find that the costs of supplying government with information exceeds the benefits. (Think of the number of people who simply hang up when a survey firm phones them because they don't want to spend 10 minutes answering questions.) In fact, many will probably find that they do not want to share information with the government, out of mistrust of how their information will be used or because they just consider it too private. Some may want to share information with government but will frame the information in a misleading way to try and affect some government policy in a way that suits them. (It could be argued that giving government information in a directed way to accomplish a specific end is what lobbyists do.) Some may just lie to government. Finally, government officials may seek actively some types of information, particularly information that supports their preferences. For whatever reason, it will always be difficult to sort out the different sources of information. At a minimum, being a passive recipient of unrepresentative data is not going to give a statistically representative sample.

c. Using Information. A large literature on bureaucratic incentives and agency capture (by firms or activists) details the gap between what might be considered the "right" thing to do for society and what is actually done. To date, while there are many suggestions to overcome these problems, there have been no effective solutions.

Certainly the use of benefit-cost analysis is one type of solution, as it does not favor any particular group. But when decisions on value-laden concepts like fairness and equity – and benefit-cost analysis is ignored, it will be more difficult to prevent rules that serve to benefit favored groups.

Much of government regulation is a one-size-applies-to-all solution. Even many benefit-cost analyses focus on total or average costs or benefits, which may obscure important effects that vary with the diversity of the population. To the extent that preferences are different, even if you could gather the right information in a timely manner to know everything (and it's not possible), regulations often contain policies that satisfy a few people's preferences at the expense of many. The more diverse people's preferences for different policies, the fewer people will be satisfied with the option policymakers choose. In general, this means that more people will be less satisfied with how the government directs resources and would prefer alternative uses.

Finally, one of the biggest problems with the government's use of information in regulations is its inability to adapt quickly to changes in new information. For example, the Food and Drug Administration's definition for the use of the term "healthy" applied to food labeling is over 15 years old. Nutrition science has changed during that time.[23] For example, the rule still includes a definition for total fat that fails to distinguish between more beneficial fats like mono and polyunsaturated fats.

Rulemaking is a slow, deliberate process, as it should be. But that also means that it is difficult if not impossible to employ rulemaking effectively to solve problems in situations where science is changing rapidly. Imagine, for example, if the government had tried to establish performance standards for personal computers. By the time a proposal would be written it would be out of date.

Why should it matter that a 50 year-old hypothesis (the Hayek knowledge problem) is still essentially correct and that governments will always be woefully short of the knowledge necessary to make intelligent decisions? It is important because the presumption must always be on the government to show, as best it can with extremely imperfect tools such as benefit-cost analysis and risk assessments, that there is some reasonable probability that it can improve the lives of citizens by the action it takes. It matters because we must set the bar for such interventions as high as possible so that, at a minimum, we follow the guiding principle for physicians, "*primum nil nocere*," first, do no harm. Any intervention should be accompanied by a great deal of humility with respect to this principle, as every attempt is fraught with uncertainty. When the government redirects resources by mandate, we will always be uncertain as to whether those resources are going to a use that is of most value to society.

In short, while the transparency and outreach initiatives are laudable, there are some problems that can never be overcome (tacit knowledge, timeliness, motivation and aggregation) and others that have yet to be solved (incentives and capture). There is a great deal of evidence of government failing to overcome these problems. The burden of proof should always fall on those who believe they can solve the knowledge problem to show that it can be done. The same problem arises when governments have tried to institute industrial policies by picking winners and losers: there is never enough knowledge to do so and the odds of success are no better than a coin toss.

Even the goal of providing the public with information should be approached with great care. The question that should be asked when information is to be provided is "what is the goal of providing that information?" In risk communication, for example, the goal is to provide people with information to help inform their decisions. So if people get and understand the

information, the goal is satisfied, even if people decide the risk is acceptable after they have been fully informed about the consequences. However, regulatory agencies may not be satisfied with that outcome. The Administration points out as a successful program the Toxic Release Inventory Program, requiring firms to report release of toxic chemicals.[24] The success that is cited is the "large reductions in toxic releases throughout the United States." But what if there had been no reductions? What if, based on the actual risks as opposed to the presence of the hazards, people were satisfied with the levels of release and there were no reductions? Would it still be considered a success? Under normal standards for evaluating the effectiveness of risk communication, it would still be a success.

Another success story cited by OMB in its "2009 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State Local and Tribal Entities" is the release of fatality data by the Occupational Health and Safety Administration (OSHA) to "promote accountability and promote safer workplaces."[25] The OMB Report does not cite whether this data was tested before it was released, or the actual goal of releasing this data. For instance, there are a number of ways the information could have been framed. It could have been framed as deaths per number of workers per year by firm or by industry. It could also have been framed as deaths per firm as a percentage of industry deaths. Another way it could be framed is as deaths that resulted in a successful claim of firm negligence versus worker errors. One can imagine a number of ways this information could be released and each one is likely to elicit a different response and perhaps, satisfy a different goal.

Behavioral economics shows that it matters how information is released, how questions are framed, and what the context of those questions is. This means that release of data can be done in such a way that drives behavioral responses in a desired way. There should be a goal for

releasing information and the agency should test it to see if it accomplishes the goal. If there is more of a motive beyond informing people's decision, then that should also be made transparent.

Recommendations

OIRA can best serve the American people by ensuring that regulatory agencies perform and use high quality analysis in their decision-making processes. Congress should set high standards for regulation in view of the limited amount of knowledge government agencies will have available to them. OIRA can do this by:

1. Ensuring that all aspects of regulations are evidence based. In particular, regulations should contain:
    a. Evidence of a systemic problem. This evidence should not be a recitation of an anecdote, the agency's legal authority, a potential problem, or a problem that is outside the agency's primary goals as articulated by its Government Performance Results Act (GPRA) annual goals. It also should not be based on individual failures, but on failures of the market or other institutions that might be corrected through changes in the "rules of the game."
    b. Evidence, through baseline analysis, that individuals, organizations, or other levels of government will not fix the problem in the absence of federal intervention. Often, when government discovers a problem, firms or consumers discover the problem more or less at the same time and take steps to correct the problem. If the problem is expected to be corrected before or reasonably after the end of a regulatory process, which includes the time from final rule to the compliance date, no regulation is necessary. This may be a period of anywhere from two to five years. These alternative solutions may arise directly from

consumer demand or indirectly through either contractual changes or incentives resulting from judicial decisions.

c. Analysis of the benefits and costs of a broad variety of options, including options that may require legislative changes. Decision makers should have available to them analysis of regulatory options that range from the least to the most restrictive. This means that the more restrictive the option ultimately chosen, such as an engineering standard like best available technology, the more analysis will be necessary to evaluate numerous less restrictive options.

d. Include in every regulation a plan for follow-up or retrospective analysis to determine whether or not the regulation is accomplishing its goal.

Focus OIRA analysts on their role as quality control officers. As stated in the "OMB Report to Congress," "To promote evidence-based regulation, those who produce the relevant numbers must respect scientific integrity." This must apply to RIAs and OIRA must take the responsibility to ensure that this happens. This means a primary focus on the quality of RIAs and ensuring that the RIAs are used to inform decisions. Where a policy option has been chosen that ignores the RIAs analysis because of a focus on fairness or equity, ensure that there is a well-articulated rationale for the decision. Where these conditions have not been met, return rules to the agencies. This will empower staff economists and encourage agencies to produce and use the results of high-quality analysis. Also, OIRA must ensure that the analyses are done and done completely and they must have sufficient time to conduct thorough reviews of the regulations.

2. Examine the possibility that regulated entities have difficulty knowing which regulations are important and determine the extent to which too many regulations results in

organizational issues that adversely affect the underlying goals regulations are intended to address. Begin to think about the core regulatory functions of government as being rule destruction and simplification as well as rule creation.

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[1] This testimony reflects only the views of its author and does not represent an official position of George Mason University.

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[18] Williams, p. 12.

[19] Rauch, Jonathan, Governments End: Why Washington Stopped Working, Public Affairs, New York, 1999.

[20] *See, e.g.*, Yandle, Bruce, "Bootleggers and Baptists in Retrospect," Environment and Risk at http://www.id.iit.edu/externalID/documents/bootleggers.pdf.

[21] Sunstein, Cass R., "Open Government and Records Management, http://www.archives.gov/records-mgmt/pdf/sunstein-raco2010.pdf
[22] Hayek, Friedrich A., "The Use of Knowledge in Society," American Economic Review, 1945, pp. 519-30.
[23] 21 CFR §101.65 (d) (i) (2) Implied nutrient content claims and related label statements.
[24] 2009 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities, Office of Management and Budget, Office of Information and Regulatory Affairs, 2009, p. 37.
[25] *Ibid*, p. 38.

Mr. COHEN. Thank you, Dr. Williams. Appreciate your testimony and your service to our Nation both in the military and at the Food and Drug.

Next witness is Curtis Copeland. Dr. Copeland is a specialist in American national government at CRS. Dr. Copeland's expertise is

appropriately relevant to today's hearing on Federal rulemaking and regulatory policy.

Previously to testifying before this Subcommittee he has held a variety of positions at the Government Accountability Office over a 23-year period, received his Ph.D. from the University of North Texas, formerly known as North Texas State, the Flying Eagles, and the school that has a master's degree in jazz band.

Welcome back, Dr. Copeland, and you will proceed with your testimony.

TESTIMONY OF CURTIS W. COPELAND, Ph.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, GOVERNMENT AND FINANCE DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. COPELAND. Thank you, Mr. Chairman, Mr. Franks. Thanks for inviting me here today to discuss Federal rulemaking.

You asked me to present the results of a recent CRS report that I wrote on the implementation of the Congressional Review Act, which was enacted in 1996 to give Congress more control over agency rulemaking. The first sentence of the CRA requires agencies to submit all of their final rules with GAO and both houses of Congress before they can take effect.

At its own initiative GAO has been checking the Federal register to determine whether agencies have, in fact, submitted all of their rules. As it turns out, they haven't.

Between 1999 and 2008 GAO sent at least five letters to OIRA identifying nearly 1,000 substantive rules that had not been submitted. GAO said OIRA didn't respond to any of these letters and GAO and OIRA officials said that they were not aware of any efforts by OIRA to contact Federal agencies regarding these missing rules. Also, GAO did not send any of these letters to Congress or congressional Committees and did not notify the public about these unsubmitted rules.

In May 2009 GAO sent another letter to OIRA listing 101 substantive rules published during fiscal year 2008 that had not been submitted. The Department of Agriculture had the largest number of rules on the list. The subjects covered by the rules varied widely and included a final list of chemicals of interest as part of the Department of Homeland Security's antiterrorism standards and several rules designating endangered species' habitats.

When contacted by CRS OIRA initially said it had no record of having GAO's May 2009 letter. Later, however, OIRA sent an e-mail to the Federal agencies telling them to contact GAO to find out which rules were missing.

Shortly thereafter the agencies began submitting their missing rules. However, as of this month 49 of the 101 missing rules from fiscal year 2008 still had not been submitted to GAO.

In January 2010 GAO sent another letter to OIRA listing 31 rules published during fiscal year 2009 that it had not received. GAO also sent letters to each of the agencies with missing rules. Again, the Department of Agriculture had the most missing rules. As of last week, however, all but three of the 31 missing rules had, in fact, been submitted to GAO.

Although the CRA says rules can't take effect until they are submitted to GAO and Congress it appears that Federal agencies are

implementing most, if not all, of these rules anyway. Section 805 of the CRA says that no action or omission under the act can be the subject of judicial review, and the issue of whether a court can prevent enforcement of unsubmitted rules has not been resolved conclusively.

The CRA says that a Member of Congress can introduce a resolution of disapproval as soon as a rule is submitted to Congress. Therefore, by not submitting their rules to Congress the agencies have arguably prevented Congress from using the expedited procedures in the CRA to disapprove their rules.

Congress may conclude that agencies' non-submission of their covered rules does not require congressional action. After all, the number of unsubmitted rules went down from 101 in fiscal year 2008 to 31 in fiscal year 2009.

Also, the agencies seem to be more responsive in submitting their rules after notification by GAO. However, if Congress wants to take action several options are available.

Last June the House of Representatives passed H.R. 2247, the Congressional Review Act Improvement Act, which you sponsored, Mr. Chairman. The legislation would eliminate the requirement that rules be sent to Congress and instead would require submission only to GAO.

This change would make it easier for agencies to submit their rules electronically, which they cannot currently do to the House and Senate, and therefore could improve the rate of rule submission. H.R. 2247 was referred to the Senate Committee on Homeland Security and Governmental Affairs on June 2009 but it has not been acted on since then.

Congress could take other actions. For example, it could require GAO to continue identifying missing rules and could require OIRA to take certain actions to improve agencies' compliance with the CRA. Also, GAO could be required to provide Congress with a copy of its CRA compliance letters, publish them in the Federal register, or publish a list of missing rules on GAO's Web site.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions.

[The prepared statement of Mr. Copeland follows:]

PREPARED STATEMENT OF CURTIS W. COPELAND

Statement of
Curtis W. Copeland, Specialist in American National Government
Congressional Research Service

Before

The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives

July 27, 2010

on

"Federal Rulemaking and the Regulatory Process"

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify at today's hearing on "Federal Rulemaking and the Regulatory Process." You asked me to present the results of a CRS report[1] that I wrote on the implementation of the Congressional Review Act (CRA, 5 U.S.C. §§ 801-808), which was enacted to reestablish a measure of congressional authority over agency rulemaking.

Monitoring of CRA Rule Submission Requirement

The first sentence of the CRA (Section 801(a)(1)(A)) generally requires federal agencies to submit all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect.[2] Since the CRA was enacted in March 1996, GAO has received more than 53,000 rules, and maintains a public database of those rules.[3] At its own initiative, GAO has periodically compared the rules it receives with those published in the *Federal Register* to determine whether any rules covered by the CRA had not been submitted.

[1] CRS Report RL40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, by Curtis W. Copeland.
[2] The CRA delays the effective dates of rules that OIRA considers "major" even further—until 60 days after the date that the rules are published in the *Federal Register* or submitted to Congress, whichever is later. Among other things, the CRA defines a major rule as one that has or is expected to have an annual impact on the economy of $100 million or more.
[3] The GAO database is available at http://www.gao.gov/fedrules/.

Because the definition of a "rule" in the CRA is broader than those required to be published in the *Federal Register*, this check can reveal some, but not necessarily all, of the covered rules that have not been submitted.

GAO did the first of these checks in 1997, determining whether all of the rules published from October 1, 1996, to July 31, 1997, had been submitted to Congress and GAO.[4] GAO ultimately concluded that 279 covered rules published during this 10-month period had not been submitted, and in November 1997 provided a list of these rules to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).[5] GAO said that OIRA distributed this list to the affected agencies and told them to contact GAO if they had any questions.

In February 1998, because many of the rules remained unfiled, GAO said that it followed up with each agency that still had missing rules. In March 1998 testimony before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, GAO said that 264 of the 279 missing rules had subsequently been submitted.[6] GAO also said the following:

> We do not know if OIRA ever followed up with the agencies to ensure compliance with the filing requirement; we do know that OIRA never contacted GAO to determine if all rules were submitted as required.... In our view, OIRA should have played a more proactive role in ensuring that agencies were both aware of the CRA filing requirements and were complying with them.[7]

In December 1998, GAO published a notice in the *Federal Register* identifying "rules published by Federal agencies in the *Federal Register* that were not received by [GAO] prior to the announced effective dates."[8] The notice included all final and interim final rules covered by the CRA that were published between October 1, 1996, and December 31, 1997. GAO reported that more than 300 of these rules were not submitted to GAO prior to their effective dates. The Departments of Agriculture and Transportation, and the Federal Emergency Management Agency, issued about 60% of the rules that had not been submitted.[9] By the date of GAO's *Federal Register* notice (nearly one year after the end of the time period covered by the review), GAO said that it had received all of the rules.

OIRA Guidance on the CRA

In 1998, Congress directed OMB to issue guidance on certain requirements in the CRA, including the requirements in Section 801(a)(1)(A) regarding the submission of rules.[10] On January 12, 1999, the Director of OMB issued a memorandum to the heads of federal departments and agencies on "Submission of Rules under the Congressional Review Act" in which he noted that the CRA requires agencies to submit each new final rule to both houses of Congress and to GAO

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[4] U.S. General Accounting Office, *Congressional Review Act: Implementation and Coordination*, GAO/T-OGC-98-38, March 10, 1998, pp. 2-3.
[5] Ibid.
[6] Ibid.
[7] Ibid., p. 3.
[8] U.S. General Accounting Office, "Federal Agency Rules Filed Under Congressional Review Act Following General Accounting Office Review of Unfiled Rules," 63 *Federal Register* 71672, December 29, 1998. Until 2004, GAO was the General Accounting Office.
[9] The Department of Agriculture rules were primarily issued by the Federal Crop Insurance Corporation. The Department of Transportation rules were primarily issued by the Federal Aviation Administration. The Federal Emergency Management Agency's rules primarily involved flood elevation determinations.
[10] This requirement was included as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999 (P.L. 105-277, 112 Stat. 2681-495, October 21, 1998).

"before the rule can take effect."[11] The memorandum also included a form that OMB and GAO developed to facilitate the submission of agency rules.

On March 30, 1999, the OMB Director issued another memorandum to the heads of federal departments and agencies on "Guidance for Implementing the Congressional Review Act."[12] In that guidance, OMB said that "In order for a rule to take effect, you must submit a report to each House of Congress and GAO containing the following: a copy of the rule; a concise general statement related to the rule, including whether the rule is a 'major rule;' and the proposed effective date of the rule." According to OMB, this guidance is still in effect.[13]

GAO Letters to OIRA: 1999 through 2008

GAO continued to check agencies' compliance with the CRA in subsequent years, and repeatedly notified OIRA of rules that had not been submitted. For example:

- On September 21, 1999, GAO sent a letter to the Deputy Administrator of OIRA identifying 31 substantive regulations that were published in the *Federal Register* during calendar year 1998 that "have not been filed with us and, presumably, have also not been filed with the Congress."[14]
- On July 3, 2003, GAO sent a similar letter to the Deputy Administrator of OIRA identifying 322 substantive regulations that were published during calendar years 2001 and 2002 but had not been filed with GAO.[15]
- On March 21, 2005, GAO sent another letter to the Deputy Administrator of OIRA identifying 460 substantive regulations that were published during calendar years 2003 and 2004 but were not filed with GAO.[16]
- On May 27, 2008, GAO sent a letter to the Administrator of OIRA identifying 116 substantive regulations that were published during fiscal year (FY) 2007 but "have not been submitted to us as required by Section 801(a)(1)(A)."[17]

In each of these letters, GAO noted the rule submission requirement in Section 801(a)(1)(A) of the CRA, and said "We trust that your office will use this information to ensure that executive agencies fully comply with [CRA] requirements by filing regulations with both the Congress and GAO."[18] GAO officials said that OIRA did not respond to GAO with regard to any of these

[11] OMB Memorandum M-99-07, January 12, 1999, available from the author.
[12] OMB Memorandum M-99-13, March 30, 1999, available from the author.
[13] E-mail from Steven D. Aitken, Deputy General Counsel, OMB, November 9, 2009, available from the author.
[14] Letter from Kathleen E. Wannisky, Associate General Counsel for Operations, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, September 21, 1999, available from the author.
[15] Letter from Kathleen E. Wannisky, Managing Associate General Counsel, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, July 3, 2003, available from the author.
[16] Letter from Kathleen E. Wannisky, Managing Associate General Counsel, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, March 21, 2005, available from the author.
[17] Letter from Robert J. Cramer, Associate General Counsel, GAO, to Susan E. Dudley, Administrator, OIRA, May 27, 2008, available from the author.
[18] GAO said that it sent other letters and lists of rules to OIRA for other years between 1998 and 2008, but could not provide copies of those documents to CRS. GAO provided a copy of an April 10, 2001, letter to OIRA, but a referenced list of unfiled substantive rules (covering the period from January 1, 2000, through December 31, 2000) was not included.

letters, and GAO and OIRA officials said they were not aware of any effort by OIRA to contact federal agencies regarding the missing rules during the time periods covered by these letters.[19]

GAO's May 2009 Letter to OIRA

On May 26, 2009, GAO sent a letter to the Acting Administrator of OIRA stating that "a number of regulations have not been submitted to us as required by section 801(a)(1)(A) [of the CRA]."[20] Enclosed with the letter was a list of 101 substantive rules that were published in the *Federal Register* during FY2008 (i.e., October 1, 2007, through September 30, 2008) and that had not been submitted to GAO. As indicated in **Table 1** below, many different federal departments and agencies had issued the missing rules. However, the Departments of Agriculture, Commerce, Defense, Homeland Security, and Transportation, as well as the General Services Administration, each had more than five missing rules on the list, and collectively accounted for more than 60% of the missing rules.

Table 1. Number of Substantive Final Rules Not Received by GAO, FY2008

Department/Agency	Number of Rules Not Received
Department of Agriculture (USDA)	20
Department of Commerce (DOC)	8
Department of Defense (DOD)	7
Department of Health and Human Services (HHS)	3
Department of Homeland Security (DHS)	7
Department of Housing and Urban Development (HUD)	1
Department of the Interior (DOI)	3
Department of State (DOS)	4
Department of Transportation (DOT)	12
Department of the Treasury	5
Department of Veterans Affairs (DVA)	1
Executive Office of the President (EOP)	2
General Services Administration (GSA)	9
Peace Corps	2
Pension Benefit Guarantee Corporation	2
Small Business Administration (SBA)	3
Other agencies (one rule each)	12
Total	101

Source: Letter from GAO to OIRA, May 24, 2009.

[19] Telephone conversations with GAO and OIRA officials, November 2009. One former OIRA official said he had a vague recollection of contacting federal agencies and telling them to submit missing rules, but he could not provide any details. Telephone conversation with Donald Arbuckle, November 9, 2009.
[20] Letter from Robert J. Cramer, Managing Associate General Counsel, GAO, to Kevin F. Neyland, Acting Administrator, OIRA, May 26, 2009, available from the author.

The subjects covered by the 101 missing rules from FY2008 were also varied, and included the following:

- A November 2007 rule that was issued by DHS entitled "Appendix to Chemical Facility Anti-Terrorism Standards," which had been required by Section 550 of the Department of Homeland Security Appropriations Act of 2007 (P.L. 109-295, October 4, 2006).[21] Among other things, the rule made final a list of "chemicals of interest" (COI), adjusted the "screening threshold quantities" for certain COI, and defined the specific security issue or issues implicated by each COI.
- An October 2007 rule that was issued by the Food and Nutrition Service within USDA on "Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs."[22] According to the rule summary, it made "changes in a school food authority's responsibilities for proper procurement procedures and contracts, limits a school food authority's use of nonprofit school food service account funds to costs resulting from proper procurements and contracts, and clarifies a State agency's responsibility to review and approve school food authority procurement procedures and contracts."[23]
- An October 2007 rule that was issued by the Fish and Wildlife Service within DOI on "Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Guaj|oacute|n (Eleutherodactylus cooki)."[24] According to the rule summary, it designated critical habitat for the guajon (a rock frog endemic to Puerto Rico) under the Endangered Species Act of 1973, as amended.
- A November 2007 rule that was issued by the Farm Service Agency (FSA) within USDA on "Regulatory Streamlining of the Farm Service Agency's Direct Farm Loan Programs."[25] According to the rule summary, it "simplifies and clarifies FSA's direct loan regulations; implements the recommendations of the USDA Civil Rights Action Team; meets the objectives of the Paperwork Reduction Act of 1995; and separates FSA's direct Farm Loan Programs regulations from the Rural Development mission area's loan program regulations."[26]
- A December 2007 rule that was issued by the Equal Employment Opportunity Commission (EEOC) on "Age Discrimination in Employment Act: Retiree Health Benefits."[27] According to the rule summary, it allowed employers to "create, adopt, and maintain a wide range of retiree health plan designs, such as Medicare bridge plans and Medicare wrap-around plans, without violating the

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[21] U.S. Department of Homeland Security, "Appendix to Chemical Facility Anti-Terrorism Standards," 72 *Federal Register* 65396, November 20, 2007. For detailed information on this issue, see CRS Report R40695, *Chemical Facility Security: Reauthorization, Policy Issues, and Options for Congress*, by Dana A. Shea.

[22] U.S. Department of Agriculture, Food and Nutrition Service, "Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs, 72 *Federal Register* 61479, October 31, 2007.

[23] Ibid., p. 61479.

[24] U.S. Department of the Interior, Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Guaj|oacute|n (Eleutherodactylus cooki)," 72 *Federal Register* 60068, October 23, 2007.

[25] U.S. Department of Agriculture, Farm Service Agency, "Regulatory Streamlining of the Farm Service Agency's Direct Farm Loan Programs," 72 *Federal Register* 63242, November 8, 2007.

[26] Ibid., p. 63242.

[27] U.S. Equal Employment Opportunity Commission, "Age Discrimination in Employment Act: Retiree Health Benefits," 72 *Federal Register* 72938, December 26, 2007.

Age Discrimination in Employment Act of 1967 (ADEA). To address concerns that the ADEA may be construed to create an incentive for employers to eliminate or reduce retiree health benefits, EEOC is creating a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program."[28]

- A December 2007 rule that was issued by the Office of Thrift Supervision (OTS) within the Department of the Treasury on "Permissible Activities of Savings and Loan Holding Companies."[29] One of the stated purposes of the rule is to "expand the permissible activities of savings and loan holding companies (SLHCs) to the full extent permitted under the Home Owners' Loan Act (HOLA)." The rule also amended the agency's existing requirements "to conform the regulation to the statute that it is intended to implement, and to set forth standards that OTS will use to evaluate applications submitted pursuant to the statutory application requirement."[30]
- A February 2008 rule that was issued by the National Oceanic and Atmospheric Administration (NOAA) within DOC on "Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon."[31] According to the rule summary, it was a "final determination to list the Oregon Coast coho salmon (Oncorhynchus kisutch) evolutionarily significant unit (ESU) as a threatened species under the Endangered Species Act (ESA)." The agency said it was "also issuing final protective regulations and a final critical habitat designation for the Oregon Coast coho ESU."[32]
- A February 2008 rule that was issued by the Bureau of Land Management (BLM) within DOI on "Oil and Gas Leasing: National Petroleum Reserve – Alaska" (NPR-A).[33] According to the summary, the rule "amends the administrative procedures for the efficient transfer, consolidation, segregation, suspension, and unitization of Federal leases in the NPR-A. The rule also changes the way the BLM processes lease renewals, lease extensions, lease expirations, lease agreements, exploration incentives, lease consolidations, and termination of administration for conveyed lands in the NPR-A. Finally, the rule makes the NPR-A regulation on additional bonding consistent with the regulations that apply outside of the NPR-A."[34]
- An April 2008 rule issued by NOAA's National Marine Fisheries Service on "Endangered and Threatened Species: Designation of Critical Habitat for North

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[28] Ibid., p. 72938.
[29] U.S. Department of the Treasury, Office of Thrift Supervision, "Permissible Activities of Savings and Loan Holding Companies," 72 *Federal Register* 72235, December 20, 2007.
[30] Ibid, p. 72235.
[31] U.S. Department of Commerce, National Oceanic and Atmospheric Administration, "Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon," 73 *Federal Register* 7816, February 11, 2008.
[32] Ibid, p. 7816.
[33] U.S. Department of the Interior, Bureau of Land Management, "Oil and Gas Leasing: National Petroleum Reserve – Alaska," 73 *Federal Register* 6430, February 4, 2008.
[34] Ibid., p. 6430.

Pacific Right Whale."[35] According to the rule summary, the "North Pacific right whale was recently listed as a separate, endangered species, and because this was a newly listed entity, we were required to designate critical habitat for it."[36]

- A June 2008 rule that was issued by the Office of the Secretary within DHS on "Procedures for Transportation Workplace Drug and Alcohol Testing Programs."[37] According to the summary, the rule amends certain provisions of its drug and alcohol testing procedures to "change instructions to collectors, laboratories, medical review officers, and employers regarding adulterated, substituted, diluted, and invalid urine specimen results. These changes are intended to create consistency with specimen validity requirements established by the U.S. Department of Health and Human Services and to clarify and integrate some measures taken in two of our own Interim Final Rules. This Final Rule makes specimen validity testing mandatory within the regulated transportation industries."[38]
- A July 2008 rule that was issued by the Transportation Security Administration within DHS on "False Statements Regarding Security Background Checks."[39] According to the rule summary, it codifies statutory provisions that "prohibit public transportation agencies, railroad carriers, and their respective contractors and subcontractors from knowingly misrepresenting Federal guidance or regulations concerning security background checks for certain individuals."[40]
- A September 2008 rule issued by the National Highway Traffic Safety Administration (NHTSA) within DOT on "Nonconforming Vehicles Decided to be Eligible for Importation."[41] According to the rule summary, it "revises the list of vehicles not originally manufactured to conform to the Federal motor vehicle safety standards (FMVSS) that NHTSA has decided to be eligible for importation."[42]

OIRA's Reaction to GAO's May 2009 Letter

When contacted by CRS in October 2009, OIRA initially said that it had no record of having received the May 2009 letter from GAO.[43] However, on November 12, 2009, the Deputy Administrator of OIRA sent an e-mail to federal agencies saying that it "had come to my attention that your agency may not have submitted final rules to Congress and to [GAO] as required by the

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[35] U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, "Endangered and Threatened Species; Designation of Critical Habitat for North Pacific Right Whale," 73 *Federal Register* 19000, April 8, 2008.
[36] Ibid., p. 19000.
[37] U.S. Department of Homeland Security, Office of the Secretary, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 *Federal Register* 35961, June 25, 2008.
[38] Ibid., p. 35961.
[39] U.S. Department of Homeland Security, Directorate of Border and Transportation Security, Transportation Security Administration, "False Statements Regarding Security Background Checks," 73 *Federal Register* 44665, July 31, 2008.
[40] Ibid., p. 44665.
[41] U.S. Department of Transportation, National Highway Traffic Safety Administration, "List of Nonconforming Vehicles Decided to be Eligible for Importation," 73 *Federal Register* 56741, September 30, 2008.
[42] Ibid., p. 56741.
[43] Telephone conversation with OIRA and OMB officials, November 6, 2009. However, GAO officials subsequently told CRS that GAO had evidence that OIRA had received the list of missing rules by at least June 2009.

Congressional Review Act." He urged the agencies to "contact the GAO to determine which rules they have not yet received from your agency." (The Deputy Administrator did not, however, provide the agencies with a list of the missing rules, either overall or for their agency.) He also noted in the e-mail that "agencies must submit all final rules to Congress before they can take effect," and provided the agencies with a copy of OMB's 1999 guidance on the CRA.

The following week, representatives from GAO's Office of the General Counsel told CRS that federal agencies had begun submitting some of the missing rules listed in the May 2009 letter.[44] Nevertheless, as of July 13, 2010, GAO's database indicated that 49 of the 101 rules listed in GAO's May 2009 letter still had not been submitted. Many of the rules that had been submitted were not received at GAO until 2010 — in some cases more than two years after they were published in the *Federal Register*.

GAO's January 2010 Letter to OIRA

On January 19, 2010, GAO sent a letter to the OIRA Administrator identifying 31 substantive regulations that were published during FY2009 and that had not been submitted to GAO.[45] In the letter, GAO said "we appreciate recent efforts made by your office to encourage executive agencies to comply with the requirements of 5 U.S.C. § 801(a)(1)(A), and would be pleased to discuss ways in which we can work together to ensure that agencies comply fully with CRA requirements by submitting rules both to Congress and to GAO." GAO also reportedly sent separate letters to each of the agencies that had missing rules, along with a listing of the rules that had not been received from each agency. GAO said it did so to avoid having to respond to subsequent inquiries from the agencies about what rules were missing.[46]

The list of rules enclosed with the letter indicated that 14 of the 31 missing rules had been issued by USDA, including 4 rules each from the department's Commodity Credit Corporation and Forest Service. Seven other missing rules had been issued by SBA; however, the agency reportedly contended that it had previously submitted the rules, and later submitted other copies to GAO.[47] Other departments and agencies with rules on the GAO list included DOT (three rules); and DOC, DOE, HUD, DOL, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Social Security Administration (one rule each).

Although the CRA requires agencies to submit all of their covered rules to GAO and Congress before they can take effect, GAO said that the list of 31 missing rules included only "substantive" regulations, and "does not include items such as technical amendments to regulations previously published in the *Federal Register*." Several of the missing rules were considered "significant" under Executive Order 12866 (a priority category higher than "substantive"),[48] and therefore had been reviewed by OIRA before being published in the *Federal Register*.[49] These included:

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[44] GAO said it was not aware that OIRA had previously urged agencies to contact GAO regarding their missing rules. Telephone conversation with Shirley Jones, Assistant General Counsel, Government Accountability Office, November 18, 2009.

[45] Letter from Robert J. Cramer, Managing Associate General Counsel, GAO, to Cass R. Sunstein, Administrator, OIRA, January 19, 2010. A copy of this letter is available from the author.

[46] Telephone conversation with Sabrina Streagle, GAO's Office of the General Counsel, February 24, 2010.

[47] Ibid.

[48] In the Unified Agenda of Federal Regulatory and Deregulatory Actions, rules are placed into one of five priority categories. From highest to lowest, those categories are: (1) economically significant (which is essentially the same as "major" under the CRA); (2) other significant; (3) substantive, nonsignificant; (4) routine and frequent; and (5) informational or administrative.

[49] The President, Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. Section 3(f) of the order defines a "significant" rule as one that may "(1) Have an annual

- A December 2008 rule issued by the USDA Commodity Credit Corporation that extended the Milk Income Loss Contract (MILC) Program from October 1, 2007, through September 30, 2012.[50] USDA said that the rule also adjusted the milk price support program regulations to specify that support purchases will only be made from manufacturers and not from third parties such as brokers. Expenditures under the program for the authorized period were estimated at between $300 million and $400 million.
- A December 2008 SBA rule on the "lender oversight program" that (among other things) codified the agency's process of risk-based oversight, including "accounting and reporting requirements; off-site reviews/monitoring; on-site reviews and examinations; and capital adequacy requirements."[51]

Other missing rules appeared substantive in nature, even though they were not considered "significant" under the executive order. One such rule, issued by the Animal and Plant Health and Inspection Service within USDA in October 2008, amended and republished the "list of select agents and toxins that have the potential to pose a severe threat to animal or plant health, or to animal or plant products."[52] The action was required by the Agricultural Bioterrorism Protection Act of 2002 (P.L. 107-188).

OIRA's Response to GAO's Letter

In March 2010, a representative from GAO's office of the general counsel said that OIRA had not responded to GAO's January 2010 letter to the OIRA Administrator.[53] She also said that GAO was unaware of any actions by OIRA to contact agencies regarding the missing rules. However, OIRA officials said that after receiving GAO's January 2010 letter, the Deputy Administrator of OIRA sent another e-mail to federal agencies that reminded them of their obligation to submit their rules to GAO and Congress, and provided another copy of OMB's 1999 guidance on the CRA.[54] They also said that OIRA planned to send similar e-mails twice each year to agency regulatory officials, and planned to give GAO a list of those agency officials so that GAO could resolve any concerns about unsubmitted rules more quickly. Finally, OIRA officials said that they

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effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

[50] U.S. Department of Agriculture, Commodity Credit Corporation, "Milk Income Loss Contract Program and Price Support Program for Milk," 73 *Federal Register* 73764, December 4, 2008.

[51] U.S. Small Business Administration, "Lender Oversight Program," 73 *Federal Register* 75498, December 11, 2008.

[52] U.S. Department of Agriculture, Animal and Plant Health Inspection Service, "Agricultural Bioterrorism Protection Act of 2002; Biennial Review and Republication of the Select Agent and Toxin List," 73 *Federal Register* 61325, October 16, 2008.

[53] E-mail from Sabrina Streagle, Office of the General Counsel, GAO, March 15, 2010.

[54] Telephone conversation with Michael Fitzpatrick, OIRA associate administrator, and Kevin Neyland, OIRA deputy administrator, March 15, 2010.

planned to raise the issue of compliance with the CRA at meetings of the Regulatory Working Group.[55]

As of July 23, 2010 — more than six months after GAO's January 2010 letter to OIRA — 3 of the 31 rules listed as missing in GAO's January 2010 letter had still not been submitted to GAO. The three rules were the following:

- A November 2008 rule issued by the Veterans Employment and Training Service within DOL that (among other things) revised the requirement that federal contractors track and annually report the number of employees in their workforces who are veterans covered under the law.[56]
- A December 2008 rule issued by the USDA's Rural Utilities Service that established a "unified guaranteed loan platform for the enhanced delivery of four existing Rural Development guaranteed loan programs — Community Facility; Water and Waste Disposal; Business and Industry; and Renewable Energy Systems and Energy Efficiency Improvement Projects."[57] The rule also incorporated provisions "that will enable the Agency to better manage the risk associated with making and servicing guaranteed loans and that will reduce the cost of operating the guaranteed loan programs."[58] This rule was considered "significant" under Executive Order 12866 and was reviewed by OIRA.
- A September 2009 rule issued by HUD on the department's Home Equity Conversion Mortgage (HECM) program.[59] Among other things, the rule established "testing standards to qualify individuals as HECM counselors eligible to provide HECM counseling to prospective HECM borrowers." According to the department, HECM counseling enables elderly homeowners to make more informed decisions when considering mortgage options and whether to pursue a HECM loan.

Concluding Observations

Agency regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. Therefore, Congress has a vested interest in overseeing the regulations that agencies issue pursuant to those statutes. Because congressional authority over agency rulemaking was believed to have waned in recent decades (while presidential authority over rulemaking had increased), the CRA was enacted in an attempt to reclaim a measure of congressional control.[60] Although Congress can learn about the issuance of agency rules in many ways, the requirement in Section 801(a)(1)(A) of the CRA that agencies submit all of their final rules to GAO and Congress before they can take effect helps to ensure that Congress will have an opportunity to review, and possibly disapprove of, agency rules.

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[55] The Regulatory Working Group was established by Section 4(d) of Executive Order 12866, and is composed in part of representatives from each agency that the OIRA administrator determines to have "significant regulatory responsibility."

[56] U.S. Department of Labor, Veterans Employment and Training Service, "Annual Report from Federal Contractors," 73 *Federal Register* 65766, November 5, 2008.

[57] U.S. Department of Agriculture, Rural Utilities Service, "Rural Development Guaranteed Loans," 73 *Federal Register* 76698, December 17, 2008.

[58] Ibid.

[59] U.S. Department of Housing and Urban Development, "Home Equity Conversion Mortgage (HECM) Counseling Standardization and Roster," 74 *Federal Register* 45311, September 2, 2009.

[60] Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996), at 142 *Cong. Rec.* S3683.

Notwithstanding this requirement, GAO said that it did not receive more than 1,000 final rules between 1999 and 2009. It is possible that some of these rules were submitted by the rulemaking agencies, and were missing because of problems with the receipt of the rules by GAO or Congress. However, because neither GAO nor either house of Congress received many of these rules,[61] it seems more likely that the agencies did not submit them as required by the CRA.

The CRA says that a Member of Congress can introduce a joint resolution of disapproval regarding a rule "beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress."[62] Therefore, by not submitting these rules to Congress, the rulemaking agencies have arguably prevented Congress from using the expedited disapproval authority that is provided for in the CRA.[63] The fact that Congress has used the CRA to disapprove only one rule since the legislation was enacted[64] does not lessen agencies' responsibilities to submit their rules in accordance with the act's requirements.

Effective Dates and Judicial Review

As noted previously, Section 801(a)(1)(A) of the CRA says that covered rules cannot take effect until they are submitted to both GAO and both Houses of Congress. A key sponsor of the legislation, Representative David McIntosh, explained during the floor debate on the bill that would become the CRA (H.R. 3136 in the 104th Congress) that "Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress."[65] The same day, Senator Don Nickles, another sponsor of the bill, said that "Upon issuing a final rule, a Federal agency must send to Congress and GAO a report containing a copy of the rule."[66] A separate joint statement by the principal sponsors of the CRA that was published in the *Congressional Record* shortly after enactment stated that "any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A)."[67]

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[61] CRS examined the House and Senate executive communication databases on October 26, 2009, which indicated that 80 of the 101 rules that GAO identified in its May 2009 letter to OIRA had not been received by the House of Representatives, and 81 had not been received by the Senate.

[62] 5 U.S.C. §802(a).

[63] Congress can also use its regular legislative procedures to overturn agency rules, and has also prevented certain rules from being issued or made final through appropriations restrictions. See CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland. Most of the expedited procedures in the CRA are only applicable to the Senate.

[64] In 2001, Congress disapproved a rule on ergonomics in the workplace. See U.S. Department of Labor, Occupational Safety and Health Administration, "Ergonomics Program," 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

[65] 142 *Cong. Rec.* H3005 (daily ed. March 28, 1996).

[66] 142 *Cong. Rec.* S3120 (daily ed. March 28, 1996).

[67] Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3684 (daily ed. April 18, 1996). The Justice Department has suggested that such post-enactment legislative history should not carry any weight. (See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at 10 n.14.) Similarly, the Supreme Court has said that "less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment." (Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980). In this case, the "subsequent legislative history" was a conference report for legislation that was being considered after the enactment of an earlier statute.) On the other hand, the Supreme Court has also described post-enactment statements by legislative sponsors as an

Nevertheless, it appears that agencies have implemented some, if not all, of the missing rules. Some of the rules have not been submitted for years. For example, of the 31 missing rules that GAO identified in its 1999 letter to OIRA, 24 were not listed in the GAO database in November 2009—more than 10 years after they were published and scheduled to go into effect. Of the seven rules that were later submitted, some were not received at GAO until years after they were published and scheduled to go into effect.

Section 805 of the CRA states that "No determination, finding, action, or omission under this chapter shall be subject to judicial review." The joint statement said that this provision meant that "the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter." The joint statement went on to say that "The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3)."[68] The issue of whether a court may prevent an agency from enforcing a covered rule that was not reported to Congress has not been resolved conclusively.[69]

Some of the missing rules were interim final or direct final rules, or were final rules in which the agencies specifically invoked the "good cause" exception to the notice and comment requirements in the Administrative Procedure Act.[70] Section 808 of the CRA states that agencies can make their rules effective "at such time as the Federal agency promulgating the rule determines" when the agency invokes the good cause exception. Therefore, in these cases, the agencies would appear to be able to put the rules into effect even though they had not been submitted to GAO and Congress. However, the joint statement by the sponsors of the CRA that was published in the *Congressional Record* shortly after enactment states that even these rules must be submitted to GAO and Congress "as soon as practicable after promulgation" to permit the congressional review period to begin.[71]

OIRA and GAO Actions

The CRA currently assigns both GAO and OIRA limited roles in the rule submission process. OIRA is required to determine which rules are "major," and GAO is to write a report on each major rule within 15 calendar days. GAO has voluntarily taken on the task of determining whether it has received all of the rules published in the *Federal Register*, and has periodically

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"authoritative guide to the statute's construction." (See, for example, North Haven Bd. of Education v. Bell, 456 U.S. 512, 526-27 (1982) (citing a bill summary placed in the Congressional Record by the bill's sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983)(relying on a 1965 explanation by "an important figure in the drafting of the 1957 [Atomic Energy Act]"); and *Grove City College v. Bell*, 465 U.S. 555, 567 (1984) (remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).)

[68] Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996).

[69] For an analysis of the legal uncertainty adhering to an agency's failure to report a covered rule to Congress, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg, pp. 28-34.

[70] See 5 U.S.C. §553(b)(3)(B). When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. A federal agency's invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review.

[71] Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3684 (daily ed. April 18, 1996).

notified OIRA of any missing rules. However, OIRA did not respond directly to GAO regarding most of these letters. Also, GAO has not sent Congress copies of its letters to OIRA, or otherwise informed Congress about the scope of this issue. It has also not provided the public with a list of these missing rules since 1998.

Congressional Options

Congress may conclude that agencies' non-submission of rules as required by the CRA is not a serious issue, or that it is an issue that can be left to GAO, OIRA, and federal agencies to resolve. Also, GAO's January 2010 letter to OIRA listed only 31 missing rules during FY2009, indicating that the problem may be getting better as a result of recent administrative actions. However, should Congress decide to address this issue, several options are available.

Current Legislation

On June 16, 2009, the House of Representatives passed H.R. 2247, the "Congressional Review Act Improvement Act," which you sponsored, Mr. Chairman. The bill would amend the CRA and eliminate the requirement that federal agencies submit their covered rules and related reports to both Houses of Congress before such rules can take effect. On June 17, 2009, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. No action has been taken regarding the legislation since that date.

If H.R. 2247 is enacted, covered rules and reports would still have to be submitted to GAO, and GAO would be required to submit to each House a weekly report containing a list of the rules received, including a notation identifying each major rule. The Speaker of the House of Representatives would be required to publish the GAO report in the *Congressional Record*. The House of Representatives passed identical legislation during the 110th Congress (H.R. 5593), but the Senate did not act on the bill before the end of the 110th Congress.

According to the report on H.R. 2247 by the House Committee on the Judiciary, the bill "would reduce reporting requirements for agencies that submit information to the legislative branch under the Congressional Review Act (CRA)."[72] Currently, agencies "must often resort to hand-delivering the required materials by courier to the House and Senate, in order to comply with the CRA and the standards regarding communications transmitted to Congress. Materials are frequently returned to the promulgating agency for failure to comply with the CRA or these other congressional requirements, delaying implementation of the rule."[73]

It is possible that elimination of the requirement that agencies submit their rules and related reports to the House and the Senate could increase the ability and willingness of agencies to submit their rules to GAO, either electronically or otherwise.[74] However, fewer FY2008 missing

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[72] U.S. Congress, House Committee on the Judiciary, *Congressional Review Act Improvement Act*, report to accompany H.R. 2247, 111th Cong., 1st sess., H.Rept. 111-150 (Washington: GPO, 2009), p. 5.
[73] Ibid., p. 3.
[74] GAO has said that it has been able to receive CRA-covered rules and reports electronically since 1999, but that most agencies do not do so because they must submit paper copies to the House and the Senate. See U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268, November 6, 2007, p. 3. Also, in its May 27, 2008, letter to the Administrator of OIRA, GAO noted that Congress was considering amendments to the CRA that would eliminate the requirement that agencies submit rules to the Senate and the House of Representatives (H.R. 5593, 110th Congress), and said if the bill was enacted into law, "we would welcome the opportunity to work with your office and federal agencies to implement the law and make greater use of electronic submission of rules to our Office." Letter from Robert J. Cramer, Associate General Counsel, GAO, to Susan E. Dudley, Administrator, OIRA, May 27, 2008, available from the author.

rules were submitted to GAO than to either the House or the Senate.[75] Therefore, enactment of H.R. 2247 could have little effect on agencies' compliance with the CRA's reporting requirements.

Other Options

Should Congress want to take other actions to improve reporting of covered rules, it could (among other things) (1) require GAO to continue to compare the rules it receives with the rules that are published in the *Federal Register*, (2) require GAO to continue to report any missing rules to OIRA, and (3) require OIRA or GAO to take other action to encourage agencies to comply with the CRA's reporting requirements. For example, GAO has said in the past that it follows up with the agencies regarding any major rules that are missing.[76] Congress could require GAO to contact the agencies for the missing non-major rules as well, or could require OIRA to contact the agencies. GAO and OIRA have each taken action in the past to contact individual agencies regarding these missing rules, and could be required to do so again.[77] Both GAO and OIRA have, however, indicated to CRS that they currently have limited resources to take ou additional responsibilities for CRA compliance enforcement.

OIRA played a somewhat similar role in improving agencies' compliance with the Paperwork Reduction Act (PRA), which specifically requires OIRA to provide direction and oversee agencies' information collection requests.[78] In its annual reports to Congress on the implementation of the PRA in the late 1990s and early 2000s, OIRA reported that there were hundreds of violations of the act each year (i.e., agencies collecting information without OIRA approval, or collecting information after such approvals had expired). For example, OIRA reported that there were 872 violations of the PRA in FY1998, and 710 in FY1999. GAO included information on these violations in its annual testimonies on the implementation of the PRA.[79] In 2001, OIRA began a concerted effort to drive down the number of violations, requiring agencies to establish procedures to ensure that information was not collected without OIRA authorization.[80] By 2003, OIRA reported that there were only 18 PRA violations government-wide.[81]

OIRA is described in Executive Order 12866 as "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory priorities."[82] The executive order also says that the Administrator of OIRA "shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law...."[83] OIRA is also uniquely positioned both within OMB (with its budgetary influence) and within the federal rulemaking process (reviewing and commenting on rules just before they are published in the *Federal Register*) to enable it to

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[75] As noted previously, 80 of the 101 rules that GAO identified in its May 2009 letter to OIRA had not been received by the House of Representatives, and 81 had not been received by the Senate

[76] See U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268, November 6, 2007, p. 3.

[77] As noted earlier in this report, GAO said that it and OIRA contacted individual agencies regarding missing rules in 1998.

[78] 44 U.S.C. §3504(a)(1)(B).

[79] See, for example, U.S. General Accounting Office, *Paperwork Reduction Act: Burden Increases at IRS and Other Agencies*, GAO/T-GGD-00-114, April 12, 2000.

[80] See http://www.whitehouse.gov/omb/assets/omb/inforeg/pra_memo111401.pdf.

[81] See http://www.whitehouse.gov/omb/assets/omb/inforeg/compliance_pra092704.pdf.

[82] The President, Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Section 2(b).

[83] Ibid., Section 6(b).

exert maximum influence on federal agencies. In 1998, Congress directed OIRA to issue guidance on the implementation of the CRA, and that guidance is still in effect. Therefore, OIRA could play an integral role in ensuring compliance with the CRA and implementation of the President's and Congress' regulatory priorities.

Also, GAO could be required to provide a copy of its CRA compliance reports to Congress, publish the reports in the *Federal Register*, or both. Providing the reports of missing rules to Congress would give Congress a clearer sense of how the CRA is being implemented, and could permit Congress to conduct oversight of agencies compliance with the act. Publishing the lists of missing rules in the *Federal Register* could provide an incentive to the agencies to comply with the CRA.

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Mr. Chairman, that concludes my prepared testimony. I would be happy to answer any questions that you or other Members of the Subcommittee might have.

Mr. COHEN. Thank you for your testimony and your service. You mentioned my bill, H.R. 2247, that went through, I think, on the suspension calendar but didn't have—I don't think—not heard.

What is the Senate's problem?

Mr. COPELAND. I don't know. I have not been in contact with folks in the Senate.

Mr. COHEN. Does anybody know what the Senate's problem is, either in a universal way or in a specific way relating to this bill?

Mr. FRANKS. Takes more than a hearing. [Laughter.]

Mr. COHEN. Ms. Katzen, you suggested something about extending these rules to the independent agencies—the SEC and the Fed and et cetera. All this stuff generally has been done through executive orders. Has there ever been legislation proposed to do such?

Ms. KATZEN. There has been legislation proposed both to codify the executive order and to other aspects of it. It could be done under the existing executive order. It could be done not directly, the way OIRA currently reviews executive branch agencies, where they say yea, nay, and it is done mostly through negotiations.

But when Congress enacted the Paperwork Reduction Act, which applies to government forms for both executive branch agencies and the independent regulatory commissions, they said that while OIRA could review executive branch paperwork directly the decision with respect to paperwork was to be sent to the agency or the commission or the board, which could void any disapproval by a full meeting, presumably in public, under the Sunshine Act, and the reasons therefore.

A similar type of review could be applied here, whereby OIRA would send to the SEC its written comments, they would be presented in an open meeting of the SEC, and the SEC would have to vote as a commission whether to accept or reject. This would enhance not only the transparency process, but should also lead to better decision-making, because if you look at the rules proposed by independent regulatory commissions they do not do, as a general rule, the type of rigorous analysis that has come to be expected for and accepted by executive branch agencies. So bringing them into the fold should enhance their analytical ability——

Mr. COHEN. I understand your proposition, but how do you effectively get that into law? Are they doing anything about it? Are they recommending it, or is there any action taking place right now?

Ms. KATZEN. There is no action taking place that I know of. When President Obama, in January 30, 2009, called for comments on a potential new executive order this was—subject was discussed by some of the commentators. But since we haven't seen an executive order it could be an OMB memorandum.

It could also be done, as you suggest, through legislation, whereby OIRA would be authorized to have this type of oversight——

Mr. COHEN. Just from your general overall knowledge of politics and the world do you think that would be something that would be a bipartisan effort? Would there be any reason anybody would object to that?

Ms. KATZEN. You mentioned at the outset "separation of powers," and there are many in Congress, on both the sides of the aisle, who feel strongly that the independent regulatory commissions are independent of the President and more the stepchildren of Congress and might well be suspicious, if not hostile or resistant, to——

Mr. COHEN. So Ron Paul is not going to vote for this?

Ms. KATZEN. I don't think I could predict where his votes would lie, but it is an issue. I am not saying it is unsurmountable, and in fact, you could get bipartisan support. I noticed that some of

your colleagues on this panel listened with interest as I described the situation. But I don't know that it is a—dare I use the expression—slam dunk.

Mr. COHEN. Yes. I understand that. Obviously it isn't because Mr. Franks has already indicated he is not going to—he is going to, you know, beat Bill Russell—slam dunk.

Dr. Williams, you mentioned, and some other people did, how Mr. Sunstein has not—and I think Mr. Jordan's question—rejected any of the rules. Could it not be possible that the agencies are just doing a much better job in proposing their rules and nothing really needs to be summarily rejected?

Mr. WILLIAMS. In my opinion that is unlikely.

Mr. COHEN. But it is possible.

Mr. WILLIAMS. Anything is possible.

Mr. COHEN. And Dr. Bass, would you say it is possible or unlikely?

Mr. BASS. I think it is quite possible.

Mr. COHEN. Dr. Copeland, from possible to unlikely?

Mr. COPELAND. Could you repeat the question? I was looking at the numbers.

Mr. COHEN. The fact that they haven't summarily dismissed and rejected these letters to say, "Hey, not going to do it," could the agencies be doing a better job in promulgating their rules and regulations such that they are not inconsistent with the Administration's policy objectives and they are creating jobs and they are doing, you know, America's work?

Mr. COPELAND. Certainly possible. If the quality of the rules coming in the door are better then the number of rejections would certainly go down.

Mr. COHEN. Thank you.

And Ms. Katzen, to close?

Ms. KATZEN. First of all, during the last 20 years there has been an OIRA, and so the agencies have gotten better at doing their job. The second data point is that even during the Bush administration—that would be the George W. Bush administration—the Administrator started off with a roar and returned more regulations in that first couple of months than had ever been returned even during the Reagan years, and then there were none sent back. It stopped.

Usually the rejections, as you call them, or the returns, are to get the agency's attention and say, "You are going to have to live up to our standards and talk to us about what you are doing." And once that message is received—and it can be received with a stick or a carrot—then the agencies normally do come to the table. So I would say it is definitely possible that the agencies are doing a much better job.

Mr. COHEN. Thank you. Thank you.

Dr. Williams, you had talked about the repent in leisure. Was that some type of anti-marriage statement?

Mr. WILLIAMS. No, sir. It was not.

Mr. COHEN. Okay. Thank you, sir. I knew it wasn't.

Mr. Franks, you are recognized.

Mr. FRANKS. You mean a rejection actually got their attention? I think that is an epiphany that we should all dwell on.

Well, Dr. Williams, I appreciate your comments today and the fact that you would be so open-minded as to say it is possible that no regulations at this point need to be changed because of this epiphany that the agencies have come to. I think it is mighty broad-minded of you and I think it is really reaching.

But I guess my question to you, sir: The White House chief of staff has said that the President is beginning his own personal review of whether there are things that the agency rules could do in a more—you know, these agency rules could be done in a more sensible way, that, to use his "in a more sensible way."

And you heard Professor Sunstein's defense of the White House earlier today. What do you think President Obama needs to do or to look at to determine whether the regulations under his Administration could be done in a more sensible way, other than resign?

Mr. WILLIAMS. Sir, I think the first thing that they can do is to make sure that for all significant regulations that they actually have a regulatory impact analysis. As I mentioned in my testimony, even for economically significant regulations—that is those that cost the economy over $100 million in either costs or benefits produced—one in five didn't have any sort of analysis at all.

I think you also find, if you look at the independent agencies, the Federal Reserve produced six economically significant rules within the last year or 2. They produced zero economic analyses.

So the first thing is to make sure the analyses are there. The second thing they can do is they have got to take the time to review those analyses or review those regulations. They are large; some of them are many thousands of pages.

There was one regulation on OMB's Web site that costs over $1 billion. It was reviewed in 1 day by OIRA. They simply have to take more time than that to review those regulations.

And finally, as I mentioned in my testimony, many of the decision-makers in regulatory agencies—and I know this from my own personal experience—basically discount regulatory impact analyses and its findings. They make their decision and then they turn around and they ask their economists, "Can you please produce an analysis that supports my decision?"

Well, when you work for those decision-makers it is pretty difficult to say no to that request, and what that ends up doing is it ends up producing a weak analysis that informs no one. The way you get around that is you have to return rules. That tends to wake decision-makers up that says, "We need to have good analysis and you need to pay some attention to it."

Mr. FRANKS. All right, let me just make sure I understood what you said. As far as the returning of rules, Mr. Sunstein suggested that he done any of that, but earlier in your testimony you said as far as economic analysis that even that started out strong and then it hasn't been done since. Can you give me the chronology of that again?

Mr. WILLIAMS. Yes. Well, we first started doing really significant economic analysis in 1981 with President Reagan's executive order and we were doing strong regulatory impact analyses. As OIRA moved more and more into overseeing regulatory agencies, became a stronger oversight agency, there was more and more of a demand

for better analysis, and when that didn't happen rules were returned.

And with every new—and, you know, every 4 years we got new political decision-makers. We sort of needed that—we sort of needed those returns in order for them to wake up and go, "This analysis is important. This is what the President—this is how the President is directing us to make decisions."

That tended to change their behavior. They tended to pay more attention to those analyses and we got better analyses which informed not just them but the Congress and the American public.

I am concerned where we have gone now nearly 2 years without a single return of rules. My suspicion, sir, would be that, in fact, regulator, impact analyses are worse, not better.

Mr. FRANKS. Well, it sounds like you may have some potential resonance on the rest of the panel here—not all of them, so we will try not to get anybody to jump out of their chair here, but that there is some at least acknowledgement of your point.

And what would you recommend to the President, to OIRA, do to assure that regulations and regulatory uncertainty do not paralyze business and prevent them from creating jobs? I have just got to tell you, I know I hit on that point a lot, but business has some realities to deal with and that seems to be one of the—you know, there is nothing so tragic in this life as a beautiful liberal theory that is totally destroyed by an unruly set of facts, but it happens so often.

And in this case, what do you think could be done to keep from paralyzing the job market?

Mr. WILLIAMS. I think several things: First of all, ensure that regulatory agencies actually are addressing a systemic problem, make sure that they identify that, make sure that they have a solution. I spoke with many businesses in the food industry, they said they are happy to comply with regulations. They want to make sure, though, that they work, that they are addressing a real problem——

Mr. FRANKS. What a novel idea.

Mr. WILLIAMS [continuing]. And that they work.

I think the other thing, as Ms. Katzen mentioned, is that you need to make sure in some way or another that the independent agencies are performing those analyses as well.

Mr. FRANKS. Mr. Chairman, my time is expired. Thank you.

Mr. COHEN. I would like to thank all the witnesses for their testimony today, and without objection the Members have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask you to promptly respond. Without objection the record will remain open for those 5 legislative days for the submission of any additional material.

Again, I thank everyone for their time and patience. This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 12:36 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS FROM CASS R. SUNSTEIN, ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA), EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Federal Rulemakiug and the Regulatory Process
July 27, 2010

Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

Questions from the Honorable Trent Franks, Ranking Member

1) **What steps have you and your staff at the Office of Iuformatiou and Regulatory Affairs (OIRA) taken to assure that federal regulations do not adversely impact the ability of businesses to create jobs?**

   Through careful consideration of costs, including costs on business, OIRA works to reduce the potential adverse impacts of regulations on economic growth and jobs. OIRA reviews carefully each regulatory action for consistency with the requirements of Executive Order 12866. Among other things, that Executive Order requires attention to both costs and benefits and explicitly notes "that the private sector and private markets are the best engine for economic growth." The Executive Order also states that each agency "shall design its regulations in the most cost-effective manner to achieve the regulatory objective." OIRA reviews regulations for consistency with these principles.

2) **Start-up businesses and other small or youug businesses offer particular promise to create jobs. What have you aud your staff at OIRA doue to assure that federal regulations do not adversely impact the abilities of these businesses to create jobs?**

   OIRA works closely with the Small Business Administration's Office of Advocacy to review agency compliance with the Regulatory Flexibility Act (RFA). The RFA requires that agencies assess whether their regulations have a significant impact on a substantial number of small entities. If a regulation has such potential impacts, the RFA requires that agencies analyze and consider more flexible and less burdensome regulatory requirements.

   In addition, the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Agency (OSHA) to convene a review panel—including small business representatives—before proposing any rule that may have a significant impact on small business. We work to ensure compliance with these requirements. More generally, we pay a great deal of attention to costs and burdens, including those faced by small or young businesses.

3) **What steps have you and your staff at OIRA taken to assure that federal regulations do not constitute barriers to entry for companies of any size that seek to compete in a given market?**

Agencies are required to assess the costs and benefits of their proposed regulations; we review carefully these assessments and work with agencies to eliminate unjustified costs and burdens. In addition, increased barriers to entry constitute a potential cost and, consistent with OMB Circular A-4, OIRA monitors proposed regulations to determine whether they are likely to have a disproportionate effect on entry. OIRA also encourages agencies to consider whether their regulatory goals can be met through flexible performance standards rather than rigid design standards. In some cases, flexible approaches can reduce regulatory barriers to entry, by reducing the capital costs required to comply with rules.

4) **What steps have you and your staff at OIRA taken to assure that federal regulations do not chill innovation in goods and services and expansion of businesses and markets?**

Executive Order 12866 explicitly directs that when designing regulations, "each agency shall consider incentives for innovation." OIRA encourages agencies to weigh such considerations carefully.

OIRA also encourages the use of performance standards instead of design standards. OMB Circular A-4 notes that performance standards "are generally superior to engineering or design standards because they give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way." Use of performance standards allows regulated entities to find new and creative ways to comply with regulations and to reduce the risk that regulation will chill innovation.

Agencies may also encourage innovation is by designing simple, clear, and understandable labels to allow consumers to evaluate the attributes of products in the market. For example, agencies are currently in the process of developing new information labels for tires and fuel economy.

5) **What have you done as OIRA Administrator to assure that agencies are doing everything possible under Executive Order 12866 to:**

   a) **regulate only when they can identify a specific market failure or other specific problem that warrants regulation?** (See response, below.)

   b) **perform sound cost-benefit and cost-effectiveness analyses and produce only the most cost-beneficial rules?** (See response, below.)

   c) **determine whether there are alternatives to regulation that would better solve the problem at issue?** (See response, below.)

   d) **issue the least burdensome regulations possible whenever they determine to regulate?** (See response, below.)

   e) **issue the clearest possible regulations and eliminate all possible regulatory uncertainty?** (See response, below.)

OIRA assesses significant regulatory action for consistency with the principles and requirements set forth in Executive Order 12866. Specifically, Executive Order 12866 states:

a. "Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."
b. "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."
c. "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating."
d. "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."
e. "Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."

Most recently, and directly responsive to goals (a) through (e), OIRA issued a simple, clear checklist to assist agencies in identifying the key components of analyses required under the Executive Order. The checklist can be found on OIRA's website (http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf).

In its two latest Reports to Congress on the Benefits and Costs of Regulation, OIRA has also provided a series of explicit recommendations to agencies to promote goals (a) through (e), and to improve the transparency of agency analyses. These documents can be found on OIRA's website (http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/).

6) Do you agree that the following serve important roles that should be preserved in regulatory development and promulgation? Please answer yes or no, then provide what additioual explauation you believe would assist the Subcommittee:

a) identification and assessment of the significance of specific market failures or other specific problems, such as the failure of public institutions, before regulatory development;

Yes. Identification and assessment of market failures (or other specific problems) serves an important role in informing regulatory decisions. Specifically, OMB Circular A-4 states, "If the regulation is designed to correct a significant market failure, you should describe the failure both qualitatively and (where feasible) quantitatively. You should show that a government intervention is likely to do more good than harm."

b) consideration of whether existing regulations or other laws have created or contributed to the problem that a new regulation is intended to correct;

Yes. Existing regulations or other laws should be considered when agencies propose new regulations. Executive Order 12866 states, "Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively."

c) consideration of non-regulatory alternatives, such as the adoption of incentive mechanisms, the publication of information on the basis of which the public can make choices, or no-action alternatives;

Yes. Both Executive Order 12866 and OMB Circular A-4 encourage agencies to explore feasible non-regulatory alternatives to the planned regulation, including market-oriented approaches and informational measures. In June 2010, OIRA issued guidance to agencies on non-regulatory tools, specifically on the use of disclosure and simplification in the regulatory process. This guidance can be found on OIRA's website (http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf). It is always appropriate to consider "no action" as well.

d) cost-benefit analysis;

Yes. Regulations should be issued only after careful consideration of the likely consequences and tradeoffs. The recent checklist, referred to above, explicitly calls for such consideration. As OMB Circular A-4 states, "[b]enefit-cost analysis is a primary tool used for regulatory analysis. Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects). This is useful information for decision makers and the public to receive, even when economic efficiency is not the only or the overriding public policy objective."

e) cost-effectiveness analysis;

Yes. Cost-effectiveness analysis can provide a rigorous way to identify options that achieve the most effective use of the resources available without requiring monetization of all relevant benefits or costs. Executive Order 12866 states, "When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity."

f) risk assessment;

Yes. Good risk analysis is an important underpinning to appropriate regulatory decisions.

g) risk-risk analysis;

Yes. Such analysis is of particular value where the proposed interventions, designed to prevent risk, turn out to introduce countervailing risks. Section 6 of OMB's Circular A-4 encourages analysis of countervailing risks.

h) the use of empirical evidence and quantitative information to the greatest extent possible;

Yes. OIRA's recently released checklist on Regulatory Impact Analysis reiterates the need for agencies to ensure that their analyses are "based on the best reasonably obtainable scientific, technical, and economic information . . . presented in an accurate, clear, complete, and unbiased manner." Wherever possible, OIRA encourages agencies to use empirical evidence and quantitative information to guide regulatory decision-making. As stated in Circular A-4, moreover, "[w]here all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the . . . alternative that generates the largest net benefits to society (ignoring distributional effects)." When monetization is not possible, OIRA encourages agencies to make an effort to quantify the likely effects of a regulation and, if this is not possible, to provide a qualitative discussion of effects.

i) use of the least burdensome regulation possible;

Yes. Under Executive Order 12866, "[e]ach agency shall tailor its regulations *to impose the least burden* on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations" (emphasis added).

j) consideration of regional, state, local or tribal regulation or responses as alternatives to federal regulation;

Yes. Consideration of regional, state, local, or tribal regulation or responses serves an important role in informing regulatory decisions. OMB guidance to federal agencies in complying with Executive Order 13132 on Federalism and the Unfunded Mandates Reform Act asks federal agencies to seek out State, local, and tribal views on costs, benefits, risks, and alternative methods of compliance. Agencies' analyses of the effects of their rules on regional, state, local, and tribal governments become a part of the interagency review of significant regulations conducted by OIRA.

k) review, recousideration aud potential withdrawal of regulations that have become outdated or excessively burdensome in light of developments in the economy and society;

Yes. OIRA's 2009 Report to Congress on the Benefits and Costs of Federal Regulations explicitly calls for review of past regulations. In addition, Executive Order 12866 asks agencies periodically to examine their regulations to determine whether they ". . . have become unjustified or unnecessary as a result of changed circumstances."

l) transparency in agencies' development and promulgation of regulations;

Yes. Since his inauguration, President Obama has placed a great deal of emphasis on transparency and open government. With respect to the development and promulgation of regulations in particular, OIRA has emphasized the relationship between careful analysis and transparency. As noted, OIRA issued a checklist for agencies to assist them in identifying the key components of analyses required under Executive Order 12866.

m) peer review of cost-benefit analyses and other analytical agency products developed to support regulatory decisions;

Yes. OMB's Information Quality Bulletin on Peer Review (available at: http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf) discusses the importance of peer review within the regulatory context and explicitly covers original data and formal analytic models used by agencies in Regulatory Impact Analyses (RIAs).

n) analysis of potential regulations' impacts on the United States' international economic competitiveness;

Yes. Considering potential international effects helps to inform important regulatory decisions for the United States. OMB Circular A-4 notes that "[t]he role of Federal regulation in facilitating U.S. participation in global markets should also be considered" along with public health and other considerations, and that "[c]oncerns that new U.S. rules could act as non-tariff barriers to imported goods should be evaluated carefully."

7) Are you aware of incentives that might be made available to agency managers to promote more robust consideration or implementation of cost-benefit analysis, non-regulatory alternatives, least burdensome regulatory alternatives or other facets of the Executive Order 12866 process in evaluating whether and how to develop or promulgate regulations? If so, please describe these incentives and what mechanisms might be used to implement them.

Our recently issued checklist provides a simple, straightforward accounting of what agencies are required to do, and by virtue of its simplicity and clarity, it should provide appropriate incentives. In addition, Executive Order 12866 directs agencies to "foster the development of effective, innovative, and least burdensome regulations" and to "identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public." The Executive Order also directs agencies to analyze "potentially effective and reasonably feasible alternatives to the planned regulation,

identified by the agencies or the public (including improving the current regulation and reasonably viable non-regulatory actions)."

In furtherance of these goals, OIRA issued a memorandum entitled, "Disclosure and Simplification as Regulatory Tools" to agencies on June 18, 2010. The memorandum sets forth principles for effective disclosure policies and provides guidance to agencies on using disclosure and simplification as alternatives to more traditional forms of regulation. More generally, we work with agencies on a continuing basis to provide appropriate incentives for careful analysis of costs and benefits and for reducing regulatory burdens.

8) **Leaving aside legal considerations, what benefits, including but not limited to the quality, consistency and appropriateness of federal regnlation, conld be obtained if the regulations of independent agencies were brought into the process which the OIRA administers under Executive Order 12866?**

In its current form, the interagency review process helps to promote a number of important goals, including consistency with law; interagency coordination through an exchange of information and perspectives; and careful consideration of costs and benefits. In terms of benefits, inclusion of the independent agencies might help to promote these goals as well. Of course, I am aware that there has been a great deal of discussion of the complex considerations (of law and policy) that bear on the general question, but do not have an official position on the matter.

9) **On September 25, 209, Ranking Member Smith wrote to you to invite you to work with him on important areas of regulatory reform. What is your response to this letter?**

Ranking Member Smith noted that OMB's review should include the following elements: cost-benefit analysis, weighing particularly difficult economic times; transparency; scientific integrity; agency accountability to Congress and the President; and the role played by the newly reauthorized Administrative Conference of the United States.

We have taken a number of steps to address these concerns. As noted, we emphasize the importance of cost-benefit analysis. In OIRA's 2010 Report on the Benefits and Costs of Federal Regulations; we noted that "some regulations have significant adverse effects on small business" and that "it is appropriate to take steps to create flexibility in the event that those adverse effects cannot be justified by commensurate benefits." OMB also sought public suggestions for regulatory reforms that have significant net benefits, that might increase exports, and that might promote growth, innovation, and competitiveness for small business, perhaps through increased flexibility.

We continue to seek such suggestions in an effort to reduce the risk that regulation will impose unjustified costs or contain unjustified rigidity—and to square important regulatory goals with the interest in economic recovery. We have also worked on transparency (especially in connection with various steps designed to promote open government); the OIRA dashboard on www.RegInfo.gov is one such product. We look forward to working

with Ranking Member Smith on this issue and will continue to take careful account of his recommendations.

10) **On January 21, 2010, Ranking Member Smith and I wrote to you, asking that you take action to obtain EPA's withdrawal of its rule finding that carbon dioxide endangers public health and welfare because EPA had violated its legal obligations to first assess the impacts of its rule on small businesses. OIRA did not directly respond, but simply wrote back to say it had referred the letter to EPA.**

As we stated in the response to your letter, the Clean Air Act and the Regulatory Flexibility Act grant relevant authority to the Environmental Protection Agency. For this reason, I forwarded your letter to Lisa Jackson, Administrator of the Environmental Protection Agency, and asked that she give it full consideration.

a) **Why did you do nothing yourself to assure that EPA did not break the law and fail to assess impacts on small businesses?** (See response, above.)

b) **Have you done anything to follow up with EPA on what it has done in response to Ranking Member Smith's and Subcommittee Ranking Member Franks' letter?** (See response, above.)

11) **In July 2010, I and Rep. Geoff Davis wrote to you, asking that you provide before your testimony at the hearing a list of all pending federal rulemakings that potentially have an economic effect in excess of $1 billion. You did not provide that list before the hearing. Please provide it uow.**

At the time of your request, OIRA had approximately 100 pending rules, 10 of which were identified as potentially "economically significant," or having potential annual costs in excess of $100 million—the threshold designated in Executive Order 12866. For rules under review, we do not have a list of regulations with a potential cost in excess of $1 billion, because the content of those rules, and the associated costs and benefits, have yet to be determined. The final cost estimates will depend on the content of the final rule and supporting analyses, which follows a process of interagency review and (generally) public comment. On www.RegInfo.gov, you can find a list of regulations now under review with an estimated annual cost over $100 million.

MATERIAL SUBMITTED BY THE HONORABLE TRENT FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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RANKING

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Eleventh Congress

March 30, 2009

BY FASCIMILE AND POST

The Honorable Peter R. Orszag
Director
The Office of Management and Budget
Washington, D.C. 20503

Dear Director Orszag,

I recently read with interest of your initiative to review the Office of Management and Budget's procedures to oversee the development and review of federal regulations. I support OMB's role in the federal regulatory process. I also applaud you for your February 26, 2009 solicitation of public comment to assist you as you consider this important topic.

In addition to the public input which you will receive, I also want you to have the benefit of my views as Ranking Member of the Committee on the Judiciary. The Judiciary Committee, as you know, has jurisdiction over the Administrative Procedure Act. Since its inception over 50 years ago, the Act has preserved a role for the American people in the regulatory process, and – to the extent that changes must be made in the APA and related statutes – the Committee is committed to ensuring that public participation remains viable and effective.

During the 109th Congress, the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary conducted extensive oversight of the rulemaking process. This effort included symposia on the rulemaking process, studies by academic experts, and numerous hearings. My staff and I have reviewed the report for this effort as well as many of the comments provided in response to the ongoing effort to review the current regulatory review process. As we in government proceed with legislative and administrative reforms of the regulatory review process over the next four years, I believe it is important that certain principles be upheld. I look forward to working with you and other members of the Administration in a cooperative spirit toward these goals.

Economic Growth

The American people are facing difficult economic times, and governmental actions must not further exacerbate the current recession. Poorly considered regulations cannot be allowed to increase costs borne by Americans or to prevent entrepreneurs from creating new jobs. To this end, I urge the Administration to avoid the adoption of costly regulations without a careful examination that demonstrates that the public benefits justify the very real compliance costs. This analysis, moreover, should ensure that the least restrictive means possible to solve the problem is adopted. Indeed, this analysis should be completed before agency employees even draft a proposed regulation. Important economic analysis must contribute at conception to the framework within which regulation is considered. It cannot be left as an afterthought, to be completed at the agency's convenience. Consistent with this view, during this difficult economic time, agencies should be required to develop thoughtful Regulatory Flexibility analyses for every rulemaking, and they should be discouraged from resorting to Interim Final Rules that are exempt from this requirement.

Transparency

The American people are entitled to know about regulations before they are adopted, and they must have a meaningful opportunity to influence the final product. Many of the recent reforms adopted by President Bush thus should be continued and expanded. Agency rulemaking dockets, including all comments on rules, should be on the Internet and easy to locate. Guidance documents should continue to be subject to OMB review. Guidance documents and other sub-regulatory actions should be easily accessible to the public before they are effective.

While the Executive branch has adopted numerous procedures over the past 25 years in the name of transparency, not all of these reforms have fulfilled their goals. In part, this is because members of the public and their representatives are rarely involved when an agency first begins the regulatory process. Too often, by the time the agency publishes a notice of proposed rulemaking, the agency officials have already made up their mind about the final rule. Public participation should be meaningful, and agencies should identify the relevant supervisors for each rule and ensure that these individuals are available to interested parties, able to explain the agency's proposals, and responsive to public input.

Furthermore, agencies should be transparent with their scientific data. While some protection should exist for the deliberative policy process, agencies should disclose the scientific data they expect to consider before the final policy decisions have been made and sent to the Federal Register, and agencies should make every effort to avoid the use of confidential data to justify decisionmaking.

Finally, agencies should make every effort to oppose actions, such as lawsuits by interest groups, that seek to impose substantive or procedural restrictions on the

rulemaking process through the courts. This is particularly important when lawsuits provide select members of the outside community a significant and outsized role in the regulatory process. The truncated deadlines that result from consent decrees and settlement agreements, for example, too often limit the opportunity for broader public engagement. At a minimum, OMB should be required to approve all agency consent decrees and settlement agreements that call for the issuance of new regulations, and this approval should be withheld until after the agency has sought public comment on the proposed resolution of the case.

Scientific Integrity

The Administration should make certain that scientific merit undergirds technical regulations. Any outside consultants retained by the agency should be disclosed immediately in the rulemaking docket, as well as the specific scientific questions that the agency will ask that consultant. Moreover, technical rulemakings should incorporate peer review by disinterested parties outside of the agency. In order to ensure that agency officials have not pre-selected panel members to obtain a favorable evaluation, OMB and the Office of Science and Technology Policy should play a central role in the selection of panel members.

Further, OMB should ensure that agencies standardize their approach to risk-based decisionmaking and fully embrace risk analysis. Incomplete scientific evidence must be put into its larger context, so the public and its leaders can evaluate the effects of changes in assumptions on decisions and any needs for more research to close uncertainty gaps. Moreover, OMB needs to continue to ensure that scientific agencies throughout the federal government reach consensus before agencies impose significant costs.

Finally, agencies must develop effective mechanisms to ensure that inaccurate scientific information is corrected quickly. As our scientific understanding proceeds, we should not retain regulations that were based on incorrect or flawed knowledge. With the Data Quality Act and its implementing guidelines, the Administration currently has a process to ensure the integrity of regulatory science. This process must not be allowed to fall into disuse because of an unwillingness to admit error.

Accountability

Any effective regulatory system must ensure that the American people have ultimate control over the decisions made in their name. Some of this effort must come through the legislative process and the Congressional Review Act. Nevertheless, review of new regulations by OMB is essential as well. Regulatory policies and priorities appropriately may change as the Presidency changes, and the President must have the procedural tools to ensure that his values and priorities are implemented by the administrative state. This is doubly true for independent agencies that regulate such a large part of the American economy, including, for example, the Securities and Exchange Commission (SEC). Several individuals have asserted that the actions of the SEC have

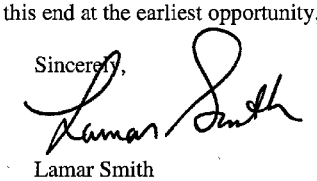
contributed to America's existing financial difficulties. If the President believes additional regulation is necessary to prevent a recurrence of these events, then the President must be accountable for any future regulations by that agency. It is not sufficient to appoint some experts from the financial industry and then trust that they will lead the agency to wise policies without further consultation. Instead, agencies such as the SEC should be brought under the umbrella of OMB review.

In addition, agencies should be held accountable for providing real outcome measures that tell the American public what they are trying to accomplish and for achieving those outcomes. These outcome measures should be derived from measures agencies are now required to use as a result of the Government Performance and Results Act.

Academic Research

Finally, I would like to work with your office to ensure that additional research on the regulatory process continues. Congress has now re-authorized and funded the Administrative Conference of the United States. In its previous incarnation, this agency provided invaluable research on the administrative state, the regulatory process, and suggestions for further reform. Now that the Congress has provided funds for the resumption of this important work, OMB must ensure that the new agency is staffed and continues to be funded at operational levels commensurate with the tasks placed before it. I look forward to learning of your efforts toward this end at the earliest opportunity.

Sincerely,



Lamar Smith
Ranking Member
Committee on the Judiciary

cc: Hon. John Conyers, Jr.

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ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

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BY FACSIMILE AND POST

September 25, 2009

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
The Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Sunstein,

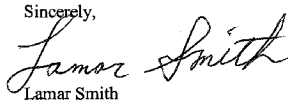
Please accept my warm congratulations on your confirmation as Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs. I strongly support OMB's and OIRA's roles in the federal regulatory process. With great interest, I look forward to your tenure at OIRA, particularly due to your forceful past advocacy of risk assessment and cost-benefit analysis in the development and evaluation of federal regulations.

As you know, OMB recently initiated an important review of its procedures to oversee the development and review of federal regulations and guidance documents. At the outset of that review, I shared with OMB Director Peter Orzag my views on a number of issues that should be central to the review. These include cost-benefit analysis, more important than ever during these difficult economic times; transparency; scientific integrity; agency accountability to Congress and the President; and the important role to be played by the newly reauthorized Administrative Conference of the United States. For your convenience, I attach a copy of my March 30, 2009, letter to Director Orzag on these matters.

Hon. Cass R. Sunstein
September 25, 2009
Page 2

As OIRA Administrator, you are now at the helm of OMB's review. I therefore take this opportunity to highlight my views for you. In my position as Ranking Member of the Committee on the Judiciary, I hope to work with you on these and other administrative law issues within the Committee's jurisdiction. I welcome the opportunity to discuss these matters with you at the earliest possible time. Please feel free to contact me or my staff to arrange for a meeting. The appropriate contact on my staff is Daniel Flores, Minority Chief Counsel for the Subcommittee on Commercial and Administrative Law. Mr. Flores may be reached at (202) 226-8685.

Sincerely,



Lamar Smith
Ranking Member
Committee on the Judiciary

cc: The Honorable John Conyers, Jr.

Enclosure

Congress of the United States
Washington, DC 20515

January 21, 2010

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Sunstein,

On December 7, 2009, the U.S. Environmental Protection Agency took one of the most far-reaching actions ever taken by a federal agency. That action was EPA's rule finding that carbon dioxide endangers public health and welfare.[1] To protect jobs and small businesses, we request that the Office of Information and Regulatory Affairs (OIRA) take steps to ensure that this action and related actions and proposals are reconsidered and, at a minimum, withdrawn unless and until EPA complies with the Regulatory Flexibility Act (RFA).

On the basis of EPA's endangerment finding, virtually every economic activity undertaken in America stands to come under the thumb of federal regulation. The first wave of follow-on regulatory actions, in fact, is already underway or foreordained by the terms of the Clean Air Act. These actions begin with EPA's and the Department of Transportation's proposed new light vehicle emission standards,[2] continue through greenhouse gas (GHG) pre-construction and operating permit requirements for stationary sources and extend as far as the mind can contemplate.

In these ways, EPA threatens to burden our economy with vastly expanded regulation not contemplated by Congress when it passed the Clean Air Act. In the depths of the current, historic recession and in the face of dramatically high levels of unemployment, this is unwise and injures America's workers and economy.

The burdens of EPA's actions will fall especially heavily on small businesses – employers that are critical to the job creation on which America depends to recover from recession. Because the Clean Air Act imposes permitting requirements on sources that emit as low as 100 or 250 tons of identified pollutants per year, by EPA's own estimate, millions of small sources never before required to be under Clean Air Act permits will now have to be covered.[3]

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[1] "Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act," EPA Docket No. EPA-HQ-OAR-2009-0171, RIN 2060-ZA14 (Dec. 7, 2009).
[2] "Proposed Rulemaking to Establish Light-Duty Vehicle Emission Standards and Corporate Average Fuel Economy Standards," 74 Fed. Reg. 49,454 (Sept. 28, 2009).
[3] "Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55292, 55302 (Oct. 27, 2009) ("Tailoring Rule").

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The permitting regimes will be expensive, many small businesses may not be able to obtain permits readily, and state and federal authorities will be overwhelmed by the administrative challenges of absorbing these businesses into the Clean Air Act regulatory scheme.

In a nod to the difficulties small businesses will confront, EPA proposes a "Tailoring Rule" through which it seeks to delay for a handful of years the imposition of requirements on sources emitting less than 25,000 tons of carbon dioxide per year. This limited delay is plainly insufficient. Moreover, it and EPA's other GHG actions appear to be in violation of the RFA, which Congress passed specifically to protect small businesses from excessively burdensome regulation. As the Office of the Chief Counsel for Advocacy within the Small Business Administration (SBA-OA) pointed out to the EPA Administrator (and, by copy, to OIRA) on December 23, 2009, EPA has failed to convene Small Business Advocacy Review Panels before imposing its rules, failed to develop and evaluate regulatory alternatives to minimize its actions' impacts on small businesses and inappropriately certified that its GHG actions will not impact small businesses.[4]

The need for RFA compliance could hardly be plainer. On the very face of EPA's proposed Tailoring Rule, EPA claims that the rule will avoid more than *$38 billion* of impacts that would otherwise fall on small sources during the suspension of the CAA's 100 and 250 tons-per-year standards.[5] What is more, the Tailoring Rule itself may be intended to serve as an end run around the RFA's requirements. In that, it fails both statutorily and practically. As the Office of the Chief Counsel for Advocacy points out, even the Tailoring Rule undershoots the mark, leaving more than a thousand small entities outside the scope of its exception.[6]

It need not and should not be this way. The Office of Management and Budget and OIRA hold substantial authority over the federal regulatory process under Executive Order 12866, Executive Order 13422 and other authorities. Executive Order 12866, for example, requires that agencies write their regulations to impose the least burden on society, including businesses of different sizes. It would be impossible for OIRA to ensure compliance with this basic tenet of E.O. 12866 if EPA and other agencies were not to assess the impacts of their rules under the RFA. OIRA could and should have exercised its authority to guide the EPA to an outcome that protected small business consistent with the requirements of the RFA and as directed by the SBA's Office of the Chief Counsel for Advocacy.

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[4] Letter from Susan Walthall, Acting Chief Counsel, Office of the Chief Counsel for Advocacy, Small Business Administration to the Honorable Lisa Jackson, Administrator, U.S. Environmental Protection Agency (Dec. 23, 2009) (SBA-OA Letter). A copy of this letter, which contains a detailed discussion of EPA's violations, is attached at Tab A.

[5] Tailoring Rule, 74 Fed. Reg. at 55,338.

[6] SBA-OA Letter at 7.

The Hon. Cass R. Sunstein
January 21, 2010
Page Three

At a minimum, OIRA should now exercise that authority to ensure that EPA will reconsider its actions and, at a minimum, not impose its massive contemplated regulatory burdens on small businesses unless and until it complies with the RFA. We request OIRA to do so and provide us with all relevant information and documents concerning OIRA's role in the review and approval of EPA's actions to date with regard to RFA compliance and the assessment of impacts on small business.

We look forward to your prompt response to these requests, which we ask you to provide no later than February 1, 2010. If you have any questions concerning our requests, please feel free to contact Daniel Flores, Minority Chief Counsel for the Committee on the Judiciary's Subcommittee on Commercial and Administrative Law and Barry Pineles, Minority Chief Counsel for the Committee on Small Business. Mr. Flores may be reached at (202) 226-8685 and Mr. Pineles may be reached at (202) 225-5821.

Sincerely,

Lamar Smith
Ranking Member
House Judiciary Committee

Sam Graves
Ranking Member
House Small Business Committee

Trent Franks
Ranking Member
Judiciary Subcommittee on Commercial and Administrative Law

Lynn Westmoreland
Ranking Member
Small Business Subcommittee on Regulations and Healthcare

cc: The Hon. John Conyers, Jr.
The Hon. Nydia M. Velázquez
The Hon. Steve Cohen
The Hon. Kathy Dahlkemper

Enclosure

Advocacy: the voice of small business in government

December 23, 2009

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Comments on EPA's Proposed Rule, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55,292 (October 27, 2009), Docket No. EPA-HQ-OAR-2009-0517

Dear Administrator Jackson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits the following comments in response to the U.S. Environmental Protection Agency's proposed rulemaking, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("GHG Tailoring Rule"), 74 Fed. Reg. 55,292 (October 27, 2009). EPA has certified that the GHG Tailoring Rule, along with two interrelated rules that will result in the federal regulation of greenhouse gases for the first time,[1] will not have a significant economic impact upon a substantial number of small entities. We disagree.

As discussed below, whether viewed separately or together, it is clear that EPA's Clean Air Act greenhouse gas rules will significantly affect a large number of small entities. EPA was therefore obligated under the Regulatory Flexibility Act to convene a Small Business Advocacy Review Panel (or Panels) prior to proposing these rules.[2] By failing to do so, EPA also lost its best opportunity to learn how its new greenhouse gas rules would actually affect small businesses, small communities and small non-profit associations. These small entities are concerned that EPA has not adequately considered

[1] "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 18,886 (April 24, 2009), and "Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 74 Fed. Reg. 49,454 (September 28, 2009).
[2] *See* 5 U.S.C. § 609(b).

regulatory alternatives that could achieve greenhouse gas emission reductions without imposing heavy new compliance burdens on large numbers of small entities.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before Federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.[3] The Regulatory Flexibility Act (RFA),[4] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[5] gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"[6] EPA is specifically required by the RFA to conduct a Small Business Advocacy Review (SBAR) Panel to assess the impact of the proposed rule on small entities,[7] and to consider less burdensome alternatives.

Background

EPA began developing a framework to regulate greenhouse gases (GHGs) under the Clean Air Act in the wake of the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*.[8] The Court found in *Massachusetts v. EPA* that GHGs are air pollutants under section 302 of the Clean Air Act,[9] and, consequently, that EPA has the authority to regulate GHGs under the Clean Air Act. On July 30, 2008, EPA published an Advance Notice of Proposed Rulemaking (ANPR) entitled "Regulating Greenhouse Gas Emissions under the Clean Air Act," 73 Fed. Reg. 44,354 (July 30, 2008). EPA discussed several Clean Air Act regulatory programs in the ANPR that could provide a means for regulating GHGs.[10] The ANPR requested comment on whether these Clean Air Act programs would be appropriate mechanisms for addressing climate change, and whether

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[3] 15 U.S.C. § 634a, *et. seq.*

[4] 5 U.S.C. § 601, *et. seq.*

[5] Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).

[6] *See* 5 U.S.C. § 609(a), (b).

[7] Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

[8] 549 U.S. 497 (2007).

[9] 42 U.S.C. § 7602.

[10] 73 Fed. Reg. 44,476-44,520 (stationary sources), 44,432-44476 (mobile sources) (July 30, 2008). These programs include National Ambient Air Quality Standards (NAAQS) for CO_2 and possibly other GHGs, New Source Review/Prevention of Significant Deterioration (NSR/PSD)(preconstruction/pre-modification permits), New Source Performance Standards (NSPS)(emission control requirements for certain industrial categories), section 112 (hazardous air pollutant requirements), Title V (federal operating permits), and Title II (mobile source requirements).

EPA should find that GHGs contribute to climate change and endanger public health and welfare. On November 28, 2008, Advocacy submitted comments on the ANPR, recommending that EPA refrain from regulating GHGs under the current Clean Air Act because of the potential impacts on small entities.[11] On April 24, 2009, EPA published its proposed endangerment determination – that six greenhouse gases[12] in the atmosphere may reasonably be anticipated to endanger public health and welfare.[13] With respect to the RFA, the agency stated "[b]ecause this proposed action will not impose any requirements, the Administrator certifies that this proposed action will not have a significant economic impact on a substantial number of small entities."[14] Subsequently, on September 28, 2009, EPA published proposed GHG emissions standards for light-duty vehicles under section 202(a) of the Clean Air Act.[15] For this rule, the agency stated

> EPA has not conducted a Regulatory Flexibility Analysis or a SBREFA SBAR Panel for the proposed rule because we are proposing to certify that the rule would not have a significant economic impact on a substantial number of small entities. EPA is proposing to defer standards for [vehicle] manufacturers meeting SBA's definition of small business as described in 13 CFR 121.201 due to the short lead time to develop this proposed rule, the extremely small emissions contributions of these entities, and the potential need to develop a program that would be structured differently for them (which would require more time). EPA would instead consider appropriate GHG standards for these entities as part of a future regulatory action.[16]

In other words, EPA certified that the GHG emissions standards rule would not have a significant economic impact on small entities because it only regulates larger vehicle manufacturers; small manufacturers are deferred from regulation. Significantly, however, regulating GHGs as pollutants for the first time under ***one part*** of the Clean Air Act means that GHGs are automatically regulated under ***the entire*** Clean Air Act. For stationary sources, therefore, the Clean Air Act would immediately require GHG preconstruction permits and GHG operating permits for businesses or facilities with emissions exceeding 100 or 250 tons per year of carbon dioxide (CO_2). At these statutory applicability thresholds, EPA has estimated that over six million facilities would need to apply for GHG permits once the vehicle emission rule takes effect.[17] EPA acknowledged that small entities are concerned about the potential impact on them of GHG permitting:

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[11] This comment letter is available at http://www.sba.gov/advo/laws/comments/epa08_1128.html.

[12] The six gases are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6).

[13] "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 18,886 (April 24, 2009). Advocacy submitted comments on the proposed endangerment determination on June 23, 2009. The comment letter is available at http://www.sba.gov/advo/laws/comments/epa09_0623.html.

[14] 74 Fed. Reg. 18,909 (April 24, 2009).

[15] "Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 74 Fed. Reg. 49,454 (September 28, 2009).

[16] 74 Fed. Reg. 49,629 (September 28, 2009).

[17] 74 Fed. Reg. 55,301, 55,302 (October 27, 2009).

> EPA recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD [preconstruction permitting] requirements that may occur given the various EPA rulemakings currently under consideration concerning greenhouse gas emissions . . . EPA is using the discretion afforded to it under section 609(c) of the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs.[18]

On October 27, 2009, EPA published the proposed GHG Tailoring Rule, which is designed to temporarily raise GHG permitting applicability thresholds to 25,000 tons per year (tpy) of carbon dioxide equivalent (CO_2e) so that smaller sources would not have to immediately apply for permits.[19] Concerning the RFA, EPA stated that:

> I certify that this rule will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities . . . We believe that this proposed action will relieve the regulatory burden associated with the major PSD [preconstruction permits program] and title V operating permits program for new or modified major sources that emit GHGs, including small businesses. . . . As a result, the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity.[20]

In response to EPA's publication of the three GHG proposals, many small entity representatives have contacted Advocacy and expressed their concerns about EPA's regulation of GHGs through the Clean Air Act's regulatory framework. These small entity representatives have also communicated their frustration that EPA has not convened a Small Business Advocacy Review Panel or Panels on these proposals. On October 13, 2009, and December 11, 2009, Advocacy hosted small business roundtables to obtain additional small business input on this issue, and Advocacy participated in EPA's November 17, 2009 Greenhouse Gas Public Outreach Meeting held in Crystal City, Virginia.

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[18] 74 Fed. Reg. 49,629 (September 28, 2009).
[19] "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55,292 (October 27, 2009). The proposed GHG Tailoring Rule would defer GHG sources below this threshold from PSD and Title V permitting for six years.
[20] 74 Fed. Reg. 55,349 (October 27, 2009).

EPA Improperly Certified Under the RFA That the GHG Rules Will Not Have A Significant Economic Impact On A Substantial Number of Small Entities

As discussed below, whether viewed separately or together, EPA's RFA certifications for the three GHG rule proposals lack a factual basis and are improper. The GHG rules are likely to have a significant economic impact on a large number of small entities. Small businesses, small communities, and small non-profit associations will be affected either immediately or in the near-term. For the following reasons, EPA should have convened one or more Small Business Advocacy Panels to properly consider the small entity impacts of these rules.

Proposed Endangerment Finding

EPA's RFA certification accompanying the proposed GHG endangerment finding is grounded on the narrow, technical argument that the finding, in and of itself, does not actually impose any direct requirements on small entities. Once finalized, however, the GHG finding legally and irrevocably commits the agency to regulating GHGs under the Clean Air Act.[21] Given this entirely new regulatory program, EPA should have recognized the potential economic impact of the endangerment finding and conducted an SBAR Panel.[22] In the months immediately preceding its issuance of the proposed endangerment finding in April 2009, EPA had sufficiently detailed information about (1) the basis for the endangerment finding, (2) the section 202(a) GHG emissions standards for vehicles, and (3) the regulatory consequences that the vehicle rule would trigger for stationary sources. Accordingly, an SBAR Panel at that time would have been useful and timely.

GHG emission standards from Light-Duty Vehicles

EPA's RFA certification accompanying the GHG emission standards rule for light-duty vehicles is based on the argument that because small vehicle manufacturers are not covered by the rule, the rule will have no impact on small entities. This narrow interpretation ignores the fact that the GHG emissions standards rule, when finalized, immediately and automatically triggers the regulation of GHGs from stationary sources, including a panoply of small entities. As EPA explains in the preamble to the Tailoring Rule:

> When the light-duty vehicle is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD [preconstruction permit] program, meaning that from that point forward, prior to constructing any new major source or major modification

[21] EPA published its final endangerment determination on December 15, 2009. 74 Fed. Reg. 66,496 (December 15, 2009).

[22] EPA recognized in the 2008 GHG ANPRM that the regulation of GHGs under the Clean Air Act is unprecedented in its scope and has significant consequences for regulated entities of all sizes and types. *See generally* "Regulating Greenhouse Gas Emissions under the Clean Air Act," 73 Fed. Reg. 44,354 (July 30, 2008).

> that would increase GHGs, a source owner would need to apply for, and a permitting authority would need to issue, a permit under the PSD program that addresses these increases. Similarly, for title V it would mean that any new or existing source exceeding the major source applicability level for those regulated GHGs, if it did not have a title V permit already, would have 1 year to submit a title V permit application.[23]

Thus, by operation of law, the final vehicle GHG rule will trigger the imposition of PSD and Title V GHG permitting requirements, and on a large scale. EPA estimates that the number of facilities that would have to obtain GHG PSD permits because of construction or modifications could increase from the current level of about 280 each year to almost 41,000 per year.[24] For Title V operating permits, EPA estimates that "more than six million facilities . . . would become newly subject to title V requirements because they exceed the 100 ton per year threshold for GHG but did not for previously regulated pollutants."[25] A large number of facilities facing these new GHG permitting requirements are small businesses, along with small communities and small non-profit associations. Thus, it is clear that the GHG emissions standards rule for light-duty vehicles directly and immediately triggers regulatory impacts for small entities.[26] If this were not true, EPA would not need to finalize the GHG Tailoring Rule prior to finalizing the GHG emission standards rule. Under section 609(b) of the RFA, EPA was therefore required to convene a SBAR Panel before proposing the GHG emission standards rule.

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[23] 74 Fed. Reg. 55,294 (October 27, 2009).
[24] *Id.* at 55,301.
[25] *Id.* at 55,302.
[26] This situation is somewhat analogous to the automatic imposition of rules triggered by the removal (delisting) of the bald eagle from the List of Endangered and Threatened Wildlife under the Endangered Species Act (ESA). In anticipation of the delisting, the U.S. Fish and Wildlife Service (FWS) proposed a definition of "disturb" under the Bald and Golden Eagle Protection Act (BGEPA) to guide post-delisting bald eagle management. 71 Fed. Reg. 8,265 (February 16, 2006). Upon delisting as an endangered species, the bald eagle would immediately fall under the protection of the BGEPA. In considering the potential costs to small entities of delisting, FWS included the costs imposed by the BGEPA-based regulations (71 Fed. Reg. at 8266-67), recognizing that those costs were a direct result of the delisting. Similarly, when the National Institute for Occupational Safety and Health (NIOSH) published a proposed rule establishing Approval Tests and Standards for Closed-Circuit Escape Respirators, 73 Fed. Reg. 75,027 (December 10, 2007), NIOSH included the cost of replacing CCERs in its economic analysis, recognizing that its proposed rule would directly trigger regulatory costs under separate Mine Safety and Health Administration respiratory standards. 73 Fed. Reg. 75,038. While NIOSH's proposed rule on its face would apply only to manufacturers of CCERs, it would also automatically trigger MSHA requirements for mine operators to provide their workers with the most current NIOSH-approved products. Accordingly, some CCERs used in mines would have to be replaced before their normal product life cycle, triggering additional costs to mine operators. *See also Aero. Repair Station Ass'n v. F.A.A.*, 494 F.3d 161 (D.C. Cir. 2007)(Court rejected agency's assertion that small business subcontractors were not directly regulated for RFA purposes by drug and alcohol testing requirements; while the regulation on its face applied only to employer air carriers who operate aircraft, employees of contractors and subcontractors were also subject to the requirements and should have been considered in the RFA analysis).

GHG Tailoring Rule

EPA's RFA certification of the GHG Tailoring Rule is based on the assertion that the rule is deregulatory in nature and that "the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity."[27] Applying the Tailoring Rule's temporary GHG applicability threshold of 25,000 tpy CO_2e, EPA believes, would shield all small entities from GHG compliance costs, at least until the expiration of the tailoring period. In reality, however, several small entities and their representatives have informed Advocacy that their anticipated GHG emissions will exceed the 25,000 tpy CO_2e threshold; accordingly, they will immediately become subject to PSD and Title V permitting requirements for GHGs. Examples of affected small entities, based on conversations with Advocacy, include:

- More than 100 small brick manufacturers;
- 400-500 small foundries;
- 150 small pulp and paper mills;
- Over 100 small coal mines;
- 80 small lime manufacturers;
- 350 small municipal utilities;
- More than 40 small electric cooperatives; and
- At least 16 small petroleum refineries.

Some of these 1,200+ small entities (e.g., brick manufacturers) report that they will be required to obtain Title V permits for the first time solely because of their GHG emissions. EPA estimates the cost of obtaining a first-time Title V permit for industrial facilities at $46,350 per permit, and new PSD permits are estimated to cost $84,530 per permit.[28] These estimates do not include the costs of project delays and potential operational modifications required by permitting authorities. In total, these costs may exceed 3 per cent of annual operating expenditures for some small entities (e.g., electrical distribution cooperatives). Under EPA's RFA Guidance, rules with 3 percent or greater economic impact on more than 1,000 small entities are presumed to be ineligible for certification under the RFA.[29] Had EPA thoroughly analyzed the potential reach of the GHG permitting requirements on small entities, it would have learned that the GHG Tailoring Rule will not benefit a substantial number (over 1,200) of small entities. The fundamental basis for EPA's RFA certification – that the GHG Tailoring Rule will

[27] 74 Fed. Reg. 55,349 (October 27, 2009).
[28] *Id.* at 55,339.
[29] EPA, *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act* (November 2006) at 24.

completely relieve the regulatory burden associated with PSD and Title V permitting for all small entities – is not factually supported. Under section 609(b) of the RFA, EPA was required to convene an SBAR Panel before proposing the GHG Tailoring Rule.

The Combined GHG Rulemaking

While EPA clearly could have convened a SBAR Panel for any of the three individual GHG rules, there is no doubt that the agency was required by the RFA to conduct a Panel for the combined GHG rulemaking. EPA's effort to regulate GHGs under the Clean Air Act is a major regulatory undertaking and is unlike previous EPA programs. This new regulatory program should not have been launched without the benefit of a thorough review of the potential small entity impacts, as required by the RFA.

EPA's GHG Public Outreach Efforts Are Not A Substitute for SBAR Panels

While Advocacy acknowledges that EPA has made a concerted effort to reach out to small entities concerning GHG regulation under the Clean Air Act, public outreach by itself is not legally or functionally equivalent to conducting an SBAR Panel. Such outreach does not typically result in the identification of significant regulatory alternatives, which is one of the primary objectives of the Panel process. Similarly, consultation between EPA, OMB and Advocacy does not take the place of the deliberative process that occurs between Panel members. Finally, and perhaps most importantly, informal consultation and public outreach do not result in a written Panel report with formal recommendations to the EPA Administrator.

When a planned rule or rules will have a significant economic impact on a substantial number of small entities, which Advocacy believes is the case with the three GHG rules, EPA cannot rely on outreach campaigns to satisfy its Panel obligation under the RFA.. Nevertheless, in the GHG emissions standards rule for light-duty vehicles, the agency stated that "EPA is using the discretion afforded to it under section 609(c) of the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs."[30] Section 609(c) of the RFA provides that "an agency may in its discretion apply subsection (b) [i.e., section 609(b), the SBAR Panel requirement] to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities."[31] Advocacy interprets section 609(c) to allow (and encourage) an agency that can properly certify a proposed rule to elect to conduct a full SBAR Panel, even though the agency is not required to do so.[32] As such, an agency proceeding under section 609(c) would be

[30] 74 Fed. Reg. 49,629 (September 28, 2009). EPA relied on similar language in the GHG Tailoring Rule, 74 Fed. Reg. 55,349 (October 27, 2009), and in another recent proposed rule concerning the interpretation of the regulatory phrase "subject to regulation" (74 Fed. Reg. 51,535 (October 7, 2009)).
[31] 5 U.S.C. § 609(c).
[32] Under the RFA's current definitions, EPA and the Occupational Safety and Health Administration are the only federal agencies that must conduct SBAR Panels when their planned rules will have a significant economic impact on a substantial number of small entities. See 5 U.S.C. § 609(d).

expected to meet all of the Panel requirements in section 609(b), not something less. Here, where EPA could not properly certify the GHG rules and already had the obligation to conduct a Panel, section 609(c) does not give EPA the legal discretion to do anything less than a full Panel. Otherwise, EPA could choose in any rulemaking to "certify" the rule and use the "discretion" of section 609(c) to conduct informal consultation and outreach. This strained interpretation would effectively vitiate the RFA's Panel requirement.

EPA Had No Legal Basis To Avoid Conducting A Panel

Although there are rare situations where an agency may have a legitimate reason for not conducting the small business impact analysis required by the RFA (which in this case would include a SBAR Panel), none of those situations are present here. Congress has not exempted these rulemakings from the Administrative Procedure Act[33] or the RFA. EPA is not acting under a court-ordered deadline for rulemaking that precludes the time needed to complete the Panel process. Likewise, EPA has not received a Congressional directive to complete these rulemakings by a date that makes compliance with the Panel requirement impossible.[34] EPA has not demonstrated that these rulemakings are eligible for a waiver of the SBAR Panel requirements, as provided in section 609(e) of the RFA.[35] More specifically, EPA has not shown that special circumstances exist that would make a Panel impractical or unnecessary. On the contrary, available evidence suggests that EPA would have greatly benefited from receiving additional advice from small entities before proposing these rules.[36]

Advocacy's Recommendations

Advocacy recommends that EPA adopt the following with respect to GHG regulations under the Clean Air Act.

- EPA should reconsider its Finding on Endangerment for GHGs. EPA published its final endangerment finding for GHGs on December 15, 2009.[37] EPA should

[33] 5 U.S.C. §§ 551-559.

[34] For example, in 2006 the Department of Homeland Security (DHS) published a draft interim final rule, *Chemical Facility Anti-Terrorism Standards*. 71 Fed. Reg. 78,276 (December 28, 2006). The draft interim final rule implemented Section 550 of the Homeland Security Appropriations Act of 2007, which required DHS to promulgate interim final regulations for the security of certain chemical facilities in the United States within six months of its passage.[34] See Pub. L. 109–295, sec. 550. In this instance, DHS did not assess the impact of this proposed rule on small entities or prepare an IRFA because Congress directed it to issue "interim final regulations" within six months. While Congress did not specifically instruct the agency to bypass the proposed rule stage, the short timeframe and "interim final" language arguably gave the agency good cause to bypass the traditional notice and comment rulemaking process and the RFA.

[35] 5 U.S.C. § 609(e).

[36] At a minimum, small entity representatives could have provided EPA with additional regulatory alternatives, and more detailed information about the real-world impacts of the PSD and title V permitting programs.

[37] 74 Fed. Reg. 66,496 (December 15, 2009).

reconsider this finding and/or delay the effective date of the finding in order to allow the agency to conduct an SBAR Panel on endangerment and the other GHG rules.

- EPA should adopt an interpretation of the effective date of the GHG emissions standards rule for light-duty vehicles that gives EPA, the states, and small entities additional time to prepare for the new GHG requirements. Several states and state air permitting authorities have commented that they will have great difficulty implementing GHG requirements at the state level.[38] Specifically, state authorities are concerned that they will not be able to incorporate the GHG Tailoring Rule thresholds for PSD and Title V permits into state law on an expedited basis. Small GHG sources would not be deferred from having to submit permit applications, which will overwhelm the state agencies. Moreover, states are concerned that they lack the resources and the trained personnel to process large volumes of permit applications. To help alleviate this situation, it has been suggested that EPA interpret the regulatory phrase "subject to regulation" in the context of the GHG emissions standards rule for light-duty vehicles so that that GHG emissions are subject to regulation only at such time as Model Year (MY) 2012 vehicles are certified, which would be an additional 15 months.[39] States will need this time to amend their state laws to reflect the applicability and significance thresholds of the GHG Tailoring Rule, and to hire and train additional permitting personnel.

- EPA must conduct an SBAR Panel on the GHG rulemakings. Whether or not EPA interprets the "subject to regulation" phrase as allowing an additional 15 months before the PSD and Title V permitting requirements become applicable, EPA needs to conduct a Panel on the GHG regulatory program, as required by the RFA. The Panel process would give EPA critical information about the impacts of GHG rules on small entities, while allowing the agency to consider alternative ways to achieve its regulatory objectives without injuring small entities.[40] The Panel could also address the issue of how EPA should determine what constitutes Best Available Control Technology for GHGs. The issue of determining BACT is critically important, particularly for the more than 1 million facilities in the U.S. that have boilers and may have to go through the PSD review process.

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[38] *See, e.g.*, Letter from South Carolina Department of Health and Environmental Control to the U.S. EPA (November 24, 2009); Letter from the National Association of Clean Air Agencies to the U.S. EPA (December 7, 2009).

[39] Letter from the National Association of Clean Air Agencies to the U.S. EPA (December 7, 2009) at 4 ("NACAA suggests that when Title II regulations are the trigger for PSD and Title V permitting, it may be permissible for EPA to interpret "subject to regulation" to mean when the regulation "takes effect" under the CAA. In this instance, EPA is proposing that its GHG regulation of light-duty vehicles would "take effect" in MY 2012. Since MY 2012 vehicles would ordinarily be certified in the summer of 2011, this interpretation would likely provide an additional 15 months after the anticipated promulgation of the regulation for states to take critical actions to respond to the initial impacts of the new programs." (*citations omitted*)).

[40] 5 U.S.C. § 603 (c) explicitly requires that any alternatives to a regulatory proposal that would minimize the impact on small entities must "accomplish the stated objectives of applicable statutes."

- EPA should adopt higher tailoring thresholds in the GHG Tailoring Rule. Small businesses have told EPA that the proposed 25,000 tpy CO_2e applicability threshold in the GHG Tailoring Rule is too low.[41] Similarly, there is concern that the applicability threshold for modifications under the PSD program should be higher than the proposed 10,000 to 25,000 tpy CO_2e. EPA should adopt a higher applicability threshold for PSD and Title V (such as 100,000 tpy CO_2e), and it should adopt a significance threshold for PSD purposes of at least 50,000 tpy CO_2e. EPA should also consider longer phase-in periods for these applicability and significance thresholds to apply. EPA needs to explain more clearly how it will apply the GHG significance threshold to routine operational changes and clarify how PSD modifications could be triggered by such operational changes.

- GHG regulations should focus on facilities' actual emissions, not on their potential to emit. The difference between actual and potential emissions at a facility can be substantial. EPA's Greenhouse Gas Reporting Rule[42] requires sources to report their actual annual GHG emissions, not their potential emissions based on a facility's design capacity. To be consistent with the GHG Reporting Rule, facilities should not be required to obtain PSD or Title V permits solely because of potential GHG emissions.[43] This regulatory approach would yield real benefits, and avoid unnecessarily burdening facilities whose actual emissions are only a small fraction of their potential emissions.

Conclusion

Whether viewed separately or together, it is clear that EPA's Clean Air Act greenhouse gas rules will significantly impact a large number of small entities. EPA was therefore obligated under the RFA to convene a Panel (or Panels) prior to proposing these rules. EPA now needs to conduct a Panel to gain informed input and develop well-considered regulatory alternatives as the agency seeks to address one of the most important and challenging environmental issues of this decade.

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[41] *See, e.g.*, Comments of American Public Power Association Regarding Proposed EPA GHG Rules Affecting Small Entities (December 1, 2009) (Association representing small municipal utilities asserts that proposed GHG Tailoring Rule's applicability threshold is too low to benefit over 350 small municipal utilities).

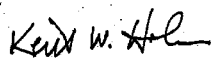
[42] "Mandatory Reporting of Greenhouse Gases" 74 Fed. Reg. 56,260 (October 30, 2009).

[43] Methods exist to allow a source to limits its potential to emit, such as federally enforceable state operating permits. EPA should develop streamlined procedures to allow GHG sources to limit their potential emissions.

Please do not hesitate to call me or Assistant Chief Counsel Keith Holman (keith.holman@sba.gov or (202) 205-6936) if you have questions or if we can be of assistance.

Sincerely,

Susan M. Walthall
Acting Chief Counsel for Advocacy



Keith W. Holman
Assistant Chief Counsel for
Environmental Policy

cc: Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Congress of the United States
Washington, DC 20515

July 23, 2010

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Dear Administrator Sunstein:

As sponsors of H.R. 3765, the Regulations from the Executive in Need of Scrutiny (REINS) Act, we are interested in the Administration's published regulatory agenda, which currently identifies 191 planned rulemakings that each may result in an annual effect of the economy of $100 million or more. We are also aware that a number of pending rulemakings may generate economic effects that have even greater consequences for our economy—*including some that may result in an annual effect on the economy of $1 billion or more*. Under the REINS Act, Congress would be required to affirmatively approve any new major rule proposed by the executive agencies before it can be enforced on the American people.

Therefore, we respectfully request that you provide us a list of all pending rulemakings that potentially have an economic effect in excess of $1 billion prior to your testimony before the Subcommittee on Commercial and Administrative Law on Tuesday, July 27, 2010.

Thank you for your assistance in this matter.

Sincerely,

Representative Trent Franks

Representative Geoff Davis

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RANKING MEMBER, DAVE CAMP

The Prescription Pad

Health Care Law Lands Devastating One-Two Punch

Up To 117 Million Americans to Lose Their Health Plan; Employer-Provided Insurance to See 9% Cost Increase Next Year

Monday, June 14, 2010

The promises made about health reform suffered two more hits this week as more and more troubling truths about the impact the Democrats' recently enacted health care overhaul will have on the American people were revealed – health care costs are continuing to skyrocket and more than half of all Americans with employer-provided health insurance could lose their current health coverage. Those disturbing details are contained within a survey from Pricewaterhouse Coopers and new regulations from the Department of Health and Human Services, Department of Labor, and Department of the Treasury.

Buried deep within the new regulations that will govern employer-provided health coverage is the startling estimate that by 2013, under the most likely scenario, 87 million Americans (1 out of 2 Americans with employer coverage) will no longer be able to retain the health plan they have and like. According to that same regulation, this number could be as high as 117 million Americans (7 out of 10 Americans with employer coverage) being forced to change health plans. And these numbers could be higher if the Obama Administration's assumptions and estimates turn out to be overly optimistic.

So much for the President's claim that, "if you like your health care plan, you can keep your health care plan." Even the New York Times reported, "the rules appear to fall short of the sweeping commitments President Obama made while trying to reassure the public in the fight over health legislation."

As if that were not enough, echoing estimates by the non-partisan Congressional Budget Office (CBO) showing that health insurance premiums for millions of families would actually increase under the Democrats' health care law, PricewaterhouseCoopers reveals that employers and employees will see a nine percent increase in their medical costs in 2011. For the average employee, this increase in medical costs could be as much as $1,200 in 2011 alone.[1]

No wonder the majority of Americans continue to oppose the health law. It spends one-trillion dollars, increases taxes, cuts Medicare to fund a new entitlement program, increases the cost of health insurance, and forces Americans out of the health plan they have and like.

###

[1] See Kaiser Family Foundation and the Health Research & Educational Trust (HRET), Employer Health Benefits Survey (2009) (calculating average impact of a 9% increase in medical cost using $13,375 average total employer premium).

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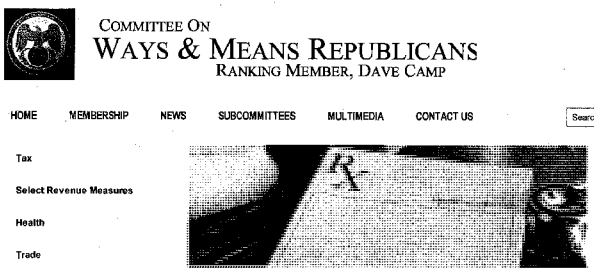

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Consensus Is In: Health Care Costs and Premiums to Rise Under Democrats' Health Law

Even Paid Obama Administration Health Consultant Admits Overhaul Fails to Control Costs
Monday, April 26, 2010

Not so long ago, President Obama **proclaimed**, "If any bill arrives from Congress that is not controlling costs, that's not a bill I can support. It's going to have to control costs."

Republicans concur with President Obama's assessment that reducing health care costs should be the primary goal. Unfortunately, just one month after Democrats enacted their $1 trillion overhaul of the nation's health care system, the consensus is in that the law receives a failing grade on this most important measure. The new law will increase national health spending and will make health insurance more expensive for millions of American families. But don't take our word for it.

> "Health care, Round Two, is when we will make a serious effort at cutting costs down, based on what this law has shown us."— **paid HHS health consultant**, health care overhaul supporter and **MIT economist Jonathan Gruber.**
>
> "[N]ational health expenditures under the health reform act would increase by a total of $311 billion (0.9 percent) during calendar years 2010-2019."— **Obama Administration's Actuaries at the Centers for Medicare and Medicaid Services.** (Note: The actuaries found the law is actually worse in this regard than either the House or Senate-passed legislation.)
>
> "The history of health coverage expansion should make us worry. If ObamaCare's actual fiscal effects look anything like previous efforts to expand health coverage, the federal budget is in for a world of hurt."— **Wall Street Journal**

And then there is the Congressional Budget Office's (CBO) **analysis** that health care premiums are going to rise sharply under the Democrats' new law.

Impact on Individual Market Health Insurance Premiums in 2016 According to CBO

Health Care Proposal	Change In Premiums Compared to Current Law Projections
Democrats' Health Care Law (H.R. 3590 and H.R. 4872)	$2,100 increase
House Republican Alternative Bill (H.R. 4038)	$1,050 **decrease**

Despite spending one trillion dollars, the Democrats' new law fails to meet the number one goal of the Administration and more importantly American families. How much more will Democrats seek to spend to undo their costly mistakes?

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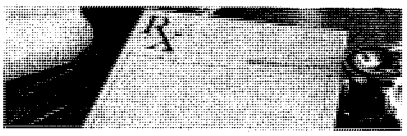

The Prescription Pad

Employers' Analysis of Democrats' Health Law: Increasing Health Costs, Jeopardizing Health Benefits and Harming Job Growth

Wednesday, June 23, 2010

This week, the Business Roundtable (BRT) and The Business Council, representing American companies with more than 12 million employees and comprising nearly a third of the total value of the U.S. stock markets, issued a dire warning to the White House Office of Management and Budget Director Peter Orszag about the consequences of the Democrats' health law.

According to these key employer groups, President Obama and the Democrats' health overhaul, "does little to change the underlying problems of our delivery system, which are the primary drivers of the unsustainable cost trends of employer provided care." As a result, employers are, "delay[ing] business decisions regarding expansions and dampen[ing] new hiring." With unemployment hovering around 10 percent, America simply cannot afford a one trillion dollar health care law that is preventing employers from hiring new workers.

BRT and The Business Council also warn that, "the potential for detrimental unintended consequences on the nation's economy and workers is very high," for the following reasons:

- "The imposition of employer mandates inhibits our ability to specifically structure our plans to our workforce and will likely result in [health care] cost increases";
- The new tax on high-cost plans, referred to as the Cadillac tax, "will divert resources away from investment in new technology, process and jobs, and will significantly increase costs";
- The changes to the tax treatment of retiree prescription drug plans will cause employers to, "reduce or eliminate prescription benefits to Medicare eligible retirees";
- Regulations limiting insurer spending (medical loss ratios) have the potential to "increase premiums" and "hurt quality and patient safety";
- Restricting workers' use of Flexible Spending Accounts (FSAs) "impact employees" and "hamper economic recovery"; and
- The Democrats' health law adds new administrative burdens, making it "even more costly to offer healthcare benefits – both a global competition and job creation issue" and "will serve to increase premiums and drive up the cost of coverage."

Last week, the Administration's own regulations conceded that up to 2 out of 3 Americans with health insurance through an employer could lose the plan they have and like. Fortune.com has reported that internal company documents reveal at least four major U.S. employers (AT&T, Verizon, Deere and Caterpillar) are considering "dumping the health care coverage they provide to their workers in exchange for paying penalty fees to the government." A clear consensus has formed; Democrats' grand experiment with the nation's health care system is too expensive for taxpayers and workers.

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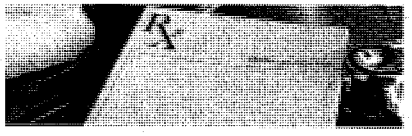

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SMALL BUSINESSES' CONCERNS CONFIRMED: Health Care Tax Credit Nearly Impossible To Navigate, Offers Little Help and Encourages Wage and Job Cuts

Thursday, May 20, 2010

Click Here to See How to Navigate Through the Small Business Tax Credit

Washington, DC -- Ways and Means Ranking Republican Dave Camp (R-MI) and Health Subcommittee Ranking Member Wally Herger (R-CA) today released a new flow chart that shows America's small businesses and their employees how to calculate the so-called small business health care tax credit the Democrats included in their massive health overhaul earlier this year.

As the navigation tool shows, employers face a dizzying array of questions and formulas before determining if they are eligible for some, all or none of this credit. In addition, the credit is limited to federal income tax liability, meaning that if a small business is losing money due to the economy, it might not be able to use the credit even if it successfully navigates the rules.

Camp said, "The health care law is going to drive up premiums even further and, as this chart shows, it forces small business to work through an exceedingly complex set of calculations just to find out they may not be eligible to receive any help at all. No wonder the nation's leading small business organization is suing to overturn the law. We need to repeal this law and replace it with health care reforms that lower costs for small businesses, families and taxpayers."

Herger added, "Ronald Reagan once said that the most terrifying words in the English language are 'I'm from the government and I'm here to help.' It's no surprise that the Democrats' big-government health care law offers no real help for small businesses struggling with high health care costs. In fact, at a time when our top priority should be to create jobs and get our economy back on track, this new law instead kills jobs and tells small business owners that it isn't in their best interest to grow and prosper. It's time for Congress to get to work on repealing this destructive health overhaul and providing real tax relief and health care savings for America's small businesses."

The Ways and Means Republican document reaffirms concerns expressed by small business owners in an Associated Press article, FACT CHECK: Tax cut math doesn't add up for some, out this morning. Below are just some of the report's excerpts:

> *But when he ran the numbers, [Zach] Hoffman discovered that his office furniture company wouldn't get any assistance with the $79,200 it pays annually in premiums for its 24 employees. "It leaves you with this feeling of a bait-and-switch," he said.*
>
> *Last in the fine print: The credit drops off sharply once a company gets above 10 workers and $25,000 average annual wages.*
>
> *To get the most out of the new federal credit, Hoffman said he'd have to cut his work force to 10 employees and slash their wages. "That seems like a strange outcome, given we've got 10 percent unemployment," he said.*

The lack of assistance to small businesses and their workers should come as no surprise. During the health care debate, the non-partisan **Congressional Budget Office** estimated that 88 percent of those who get health insurance from a small employer work for a business that will not receive tax credits under the Democrats' legislation.

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NFIB Confirms Health Care Law Bad For Workers

CAMP: "If it is bad for small businesses, it is bad for America,and this health care law is bad for both."
Friday, May 14, 2010

Washington, DC – Ways and Means Ranking Member Dave Camp (R-MI) today released the following statement on the announcement that the nation's leading small business organization, NFIB, is joining 20 state attorneys general in seeking to invalidate the recently enacted health care law.

"This is confirmation for every person worried about their job or looking for work, that the health care law is only making matters worse. If it is bad for small businesses, it is bad for America, and this health care law is bad for both. Instead of increasing costs and adding new mandates on employers, we need to lower their costs so they can start hiring again – that's what the House Republican bill did."

Camp also released six facts about the Democrats' health care law that every American worker must know:

FACT # 1: Employers are already being hit by hundreds of millions of dollars in added costs, putting the nation's economic recovery further in doubt.

So far, some of America's biggest companies have begun warning that the tax changes in the Democrats' health care bill will reduce their earnings, threatening their ability to hire new workers and retain existing ones. Here is a quick look at just some of those companies, the number of workers they employ, and the added charges to earnings they will bear as a result of the Democrats' health care bill:

Company	Number of Employees	Increase in Health Care Costs
3M	74,835	$90 million
AT&T	281,000	$1 billion
Caterpillar	93,813	$100 million
John Deere	51,300	$150 million
Medtronic	41,000	$150-200 million
Prudential	41,943	$100 million
Valero	20,920	$15-20 million

In order to protect investors, companies are required under law and regulation to report on rapid and current basis material changes in a company's financial position.

FACT # 2: The Democrats' health care bill could discourage the hiring of new workers.

The health care bill does nothing to help small businesses with their already skyrocketing health care costs. According to the non-partisan Congressional Budget Office (CBO) premiums will continue to increase. Adding insult to injury, the legislation's so-called small business tax credits could force employers to choose between hiring new workers and losing the value of the credit. Under the Democrats' health care bill, the value of the tax credit phases out for businesses with 11 or more workers and disappears completely for those with more than 25 employees. Some small business owners may have to think twice before they seek to hire new employees out of fear they might lose their tax credit on their existing workers.

FACT # 3: The Democrats' health care bill could encourage employers to keep wages low

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The Prescription Pad

Find Some Shade Because the Tanning Tax Hits Tomorrow

NFIB, ITA and IFA note small businesses will get burned by this tax
Wednesday, June 30, 2010

Unfortunately, no amount of sunscreen or Aloe will relieve the pain of the Democrats' impending 10 percent tax on indoor tanning beds,which goes into effect tomorrow, July 1. This $2.7 billion tax will hit tens of thousands of small businesses and consumers and is just one of the many of the $569,000,000,000 in new health care taxes that violate the President's promise not to raise taxes on middle-class families.

Despite the size and reach of this new tax increase, many Americans and small businesses are unaware of this provision or how to comply with it. According to a survey taken earlier this month, "only 5 percent of tanning business owners in the poll said they had been contacted by the government. Fully 95 percent say they are flying blind about how to collect the tax."

On June 11, 2010, Ways and Means Ranking Member Dave Camp (R-MI) wrote to IRS Commissioner Doug Schulman asking whether the IRS would engage in aggressive outreach to notify Americans affected by the health care law's new tax on tanning services. Camp noted that that the IRS sent over 4 million postcards advertising a small business health care tax credit that many employers are ineligible to receive. The IRS has yet to explain why it has not notified tanning operators about this tax.

Below are excerpts from "**By the Numbers**" put together by the National Federation of Independent Business, Indoor Tanning Association and the International Franchising Association on the new tanning tax.

2.7 billion: The amount of money tha IRS plans to collect from small businesses over the next 10 years from this tax.

~19,000: Number of "mom and pop" small businesses who may be affected by the new tax.

12: Number of pages it takes the IRS to explain the rules to comply with the complicated "suntan tax."

36: Number of hours estimated by the IRS to complete and file Form 720, prior to the IRS revising and adding the new suntan tax to it.

>$74: Average cost, per hour, spent by small businesses to comply with federal tax paperwork burdens.

>4 million: Quantity of postcards mailed to small businesses alerting them to the availability of a small business tax credit.

0: Number of postcards sent to alert tanning businesses of the new tax on their business.

2: Number of weeks in advance small businesses received the regulations for complying with the new suntan tax.

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DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop N3-01-21
Baltimore, Maryland 21244-1850

Office of the Actuary

DATE: April 22, 2010

FROM: Richard S. Foster
Chief Actuary

SUBJECT: Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended

The Office of the Actuary has prepared this memorandum in our longstanding capacity as an independent technical advisor to both the Administration and the Congress. The costs, savings, and coverage impacts shown herein represent our best estimates for the Patient Protection and Affordable Care Act. We offer this analysis in the hope that it will be of interest and value to policy makers and administrators as they implement and monitor these far-reaching national health care reforms. The statements, estimates, and other information provided in this memorandum are those of the Office of the Actuary and do not represent an official position of the Department of Health & Human Services or the Administration.

This memorandum summarizes the Office of the Actuary's estimates of the financial and coverage effects through fiscal year 2019 of selected provisions of the "Patient Protection and Affordable Care Act" (P.L. 111-148) as enacted on March 23, 2010 and amended by the "Health Care and Education Reconciliation Act of 2010" (P.L. 111-152) as enacted on March 30, 2010. For convenience, the health reform legislation, including amendments, will be referred to in this memorandum as the Patient Protection and Affordable Care Act, or PPACA.

Included are the estimated net Federal expenditures in support of expanded health insurance coverage, the associated numbers of people by insured status, the changes in Medicare and Medicaid expenditures and revenues, and the overall impact on total national health expenditures. Except where noted, we have not estimated the impact of the various tax and fee provisions or the impact on income and payroll taxes due to economic effects of the legislation. Similarly, the impact on Federal administrative expenses is excluded. A summary of the data, assumptions, and methodology underlying our national health reform estimates will be available in a forthcoming memorandum by the OACT Health Reform Modeling Team.

Summary

The table shown on page 2 presents financial impacts of the selected PPACA provisions on the Federal Budget in fiscal years 2010-2019. We have grouped the provisions of the legislation into six major categories:

(i) Coverage provisions, which include the mandated coverage for health insurance, a substantial expansion of Medicaid eligibility, and the additional funding for the Children's Health Insurance Program (CHIP);

(ii) Medicare provisions;

(iii) Medicaid and CHIP provisions other than the coverage expansion and CHIP funding;

(iv) Provisions aimed in part at changing the trend in health spending growth;

(v) The Community Living Assistance Services and Supports (CLASS) program; and

(vi) Immediate health insurance reforms.

The estimated costs and savings shown in the table are based on the effective dates specified in the law as enacted. Additionally, we assume that employers and individuals would take roughly 3 to 5 years to fully adapt to the new insurance coverage options and that the enrollment of additional individuals under the Medicaid coverage expansion would be completed by the third year of implementation. Because of these transition effects and the fact that most of the coverage provisions would be in effect for only 6 of the 10 years of the budget period, the cost estimates shown in this memorandum do not represent a full 10-year cost for the new legislation.

Estimated Federal Costs (+) or Savings (−) under Selected Provisions of the Patient Protection and Affordable Care Act as Enacted and Amended
(in billions)

	Fiscal Year										Total,
Provisions	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2010-19
Total*	$9.2	−$0.7	−$12.6	−$22.3	$16.8	$57.9	$63.1	$54.2	$47.2	$38.5	$251.3
Coverage†	3.3	4.6	4.9	5.2	82.9	119.2	138.2	146.6	157.6	165.8	828.2
Medicare	1.2	−4.7	−14.9	−26.3	−68.8	−60.3	−75.2	−92.1	−108.2	−125.7	−575.1
Medicaid/CHIP	−0.9	−0.9	0.8	4.5	8.6	5.1	4.6	3.4	1.3	1.7	28.3
Cost trend‡	—	—	—	—	−0.0	−0.1	−0.2	−0.4	−0.6	−0.9	−2.3
CLASS program	—	−2.8	−4.5	−5.6	−5.9	−6.0	−4.3	−3.4	−2.8	−2.4	−37.8
Immediate reforms	5.6	3.2	1.2	—	—	—	—	—	—	—	10.0

* Excludes Title IX revenue provisions except for sections 9008 and 9015, certain provisions with limited impacts, and Federal administrative costs.

† Includes expansion of Medicaid eligibility and additional funding for CHIP.

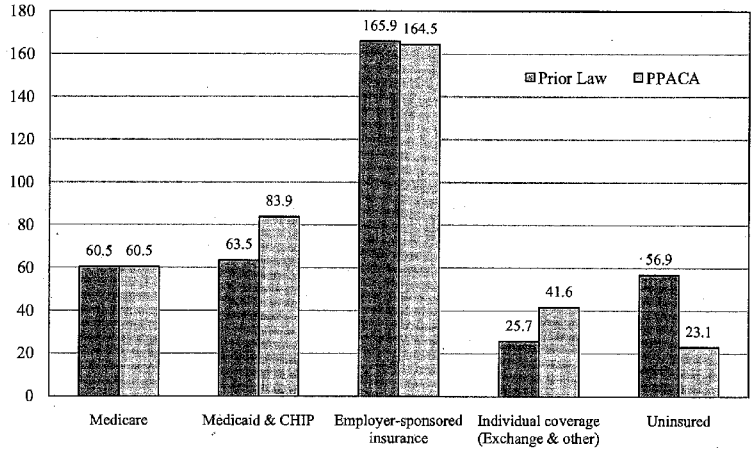
‡ Includes estimated non-Medicare Federal savings from provisions for comparative effectiveness research, prevention and wellness, fraud and abuse, and administrative simplification. Excludes impacts of other provisions that would affect cost growth rates, such as the productivity adjustments to Medicare payment rates (which are reflected in the Medicare line) and the section 9001 excise tax on high-cost employer plans.

As indicated in the table above, the provisions in support of expanding health insurance coverage (including the Medicaid eligibility changes and additional CHIP funding) are estimated to cost $828 billion through fiscal year 2019. The Medicare, Medicaid, growth-trend, CLASS, and immediate reform provisions are estimated to result in net savings of about $577 billion, leaving a net overall cost for this period of $251 billion before consideration of additional Federal administrative expenses and the increase in Federal revenues that would result from the excise tax on high-cost employer-sponsored health insurance coverage and other revenue provisions. (The additional Supplementary Medical Insurance revenues from fees on brand-name prescription drugs under section 9008 of the PPACA, and the additional Hospital Insurance payroll tax income under section 9015, are included in the estimated Medicare savings shown here.) The Congressional Budget Office and the Joint Committee on Taxation have estimated that the total net amount of Medicare savings and additional tax and other revenues would

somewhat more than offset the cost of the national coverage provisions, resulting in an overall reduction in the Federal deficit through 2019.

The following chart summarizes the estimated impacts of the PPACA on insurance coverage. The mandated coverage provisions, which include new responsibilities for both individuals and employers, and the creation of the American Health Benefit Exchanges (hereafter referred to as the "Exchanges"), would lead to shifts across coverage types and a substantial overall reduction in the number of uninsured, as many of these individuals become covered through their employers, Medicaid, or the Exchanges.

Estimated Effect of the Patient Protection and Affordable Care Act, as Enacted and Amended, on 2019 Enrollment by Insurance Coverage
(in millions)



Note: Totals across categories are not meaningful due to overlaps among categories (e.g., Medicare and Medicaid).

By calendar year 2019, the mandates, coupled with the Medicaid expansion, would reduce the number of uninsured from 57 million, as projected under prior law, to an estimated 23 million under the PPACA. The additional 34 million people who would become insured by 2019 reflect the net effect of several shifts. First, an estimated 18 million would gain primary Medicaid coverage as a result of the expansion of eligibility to all legal resident adults under 133 percent[1] of the Federal Poverty Level (FPL).[2] (In addition, roughly 2 million people with employer-

[1] The health reform legislation specifies an income threshold of 133 percent of the Federal Poverty Level but also requires States to apply an "income disregard" of 5 percent of the FPL in meeting the income test. Consequently, the *effective* income threshold is actually 138 percent of the FPL. For convenience, we refer to the statutory factor of 133 percent in this memorandum.

[2] This provision would extend eligibility to two significant groups: (i) individuals who would meet current Medicaid eligibility requirements, for example as disabled adults, but who have incomes in excess of the existing State thresholds but less than 133 percent of the FPL; and (ii) people who live in households with incomes below 133 percent of the FPL but who have no other qualifying factors that make them eligible for Medicaid under prior law, such as being under age 18, age 65 or older, disabled, pregnant, or parents of eligible children.

sponsored health insurance would enroll in Medicaid for supplemental coverage.) Another 16 million persons (most of whom are currently uninsured) would receive individual insurance coverage through the newly created Exchanges, with the majority of these qualifying for Federal premium and cost-sharing subsidies. Finally, we estimate that the number of individuals with employer-sponsored health insurance would decrease overall by about 1 million, reflecting both gains and losses in such coverage under the PPACA.

As described in more detail in a later section of this memorandum, we estimate that overall national health expenditures under the health reform act would increase by a total of $311 billion (0.9 percent) during calendar years 2010-2019, principally reflecting the net impact of (i) greater utilization of health care services by individuals becoming newly covered (or having more complete coverage), (ii) lower prices paid to health providers for the subset of those individuals who become covered by Medicaid, (but with net Medicaid costs from provisions other than the coverage expansion), and (iii) lower payments and payment updates for Medicare services. Although several provisions would help to reduce health care cost growth, their impact would be more than offset through 2019 by the higher health expenditures resulting from the coverage expansions.

The actual future impacts of the PPACA on health expenditures, insured status, individual decisions, and employer behavior are very uncertain. The legislation would result in numerous changes in the way that health care insurance is provided and paid for in the U.S., and the scope and magnitude of these changes are such that few precedents exist for use in estimation. Consequently, the estimates presented here are subject to a substantially greater degree of uncertainty than is usually the case with more routine health care legislation.

The balance of this memorandum discusses these financial and coverage estimates—and their limitations—in greater detail.

Effects of Coverage Provisions on Federal Expenditures and Health Insurance Coverage

Federal Expenditure Impacts

The estimated Federal costs of the coverage provisions in the PPACA are provided in table 1, attached, for fiscal years 2010 through 2019. We estimate that Federal expenditures would increase by a net total of $251 billion during this period as a result of the selected PPACA provisions—a combination of $828 billion in net costs associated with coverage provisions, $575 billion in net savings for the Medicare provisions, a net cost of $28 billion for the Medicaid/CHIP provisions (excluding the expansion of Medicaid eligibility and the additional CHIP funding), $2 billion in savings from provisions intended to help reduce the rate of growth in health spending, $38 billion in net savings from the CLASS program, and $10 billion in costs for the immediate insurance reforms. These latter five impact categories are discussed in subsequent sections of this memorandum.

Of the estimated $828 billion net increase in Federal expenditures related to the coverage provisions of the PPACA, about one-half ($410 billion) can be attributed to expanding Medicaid coverage for all adults who live in households with incomes below 133 percent of the FPL. This cost reflects the fact that newly eligible persons would be covered with a Federal Medical Assistance Percentage (FMAP) of over 99 percent for the first 3 years, declining to 93 percent by the sixth year; that is, the Federal government would bear a significantly greater proportion of

the cost of the newly eligible enrollees than is the case for current Medicaid beneficiaries.[3] Also included in this cost is the additional funding for the CHIP program for 2014 and 2015, which would increase such expenditures by an estimated $29 billion. The remaining costs of the coverage provisions arise from the refundable tax credits and reduced cost-sharing requirements for low-to-middle-income enrollees purchasing health insurance through the Exchanges ($507 billion) and credits for small employers who choose to offer insurance coverage ($31 billion). The increases in Federal expenditures would be partially offset by the penalties paid by affected individuals who choose to remain uninsured and employers who opt not to offer coverage; such penalties total $120 billion through fiscal year 2019, reflecting the relatively low per-person penalty amounts specified in the legislation.[4]

The refundable premium tax credits in section 1401 of the PPACA (as amended by section 1001 of the Reconciliation Act) would limit the premiums paid by individuals with incomes up to 400 percent of the FPL to a range of 2.0 to 9.5 percent of their income and would cost an estimated $451 billion through 2019. An estimated 25 million Exchange enrollees (79 percent) would receive these Federal premium subsidies. The cost-sharing credits would reimburse individuals and families with incomes up to 400 percent of the FPL for a portion of the amounts they pay out-of-pocket for health services, as specified in section 1402, as amended. These credits are estimated to cost $55 billion through 2019.

The PPACA establishes the Exchange premium subsidies during 2014-2018 in such a way that the reduced premiums payable by those with incomes below 400 percent of FPL would maintain the same share of total premiums over time. As a result, the Federal premium subsidies for a qualifying individual would grow at the same pace as per capita health care costs during this period. Because the cost-sharing assistance is based on a percentage of health care costs incurred by qualifying individuals and families, average Federal expenditures for this assistance would also increase at the same rate as per capita health care costs. After 2018, if the Federal cost of the premium and cost-sharing subsidies exceeded 0.504 percent of GDP, then the share of Exchange health insurance premiums paid by enrollees below 400 percent of the FPL would increase such that the Federal cost would stay at approximately 0.504 percent of GDP. We estimate that the subsidy costs in 2018 would represent about 0.518 percent of GDP, with the result that the enrollee share of the total premium would generally increase in 2019 and later.

As noted previously, the Federal costs for the coverage expansion provisions are somewhat offset by the individual and employer penalties stipulated by the PPACA. We estimate that individual penalties would provide $33 billion in revenue to the Federal government in fiscal years 2014-2019, taking into account the time lag associated with collecting the penalty amounts through the Federal income tax system. (A discussion of the estimated number of individuals who would choose to remain uninsured is provided below.) Additionally, for firms that do not

[3] For the newly eligible enrollees, the FMAP for fiscal year 2020 and later will be 90 percent, compared to an average of 57 percent for the previously eligible enrollee population. In addition, the estimated cost includes new Medicaid enrollments by previously eligible individuals as a result of the publicity, enrollment assistance through the Exchanges, and reduced stigma associated with Federal assistance for health care. Also included here are the Medicaid costs for the provision to extend Medicaid coverage to individuals up to age 26 who were previously in foster care.

[4] Employer penalties would be $2,000 per employee in 2014, generally, which is substantially less than the cost of providing health insurance coverage. The relationship between penalties and premiums is much more complicated for individuals than for employers; still, for many individuals the applicable penalty would be considerably smaller than the cost of coverage.

offer health insurance and are subject to the "play or pay" penalties, we estimate that the penalties would total $87 billion in 2014-2019.

The penalty amounts for noncovered individuals will be indexed over time by the CPI (or, in certain instances, by growth in income) and would normally increase more slowly than health care costs. As a result, penalty revenues for nonparticipating individuals are estimated to grow more slowly than the Federal expenditures for the premium assistance credits. Penalties for employers who do not offer health insurance will be indexed by premium levels and will thus keep pace with health care cost growth.

The health reform act specifies maximum out-of-pocket limits in 2014 equal to the corresponding maximums as defined in the Internal Revenue Code for high-deductible health plans. We estimate that these limits would be $6,645 for an individual and $13,290 for a family with qualified creditable coverage (including employer-sponsored health insurance). For future years, the limits are indexed to the growth in the average health insurance premium in the U.S. Under this approach, the proportion of health care costs above the out-of-pocket maximum would be relatively stable over time. For the basic "bronze" benefit plan for individuals, with an actuarial value of 60 percent, we estimate that the cost-sharing percentage applicable before the out-of-pocket maximum is reached would average about 76 percent in 2014 and later. The corresponding cost-sharing rate for family coverage is 64 percent. For the "silver" benefit package, the individual and family cost-sharing rates below the out-of-pocket maximums would average about 47 percent and 40 percent, respectively. For the more comprehensive "gold" and "platinum" benefit packages authorized through the Exchanges, these initial cost-sharing levels would be significantly lower.

Health Insurance Coverage Impacts

The estimated effects of the PPACA on health insurance coverage are provided in table 2, attached. As summarized earlier, we believe that these effects will be quite significant. By calendar year 2019, the individual mandate, Medicaid expansion, and other provisions are estimated to reduce the number of uninsured from 57 million under prior law to 23 million after the PPACA. The percentage of the U.S. population with health insurance coverage is estimated to increase from 83 percent under the prior-law baseline to 93 percent after the changes have become fully effective.

Of the additional 34 million people who are estimated to be insured in 2019 as a result of the PPACA, a little more than one-half (18 million) would receive Medicaid coverage due to the expansion of eligibility to adults under 133 percent of the FPL. (Included in the total are an estimated 50,000 individuals who would gain Medicaid coverage as former children in foster care programs and who could be covered up to age 26 under the new law.) We anticipate that the intended enrollment facilitation under the PPACA—i.e., that the Health Benefits Exchanges help people determine which insurance plans are available and identify whether individuals qualify for Medicaid coverage, premium subsidies, etc.—would result in a high percentage of eligible persons becoming enrolled in Medicaid. We further believe that the great majority of such persons (15 million) would become covered in the first year, 2014, with the rest covered by 2016. About 2 million people who currently have employer-sponsored health insurance are estimated to enroll in Medicaid as a supplement to their existing coverage.

We estimate that 16 million people would receive health coverage in 2019 through the newly created Exchanges under the PPACA. (Another 15 million, who currently have individual health insurance policies, are also expected to switch to Exchange plans.) We modeled the choice to purchase coverage from the Exchanges as a function of individuals' and families' expected health expenditures relative to the cost of coverage if they were insured (taking into account applicable premium subsidies). We also considered the required penalty associated with the individual mandate if they chose to remain uninsured, along with other factors.[5] Our model indicated that roughly 63 percent of those eligible for the Exchanges would choose to take such coverage, with the principal incentive being the level of premium assistance available. For many individuals, the penalty amounts for not having insurance coverage were not sufficiently large to have a sizable impact on the coverage decision. Also, in this regard, individuals or families would not be subject to a penalty for failing to enroll in an Exchange plan if the "bronze" premium level (reduced by the premium tax credit, if applicable) would exceed 8 percent of income. We estimate that this provision would exempt individuals and families with incomes between about 400 percent and 542 percent of the FPL, representing about 16 percent of the non-aged population.

The new legislation would require the Office of Personnel Management to arrange for at least two private, multi-State health plans to be offered through each health insurance Exchange. The multi-State plans would generally meet the same benefit, cost-sharing, network, and other requirements applicable to private Exchange plans and would negotiate payment rates with providers. (A State could enact a requirement for additional benefits in the multi-State plans, beyond the essential benefits specified for a qualified plan, but would have to make payments on behalf of eligible individuals to defray the cost of the additional benefits.) We estimate that the multi-State plans would have costs that were very similar to those for other Exchange plans.

Employer-sponsored health insurance has traditionally been the largest source of coverage in the U.S., and we anticipate that it would continue to be so under the PPACA. By 2019, an estimated 13 million workers and family members would become newly covered as a result of additional employers offering health coverage, a greater proportion of workers enrolling in employer plans, and an extension of dependent coverage up to age 26. However, a number of workers who currently have employer coverage would likely become enrolled in the expanded Medicaid program or receive subsidized coverage through the Exchanges. For example, some smaller employers would be inclined to terminate their existing coverage, and companies with low average salaries might find it to their—and their employees'—advantage to end their plans, thereby allowing their workers to qualify for heavily subsidized coverage through the Exchanges. Somewhat similarly, many part-time workers could obtain coverage more inexpensively through the Exchanges or by enrolling in the expanded Medicaid program. Finally, as mentioned previously, the per-worker penalties assessed on nonparticipating employers are relatively low compared to prevailing health insurance costs. As a result, the penalties would not be a substantial deterrent to dropping or forgoing coverage. We estimate that such actions would collectively reduce the number of people with employer-sponsored health coverage by about 14 million, or slightly more than the number newly covered through

[5] Such other factors include age, gender of head of household, race, children, marital status, health status, and employment status (for both the head of household and the spouse), as well as adjustments to reflect the availability of health insurance on a guaranteed-issue basis and at community-rated, group insurance premium rates. Finally, we also considered the general desire to comply with the intent of the law, even in the significant number of cases in which the penalty amount would be small or would not apply.

existing and new employer plans under the PPACA. As indicated in table 2, the total number of persons with employer coverage in 2019 is estimated to be 1 million lower under the reform legislation than under the prior law.

For the estimated 23 million people who would remain uninsured in 2019, roughly 5 million are undocumented aliens who would be ineligible for Medicaid or the Exchange coverage subsidies under the health reform legislation. The balance of 18 million would choose not to be insured and to pay the penalty (if applicable) associated with the individual mandate. For the most part, these would be individuals with relatively low health care expenses for whom the individual or family insurance premium would be significantly in excess of any penalty and their anticipated health benefit value. In other instances, as happens currently, some people would not enroll in their employer plans or take advantage of the Exchange opportunities even though it would be in their best financial interest to do so.

Impact on Medicare and Medicaid

Medicare

The estimated financial impacts of the Medicare provisions in the PPACA are provided in detail in table 3, attached, which is organized by section of the legislation.[6] Net Medicare savings are estimated to total $575 billion for fiscal years 2010-2019. Substantial savings are attributable to provisions that would, among other changes, reduce Part A and Part B payment levels and adjust future "market basket" payment updates for productivity improvements ($233 billion); eliminate the Medicare Improvement Fund ($27 billion); reduce disproportionate share hospital (DSH) payments ($50 billion); reduce Medicare Advantage payment benchmarks and permanently extend the authority to adjust for coding intensity ($145 billion); freeze the income thresholds for the Part B income-related premium for 9 years ($8 billion); implement an Independent Payment Advisory Board together with strict Medicare expenditure growth rate targets ($24 billion); and increase the HI payroll tax rate by 0.9 percentage point for individuals with incomes above $200,000 and families above $250,000 ($63 billion). Other provisions would generate relatively smaller amounts of savings, through such means as reporting physician quality measures, reducing payments in cases involving hospital-acquired infections, reducing readmissions, refining imaging payments, increasing Part D premiums for higher-income beneficiaries, and implementing evidence-based coverage of preventive services.

These savings are slightly offset by the costs of closing the Part D coverage gap ($12 billion); reducing the growth in the Part D out-of-pocket cost threshold ($1 billion); extending a number of special payment provisions scheduled to expire, such as the postponement of therapy caps ($5 billion); and by the costs for improving preventive health services and access to primary care ($6 billion).

[6] For ease of interpretation, we have incorporated the Medicare and Medicaid provisions of the managers' amendments, as specified in Title X of the PPACA, into the corresponding provisions of Titles II through VII and Title IX. For example, the savings shown for section 3403 (Independent Payment Advisory Board) represent the impact of this provision from the original bill as amended by Senate managers' amendment section 10320. Similarly, any further amendments introduced by the Reconciliation Act and managers' amendments to the Reconciliation Act have also been included with the corresponding title of the PPACA. For example, the costs under section 1101 of the Reconciliation Act, to close the Part D coverage gap or "donut hole," are included with the Part D provisions of PPACA, as are the costs of slowing the growth in the enrollee out-of-pocket cost threshold, as added by the managers' amendments to the Reconciliation Act.

The Reconciliation Act amendments introduced a new 3.8-percent "unearned income Medicare contribution" on income from interest, dividends, annuities, and other non-earnings sources for individual taxpayers with incomes above $200,000 and couples filing joint returns with incomes above $250,000. Despite the title of this tax, this provision is unrelated to Medicare; in particular, the revenues generated by the tax on unearned income are not allocated to the Medicare trust funds (and thus are not shown in table 3).

Conversely, the revenues from fees on manufacturers and importers of brand-name prescription drugs under section 9008 of the PPACA are earmarked for the Part B account in the Medicare Supplementary Medical Insurance trust fund. From the standpoint of the Federal Budget, these amounts are new receipts and serve to reduce the Budget deficit. From a trust fund perspective, however, the situation is more complicated. No changes were made in the existing statutory provisions for Part B beneficiary premiums and general revenue matching amounts, which by law are set each year at a level adequate to finance Part B expenditures. With no change to the existing financing, the additional revenues under section 9008 would result in an excessive level of financing for Part B and an unnecessary accumulation of account assets. It would be reasonable to establish a negative "premium margin" to maintain Part B assets at an appropriate contingency level, which would reduce beneficiary premium rates and matching general revenues by an amount equal to the new revenues from prescription drug fees. The estimated savings amounts shown in table 3 for section 9008 represent the net Budget impact (additional fee receipts less the reduction in beneficiary premiums). In practice, there would be no net impact on the operations of the Part B trust fund account.

Based on the estimated savings for Part A of Medicare, the assets of the Hospital Insurance trust fund would be exhausted in 2029 compared to 2017 under the prior law—an extension of 12 years. The combination of lower Part A costs and higher tax revenues results in a lower Federal deficit based on budget accounting rules. However, trust fund accounting considers the same lower expenditures and additional revenues as extending the exhaustion date of the HI trust fund. In practice, the improved HI financing cannot be simultaneously used to finance other Federal outlays (such as the coverage expansions) and to extend the trust fund, despite the appearance of this result from the respective accounting conventions.

It is important to note that the estimated savings shown in this memorandum for one category of Medicare provisions may be unrealistic. The PPACA introduces permanent annual productivity adjustments to price updates for most providers (such as hospitals, skilled nursing facilities, and home health agencies), using a 10-year moving average of economy-wide private, non-farm productivity gains. While such payment update reductions will create a strong incentive for providers to maximize efficiency, it is doubtful that many will be able to improve their own productivity to the degree achieved by the economy at large.[7] Over time, a sustained reduction in payment updates, based on productivity expectations that are difficult to attain, would cause Medicare payment rates to grow more slowly than, and in a way that was unrelated to, the

[7] The provision of most health services tends to be very labor-intensive. Economy-wide productivity gains reflect relatively modest improvements in the service sector together with much larger improvements in manufacturing. Except in the case of physician services, we are not aware of any empirical evidence demonstrating the medical community's ability to achieve productivity improvements equal to those of the overall economy. The Office of the Actuary's most recent analysis of hospital productivity highlights the difficulties in measurement but suggests that such productivity has been small or negligible during 1981 to 2005.
(See http://www.cms.hhs.gov/HealthCareFinancingReview/downloads/07-08Winterpg49.pdf.)

providers' costs of furnishing services to beneficiaries. Thus, providers for whom Medicare constitutes a substantive portion of their business could find it difficult to remain profitable and, absent legislative intervention, might end their participation in the program (possibly jeopardizing access to care for beneficiaries). Simulations by the Office of the Actuary suggest that roughly 15 percent of Part A providers would become unprofitable within the 10-year projection period as a result of the productivity adjustments.[8] Although this policy could be monitored over time to avoid such an outcome, changes would likely result in smaller actual savings than shown here for these provisions.

A related concern is posed by the requirements that will be placed on the Independent Payment Advisory Board. The Board will be charged with recommending changes to certain Medicare payment categories in an effort to prevent per-beneficiary Medicare costs from increasing faster than the average of the CPI and the CPI-medical for "implementation years" 2015 through 2019.[9] The Secretary of HHS is required to implement the Board's recommendations unless the statutory process is overridden by new legislation.

Average Medicare costs per beneficiary usually increase over time as a function of (i) medical-specific price growth, (ii) more utilization of services by beneficiaries, and (iii) greater "intensity" or average complexity of these services. In general, limiting cost growth to a level below medical price inflation alone would represent an exceedingly difficult challenge. Actual Medicare cost growth per beneficiary was below the target level in only 4 of the last 25 years, with 3 of those years immediately following the Balanced Budget Act of 1997; the impact of the BBA prompted Congress to pass legislation in 1999 and 2000 moderating many of the BBA provisions. As an additional comparison, during the last 25 years the average increase in the target growth rate has been 0.33 percent per year below the average increase in nominal GDP per capita—which is approximately the target level for the physician sustainable growth rate (SGR) payment system. Congress has overridden the SGR-based payment reductions for each of the last 7 years (and, to date, for the first 5 months of 2010).

The Board's efforts would be further complicated by provisions that prohibit increases in cost-sharing requirements and that exempt certain categories of Medicare expenditures from consideration. We have estimated the savings for section 3403 under the assumption that the provision will be implemented as specified; in particular, we have not assumed that Congress would pass subsequent legislation to prevent implementation of the Board's recommendations. Although the savings from the other Medicare provisions in the PPACA are quite substantial, they would not be sufficient to meet the growth rate targets specified in conjunction with the Advisory Board. We estimate that meeting the growth rate targets in 2015-2019 would require changes that would reduce Medicare growth rates by another 0.3 percent per year, on average, in addition to the impacts of the productivity adjustments, MA and DSH reductions, and other provisions in the PPACA.

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[8] The simulations were based on actual fiscal year 2007 Medicare and total facility margin distributions for hospitals, skilled nursing facilities, and home health agencies. Provider revenues and expenditures were projected using representative growth rates and the Office of the Actuary's best estimates of achievable productivity gains for each provider type, and holding all other factors constant. A sensitivity analysis suggested that the conclusions drawn from the simulations would not change significantly under different provider behavior assumptions.

[9] Maximum growth rate reductions of 0.5, 1.0, and 1.25 percentage points would apply to 2015, 2016, and 2017, respectively, and the maximum would be 1.5 percentage points thereafter. After implementation year 2019, the target growth amount would be based on the increase in per capita GDP plus 1 percentage point.

After 2019, further Advisory Board recommendations for growth rate reductions would generally not be required. The other Medicare savings provisions, if permitted to continue, would normally reduce expenditure growth rates to slightly below the post-2019 target level based on per capita GDP growth plus 1 percent. Even if Medicare growth rates exceeded the targets, recommendations might not be required if the projected Medicare growth rate were less than that for overall national health expenditures on a per capita basis—as would tend to be the case, given the continuing Medicare savings. (This exemption from the requirement to make recommendations could not be applied in 2 successive years.) Although the Advisory Board process would have no impact after 2019 based on the specific assumptions underlying these estimates, it would still serve as a brake during any periods of unusually rapid spending growth.

Under the prior law, Medicare Advantage payment benchmarks were generally in the range of 100 to 140 percent of fee-for-service costs. Section 1102 of reconciliation amendments sets the 2011 MA benchmarks equal to the benchmarks for 2010 and specifies that, ultimately, the benchmarks will equal a percentage (95, 100, 107.5, or 115 percent) of the fee-for-service rate in each county. During a transition period, the benchmarks will be based on a blend of the prior ratebook approach and the ultimate percentages. The phase-in schedule for the new benchmarks will occur over 2 to 6 years, with the longer transitions for counties with the larger benchmark decreases under the new method.

The PPACA, as amended, also introduces MA bonuses and rebate levels that are tied to the plans' quality ratings. Beginning in 2012, benchmarks will be increased for plans that receive a 4-star or higher rating on a 5-star quality rating system. The bonuses will be 1.5 percent in 2012, 3.0 percent in 2013, and 5.0 percent in 2014 and later. An additional county bonus, which is equal to the plan bonus, will be provided on behalf of beneficiaries residing in specified counties. The percentage of the "benchmark minus bid" savings provided as a rebate, which historically has been 75 percent, will also be tied to a plan's quality rating. In 2014, when the provision is fully phased in, the rebate share will be 50 percent for plans with a quality rating of less than 3.5 stars; 65 percent for a quality rating of 3.5 to 4.49; and 70 percent for a quality rating of 4.5 or greater.

The new provisions will generally reduce MA rebates to plans and thereby result in less generous benefit packages.[10] We estimate that in 2017, when the MA provisions will be fully phased in, enrollment in MA plans will be lower by about 50 percent (from its projected level of 14.8 million under the prior law to 7.4 million under the new law).

Medicaid/CHIP

The estimated Federal financial effects of the Medicaid and CHIP provisions in the PPACA are shown in table 4, attached. As noted earlier, the costs associated with the expansion of Medicaid eligibility to individuals and families with incomes below 133 percent of the FPL and to children previously in foster care are included with the national coverage provisions shown in table 1. The additional funding for the CHIP program is also included in table 1 with the other coverage provisions.

[10] MA plans use rebate revenues to reduce Medicare coinsurance requirements, add extra benefits such as vision or dental care, and/or reduce enrollee premiums for Part B or Part D of Medicare. The new law also requires adjustments to offset the impact of excess "coding intensity" in determining plan risk scores. These adjustments would prevent increases in future payments to MA plans as a result of such coding.

The total net Federal cost of the other Medicaid and CHIP provisions is estimated to be $28 billion in fiscal years 2010-2019 and reflects numerous cost increases and decreases under the individual provisions. Those with significant Federal savings include various provisions increasing the level of Medicaid prescription drug rebates ($24 billion) and reductions in Medicaid DSH expenditures ($14 billion). Interactions between the different sections of the legislation, such as the lower Medicare Part B premiums under the PPACA, contribute an additional $9 billion in reduced Medicaid outlays.

The key provisions that would increase Federal Medicaid and CHIP costs are the Medicaid "Community First Choice Option" and other changes to encourage home and community-based services ($29 billion), higher Federal matching rates for States with existing childless-adult coverage expansions ($24 billion), a temporary increase in payments to primary care physicians ($11 billion), and increased payments to the territories ($7 billion). (The net impact of the Medicaid and CHIP provisions on State Medicaid costs is a reduction totaling $33 billion through fiscal year 2019. These savings result in part because certain of the provisions reallocate costs from States to the Federal government.)

Impact of Provisions on the Rate of Growth in Health Care Costs

The PPACA includes a number of provisions that are intended, in part, to help control health care costs and to change the overall trend in health spending growth. Many of these are specific to the Medicare program, and their estimated financial effects are shown in table 3. While some of the Medicare provisions would have a largely one-time impact on the *level* of expenditures (for example, the reduction in MA benchmarks), others would have an effect on expenditure *growth rates*. Examples of the latter include the productivity adjustments to Medicare payment updates for most categories of providers, which would reduce overall Medicare cost growth by roughly 0.6 to 0.7 percent per year, and the Independent Payment Advisory Board process, which would further reduce Medicare growth rates during 2015-2019 by about 0.3 percent per year. As discussed previously, however, the growth rate reductions from productivity adjustments are unlikely to be sustainable on a permanent annual basis, and meeting the CPI-based target growth rates prior to 2020 will be very challenging as well.

The Independent Payment Advisory Board will also be required to periodically submit recommendations to Congress and the President regarding methods of slowing the growth of non-Federal health care programs. In many cases, Federal or State legislation would need to be enacted to implement these recommendations. In other cases, they could be adopted voluntarily by private health insurance plans or by health providers or introduced administratively by government entities. Because the nature of these broader recommendations is not known and there is no mandate to adopt them, we have not estimated an explicit impact on health care spending growth.

Another provision that would tend to moderate health care cost growth rates is the excise tax on high-cost employer-sponsored health insurance coverage (section 9001), which is described in more detail in the section of this memorandum on national health expenditures. In reaction to the tax, which would take effect in 2018, many employers would reduce the scope of their health benefits. The resulting reductions in covered services and/or increases in employee cost-sharing requirements would induce workers to use fewer services. Because plan benefit values will generally increase faster than the threshold amounts for defining high-cost plans (which, after

2019, are indexed by the CPI), additional plans would become subject to the excise tax over time, prompting many of those employers to scale back coverage. This continuing cycle would have a moderate impact on the overall growth of expenditures for employer-sponsored insurance. It should be noted, however, that an estimated 12 percent of insured workers in 2019 would be in employer plans with benefit values in excess of the thresholds (before changes to reduce benefits) and that this percentage would increase rapidly thereafter. The effect of the excise tax on reducing health care cost growth would depend on its ongoing application to an expanding share of employer plans and on an increasing scope of benefit reductions for affected plans. Since this provision is characterized as affecting high-cost employer plans, its broader and deeper impact could become an issue.

Certain other provisions of the PPACA are also intended to help control health care costs more generally, through promotion of comparative effectiveness research, greater use of prevention and wellness measures, administrative simplification, and augmented fraud and abuse enforcement. For fiscal years 2010 through 2019, we estimate a relatively small reduction in non-Medicare Federal health care expenditures of $2 billion for these provisions, all of which is associated with comparative effectiveness research.

Comparative Effectiveness Research

We reviewed literature and consulted experts to determine the potential cost savings that could be derived from comparative effectiveness research (CER). We found that the magnitude of potential savings varies widely depending upon the scope and influence of comparative effectiveness efforts. Small savings could be achieved through the wide availability of non-binding research, while substantial savings could be generated by a comparative effectiveness board with authority over payment and coverage policies.

Our interpretation of the CER provisions in the PPACA, which allow the Secretary of HHS to use evidence and findings from CER within defined limits in making coverage determinations under Medicare, is consistent with a low level of influence, translating into an estimated total reduction in national health expenditures of $8 billion for calendar years 2010 through 2019, and Federal savings of about $4 billion for fiscal years 2010 through 2019 (including Medicare). We anticipate that such savings would develop gradually, as changes in provider practice and culture evolved over time. Expert input on this subject suggests that the full impact of comparative effectiveness research, together with dissemination and application of its results, would take many years to develop.

Other Provisions

We show a negligible financial impact over the next 10 years for the other provisions intended to help control future health care cost growth. There is no consensus in the available literature or among experts that prevention and wellness efforts result in lower costs. Several prominent studies conclude that such provisions—while improving the quality of individuals' lives in important ways—generally increase costs overall. For example, while it is possible that savings can be achieved for many people by diagnosing diseases in early stages and promoting lifestyle

and behavioral changes that reduce the risk for serious and costly illnesses, additional costs are incurred as a result of increased screenings, preventive care, and extended years of life.[11]

Regarding the general fraud and abuse and administrative simplification provisions (that is, excluding the Medicare and Medicaid provisions), we find that the language is not sufficiently specific to provide estimates.

CLASS Program

Title VIII of the health reform act establishes a new, voluntary, Federal insurance program providing a cash benefit if a participant is unable to perform at least two or three activities of daily living or has substantial cognitive impairment. The program will be financed by participant premiums, with no Federal subsidy. Participants will have to meet certain modest work requirements during a 5-year vesting period before becoming eligible for benefits. Benefits are intended to be used to help purchase community living assistance services and supports (CLASS) that would help qualifying beneficiaries maintain their personal and financial independence and continue living in the community. Benefits can also be used to help cover the cost of institutional long-term care.

As shown in the table on page 2, we estimate a net Federal savings for the CLASS program of $38 billion during the first 9 years of operations—the first 5 of which are prior to the commencement of benefit payments. After 2015, as benefits are paid, the net savings from this program will decline; in 2025 and later, projected benefits exceed premium revenues, resulting in a net Federal cost in the longer term.[12]

We estimate that roughly 2.8 million persons will participate in the program by the third year. This level represents about 2 percent of potential participants, compared to a participation rate of 4 percent for private long-term care insurance offered through employers. Factors affecting participation in CLASS include the program's voluntary nature, the lack of a Federal subsidy, a minimal premium for students and individuals with incomes under 100 percent of the FPL (initially $5 per month), a relatively high premium for all other participants as a result of adverse selection and the effect of subsidizing participants paying the $5 premium, a new and unfamiliar benefit, and the availability of lower-priced private long-term care insurance for many.

Compounding this situation will be the probable participation of a significant number of individuals who already meet the functional limitation requirements to qualify for benefits. In the sixth year of the program (2016), these participants would begin to receive benefits, along with others who had developed such limitations in the interim. We estimate that an initial

[11] Title IV in the PPACA creates a Prevention and Public Health Fund and authorizes the appropriation of $15 billion for these purposes. We consider these expenditures to be primarily administrative in nature and thus have not included them as program costs in this memorandum.

[12] The CLASS program is intended to be financed on a long-range, 75-year basis through participant premiums that would fully fund benefits and administrative expenses. If this goal can be achieved, despite anticipated serious adverse selection problems (described subsequently), then annual expenditures would be met through a combination of premium income and interest earnings on the assets of the CLASS trust fund. The Federal Budget impact would be the net difference between premium receipts and program outlays. Thus, the trust fund would be adequately financed in this scenario, but the Federal Budget would have a net savings each year prior to 2025 and a net cost each year thereafter.

average premium level of about $240 per month would be required to adequately fund CLASS program costs for this level of enrollment, adverse selection, and premium inadequacy for students and low-income participants. (Except for those paying the $5 premium, individuals enrolling in a given year will pay a constant premium amount throughout their participation, unless trust fund deficits necessitate a premium increase. Premiums will vary by age at enrollment and by year of enrollment.)

In general, voluntary, unsubsidized, and non-underwritten insurance programs such as CLASS face a significant risk of failure as a result of adverse selection by participants. Individuals with health problems or who anticipate a greater risk of functional limitation would be more likely to participate than those in better-than-average health. Setting the premium at a rate sufficient to cover the costs for such a group further discourages persons in better health from participating, thereby leading to additional premium increases. This effect has been termed the "classic assessment spiral" or "insurance death spiral." The problem of adverse selection is intensified by requiring participants to subsidize the $5 premiums for students and low-income enrollees. Although Title VIII includes modest work requirements in lieu of underwriting and specifies that the program is to be "actuarially sound" and based on "an actuarial analysis of the 75-year costs of the program that ensures solvency throughout such 75-year period," there is a very serious risk that the problem of adverse selection will make the CLASS program unsustainable.[13]

Immediate Insurance Reforms

A number of provisions in the PPACA have an immediate effect on insurance coverage. Most of these provisions, however, do not have a direct impact on Federal expenditures. (A discussion of their impact on national health expenditures is included in the following section of this memorandum.) Section 1101 of the PPACA authorizes the expenditure of up to $5 billion in support of a temporary national insurance pool for high-risk individuals without other health insurance. Section 1102 requires the Secretary of HHS to establish a Federal reinsurance program in 2010-2013 for early retirees and their families in employer-sponsored health plans. Participation by employers is optional, and the law authorizes up to $5 billion in Federal financing for the reinsurance costs. No other financing is provided, and reinsurance claims would be paid only as long as the authorized amount lasts. We estimate that the full amount of the authorizations for sections 1101 and 1102 would be expended during the first 1 to 3 calendar years of operation.

National Health Expenditure Impacts

The estimated effects of the PPACA on overall national health expenditures (NHE) are shown in table 5. In aggregate, we estimate that for calendar years 2010 through 2019, NHE would increase by $311 billion, or 0.9 percent, over the updated baseline projection that was released on June 29, 2009.[14] Year by year, the relative increases are largest in 2016, when the coverage expansions would be fully phased in (2.0 percent), and gradually decline thereafter to 1.0 percent

[13] An analysis of the potential adverse selection problems for the CLASS program was performed by a nonpartisan, joint workgroup of the American Academy of Actuaries and the Society of Actuaries. Their report was issued on July 22, 2009 and is available at http://www.actuary.org/pdf/health/class_july09.pdf .

[14] R. Foster and S. Heffler, "Updated and Extended National Health Expenditure Projections, 2010-2019." Memorandum dated June 29, 2009. Available online at http://www.cms.hhs.gov/NationalHealthExpendData/Downloads/NHE_Extended_Projections.pdf.

in 2019, as the effects of the Medicare market basket reductions compound and as the excise tax on high-cost employer health plans becomes effective. The NHE share of GDP is projected to be 21.0 percent in 2019, compared to 20.8 percent under prior law.

The increase in total NHE is estimated to occur primarily as a net result of the substantial expansions in coverage under the PPACA, together with the expenditure reductions for Medicare. Numerous studies have demonstrated that individuals and families with health insurance use more health services than otherwise-similar persons without insurance. Under the health reform legislation, as noted above, an estimated 34 million currently uninsured people would gain comprehensive coverage through the health insurance Exchanges, their employers, or Medicaid. The availability of coverage would typically result in a fairly substantial increase in the utilization of health care services, with a corresponding impact on total health expenditures. These higher costs would be partially offset by the sizable discounts imposed on providers by State Medicaid payment rules and by the significant discounts negotiated by private health insurance plans. We estimate that the net effect of the utilization increases and price reductions arising from the coverage provisions of the PPACA would increase NHE in 2019 by about 3.4 percent.

The PPACA will also affect aggregate NHE through the Medicare savings provisions. We estimate that these impacts would reduce NHE by roughly 2.4 percent in 2019, assuming that the productivity adjustments to Medicare payment updates and the impacts of the Independent Payment Advisory Board can be sustained through this period. The legislation would have only a slight impact on the utilization of health care services by Medicare beneficiaries (subject to the caveat mentioned previously regarding possible access issues under the provision to permanently reduce annual provider payment updates by economy-wide productivity gains). Medicaid outlays for health care would increase under some provisions and decrease under others; excluding the coverage expansion, the overall higher level of such costs would lower total U.S. health expenditures in 2019 by about 0.1 percent.

The immediate insurance reforms in Title I will affect national health expenditures as well, although by relatively small amounts. We estimate that the creation of a national high-risk insurance pool will result in roughly 375,000 people gaining coverage in 2010, increasing national health spending by $4 billion. By 2011 and 2012 the initial $5 billion in Federal funding for this program would be exhausted, resulting in substantial premium increases to sustain the program; we anticipate that such increases would limit further participation. An estimated 2.7 million retirees and dependents would be affected by the Federal reinsurance program for early retirees with employer-sponsored insurance. Although the reinsurance program would increase Federal costs by the allotted $5 billion, we estimate that the impact on total national health expenditures would be negligible.

Beginning in 2010, qualified child dependents below age 26 who are uninsured will be allowed to enroll under dependent coverage. An estimated 485,000 dependent children will gain insurance coverage through their parents' private group health plans, increasing national health spending by $0.9 billion. These impacts are expected to persist through 2013. Additionally, because this provision would not expire when the Medicaid expansion, individual mandate, and Exchanges start in 2014, we anticipate that these individuals would continue to remain covered as dependents even though they may be newly eligible for other coverage. Finally, we did not estimate NHE coverage or cost impacts for the other immediate reform provisions, such as prohibiting limitations on pre-existing conditions or elimination of lifetime aggregate benefit

limits. We believe that each of these provisions would have only a relatively minor upward impact on national health spending.

Section 9001 of the PPACA places an excise tax on employer-sponsored health insurance coverage with a benefit value above specified levels (generally $10,200 for individuals and $27,500 for families in 2018, adjusted in 2019 by growth in the CPI plus 1 percentage point and by growth in the CPI thereafter).[15] The tax is 40 percent of the excess benefit value above these thresholds. We estimate that, in aggregate, affected employers will reduce their benefit packages in such a way as to eliminate about three-quarters of the excess benefit value. The resulting higher cost-sharing requirements for employees would have an initial impact on the overall level of health expenditures, reducing total NHE by an estimated 0.1 percent in 2019. Moreover, because health care costs will generally increase faster than the CPI, we anticipate additional, incremental benefit coverage reductions in future years to prevent an increase in the share of employer coverage subject to the excise tax. These further adjustments would contribute to a small reduction in the growth in total health care costs (but an increase in out-of-pocket costs) for affected employees in 2019 and later.[16] As mentioned earlier, the proportion of workers experiencing reductions in their employer-sponsored health coverage as a result of the excise tax is estimated to increase rapidly after 2019.

The health reform legislation, as enacted, imposes collective annual fees on manufacturers and importers of brand-name prescription drugs and on health insurance plans. In addition, the PPACA establishes an excise tax on non-personal-use retail sales by manufacturers and importers of medical devices. For manufacturers and importers of brand-name prescription drugs, the fee is $2.5 billion in 2011, increasing to a maximum of $4.1 billion by 2018, and then is set at $2.8 billion per year in 2019 and beyond.[17] For insurers, the annual fee is set at $8.0 billion starting in 2014 and rises to $14.3 billion by 2018; thereafter, the fee increases by the rate of premium growth. In each case, the total annual fee amount would be assessed on the specified industry as a whole; the share of the fee payable by any given firm in that industry would be determined based on sales (for manufacturers and importers of drugs) and on net premiums (in the case of insurers), with some limited exemptions. The excise tax on medical device sales is effective in 2011 and is set at 2.3 percent of first sales in each year. We anticipate that these fees and the excise tax would generally be passed through to health consumers in the form of higher drug and device prices and higher insurance premiums, with an associated increase in overall national health expenditures ranging from $2.1 billion in 2011 to $18.2 billion in 2018 and $17.8 billion in 2019.

Although, compared to prior law, the *level* of total national health expenditures is estimated to be higher through 2019 under the PPACA, two particular provisions of the legislation would help reduce NHE *growth rates* after 2016. Specifically, the productivity adjustments to most Medicare payment updates would reduce NHE growth by about 0.10 to 0.15 percent per year. In addition, the excise tax on high-cost employer health plans (with benefit thresholds indexed by the CPI plus 1 percent for 2019 and by the CPI thereafter) would exert a further decrease in NHE

[15] Higher thresholds apply in the case of qualified retirees and individuals in high-risk occupations. Additionally, a higher threshold applies for employers with above-average proportions of older and/or female workers.
[16] We have not included the excise taxes under this provision in the estimated financial effects of the PPACA shown in this memorandum. Similarly, the indirect impacts on Federal income taxes and social insurance payroll taxes are not shown.
[17] These fees are allocated to the Part B account of the Medicare Supplementary Medical Insurance trust fund.

growth rates of an estimated 0.05 percent in 2019 and slightly more than that for some years after. Although these growth rate differentials are not large, over time they would have a noticeable downward effect on the level of national health expenditures. Such an outcome, however, would depend critically on the sustainability of both provisions. As discussed previously, the Medicare productivity adjustments could become unsustainable even within the next 10 years, and over time the reductions in the scope of employer-sponsored health insurance could also become an issue. For these reasons, the estimated reductions in NHE growth rates after 2016 may not be fully achievable.

Underlying the overall moderate effects of the PPACA on NHE will be various changes by payer. Based on the net impact of (i) the substantial coverage expansions, (ii) the significant cost-sharing subsidies for low-to-middle-income persons, (iii) the maximum out-of-pocket limitations associated with the qualified health benefit, and (iv) the increases in workers' cost-sharing obligations in plans affected by the excise tax on high-cost employer-sponsored health insurance coverage, we estimate that overall out-of-pocket spending would be reduced significantly by the PPACA (a net total decline of $237 billion in calendar years 2010-2019).

Public spending would increase under the PPACA as a result of the expansion of the Medicaid program and additional CHIP funding but would be reduced by the net Medicare savings from the legislation. Private expenditures would decrease somewhat because of the net reduction in the number of persons with employer-sponsored health insurance and the reduced benefits for plans affected by the excise tax on high-cost employer coverage. The sizable growth in health insurance coverage through Exchange plans would also affect NHE amounts by payer. Prior to the PPACA, public expenditures (principally Medicare and Medicaid) were estimated to represent 52 percent of total NHE in 2019. Under the PPACA, the public share would be roughly 51 percent if health expenditures by Exchange plans are classified as private spending.[18]

Caveats and Limitations of Estimates

The Federal costs and savings, changes in health insurance coverage, and effects on total national health expenditures presented in this memorandum represent the Office of the Actuary's best estimates for the PPACA. Although we believe that these estimates are reasonable and fairly portray the likely future effects of this comprehensive package of health care reforms, they are

[18] The allocation of NHE *by payer* is based on the entity that is responsible for establishing the coverage and benefit provisions and that has the primary responsibility to ensure that payment is made for health care services. (Auxiliary analyses of NHE *by sponsor* are also prepared, based on the financing of health expenditures in the U.S.) Because all Exchange plans will be private plans, under the traditional NHE classification approach these expenditures would be considered private health insurance spending. However, the classification of health expenditures made by Exchange plans is complicated by three factors:

(i) The Exchanges will be government entities, with a role in setting minimum benefit standards, but they will not directly provide health insurance coverage. The same situation applies to the multi-State Exchange plans arranged by the Office of Personnel Management.

(ii) The Federal government, through the refundable tax credits and cost-sharing reductions, will subsidize a significant portion of Exchange plan premiums and cost-sharing liabilities.

(iii) The premium subsidies will vary between zero and 100 percent from one person to another, and the cost-sharing subsidies from zero to 80 percent on an insurance-value basis.

A more precise determination of the appropriate classification of the Exchange plan expenditures based on national health expenditure accounting principles will be conducted in the future.

subject to much greater uncertainty than normal. The following caveats should be noted, and the estimates should be interpreted cautiously in view of their limitations.

- These financial and coverage impacts are based on the provisions of the PPACA as enacted on March 23, 2010 and amended on March 30 by the Health Care and Education Reconciliation Act of 2010.

- Many of the provisions, particularly the coverage expansions, are unprecedented or have been implemented only on a smaller scale (for example, at the State level). Consequently, little historical experience is available with which to estimate the potential impacts.

- The behavioral responses to changes introduced by national health reform legislation are impossible to predict with certainty. In particular, the responses of individuals, employers, insurance companies, and Exchange administrators to the new coverage mandates, Exchange options, and insurance reforms could differ significantly from the assumptions underlying the estimates presented here.

- The nominal dollar amounts of costs and savings under national health reform are sensitive to the assumed trajectory of future health cost trends. Relative measures, such as the cost as a percentage of GDP, are less sensitive.

- Due to the very substantial challenges inherent in modeling national health reform legislation, our estimates will vary from those of other experts and agencies. Differences in results from one estimating entity to another may tend to cause confusion among policy makers. These differences, however, provide a useful reminder that all such estimates are uncertain and that actual future impacts could differ significantly from the estimates of any given organization. Indeed, the future costs and coverage effects could lie outside of the range of estimates provided by the various estimators.

- The existing number of uninsured persons in the U.S. is difficult to measure, and the number of uninsured persons who are undocumented aliens is considerably more uncertain. Medicaid coverage and Exchange premium subsidies under the PPACA are not available to undocumented aliens. As a result of these measurement difficulties, the actual costs under the PPACA and the reduction in the number of uninsured persons may be somewhat higher or lower than estimated in this memorandum.

- Certain Federal costs and savings were not included in our estimates if (i) a provision would have no, or only a minor, impact; (ii) the legislative language did not provide sufficient detail with which to estimate a provision's impact; or (iii) the estimates are outside of the scope of the Office of the Actuary's expertise and will be prepared by other agencies. In particular, we did not include any Federal savings pertaining to the excise tax on high-cost employer-sponsored health insurance coverage, the fees on insurance plans, the excise tax on devices, and other non-Medicare revenue provisions of the PPACA, as those estimates are provided by the Department of the Treasury. (In contrast, the impacts of these provisions on national health expenditures are reflected.) Similarly, Federal administrative expenses associated with the PPACA are not included here and will be estimated separately. The Congressional Budget Office and the Joint Committee on Taxation have estimated that the total amount of Medicare savings and additional excise tax and other revenues would somewhat more than offset the cost of the national coverage provisions, resulting in an overall small reduction in the Federal

deficit through 2019, and for the following 10 years as well, if all of the provisions continued to be fully implemented.

- In estimating the financial impacts of the PPACA, we assumed that the increased demand for health care services could be met without market disruptions. In practice, supply constraints might initially interfere with providing the services desired by the additional 34 million insured persons. Price reactions—that is, providers successfully negotiating higher fees in response to the greater demand—could result in higher total expenditures or in some of this demand being unsatisfied. Alternatively, providers might tend to accept more patients who have private insurance (with relatively attractive payment rates) and fewer Medicare or Medicaid patients, exacerbating existing access problems for Medicaid enrollees. Either outcome (or a combination of both) should be considered plausible and even probable initially.

  The latter possibility is especially likely in the case of the substantially higher volume of Medicaid services, for which provider payment rates are well below average. Therefore, it is reasonable to expect that a significant portion of the increased demand for Medicaid would be difficult to meet, particularly over the first few years.

  We have not attempted to model that impact or other plausible supply and price effects, such as supplier entry and exit or cost-shifting towards private payers. A specific estimate of these potential outcomes is impracticable at this time, given the uncertainty associated with both the magnitude of these effects and the interrelationships among these market dynamics. We may incorporate such factors in future estimates, should we determine that they can be estimated with a reasonable degree of confidence. For now, we believe that consideration should be given to the potential consequences of a significant increase in demand for health care meeting a relatively fixed supply of health care providers and services.

- As stated in the section on Medicare estimates, reductions in payment updates to health care providers, based on economy-wide productivity gains, are unlikely to be sustainable on a permanent annual basis. If these reductions were to prove unworkable within the 10-year period 2010-2019 (as appears probable for significant numbers of hospitals, skilled nursing facilities, and home health agencies), then the actual Medicare savings from these provisions would be less than shown in this memorandum. Similarly, the further reductions in Medicare growth rates mandated for 2015 through 2019 through the Independent Payment Advisory Board may be difficult to achieve in practice.

- In estimating the financial impact of the Medicaid eligibility expansion, we assumed that existing and new Medicaid enrollees would be appropriately classified for FMAP purposes.

- As discussed in the section on the CLASS program, we believe that there is a very serious risk that the program, as currently specified, will not be sustainable because of adverse selection.

Conclusions

The national health care reform provisions in the Patient Protection and Affordable Care Act, as amended, make far-reaching changes to the health sector, including mandated coverage for most people, required payments by most employers not offering insurance, expanded eligibility for Medicaid, Federal premium and cost-sharing subsidies for many individuals and families, a new system of health benefits Exchanges for facilitating coverage, and a new Federal insurance

program in support of long-term care. Additional provisions will reduce Medicare outlays, make other Medicaid modifications, provide more funding for the CHIP program, add certain benefit enhancements for these programs, and combat fraud and abuse. Federal revenues will be increased through an excise tax on high-cost insurance plans; fees or excise taxes on drugs, devices, and health plans; higher Hospital Insurance payroll taxes for high-income taxpayers; a new tax on investment revenues and other unearned income; and other provisions.

The Office of the Actuary at CMS has estimated the effects of the non-tax provisions of the PPACA on Federal outlays, overall national health expenditures, and health insurance coverage in the U.S. Our estimates are based on available data sources and what we believe are reasonable assumptions regarding individual, employer, and health plan responses to the legislation, together with analyses of the likely changes in the cost and use of health care services. Our primary estimates for the PPACA are as follows:

- The total Federal cost of the national insurance coverage provisions would be about $828 billion during fiscal years 2010 through 2019.

- By 2019, an additional 34 million U.S. citizens and other legal residents would have health insurance coverage meeting the essential-benefit requirements.

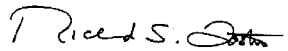
- Total net savings in 2010-2019 from Medicare provisions would offset about $575 billion of the Federal costs for the national coverage provisions. The Medicaid and CHIP provisions, excluding the expansion of Medicaid and increased CHIP funding, would raise costs by $28 billion. Additional Federal revenues would further offset the coverage costs; however, the Office of the Actuary does not have the expertise necessary to estimate all such impacts. The Congressional Budget Office and the Joint Committee on Taxation have estimated an overall reduction in the Federal Budget deficit through 2019 under the PPACA.

- The new Community Living Assistance Services and Supports (CLASS) insurance program would produce an estimated total net savings of $38 billion through fiscal year 2019. This effect, however, is due to the initial 5-year period during which no benefits would be paid. Over the longer term, expenditures would exceed premium receipts, and there is a very serious risk that the program would become unsustainable as a result of adverse selection by participants.

- Total national health expenditures in the U.S. during 2010-2019 would increase by about 0.9 percent. The additional demand for health services could be difficult to meet initially with existing health provider resources and could lead to price increases, cost-shifting, and/or changes in providers' willingness to treat patients with low-reimbursement health coverage.

- The mandated reductions in Medicare payment updates for providers, the actions of the Independent Payment Advisory Board, and the excise tax on high-cost employer-sponsored health insurance would have a downward impact on future health care cost growth rates. During 2010-2019, however, these effects would be outweighed by the increased costs associated with the expansions of health insurance coverage. Also, the longer-term viability of the Medicare update reductions is doubtful. Other provisions, such as comparative effectiveness research, are estimated to have a relatively small effect on expenditure growth rates.

We hope that the information presented here will be of value to policy makers and administrators as they endeavor to implement and monitor the health reform act.



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Attachments: 5

Table 1 — Estimated Federal Costs (+) or Savings (-) under the Patient Protection and Affordable Care Act, as Enacted and Amended, in billions

Provisions	Fiscal Year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, FY 2010-2019
Total*	$9.2	-$0.7	-$12.6	-$22.3	$16.8	$57.9	$63.1	$54.2	$47.2	$38.5	$251.3
Coverage Provisions:	3.3	4.6	4.9	5.2	82.9	119.2	138.2	146.6	157.6	165.8	828.2
Medicaid Expansion and CHIP Funding	—	—	—	—	38.8	62.9	78.7	72.2	76.3	81.2	410.3
Credits:	3.3	4.6	4.9	5.2	49.6	67.6	77.9	99.1	110.3	115.5	537.9
Individual Exchange Subsidies:	—	—	—	—	43.9	61.4	76.3	99.1	110.3	115.5	506.5
Refundable Premium Tax Credits	—	—	—	—	38.4	54.2	68.3	88.6	98.7	103.0	451.1
Reduced Cost-Sharing Requirements	—	—	—	—	5.5	7.2	8.0	10.5	11.6	12.5	55.4
Small Employer Credits	3.3	4.6	4.9	5.2	5.7	6.2	1.6	0.0	0.0	0.0	31.4
Penalties:	—	—	—	—	-5.5	-11.3	-18.4	-24.7	-29.0	-30.9	-119.9
Individual Penalties	—	—	—	—	0.0	-2.4	-5.3	-7.6	-8.6	-9.2	-33.1
Employer Penalties	—	—	—	—	-5.5	-9.0	-13.0	-17.1	-20.4	-21.8	-86.8
Medicare	1.2	-4.7	-14.9	-26.3	-68.8	-60.3	-75.2	-92.1	-108.2	-125.7	-575.1
Medicaid/CHIP (Excluding Coverage Expansions)	-0.9	-0.9	0.8	4.5	8.6	5.1	4.6	3.4	1.3	1.7	28.3
Cost Trend Proposals:	—	—	—	—	0.0	-0.1	-0.2	-0.4	-0.6	-0.9	-2.3
Comparative Effectiveness Research†	—	—	—	—	0.0	-0.1	-0.2	-0.4	-0.6	-0.9	-2.3
Prevention and Wellness	—	—	—	—	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Fraud and Abuse	—	—	—	—	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Administrative Simplification	—	—	—	—	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Additional Proposals:	5.6	0.4	-3.3	-5.6	-5.9	-6.0	-4.3	-3.4	-2.8	-2.4	-27.8
CLASS Program	—	-2.8	-4.5	-5.6	-5.9	-6.0	-4.3	-3.4	-2.8	-2.4	-37.8
Immediate Reforms	5.6	3.2	1.2	—	—	—	—	—	—	—	10.0

* Excludes Title IX revenue provisions except for sections 9008 (fees on manufacturers and importers of brand-name prescription drugs) and 9015 (additional HI payroll tax). Also excludes certain provisions with limited impacts and Federal administrative costs.

† Excludes the Medicare impact of CER, which is included in the Medicare savings total.

Source: Centers for Medicare & Medicaid Services, Office of the Actuary.
April 22, 2010

Table 2 — Estimated Effects of the Patient Protection and Affordable Care Act, as Enacted and Amended, on Enrollment by Insurance Coverage, in millions

	Calendar Year									
Prior Law Baseline	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Medicare	46.9	48.0	49.4	50.9	52.4	53.9	55.4	57.1	58.7	60.5
Medicaid/CHIP	59.2	60.5	61.6	62.0	60.6	60.3	61.1	61.9	62.7	63.5
Other Public	12.3	12.6	12.9	13.2	13.6	13.9	14.2	14.6	14.9	15.2
Employer-Sponsored Private Health Insurance	163.8	163.2	164.5	165.0	166.1	166.6	166.4	166.2	166.0	165.9
Other Private Health Insurance*	26.1	25.3	25.5	25.6	25.8	25.8	25.8	25.8	25.8	25.7
Uninsured	48.3	48.6	47.9	48.1	50.0	51.7	53.1	54.4	55.6	56.9
Insured Share of US Population†	84.4%	84.5%	84.8%	84.9%	84.4%	84.0%	83.8%	83.5%	83.3%	83.0%

	Calendar Year									
New Law — PPACA	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Medicare	46.9	48.0	49.4	50.9	52.4	53.9	55.4	57.1	58.7	60.5
Medicaid/CHIP	59.2	60.5	61.6	62.0	83.6	84.6	84.1	82.1	82.9	83.9
Other Public	12.6	12.6	12.9	13.2	13.6	13.9	14.2	14.6	14.9	15.2
Employer-sponsored Private Health Insurance	164.3	163.7	164.9	165.5	168.1	169.0	166.6	164.7	163.7	164.5
Other Private Health Insurance*	26.1	25.3	25.5	25.6	12.6	12.2	11.5	10.9	10.4	10.0
Exchanges	—	—	—	—	16.9	18.6	24.8	29.8	31.4	31.6
Uninsured	47.5	48.1	47.4	47.6	23.8	22.2	21.0	22.0	22.8	23.1
Insured Share of US Population†	84.7%	84.6%	85.0%	85.0%	92.6%	93.2%	93.6%	93.3%	93.1%	93.1%

	Calendar Year									
Impact of PPACA	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Medicare	—	—	—	—	—	—	—	—	—	—
Medicaid/CHIP	—	—	—	—	23.0	24.3	23.1	20.2	20.2	20.4
Other Public	0.4	—	—	—	—	—	—	—	—	—
Employer-sponsored Private Health Insurance	0.5	0.5	0.5	0.5	2.0	2.5	0.2	-1.5	-2.4	-1.4
Other Private Health Insurance*	—	—	—	—	-13.2	-13.7	-14.3	-14.9	-15.3	-15.7
Exchanges	—	—	—	—	16.9	18.6	24.8	29.8	31.4	31.6
Uninsured	-0.9	-0.5	-0.5	-0.5	-26.2	-29.5	-32.1	-32.4	-32.9	-33.8
Insured Share of US Population†	0.3%	0.2%	0.2%	0.2%	8.2%	9.1%	9.8%	9.8%	9.9%	10.1%

* In the prior-law baseline, other private health insurance includes private Medicare supplemental coverage and individual coverage. In the new-law estimates, other private health insurance includes only those with Medicare supplemental coverage.

† Calculated as a proportion of total U.S. population, including unauthorized immigrants.

Source: Centers for Medicare & Medicaid Services, Office of the Actuary.
April 22, 2010

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
	TITLE III-IMPROVING THE QUALITY AND EFFICIENCY OF HEALTH CARE												
	SUBTITLE A-TRANSFORMING THE HEALTH CARE DELIVERY SYSTEM												
	PART I-LINKING PAYMENT TO QUALITY OUTCOMES IN THE MEDICARE PROGRAM												
3001	Hospital Value-Based Purchasing	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
3002	Physician Quality Reporting Initiative	0	0	0	210	120	-190	-390	-580	-560	-530	330	-1,920
3003	Expansion of Physician Feedback Program	0	0	0	0	0	0	0	0	0	0	0	0
3004	Quality Reporting for Long-Term Care Hospitals, Inpatient Rehabilitation Hospitals, and Hospice Programs	0	0	0	0	-30	-30	-30	-30	-20	-20	-30	-160
3005	Quality Reporting for PPS-exempt Cancer Hospitals	0	0	0	0	0	0	0	0	0	0	0	0
3006	Value-based Purchasing for SNF, HHA, & ASC	0	0	0	0	0	0	0	0	0	0	0	0
3007	Value-based Payment Modifer under Physician Fee Schedule	0	0	0	0	0	0	0	0	0	0	0	0
3008	Payment Adjustment for Conditions Acquired in Hospitals	0	0	0	0	0	-520	-610	-660	-700	-750	0	-3,240
	PART II-NATIONAL STRATEGY TO IMPROVE HEALTH CARE QUALITY												
3011	National Strategy	0	0	0	0	0	0	0	0	0	0	0	0
3012	Interagency Working Group on Health Care Quality	0	0	0	0	0	0	0	0	0	0	0	0
3013	Quality Measure Development	0	0	0	0	0	0	0	0	0	0	0	0
3014	Quality and Efficiency Measurement	0	0	0	0	0	0	0	0	0	0	0	0
3015	Data Collection; Public Reporting	0	0	0	0	0	0	0	0	0	0	0	0
	PART III-ENCOURAGING DEVELOPMENT OF THE NEW PATIENT CARE MODELS												
3021	CMS Innovation Center	0	0	0	0	0	0	0	0	0	0	0	0
3022	Medicare Shared Savings Program	0	0	0	0	0	0	0	0	0	0	0	0
3023	National Pilot Program on Payment Bundling	0	0	0	0	0	0	0	0	0	0	0	0
3024	Independence at Home Demonstration Program	0	0	0	0	0	0	0	0	0	0	0	0
3025	Hospital Readmissions Reduction Program	0	0	0	-530	-630	-1,180	-1,320	-1,410	-1,510	-1,620	-1,160	-8,200
3026	Community-Based Care Transitions Program												
	Part A	0	100	100	100	100	100	0	0	0	0	400	500
	Part B	0	0	0	0	0	0	0	0	0	0	0	0
3027	Extension of Gainsharing Demonstration	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE B-IMPROVING MEDICARE FOR PATIENTS AND PROVIDERS												
	PART I-ENSURING BENEFICIARY ACCESS TO PHYSICIAN CARE AND OTHER SERVICES												
3101	Increase in Physician Payment Update	0	0	0	0	0	0	0	0	0	0	0	0
3102	Extension of Floor on Medicare Work Geographic Adjustment	510	780	290	0	0	0	0	0	0	0	1,580	1,580
3103	Extension of Exceptions for Therapy Caps	520	1,160	500	10	10	20	20	20	20	20	2,200	2,300
3104	Extension of Treatment of Certain Physician Pathology Services	40	80	40	0	0	0	0	0	0	0	160	160
3105	Extension of Ambulance Add-ons	20	10	0	0	0	0	0	0	0	0	30	30
3106	Extension of Long-Term Care Hospital Provisions	30	440	530	140	10	0	0	0	0	0	1,150	1,150
3107	Extension of Physician Fee Schedule Mental Health Add-on	40	20	0	0	0	0	0	0	0	0	60	60
3108	Permitting Physician Assistants to Order Post-Hospital Extended Care Services	0	0	0	0	0	0	0	0	0	0	0	0
3109	Exemption of Certain Pharmacies from Accreditation Requirements	0	0	0	0	0	0	0	0	0	0	0	0
3110	Part B Special Enrollment for Disabled TRICARE	0	10	20	30	40	40	40	40	50	50	100	320

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
3111	Bone Density Tests	20	40	20	0	0	0	0	0	0	0	80	80
3112	Revision to Medicare Improvement Func												
	Part A	0	0	0	0	-15,350	0	0	0	0	0	-15,350	-15,350
	Part B	0	0	0	0	-11,890	0	0	0	0	0	-11,890	-11,890
3113	Treatment of Certain Complex Diagnostic Lab Test:	0	0	0	0	0	0	0	0	0	0	0	0
3114	Improved Access for Certified Midwife Service:	0	0	0	0	0	0	0	0	0	0	0	0
	PART II-RURAL PROTECTIONS												
3121	Extend of Outpatient Hold Harmless Provision	50	20	0	0	0	0	0	0	0	0	70	70
3122	Extend Reasonable Cost Reimbursement for Laboratory Services in Small Rural Hospitals	0	0	0	0	0	0	0	0	0	0	0	0
3123	Extend Rural Community Hospital Demonstration Program	0	0	0	0	0	0	0	0	0	0	0	0
3124	Extend Medicare Dependent Hospital Program	0	0	100	10	0	0	0	0	0	0	110	110
3125	Improvements to Hospital Payments for Low-volume Hospital:	0	100	110	10	0	0	0	0	0	0	220	220
3126	Demonstration Project on Community Health Integration Model:	0	0	0	0	0	0	0	0	0	0	0	0
3127	MEDPAC Study on Payments in Rural Areas	0	0	0	0	0	0	0	0	0	0	0	0
3128	Technical Correction to Critical Access Hospital Service:	0	0	0	0	0	0	0	0	0	0	0	0
3129	Medicare Rural Hospital Flexibilty Program	0	0	0	0	0	0	0	0	0	0	0	0
	PART III-IMPROVING PAYMENT ACCURACY												
3131	Payment Adjustment for Home Health Care												
	Part A	20	-220	-370	-410	-690	-1,140	-1,710	-2,340	-2,700	-2,900	-1,670	-12,460
	Part B	20	-260	-450	-510	-860	-1,410	-2,120	-2,900	-3,350	-3,600	-2,060	-15,440
3132	Hospice Reform	0	0	0	0	0	0	0	0	0	0	0	0
3133	Improvement to Medicare DSH Payment:	0	0	0	0	-110	-7,100	-9,170	-10,610	-11,180	-11,760	-110	-49,930
3134	Misvalued Codes under Physician Fee Schedule	0	0	0	0	0	0	0	0	0	0	0	0
3135	Equipment Utilization Factor for Advanced Imaging Service:	0	-110	-170	-200	-210	-230	-240	-260	-270	-290	-690	-1,980
3136	Revision of Payment for Power Wheelchair:	0	-40	-50	-50	-50	-60	-70	-70	-80	-80	-190	-550
3137	Hospital Wage Index Improvemen	260	30	0	0	0	0	0	0	0	0	290	290
3138	Treatment of Certain Cancer Hospitals	0	0	0	0	0	0	0	0	0	0	0	0
3139	Payment for Biosimilar Biological Product:												
	Part B	0	0	0	10	20	-350	-810	-960	-1,150	-1,360	30	-4,600
	Part D	0	0	0	10	-20	-80	-130	-150	-180	-220	-10	-770
3140	Hospice Concurrent Care Demonstration	0	0	0	0	0	0	0	0	0	0	0	0
3141	Budget Neutrality in Calculation of Hospital Wage Index Floo	0	0	0	0	0	0	0	0	0	0	0	0
3142	Study on Urban Medicare-dependent Hospitals	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE C-PROVISIONS RELATING TO PART C												
3201	Medicare Advantage Payment												
	Part A	0	-3,170	-5,170	-7,170	-9,000	-10,160	-11,350	-12,480	-13,270	-14,190	-24,510	-85,960
	Part B	0	-2,090	-3,400	-4,720	-5,840	-6,700	-7,700	-8,670	-9,560	-10,390	-16,050	-59,070
3202	Benefit Protection and Simplification	0	0	0	0	0	0	0	0	0	0	0	0
3203	Coding Intensity Adjustment During MA Payment Transition	0	0	0	0	0	0	0	0	0	0	0	0
3204	Simplification of Annual Beneficiary Election Period:	0	0	0	0	0	0	0	0	0	0	0	0
3205	Specialized MA Plans for Special Needs Individuals	0	0	0	0	0	0	0	0	0	0	0	0
3206	Extension of Reasonable Cost Contracts	0	0	0	0	0	0	0	0	0	0	0	0

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
3207	Technical Correction to MA Private FFS Plans	0	0	0	0	0	0	0	0	0	0	0	0
3208	Making Senior Housing Facility Demonstration Permanent	0	0	0	0	0	0	0	0	0	0	0	0
3209	Authority to Deny Plan Bids	0	0	0	0	0	0	0	0	0	0	0	0
3210	Development of New Standards for Certain Medigap Plans												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	0	0	0	-50	-70	-80	-90	-90	0	-380
1103	Savings from limits on MA adminstrative costs	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE D-MEDICARE PART D IMPROVEMENTS FOR PRESCRIPTION DRUG PLANS AND MA-PD PLANS												
3301	Medicare Coverage Gap Discount Program	0	110	140	160	180	200	240	250	250	310	590	1,840
3302	Improving the Determination of Part D Low-Income Benchmarks	0	90	120	130	140	140	150	170	180	190	480	1,310
3303	Voluntary De Minimus Policy for Low-Income Subsidy Plans	0	20	20	20	20	30	30	30	30	30	80	230
3304	Special Rule for Widows and Widowers Regarding Eligibility for Low-Income Assistance	0	0	0	0	0	0	0	0	0	0	0	0
3305	Improved Information for Subsidy Eligible Individuals	0	0	0	0	0	0	0	0	0	0	0	0
3306	Funding Outreach and Assistance of Low-Income Programs	45	45	45	0	0	0	0	0	0	0	135	135
3307	Improving Formularies with Respect to Certain Categories or Classes	0	0	0	0	0	0	0	0	0	0	0	0
3308	Reducing the Part D Premium Subsidy for High-Income Beneficiaries	0	-390	-590	-670	-760	-860	-980	-1,110	-1,260	-1,430	-2,410	-8,050
3309	Elimination of Cost Sharing for Certain Dual Eligible Individuals	0	0	0	0	0	0	0	0	0	0	0	0
3310	Reducing Wasteful Dispensing of Outpatient Prescription Drugs	0	0	0	0	0	0	0	0	0	0	0	0
3311	Improved Plan Complaint System	0	0	0	0	0	0	0	0	0	0	0	0
3312	Uniform Exception and Appeals Process	0	0	0	0	0	0	0	0	0	0	0	0
3313	OIG Studies and Reports	0	0	0	0	0	0	0	0	0	0	0	0
3314	Cost Incurred by AIDS Drug Assistance and HIS	0	50	70	70	80	90	100	110	120	130	270	820
9012	Elimination of deduction for Medicare Part D subsidy	0	0	0	40	100	130	170	190	190	200	140	1,020
1101	Closing the Medicare prescription drug "donut hole"	0	990	170	380	560	860	1,250	1,760	2,340	3,470	2,100	11,780
—	Reducing growth rate of out-of-pocket threshold	0	0	0	0	40	70	170	240	320	480	40	1,320
1206	Drug rebates for new formulations of existing drugs	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE E-ENSURING MEDICARE SUSTAINABILITY												
3401	Market Basket Revisions and Productivity Adjustments												
	Skilled Nursing Facilities	0	-30	-440	-1,000	-1,560	-2,160	-2,920	-3,700	-4,530	-5,660	-3,030	-22,000
	Long-Term Care Hospitals	-10	-50	-120	-220	-340	-450	-590	-780	-980	-1,250	-740	-4,790
	Inpatient Rehabilitation Facilities	-10	-40	-130	-250	-390	-530	-700	-930	-1,180	-1,510	-820	-5,670
	Hospitals Paid Under the Inpatient Prospective Payment System	-140	-870	-2,670	-4,940	-7,630	-10,360	-13,940	-18,550	-23,510	-29,990	-16,250	-112,600
	Inpatient Psychiatric Facilities--Productivity Adjustments	-10	-30	-100	-190	-290	-400	-530	-700	-890	-1,130	-620	-4,270
	Inpatient Psychiatric Facilities--Quality Reporting	0	0	0	0	-10	-10	-10	-10	-10	0	-10	-50
	Hospice	0	0	0	-220	-450	-690	-980	-1,330	-1,700	-2,120	-670	-7,490
	Hospital Outpatient Services	0	0	-820	-1,280	-1,850	-2,460	-3,180	-4,210	-5,490	-6,970	-3,950	-26,260
	Durable Medical Equipment	0	-20	-50	-80	-110	-140	-180	-230	-280	-330	-260	-1,420
	All Other Part B Fee Schedules, Except Physicians' Services	0	-100	-300	-520	-750	-1,010	-1,310	-1,680	-2,100	-2,600	-1,670	-10,370
	Home Health--Part A	0	-60	-160	-290	-350	-440	-610	-780	-970	-1,230	-860	-4,890
	Home Health--Part B	0	-70	-180	-320	-380	-490	-680	-870	-1,080	-1,370	-950	-5,440

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
3402	Temporary Adjustment to Calculation of Part B Premiums												
	Part B Income (additional premiums)	0	-70	-190	-320	-510	-740	-990	-1,320	-1,700	-2,300	-1,090	-8,140
	Part B Benefits	0	0	0	-10	-10	-10	-20	-20	-50	-70	-20	-190
3403	Independent Payment Advisory Board												
	Part A	0	0	0	0	0	-370	-710	-1,200	-2,010	-3,000	0	-7,290
	Part B	0	0	0	0	0	-440	-830	-1,430	-2,420	-3,680	0	-8,800
	Part D	0	0	0	0	0	-330	-670	-1,190	-2,090	-3,290	0	-7,570
10323	Medicare Coverage for Individuals Exposed to Environmental Health												
	Part A	10	10	10	10	10	20	20	20	20	20	50	150
	Part B	0	10	10	10	10	10	10	10	10	20	40	100
10324	Protection for Frontier States												
	Part A	0	190	230	250	260	280	300	320	340	370	930	2,540
	Part B	0	80	150	170	170	190	200	230	240	280	570	1,710
10325	Delay Implementation of RUG-IV	0	0	0	0	0	0	0	0	0	0	0	0
10326	Pilot Testing for Pay-for-Performance	0	0	0	0	0	0	0	0	0	0	0	0
10327	Improvments to Physician Quality Reporting System	0	0	0	110	120	140	160	0	0	0	230	530
10328	Improvments to Part D Medication Therapy Managemen	0	0	0	0	0	0	0	0	0	0	0	0
10329	Methodology to Assess Health Plan Value	0	0	0	0	0	0	0	0	0	0	0	0
10330	Modernizing CMS Computer and Data System	0	0	0	0	0	0	0	0	0	0	0	0
10331	Public Reporting of Performance Informatior	0	0	0	0	0	0	0	0	0	0	0	0
10332	Availability of Medicare Data for Perfomance Measuremen	0	0	0	0	0	0	0	0	0	0	0	0
10333	Community Based Collaborative Care Networks	0	0	0	0	0	0	0	0	0	0	0	0
10334	Minority Health	0	0	0	0	0	0	0	0	0	0	0	0
10335	Technical Correction to Hospital Value-based Purchasing	0	0	0	0	0	0	0	0	0	0	0	0
10336	Report on Access to High-quality Dialysis Services	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE F-HEALTH CARE QUALITY IMPROVEMENTS												
3501	Health Care Delivery System Research	0	0	0	0	0	0	0	0	0	0	0	0
3502	Support Patient-Sentered Medical Home	0	0	0	0	0	0	0	0	0	0	0	0
3503	Medication Management Services	0	0	0	0	0	0	0	0	0	0	0	0
3504	Regionalized Systems for Emergency Care	0	0	0	0	0	0	0	0	0	0	0	0
3505	Trauma Care Centers	0	0	0	0	0	0	0	0	0	0	0	0
3506	Shared Decisionmaking	0	0	0	0	0	0	0	0	0	0	0	0
3507	Prescription Drug Benefit and Risk Informatior	0	0	0	0	0	0	0	0	0	0	0	0
3508	Demonstration to Integrate Quality Care and Patient Safety	0	0	0	0	0	0	0	0	0	0	0	0
3509	Improving Woman's Health	0	0	0	0	0	0	0	0	0	0	0	0
3510	Patient Navigator Program	0	0	0	0	0	0	0	0	0	0	0	0
3511	Authorization of Appropriations	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL, TITLE III		1,415	-3,235	-12,685	-22,020	-58,080	-48,770	-62,690	-77,850	-92,760	-110,160	-94,605	-486,835

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
	TITLE IV-PREVENTION OF CHRONIC DISEASE AND IMPROVING PUBLIC HEALTH												
	SUBTITLE A-MODERNINZING DISEASE PREVENTION AND PUBLIC HEALTH SYSTEMS												
4001-4004		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE B-INCREASING ACCESS TO CLINICAL PREVENTIVE SERVICES												
4103	Annual Wellness Visit Providing a Personalized Plan	0	230	380	380	390	420	470	530	590	650	1,380	4,040
4104	Removing Barriers to Preventive Services	0	110	190	200	210	230	250	270	300	330	710	2,090
4105	Evidence-Based Coverage of Preventive Services	-60	-140	-160	-170	-170	-180	-200	-220	-240	-260	-700	-1,800
	SUBTITLE C-CREATING HEALTHIER COMMUNITIES												
4201-4207		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE D-SUPPORT FOR PREVENTION AND PUBLIC HEALTH INNOVATION												
4301-4306		0	0	0	0	0	0	0	0	0	0	0	0
	Additional Provisions	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE E-MISCELLENEOUS PROVISIONS												
4401-4402		0	0	0	0	0	0	0	0	0	0	0	0
TOTAL, TITLE IV		-60	200	410	410	430	470	520	580	650	720	1,390	4,330
	TITLE V-HEALTH CARE WORKFORCE												
	SUBTITLE A-PURPOSE AND DEFINITIONS												
5001-5002		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE B-INNOVATIONS IN HEALTH CARE WORKFORCE												
5101-5103		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE C- INCREASING THE SUPPLY OF THE HEALTH CARE WORKFORCE												
5201-5210		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE D-EHANCING HEALTH CARE WORKFORCE EDUCATION AND TRAINING												
5301-5315		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE E-SUPPORTING THE EXISTING HEALTH CARE WORKFORCE												
5401-5405		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE F-STRENGTHENING PRIMARY CARE AND OTHER WORKFORCE IMPROVEMENTS												
5501	Expanding Access to Primary Care/General Surgery Services	0	170	260	260	260	270	110	0	0	0	950	1,330
5502	Medicare Federally Qualified Health Center Improvement	0	10	10	20	20	70	90	100	100	110	60	530
5503	Distribution of Additional Residency Positions	0	0	0	0	0	0	0	0	0	0	0	0
5504	Counting Resident Time in Outpatient Setting	0	0	0	0	0	0	0	0	0	0	0	0
5505	Rules for Counting Resident Time for Didactic/Scholarly Activities	0	0	0	0	0	0	0	0	0	0	0	0
5506	Preservation of Resident Cap Positions	0	0	0	0	0	0	0	0	0	0	0	0
5507	Demonstration to Address Health Professions Workforce Needs	0	0	0	0	0	0	0	0	0	0	0	0
5508	Increasing Teaching Capacity	0	0	0	0	0	0	0	0	0	0	0	0
5509	Graduate Nurse Education Demonstration Program	0	0	0	0	0	0	0	0	0	0	0	0

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
	SUBTITLE G-IMPROVING ACCESS TO HEALTH CARE SERVICES												
5601-5605		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE H-GENERAL PROVISIONS												
5701	Reports	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL, TITLE V		0	180	270	280	280	340	200	100	100	110	1,010	1,860
	TITLE VI-TRANSPARENCY AND PROGRAM INTEGRITY												
	SUBTITLE A-PHYSICIAN OWNERSHIP AND OTHER TRANSPARENCY												
6001	Limitation on Medicare Exception to the Prohibition on Certain Physician Referrals for Hospitals	0	0	0	0	0	0	0	0	0	0	0	0
6002	Transparency Reports on Physician Ownership	0	0	0	0	0	0	0	0	0	0	0	0
6003	Disclosure Requirements for in-Office Ancillary Services	0	0	0	0	0	0	0	0	0	0	0	0
6004	Prescription Drug Sample Transparency	0	0	0	0	0	0	0	0	0	0	0	0
6005	Pharmacy Benefit Managers Transparency Requirements	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE B-NURSING HOME TRANSPARENCY AND IMPROVEMENT												
6101-6121		0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE C-NATIONWIDE PROGRAM FOR BACKGROUND CHECKS ON DIRECT PATIENT ACCESS EMPLOYEES OF LONG-TERM CARE FACILITIES AND PROVIDERS												
6201	Nationwide Program for Background Checks	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE D-PATIENT CENTERED OUTCOMES RESEARCH												
6301	Patient Centered Outcomes Research	0	0	0	0	0	0	0	0	0	0	0	0
6302	Federal Coordinating Council for CER	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE E-MEDICARE, MEDICAID, AND CHIP PROGRAM INTEGRITY												
6401	Provider Screening and Other Enrollment Requirements												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	-10	-20	-20	-30	-30	-30	-30	-30	-40	-40	-110	-280
6402	Enhanced Program Integrity Provisions												
	Part A	0	0	-10	-20	-30	-30	-30	-40	-40	-40	-60	-240
	Part B	0	0	-10	-10	-20	-20	-20	-20	-20	-20	-40	-140
6403	Elimination of Duplication between Data Banks												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	0	0	0	0	0	0	0	0	0	0
6404	Maximum Period for Submission of Medicare Claims to Not More Than 12 Months												
	Part A	0	60	70	70	80	80	90	100	100	110	280	760
	Part B	0	50	50	50	50	60	60	70	70	80	200	540
6405	Physicians Required to Be Enrolled Physicians												
	Part A	-10	-20	-20	-20	-30	-30	-30	-30	-30	-40	-100	-260
	Part B	-30	-50	-50	-50	-60	-60	-60	-70	-70	-80	-240	-580

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
6406	Documentaion on Referrals to Programs at High Risk of Waste and Abuse												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	0	0	0	0	0	0	0	0	0	0
6407	Face to Face Encounter with Patient Required Before Physician May Certify for HHA or DME												
	Part A	-50	-70	-70	-80	-80	-90	-100	-100	-110	-120	-350	-870
	Part B	-70	-110	-120	-130	-140	-150	-160	-170	-180	-190	-570	-1,420
6408	Enhanced Penalties												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	0	0	0	0	0	0	0	0	0	0
6409	Medicare Self-referral Disclosure Protoca												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	0	0	0	0	0	0	0	0	0	0
	Adjustments to DME, Prosthetics, Orthotics, and Supplies												
6410	Competitive Acquisition Program												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	-10	-20	-20	-20	-20	-80	-120	-130	-140	-70	-560
6411	Expansion of Recovery Audit Contractor (RAC) program												
	Part A	0	-20	-30	-40	-40	-40	-50	-50	-50	-60	-130	-380
	Part B	0	0	-10	-10	-10	-10	-10	-10	-10	-10	-30	-80
	Part D	0	-10	-20	-30	-30	-30	-30	-40	-40	-50	-90	-280
1301	Limit MH Center Providers												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	-10	-10	-20	-20	-20	-20	-20	-30	-40	-150
1302	Repeal Limits on Claims Review												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	0	0	0	-10	-10	-10	-10	-10	0	-50
1303	CMS-IRS Data Match to Find Fraudulent Providers												
	Part A	0	0	0	0	0	-10	-10	-10	-10	-10	0	-50
	Part B	0	0	0	-20	-60	-110	-130	-140	-150	-160	-80	-770
1304	Funding for Fraud and Abuse Activities												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	0	0	0	0	0	0	0	0	0	0
1305	Enhanced Claims Review of New DME Providers												
	Part A	0	0	0	0	0	0	0	0	0	0	0	0
	Part B	0	0	-10	-10	-10	-10	-10	-20	-20	-20	-30	-110
	SUBTITLE G-ADDITIONAL PROGRAM INTEGRITY PROVISIONS												
6601	Prohibition on false Statements and Representations	0	0	0	0	0	0	0	0	0	0	0	0
6602	Clarifying Definition	0	0	0	0	0	0	0	0	0	0	0	0
6603	Development of Model Uniform Report Form	0	0	0	0	0	0	0	0	0	0	0	0
6604	Applicability of State Law to Combat Fraud and Abuse	0	0	0	0	0	0	0	0	0	0	0	0
6605	Administrative Summary Cease and Desist Orders	0	0	0	0	0	0	0	0	0	0	0	0

Table 3—Estimated Medicare Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended

(Amounts in millions)

Sec.	Provision	Fiscal year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
6606	MEWA Plan Registration	0	0	0	0	0	0	0	0	0	0	0	0
6607	Permitting Evidentiary Privilege and Confidential Communication	0	0	0	0	0	0	0	0	0	0	0	0
	Additional Provisions	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE H-ELDER JUSTICE ACT												
6701	Short Title of Subtitle	0	0	0	0	0	0	0	0	0	0	0	0
6702	Definitions	0	0	0	0	0	0	0	0	0	0	0	0
6703	Elder Justice	0	0	0	0	0	0	0	0	0	0	0	0
	SUBTITLE I-SENSE OF THE SENATE REGARDING MEDICAL MALPRACTICE												
6801	Sense of the Senate Regarding Medical Malpractice	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL, TITLE VI		-170	-200	-280	-360	-450	-530	-630	-710	-760	-830	-1,460	-4,920
	TITLE IX-REVENUE PROVISIONS												
9008	Fees on Brand-Name Pharmaceutical Manufacturers & Importers	0	-1,650	-2,590	-2,720	-2,850	-2,900	-2,900	-3,640	-3,970	-3,060	-9,810	-26,280
9015	Additional hospital insurance tax on high-income taxpayers[1]	0	0	0	-1,936	-8,090	-8,901	-9,735	-10,580	-11,504	-12,484	-10,026	-63,230
TOTAL, TITLE IX		0	-1,650	-2,590	-4,656	-10,940	-11,801	-12,635	-14,220	-15,474	-15,544	-19,836	-89,510
	TOTAL IMPACT, III-VI and IX	1,185	-4,705	-14,875	-26,346	-68,760	-60,291	-75,235	-92,100	-108,244	-125,704	-113,501	-575,075

[1] Estimates prepared by the Office of the Chief Actuary, Social Security Administration.

Notes: The effects of the managers' amendments, in Title X of P.L. 111-148 and in P.L. 111-152, on provisions in other titles have been incorporated with the estimates shown for those titles.
New proposals included in Title X have been grouped with the corresponding category of proposal in the estimates shown for earlier titles
The estimates for provisions affecting Medicare Part B are net of premium offset.
The estimates for Medicare provisions that affect fee-for-service benefits also reflect interactions with payments to managed care plans.

Table 4— Estimated Federal Medicaid and CHIP Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended, in billions

Sec.	Provision	Fiscal Year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
	Patient Protection and Affordable Care Act (P.L. 111-148)												
	TITLE II—ROLE OF PUBLIC PROGRAMS												
	Subtitle A—Improved Access to Medicaid												
2001	Medicaid coverage for the lowest income populations	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
	Impact of sections not affecting Medicaid expansion	$0	$0	$0	$30	$1,760	$3,010	$3,800	$4,180	$4,960	$5,780	$1,790	$23,520
2002	Income eligibility for nonelderly determined using modified gross income	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
2003	Requirement to offer premium assistance for employer-sponsored insurance	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
2004	Medicaid coverage for former foster care children	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
2005	Payments to territories	0	191	764	764	930	930	930	930	930	930	2,648	7,300
2006	Special adjustment to FMAP for major disaster recovery	0	255	90	0	0	0	0	0	0	0	345	345
2007	Medicaid Improvement Fund rescission	0	0	0	0	-100	-150	-150	-150	-150	0	-100	-700
	Subtitle B—Enhanced Support for CHIP												
2101	Additional federal financial participation for CHIP	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
2102	Technical corrections	0	0	0	0	0	0	0	0	0	0	0	0
	Subtitle C—Enrollment Simplification												
2201	Enrollment simplificiation and coordination with State health insurance exchanges	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
2202	Permitting hospitals to make presumptive eligibility determinations for al Medicaid eligible populations	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
	Subtitle D—Improvements to Medicaid services												
2301	Coverage for freestanding birth center services	0	0	0	0	0	0	0	0	0	0	0	0
2302	Concurrent care for children	15	15	15	15	20	20	20	25	25	25	80	195
2303	State eligibility option for family planning services	1	0	0	-2	-4	-6	-9	-12	-15	-18	-5	-65
2304	Clarification of definition of medical assistance	0	0	0	0	0	0	0	0	0	0	0	0
	Subtitle E—New State Options for Long-term Services & Supports												
2401	Community First Choice Option	0	0	820	1,060	1,815	2,585	3,520	3,940	4,630	5,210	3,695	23,580
2402	Removal of barriers to providing home and community-based services	25	50	80	120	170	190	215	240	270	300	445	1,660
2403	Money Follows the Person Rebalancing Demonstration	0	0	450	450	450	450	450	0	0	0	1,350	2,250
2404	Protection for recipients of home and community-based services against spousal impoverishment	0	0	0	0	125	190	215	240	270	75	125	1,115
2405	Funding to expand State Aging and Disability Resource Centers	10	10	10	10	10	0	0	0	0	0	50	50
2406	Sense of the Senate regarding long-term care	0	0	0	0	0	0	0	0	0	0	0	0
	Subtitle F—Medicaid Prescription Drug Coverage												
2501(a)(1)	Increase minimum rebate percentage for brand drugs	-240	-440	-440	-470	-500	-530	-560	-590	-630	-670	-2,090	-5,070
2501(a)(2)	Recapture of total savings	-230	-610	-680	-720	-770	-820	-870	-920	-980	-1,040	-3,010	-7,640
2501(b)	Increase rebate percentage for generic drugs	-20	-30	-30	-30	-40	-40	-40	-40	-50	-50	-150	-370
2501(c)	Extension of prescription drug discounts to enrollees of Medicaid managed care organizations	-580	-720	-720	-770	-820	-870	-930	-990	-1,040	-1,100	-3,610	-8,540
2501(d)	Rebates on new drug formulations	-110	-210	-210	-220	-230	-250	-260	-280	-290	-310	-980	-2,370
2501(e)	Maximum rebate amount	0	0	0	0	0	0	0	0	0	0	0	0
2501(f)	Conforming Amendment	0	0	0	0	0	0	0	0	0	0	0	0

Table 4— Estimated Federal Medicaid and CHIP Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended, in billions

Sec.	Provision	Fiscal Year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
2502	Elimination of exclusion of coverage of certain drugs	0	0	0	0	25	30	30	40	45	45	25	215
2503	Providing adequate pharmacy reimbursement	0	135	275	290	310	325	345	370	390	415	1,010	2,855
	Subtitle G—Medicaid Disproportionate Share Hospital Payments												
2551	Disproportionate share hospital payments	0	0	0	0	-500	-600	-600	-1,800	-5,000	-5,600	-500	-14,100
	Subtitle H—Dual Eligibles												
2601	5-year period for demonstration projects	0	0	0	0	0	0	0	0	0	0	0	0
2602	Providing Federal coverage and payment coordination for low-income Medicare beneficiaries	0	0	0	0	0	0	0	0	0	0	0	0
	Subtitle I—Medicaid Quality												
2701	Adult health quality measures	40	50	60	70	80	0	0	0	0	0	300	300
2702	Payment Adjustment for Health Care-Acquired Conditions	0	-1	-4	-5	-5	-5	-6	-6	-7	-7	-15	-46
2703	State option to provide health homes for enrollees with chronic conditions	0	35	90	115	145	175	150	135	135	135	385	1,115
2704	Demonstration project to evaluate integrated care around a hopitalization	0	0	0	0	0	0	0	0	0	0	0	0
2705	Medicaid Global Payment System Demonstration Project	0	0	0	0	0	0	0	0	0	0	0	0
2706	Pediatric Accountable Care Organization Demonstration Project	0	0	0	0	0	0	0	0	0	0	0	0
2707	Medicaid emergency psychiatric demonstration project	15	15	15	15	15	0	0	0	0	0	75	75
	Subtitle J—Improvements to the Medicaid and CHIP Payment and Access Commission (MACPAC)												
2801	MACPAC assessment of policies affecting all Medicaid beneficiaries	0	0	0	0	0	0	0	0	0	0	0	0
	Subtitle K—American Indians and Alaska Natives												
2901	Special rules relating to Indians	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/	1/
2902	Elimination of sunset for reimbursement for all Medicare Part B services furnished by certain Indian hospitals and clinics	0	20	20	20	30	30	30	30	30	30	90	240
	TITLE III—IMPROVING THE QUALITY AND EFFICIENCY OF HEALTH CARE												
	Subtitle B—Improving Medicare for Patients and Providers												
	PART III—Improving payment accuracy												
3139	Payment for biosimilar biological products - Medicaid impact	0	0	0	0	-10	-30	-50	-60	-80	-90	-10	-320
	TITLE IV—PREVENTION OF CHRONIC DISEASE AND IMPROVING PUBLIC HEALTH												
	Subtitle A—Modernizing Disease prevention and Public Health Systems												
4004(i)	Public awareness of preventive and obesity-related services	0	0	0	0	0	0	0	0	0	0	0	0
	Subtitle B—Increasing Access to clinical Preventive Services												
4101	School-based health centers	155	200	105	115	125	135	145	160	175	190	700	1,505
4106	Improving access to preventive services for eligible adults	0	0	0	6	9	9	10	11	11	12	15	68
4107	Coverage of comprehensive tobacco cessation services for pregnant women	0	0	0	0	-10	-10	-10	-10	-10	-20	-10	-70
4108	Incentives for prevention of chronic disease	0	20	20	20	20	20	0	0	0	0	80	100
	Subtitle D—Support for Prevention and Public Health Innovation												
4302(b)	Addressing health care disparities in Medicaid and CHIP	0	0	0	0	0	0	0	0	0	0	0	0
4306	Funding for Childhood Obesity Demonstration Project	5	5	5	5	5	0	0	0	0	0	25	25

Table 4— Estimated Federal Medicaid and CHIP Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended, in billions

Sec.	Provision	Fiscal Year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
	TITLE VI—TRANSPARENCY AND PROGRAM INTEGRITY												
	Subtitle E—Medicare, Medicaid & CHIP Program Integrity Provisions												
6201	Background checks for certain employees of LTC facilities	0	30	20	30	30	30	30	30	30	30	110	260
6401	Provider screening and other enrollment requirements under Medicare, Medicaid & CHIP	0	0	0	0	0	0	0	0	0	0	0	0
6402	Enhanced Medicare and Medicaid program integrity provisions	0	0	0	0	0	0	0	0	0	0	0	0
6403	Elimination of duplication between the Healthcare Integrity and Protection Data Bank and the National Practitioner Data Bank	0	0	0	0	0	0	0	0	0	0	0	0
6407	Face to face encounter with patient required before physicians may certify eligibility for home health services or durable medical equipment under Medicare	0	0	0	0	0	0	0	0	0	0	0	0
6408	Enhanced penalties	0	0	0	0	0	0	0	0	0	0	0	0
6411	Expansion of the Recovery Audit Contractor Program	0	-80	-170	-250	-310	-330	-360	-390	-420	-450	-810	-2,760
	Subtitle F—Additional Medicaid Program Integrity Provisions												
6501	Termination of provider participation under Medicaid if terminated under Medicare or other State plan	0	0	0	0	0	0	0	0	0	0	0	0
6502	Medicaid exclusion from participation relating to certain ownership, control, and management affiliations	0	0	0	0	0	0	0	0	0	0	0	0
6503	Billing agents, clearinghouses, or other alternate payees required to registe under Medicaid	0	0	0	0	0	0	0	0	0	0	0	0
6504	Requirement to report expanded set of data elements under MMIS to detect fraud and abuse	0	0	0	0	0	0	0	0	0	0	0	0
6505	Prohibition on payments to institutions or entities located outside of the United States	0	0	0	0	0	0	0	0	0	0	0	0
6506	Overpayments	260	480	-65	-70	-75	-80	-85	-90	-95	-105	530	75
6507	Mandatory State use of national correct coding initiative	-10	-25	-40	-45	-55	-75	-85	-90	-95	-100	-175	-620
6508	General effective date	0	0	0	0	0	0	0	0	0	0	0	0
	TITLE VII—IMPROVING ACCESS TO INNOVATIVE MEDICAL THERAPIES												
	Subtitle B—More Affordable Medicines for Children and Underserved Communities												
7101(d)	Expanded participation in 340B programs - Medicaid credits	2/	2/	2/	2/	2/	2/	2/	2/	2/	2/	2/	2/
	TITLE X—STRENGTHENING QUALITY, AFFORDABLE HEALTH CARE FOR ALL AMERICANS												
	Subtitle B—Provisions Relating to Title II												
	Part I—Medicaid and CHIP												
10202	Incentives for States to offer home and community-based services as a long term care alternative to nursing homes	0	0	800	910	1,030	260	0	0	0	0	2,740	3,000
SUBTOTAL, P.L. 111-148		*-664*	*-605*	*1,279*	*1,463*	*3,675*	*4,593*	*5,875*	*4,903*	*3,040*	*3,617*	*5,149*	*27,177*

Table 4— Estimated Federal Medicaid and CHIP Costs (+) or Savings (–) under the Patient Protection and Affordable Care Act, as Enacted and Amended, in billions

Sec.	Provision	Fiscal Year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, 2010-14	2010-19
	Health Care and Education Reconciliation Act of 2010 (P.L. 111-152)												
	TITLE I—Coverage Medicare, Medicaid, and Revenues												
	Subtitle C—Medicaid												
1202	Payment to primary care physicians	0	0	0	3,670	5,460	1,450	0	0	0	0	9,130	10,580
SUBTOTAL, P.L. 111-152		*0*	*0*	*0*	*3,670*	*5,460*	*1,450*	*0*	*0*	*0*	*0*	*9,130*	*10,580*
	Interaction - Prescription Drugs	-190	-250	-270	-280	-300	-320	-330	-360	-390	-410	-1,290	-3,100
	Interaction - Medicaid Expansion	0	0	0	0	200	-90	-270	-300	-320	-350	200	-1,130
	Interaction with Medicare Premium Provisions	0	-70	-220	-320	-400	-520	-670	-840	-1,010	-1,140	-1,010	-5,190
TOTAL, P.L. 111-148 and P.L. 111-152, with interactions		**-854**	**-925**	**789**	**4,533**	**8,635**	**5,113**	**4,605**	**3,403**	**1,320**	**1,717**	**12,179**	**28,337**

[1] Included with Title I impacts.

[2] Insufficient detail for estimation.

Table 5 — Estimated Increases (+) or Decreases (–) in National Health Expenditures under the Patient Protection and Affordable Care Act, as Enacted and Amended, in billions

Prior Law Baseline	Calendar Year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, CY 2010-2019
Total National Health Expenditures (NHE)	$ 2,632.2	$ 2,778.7	$ 2,944.4	$ 3,125.4	$ 3,325.5	$ 3,551.5	$ 3,798.5	$ 4,067.7	$ 4,358.8	$ 4,670.6	$ 35,253.3
Medicare	515.5	550.5	591.0	634.1	679.7	732.1	790.4	857.2	930.9	1,010.9	7,292.3
Medicaid/CHIP	436.1	473.0	512.4	553.4	593.9	641.7	696.6	755.9	821.7	893.2	6,377.9
Federal	282.2	277.9	292.7	315.9	337.8	364.3	395.0	427.9	464.6	504.5	3,662.8
State & Local	153.9	195.1	219.6	237.6	256.1	277.4	301.5	328.0	357.1	388.7	2,715.1
Other Public	307.7	325.1	343.9	364.6	386.6	410.5	436.4	464.0	493.2	523.6	4,055.5
Out of Pocket	285.1	297.7	308.9	322.3	340.3	359.4	379.1	400.2	422.8	446.7	3,562.4
Employer-Sponsored Private Health Insurance	847.0	879.0	919.3	966.0	1,024.5	1,088.4	1,156.0	1,228.7	1,305.6	1,387.3	10,801.8
Other Private Health Insurance*	49.2	51.0	54.6	57.7	59.4	61.5	63.5	65.9	68.2	70.6	601.7
Other Private†	191.6	202.4	214.5	227.3	241.1	257.8	276.4	296.0	316.4	338.3	2,561.8
NHE as percent of Gross Domestic Product (GDP)‡	17.8%	17.9%	18.1%	18.3%	18.6%	19.0%	19.4%	19.8%	20.3%	20.8%	

New Law — PPACA	Calendar Year 2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total, CY 2010-2019
Total National Health Expenditures (NHE)	$ 2,636.4	$ 2,774.4	$ 2,932.7	$ 3,101.5	$ 3,358.8	$ 3,615.9	$ 3,875.2	$ 4,139.6	$ 4,413.1	$ 4,716.5	$ 35,564.0
Medicare	516.0	545.7	577.1	604.8	626.1	682.1	726.1	778.1	836.4	897.9	6,790.2
Medicaid/CHIP	434.2	471.4	513.3	557.7	657.3	716.6	779.4	832.7	900.8	977.9	6,841.4
Federal	281.2	277.4	294.5	321.4	398.3	435.7	478.2	503.6	543.8	588.7	4,122.7
State & Local	153.0	194.1	218.9	236.3	259.0	280.8	301.2	329.1	357.1	389.2	2,718.7
Other Public	312.3	325.2	344.0	364.9	381.7	406.2	434.6	463.4	493.5	523.6	4,049.4
Out of Pocket	285.1	297.9	308.6	321.6	313.6	323.9	334.7	352.5	381.4	405.8	3,325.1
Employer-Sponsored Private Health Insurance	848.2	881.0	921.3	968.3	1,038.8	1,112.3	1,160.7	1,212.2	1,259.7	1,336.1	10,738.7
Other Private Health Insurance*	49.3	50.9	54.1	57.0	14.9	14.9	14.5	14.2	13.9	13.6	297.4
Other Private†	191.4	202.3	214.3	227.2	234.8	251.9	272.8	293.4	314.5	335.6	2,538.1
Exchanges	—	—	—	—	91.7	107.9	152.4	193.1	212.8	225.8	983.7
NHE as percent of Gross Domestic Product (GDP)‡	17.8%	17.9%	18.0%	18.2%	18.8%	19.3%	19.8%	20.2%	20.5%	21.0%	

Table 5, continued --- Estimated Increases (+) or Decreases (–) in National Health Expenditures under the Patient Protection and Affordable Care Act, as Enacted and Amended, in billions

Impact of PPACA	Calendar Year										Total, CY 2010-2019
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	
Total National Health Expenditures (NHE)	$ 4.2	-$ 4.3	-$ 11.7	-$ 24.0	$ 33.4	$ 64.4	$ 76.7	$ 71.9	$ 54.3	$ 45.8	$ 310.8
Medicare	0.4	-4.8	-13.9	-29.4	-53.6	-50.0	-64.3	-79.1	-94.5	-113.0	-502.1
Medicaid/CHIP	-1.9	-1.5	1.0	4.3	63.4	74.8	82.8	76.8	79.2	84.7	463.5
Federal	-1.1	-0.5	1.7	5.6	60.4	71.4	83.2	75.7	79.2	84.2	459.9
State & Local	-0.8	-1.0	-0.8	-1.3	2.9	3.5	-0.4	1.1	0.0	0.5	3.6
Other Public	4.6	0.1	0.2	0.3	-4.9	-4.3	-1.9	-0.6	0.3	0.0	-6.1
Out of Pocket	-0.1	0.2	-0.3	-0.7	-26.7	-35.5	-44.4	-47.6	-41.3	-40.9	-237.3
Employer-Sponsored Private Health Insurance	1.2	2.0	2.0	2.3	14.3	24.0	4.8	-16.4	-45.9	-51.2	-63.1
Other Private Health Insurance*	0.1	-0.1	-0.4	-0.7	-44.5	-46.5	-49.1	-51.7	-54.3	-57.0	-304.2
Other Private†	-0.2	-0.2	-0.2	-0.1	-6.3	-5.9	-3.7	-2.6	-2.0	-2.7	-23.7
Exchanges	—	—	—	—	91.7	107.9	152.4	193.1	212.8	225.8	983.7
NHE as percent of Gross Domestic Product (GDP)‡	0.0%	0.0%	-0.1%	-0.1%	0.2%	0.3%	0.4%	0.3%	0.3%	0.2%	

*In the prior-law baseline, other private health insurance includes private Medicare supplemental coverage and individual coverage. In the new-law estimates, other private health insurance includes only those with Medicare supplemental coverage.

†In the NHE accounts, other private spending includes philanthropic giving and income from non-patient sources, such as parking and investment income, for institutional providers.

‡Based on Gross Domestic Product (GDP) projections that accompanied the February 24, 2009 NHE projections release for 2008-2018.
(http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2008.pdf)

Source: Centers for Medicare & Medicaid Services, Office of the Actuary.
April 22, 2010

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

1615 H STREET, NW
WASHINGTON, DC 20062-2000

July 14, 2010

JOBS FOR AMERICA:

An Open Letter to the President of the United States, the United States Congress, and the American People

Eighteen months ago, during the greatest economic crisis since the Great Depression, the business community stood united with Congress and the President behind our shared goal of rescuing the U.S. economy and putting Americans back to work. We supported programs to stabilize our financial institutions, bolster key industries, and aid the unemployed.

Working together, we succeeded in stabilizing the economy and preventing another depression. But once accomplished, the congressional leadership and the administration took their eyes off the ball. They neglected America's number one priority—creating the more than 20 million jobs we need over the next 10 years for those who lost their jobs, have left the job market, or were cut to part-time status—as well as new entrants into our workforce. Instead of continuing their partnership with the business community and embracing proven ideas for job creation, they vilified industries while embarking on an ill-advised course of government expansion, major tax increases, massive deficits, and job-destroying regulations.

This approach has failed to return our economy to a path of robust growth, which is a critical prerequisite to significant private sector job growth. In some cases, wrong policy choices are actually eliminating good job opportunities for American workers. By straying from the proven principles of American free enterprise, policymakers are needlessly prolonging the economic agony of the recession for millions of Americans and their families.

Today, more than 16% of American workers are unemployed, underemployed, or have simply given up looking for a job. Consumer confidence remains low, housing prices are still depressed, the stock market has trended downward, the global recovery is sputtering, and there are growing concerns about the prospects of a double-dip recession.

Uncertainty is the enemy of growth, investment, and job creation. Through their legislative and regulatory proposals—some passed, some pending, and others simply talked about—the congressional majority and the administration have injected tremendous uncertainty into economic decision making and business planning. This is why banks are reluctant to lend and why American corporations are sitting on well over a trillion dollars. It is why America's small businesses and entrepreneurs, the engines of innovation and job creation, are starving for capital and are either struggling to survive or unable to expand.

In the process, we are also eroding our competitive position globally, as other nations take steps to cut taxes, reduce regulations, and restrain the appetites of government. Some are making serious headway in efforts to upgrade the skills of their students and workers, while we have yet to make

significant progress. For all these reasons, the known and unknown costs that come with expanding operations and adding to payrolls in the United States are simply too high.

As the President has said repeatedly, and as every economist knows, prosperity and job growth come from the private sector, not from the government. Government's role is to establish the right conditions in which the private sector can do what it does best—foster economic growth, create innovative products and services, generate wealth, and, in the process, produce expanded revenues to educate our children, care for the sick and poor, and defend our nation.

Yet who in our government today recognizes that every bill—proposed, considered, or passed—is a "jobs bill"? Government can either help the private sector create jobs or it can drive jobs away. No matter how well intentioned or politically popular a proposed law or regulation appears, the question must always be asked, What will the impact be on jobs?

We fear that this consideration is routinely ignored in the halls of our government today. American workers and those who are struggling to keep them employed deserve better.

Fortunately, it is not too late to improve the economic environment, forestall another downturn, and revive the job-creating capacity of our nation. We call upon policymakers of all parties and philosophies to end the finger-pointing and work constructively with the job creators to reduce uncertainty, restore confidence, and restart the recovery. It's time for some different approaches to unlock frozen capital and jolt our economy back to life.

Create a Growth and Jobs Tax Policy—Some $700 billion in tax increases have already been passed to pay for health care and other programs. Proposals in the capital markets, energy, and climate change arenas would raise hundreds of billions more. On top of all this, just six months from now, Americans will be hit with the largest tax increase in history in precisely those areas that would have the greatest negative impact on investment and jobs—individual tax rates, dividends and capital gains taxes, the death tax, and the alternative minimum tax.

We understand that the political battle lines have long been drawn over which of the 2001 and 2003 tax cuts should be extended. Yet the "facts on the ground" must take precedence. Our precariously weak economy—and especially our all-important small business sector—simply cannot sustain such massive tax hikes at this time. We therefore urge Congress and the administration to immediately support at least a temporary extension of all the tax relief passed in the prior decade. In one bold, swift move, this would substantially boost investor, business, and consumer confidence and would infuse our economy with fresh momentum.

Congress should also reduce the U.S. corporate tax rate, which is among the highest in the world, and address the fact that the United States is the only major economy that double taxes overseas earnings. Taking these steps would make our companies more competitive on the world stage and help spur investment and job growth here at home.

Restore Fiscal Health—Meanwhile, spending is going through the roof and deficits right along with it. On its current course, government debt will rise from nearly 41% of GDP in FY2008 to 63% in FY2010 to 90% in FY2020. By crowding out available capital for business expansion and eventually triggering increases in interest rates and inflation, rising deficits and debt add to uncertainty, inhibit growth, and smother job creation.

No one we know of has a full or easy answer to America's debt crisis. The Chamber looks forward to the report due later this year from the National Commission on Fiscal Responsibility and Reform. However, we already know that mandatory spending, especially in entitlements, is the primary culprit. And the situation will only get worse as the population ages. Instead of expanding entitlements, as the administration and Congress have been doing, we must modernize those programs without further delay.

We also know that without sustained economic growth, we can never restore our nation to fiscal health. A growing economy produces more government revenues, which can substantially reduce the deficit—if and only if these revenues are accompanied by serious spending restraint.

Still, our fiscal hole is so deep that we will also need to generate additional revenues. Our policy challenge is to do so in ways that do not undermine economic growth or competitiveness. For example, there are numerous oil, gas, and shale leases on our lands and off our shores that are currently inactive. Some estimates show that they could generate as much as $1.7 trillion worth of royalties over the next 10 years. Tapping these reserves would create direct federal revenues and hundreds of thousands of jobs while indirectly swelling the tax base and spurring economic development.

Furthermore, more than 80% of national forest lands are currently closed to timber harvesting. Opening these lands would generate direct use fees as well as thousands of jobs and would add billions of dollars to the tax base. Such initiatives must be undertaken with full and, where necessary, improved environmental safeguards and sound resource management. Embarking on this path would create growth, jobs, and tax revenues while boosting our nation's energy security.

Expand Trade and Export-Driven Jobs—The President has said that millions of American jobs can be created by doubling U.S. exports in five years, and we agree. We must now have an aggressive trade expansion agenda to make it happen. If Congress really cares about creating jobs, it will pass pending free trade agreements with Colombia, Panama, and South Korea now. Failure to act quickly will cost Americans many new job opportunities. But that's not all. At least 380,000 existing jobs will be lost to our competitors in the EU and Canada, which will soon implement free trade arrangements in these markets.

We should not stop there. American leadership is needed to revive the Doha Development Round, which would expand the economy worldwide and open new markets to our exports. The President should be given fast-track trade promotion authority, and he should use it vigorously to strike additional bilateral and regional trade and investment deals that open foreign markets and boost U.S. exports and jobs.

America's intellectual property must be better protected at home and abroad, and export control rules should be immediately revised to allow our manufacturers to sell high-tech and other products to customers that can already acquire them from our competitors.

Rebuild and Expand America's Infrastructure—Millions of jobs, as well as our global competitiveness and quality of life, depend on modernizing all forms of the American infrastructure, including surface and air transportation, ports, inland waterways, water and power generation facilities, and broadband capacity.

Much of this important work can be done with private investment, but governments at all levels must first remove the regulatory, legal, and financial roadblocks. If America's transportation and water infrastructure, for instance, was fully open to private investment, the $180 billion available today in private capital could generate more than 1.5 million jobs over 10 years. Greater private investment in broadband would also foster economic development and create jobs. To ensure that all Americans

fully benefit from this technology, federal policies should foster private sector investment in broadband infrastructure and minimize regulatory uncertainty.

Incentives and legal surety for investment in clean coal technologies, carbon capture systems, and massive expansion of nuclear power would also create hundreds of thousands of jobs at all skill levels while helping address environmental challenges.

Congress must also quickly pass a multiyear federal surface transportation bill. According to the U.S. Department of Transportation, each $1 billion in federal highway investment accompanied by the required 20% state match supports nearly 35,000 jobs, with similar figures for public transportation capital investment.

Ease the Regulatory Burden—There must be a recognition by the administration and Congress that the regulatory burden they have imposed on the U.S. economy has reached a tipping point. Unless the cumulative impact of existing regulations, newly mandated regulations, and proposed regulations is seriously addressed, the economy will not create the jobs Americans need. We will lose even more jobs. They will simply disappear or be sent offshore.

In recent months, the House passed a climate change bill that would create nearly 1,500 new regulations and mandates and carry a price tag of well over a trillion dollars. The Senate is considering similar legislation. The Environmental Protection Agency is moving forward with 29 major economic rules and 173 major policy rules, an unprecedented level of regulatory action. The Labor Department is considering dozens of new, restrictive workplace policies, while the newly appointed National Labor Relations Board is expected to make sweeping changes governing every facet of union-management relations.

The soon-to-be-finalized financial regulatory reform legislation creates over 350 regulatory rulemakings, 47 studies, and 74 reports—dwarfing anything in Sarbanes-Oxley. The massive health care bill, with its unprecedented and confusing employer mandate and hundreds of billions of dollars in business taxes, will require thousands of pages of new regulations to be followed by individuals, businesses, health care industry providers, and the states.

Uncertainty—You can find in these numbers a principal reason why businesses are so reluctant to make investments and create jobs. Each time a new regulatory proposal is even floated in Washington, investors in the potentially impacted industries close their wallets. Uncertainty forces them to do so.

These new regulatory burdens fall heavily on new and small businesses, but they hurt larger companies too. And when larger companies are hurt, the small businesses that supply them, depend on them for sales, and service their employees suffer even more.

Creating sufficient economic growth to put Americans back to work in good-paying jobs and rewarding careers is the U.S. Chamber's top priority. The citizens of our country have repeatedly said that it is their top priority as well. It is imperative that during these difficult times, business and government leaders work with each other, not against each other. The American people expect us to find common ground and get things done to grow this economy and create jobs.

The business community shares the view of most Americans that the current approaches are not working. We are offering an achievable road map to greater economic growth and more jobs, and we don't care who gets the credit. We invite leaders in government and citizens across the nation to support it.

To learn more about the U.S. Chamber's jobs agenda, please go to www.uschamber.com/jobs.

Statement of the U.S. Chamber of Commerce

ON: **WAR ON WESTERN JOBS**

TO: **SENATE AND CONGRESSIONAL WESTERN CAUCUSES**

BY: **WILLIAM L. KOVACS**
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DATE: **JULY 13, 2010**

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

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 113 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

"War on Western Jobs Hearing Overview"

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

July 13, 2010

Good morning, Members of the Senate and House Western Caucuses. I am William L. Kovacs, Senior Vice President for Environment, Technology and Regulatory Affairs for the U.S. Chamber of Commerce, the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today on the impact of environmental regulations and permitting on the jobs and economy of the western states.

The Joint Senate and House Western Caucuses are attempting to cover an enormous amount of substantive policy in a very short time period. That said, I congratulate you for the undertaking, as it is estimated that as of 2007 there were approximately 110,000 federal regulations[1], and that number is growing at the rate of 4,000 additional new regulations annually. As if that were not enough to be concerned about, these regulations are supplemented by thousands more guidance documents, administrative orders, and staff opinions. In addition, many, if not most, of those regulations having a major economic or policy impact are litigated in the courts.

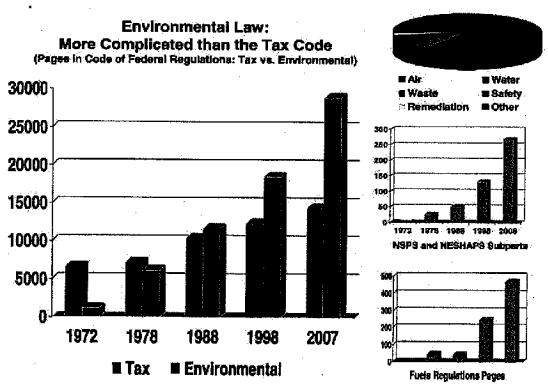
Altogether, this regulatory process is an amazingly complex undertaking, which if unclear in its application can result in huge uncertainties, and that alone is enough to stall private sector investment. Moreover, the regulatory process, in particular the permitting aspect of the process, can have a major impact on job creation or job destruction, depending upon whether a permit is approved or denied.

[1] John D. Graham, Administrator of the Office of Information and Regulatory Affairs, testimony before the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, U.S. House of Representatives (Nov. 17, 2004).

To cut through this burdensome regulatory morass that all U.S. businesses must address I will focus here on a few key concepts, and for each, in the spirit of enshrining the concept that a picture is worth a thousand words, I will provide an illustrative graphic.

The massive volume and impact of environmental regulations—a few examples:

As a starting point for comparison, consider that in 1972, for every 1000 pages of environmental regulations issued, there were 6000 pages of Internal Revenue Tax regulations issued. By 1988 tax regulations and environmental regulations issued were about equal in number, around 10,000 pages of text. By 2007 tax regulations issued had grown to 13,000 pages; however, in that same year environmental regulations had grown to 30,000 pages! Figure 1 below illustrates the growth of environmental regulations.



These environmental regulations cover almost every aspect of production in the U.S., ranging from permits needed to construct a facility, to facility operation, to the management of waste or emissions, to the technology used in the facility, and to facility shutdown.

Unfortunately, the amount of environmental regulation is growing at an alarming rate. EPA in its most recent 309 page *Semi-Annual Regulatory Agenda*, published

April 26 2010, listed 302 proposed rules and identified 29 rulemakings as having a major economic impact and identified 173 rulemakings as ones that raise major novel policy questions. Figure 2 below identifies the current rulemakings having a major economic impact. In comparison, these 29 major economic impact rulemakings are about double the number identified as having a major economic impact in EPA *Semi-Annual Regulatory Agendas* published in 2007 – 2008.

EPA "MAJOR" RULEMAKINGS – EFFECT ON ECONOMY OF $100 MILLION OR MORE

- ▶Criteria and standards for cooling water intake structures
- ▶National primary drinking water regulations: radon
- ▶Effluent limitations guidelines and standards for the construction and development point source category
- ▶Standards for the management of coal combustion residuals generated by commercial electric power producers
- ▶Revising undergrd. strg. tank regs.–revisions to existing rqmnts. & addns. to incorporate the provisions of EPAct
- ▶Oil pollution prevention: spill prevention, control, and countermeasure rule requirements – amendments for milk
- ▶Revisions to the spill prevention, control, and countermeasure (SPCC) rule
- ▶Review of the NAAQS for carbon monoxide
- ▶NESHAP for area sources: Industrial, commercial and institutional boilers
- ▶Implementing periodic monitoring in Federal and State operating permit programs
- ▶Review of the NAAQS for particulate matter
- ▶Transport rule (CAIR replacement rule)
- ▶NESHAP for coal- and oil-fired electric utility steam generating units
- ▶Control of greenhouse gas emissions from heavy-duty vehicles
- ▶NESHAP for major source industrial, commercial and institutional boilers and process heaters
- ▶NESHAP: Portland cement notice of reconsideration
- ▶Review of NSPS – Portland cement
- ▶Review of primary NAAQS for sulfur dioxide
- ▶EPA/NHTSA joint rulemaking to establish light-duty greenhouse gas emission standards and CAFÉ standards
- ▶Reconsideration of the 2008 ozone NAAQS
- ▶NESHAP for reciprocating internal combustion engines – existing stationary spark ignition (gas-fired)
- ▶Review of the secondary NAAQS for oxides of nitrogen and oxides of sulfur
- ▶Review of the NAAQS for ozone
- ▶Review of the primary NAAQS for nitrogen dioxide
- ▶Renewable fuels standard program
- ▶NESHAP for reciprocating internal combustion engines – compression ignition
- ▶Lead: renovation, repair and painting program for public and commercial buildings
- ▶Lead: clearance and clearance testing requirements for the renovation, repair and painting program
- ▶Lead: amendment to the opt-out and recordkeeping provisions in the renovation, repair and painting program.

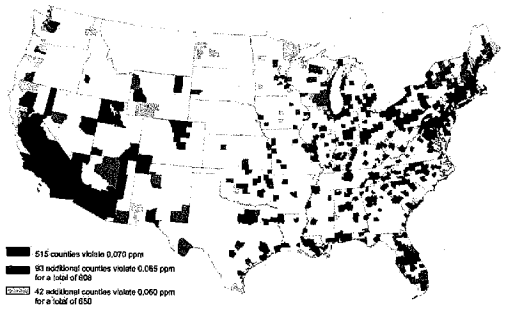
Even leaving aside EPA's rulemakings aimed at regulating greenhouse gases, there are many other rules that will have a staggering impact on the business community and especially the west. For example, EPA is considering regulating coal ash as a hazardous waste. This is highly problematic, for large amounts of coal ash are used today as a recycled material—in the making of cement and wallboard. If coal ash is determined to be hazardous, it would no longer be recycled, and ash disposal costs for facilities using coal as a fuel source would increase from around $10 a ton to $150 a ton or more. Consider what that will mean given that as a result of EPA's action there could be many tens of millions of tons of coal ash in need of disposal as a hazardous waste![2]

[2] Approximately 130 million tons of coal ash are produced in the U.S. annually. If all the ash were treated as a hazardous waste, at a disposal cost of $150 per ton, the aggregate disposal cost would amount to about $20 billion.

Another example of a rulemaking that will impact western states is EPA's proposed new National Ambient Air Quality Standard for ozone, which was published in the *Federal Register* on January 19, 2010. The proposed ozone NAAQS is especially troublesome to the western states for several reasons. First, ozone standards are to be revised by EPA every five years. The last revision was made in 2008 when the standard was lowered from 0.084 parts per million (ppm) to 0.075 ppm.[3] Now, rather than waiting five years for the current regulations to be implemented, EPA is proposing once again to lower and tighten a standard that was adopted less than two years ago, to perhaps as low as 0.060 ppm.

If this proposal becomes final, at the lower end of the range now under consideration, the tightened standard would nearly triple the number of non-attainment counties across the U.S. EPA's own information shows that 650 of the 675 currently monitored counties would violate the proposed 0.060 ppm standard. Areas in non-attainment can lose highway funding and cannot bring in a new business that needs an air permit unless the area reduces existing source emissions by an amount equal to or greater than the emissions from the new business. Figure 3 below indicates counties in the U.S. that will be impacted by the EPA proposal, and many of the areas never before in non-attainment will be in the west.

Counties With Monitors Violating Proposed Primary 8-hour Ground-level Ozone Standards
0.060 - 0.070 parts per million
(Based on 2006 – 2008 Air Quality Data)
EPA will not designate areas as nonattainment on these data, but likely on 2008 – 2010 data which are expected to show improved air quality.



Notes:
1. No monitored counties outside the continental U.S. violate.
2. EPA is proposing to determine compliance with a revised primary ozone standard by rounding the 3-year average to three decimal places.

[3] U.S. Environmental Protection Agency, "National Ambient Air Quality Standards for Ozone; Final Rule" Federal Register 73(60), 16436-16514, March 27, 2008.

Perhaps a more troubling aspect of the ozone issue is that much of the ozone that triggers non-compliance in the west ultimately arises as a result of long-range pollution transported from Asia. As stated by the National Research Council of the National Academy of Science in its assessment of long-range transport of key air pollutants to and from the U.S.:

> *Most* [U.S. ozone NAAQS] *violations are only a few ppb above the standard, and thus the increase in baseline O_3 since the preindustrial era driven by global pollution has contributed to these violations.*[4]

Commenting in a February 10, 2010 article titled, "Asia-produced ozone making its way to U.S." McClatchy Newspapers' Les Blumenthal wrote:[5]

> *A new study further bolsters concerns that pollution blowing across the Pacific Ocean from China and other rapidly developing Asian nations may swamp efforts to clean up the air in the Western United States and make it difficult for states and cities to meet federal standards.*

The U.S. Chamber has raised this concern with EPA several times, including in a petition asking that EPA use its authorities under the Clean Air Act to take into account Asian pollutant emissions. Western states must not be driven into noncompliance as a result of impacts arising from the long-range transport of pollution originating outside the U.S.[6] Notwithstanding concerns raised by the Chamber, EPA has so far failed to employ reasonable measures that take account of such pollutant impacts.

The economic impacts of facilities not being able to secure environmental permits are huge.

As EPA moves this nation toward a "green" economy, one question that frequently arises is what type of energy will be used if fossil fuel-based energy is increasingly to be replaced. On this matter, the Chamber's Emerging Technology

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[4] National Research Council of the National Academy of Science, *Global Saurces of Local Pollution: An Assessment of Long-Range Transport of Key Air Pollutants to and from the United States*; p. 40, 2009; *available at* http://www.nap.edu/catalog/12743.html.

[5] Les Blumenthal, "Asia-produced ozone making its way to U.S., study finds," McClatchy Newspapers, February 21, 2010 at: http://www.mcclatchydc.com/2010/02/21/86565/asia-produced-ozone-making-its.html.

[6] The Chamber filed a petition for rulemaking on December 13, 2006 and comments with EPA on October 9, 2007 and again on March 22, 2010.

Committee has received extensive advice from world renowned energy experts. Based on this and other significant information, for a whole host of reasons, it is apparent that as a nation we should do all we can to develop as many affordable new clean technologies as fast as reasonably possible.

But that said there remains the nagging question whether even if these new technologies are developed, can they in fact be built? At the outset of raising this point, the Chamber found that this was a concern that technologists could not really answer. Perhaps even more surprising, the Chamber found that there had been few facts gathered that could actually be used to address the question.

Motivated by the lack of information needed to answer the question, the Chamber started what is now called "Project No Project," or PNP. In its essence, it is a study of proposed energy projects around the U.S. that have been unable to obtain permits needed for construction. When we started the project, we were already aware that what with the on-going environmentalists' "war on coal," we would find many coal projects that were being denied construction permits. In fact we did, but what was shocking is that as the project evolved we found that even more alternative energy projects (wind, solar, biomass) faced permit delays than coal projects. Based on the PNP analysis we found that projects were delayed as follows:

Renewable projects	167
Coal projects	129
Gas projects	41
Nuclear projects	20
Transmission projects	24
Total projects	381

Figure 4 (see next page) identifies the specific locations and type of projects unable to obtain final clearance. **Of the 381 energy projects unable to obtain permits, 152 of these projects (73 are renewable energy projects) were located in the west.**

The economic cost to the country of losing these projects is estimated to amount to over $560 billion in direct and private investment and the impact of these projects not moving forward is estimated to deprive us of 250,000 direct jobs.

The economic loss to the west is estimated to be almost $271 billion along with 102,000 jobs not created.

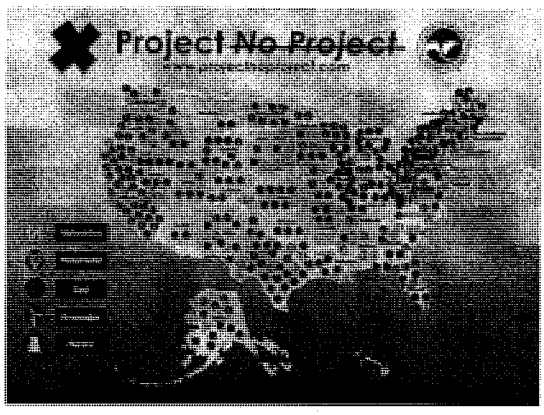


Figure 5 below summarizes the impact of permit challenges on the Western states.

State	Number of Stalled Projects ("Green" projects in parenthesis)	Value ($)	Jobs Lost
Arizona	2	1,589,000,000.00	1,840
California	37 (25)	30,145,500,000.00	11,097
Colorado	6 (2)	3,330,000,000.00	1,820
Idaho	5 (3)	1,445,000,000.00	408
Kansas	7 (5)	985,000,000.00	100
Montana	2 (1)	1,000,000,000.00	5,735
Nebraska	2 (1)	1,000,000,000.00	----
Nevada	11 (4)	104,327,000,000.00	5,804
New Mexico	8 (3)	10,519,000,000.00	6,380
North Dakota	6 (1)	20,150,000,000.00	20,670
Oklahoma	4	2,800,000,000.00	1,600
Oregon	11 (7)	3,090,000,000.00	3,281
South Dakota	1 (1)	620,000,000.00	123
Texas	29 (10)	64,165,000,000.00	23,993
Utah	6 (1)	15,048,000,000.00	6,601
Washington	6 (5)	3,900,160,000.00	1,579
Wyoming	9 (4)	6,255,000,000.00	10,583
TOTAL:	152 (73)	270,368,660,000.00	101,614

A description of each of the projects identified as a result of the PNP effort can be found on the Chamber's website at www.projectnoproject.com. The site is interactive, and we invite site visitors to comment on the information presented as well as to help us update the information. To our knowledge, this is the only such compilation of this type of knowledge in the United States.

The Chamber is presently preparing an economic study of the impact on GDP and jobs arising from the failure of these identified sites to obtain permits for construction and operation. As soon as the study is completed and peer reviewed, we will provide it to the members of the caucus.

The impact of NEPA on energy projects.

You also asked that I address the impact of the National Environmental Policy Act (NEPA) on energy projects. While we do not have analysis of the generalized impact of NEPA on energy projects we have done some analysis of the use of NEPA challenges to energy projects.

Figure 6 (below) lists such NEPA energy project challenges, and as you will note, the vast majority of such challenges are for projects located in western states.

Project Name	Location(s)	Details
New Mexico Oil and Gas Lease Sale	NM	Environmental groups protested the BLM's New Mexico oil and gas lease sale of April 2008 on climate grounds.
EPAct Advanced Coal Gasification Tax Credits	IN, FL, MS, NC, KY, CA, and TX	Environmental groups challenged DOE for failing to conduct NEPA analysis of nine advanced coal gasification projects authorized by Energy Policy Act of 2005.
Black Mesa Complex	AZ	Kayenta and Black Mesa coal mines, which have been in operation since the early 1970s.
BCP and T-US Power Lines	CA	Permits and rights-of-way to build electricity transmission lines within the United States and across the United States-Mexico border to connect new power plants in Mexico with the power grid in Southern California.
West-Wide Energy Corridor	NV, MT, WY, CO, NM, AZ, UT, ID, WA, OR, CA	Energy transmission corridor authorized by EPAct 2005 to facilitate future siting of oil, gas, and hydrogen pipelines, as well as renewable energy development projects and electricity transmission and distribution facilities on Federal lands in the West.
Five-Year Leasing Program for the Outer Continental Shelf	AK	New five-year Leasing Program included an expansion of previous lease offerings in the Beaufort, Bering, and Chukchi Seas off the coast of Alaska.
Richmond Refinery	CA	Proposed expansion of Chevron oil refinery.
OPIC international fossil fuel projects	International	Chad-Cameroon Oil Pipeline Project; Sakhalin Oil Field Project; West Seno I and II Oil and Gas Fields Project; Cantarell Oil Field Project; the Hamaca Heavy Crude Oil Development Project; and Dezhou Coal-Fired Power Plant Project.
Laidlaw Energy Biomass Plant	NY	16.5-acre tract to be developed into woody biomass renewable energy plant.
Montana oil and gas leases	MT	38,000 acres of oil and gas leases throughout Montana
West Elk Methane Venting Project	CO	Proposal to vent methane from mine (as a safety measure) would create 168 methane drainage wells on 146 well pads and construct nearly 23 miles of new road.

Energy Projects are not the only projects unable to obtain permits.

In fact, the permits for many types of projects are being challenged, ranging from big box stores to cell towers to hotels to agricultural operations to airport runways and more. Figure 7 below indicates a sampling of the types of projects that are being challenged.

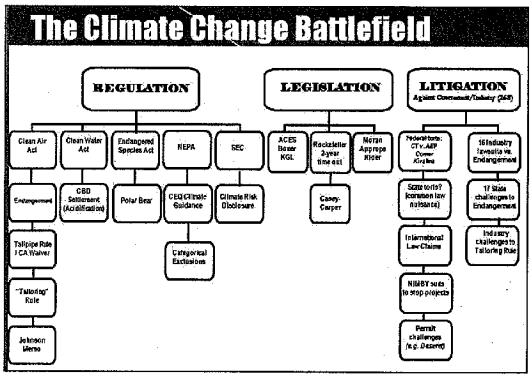
Project Name	Type	Location(s)	Details
Napa Junction	Retail	CA	Napa Junction is the creation of a new downtown area within the City of American Canyon and the start of Main Street for the City. It is a mixed-use project that includes a 3-acre Main Street Park, 216 unit apartment complex, 100 room hotel, 215,000 square feet of retail and retail services anchored by the only Wal-Mart Supercenter within the Bay Area.
The Shops at Santa Anita	Retail	CA	800,000 square foot shopping mall next to Santa Anita Race Track.
I-95 Intercounty Connector	Transportation	MD	Proposed highway project, the Intercounty Connector, would connect I-95/US 1 in Prince George's County, Maryland and I-270 in Montgomery County, Maryland.
Sierra Pacific Industries Logging Projects	Forestry	CA	15 plans by Sierra Pacific Industries to conduct logging in California forests.
City of Banning residential development	Residential	CA	1,500 home development project (consisting of a school, neighborhood park and cluster of homes) proposed to be built in remote, undeveloped area.
Desert Hot Springs Palmwood Project	Residential & Commercial	CA	Palmwood Project consists of 2,700 homes, 1 million sq. ft. of commercial space, 400-unit hotel, commercial amphitheatre, and 45 holes of golf courses, on undeveloped land northwest of the city.
City of Perris Wal-Mart	Retail	CA	520,000 sq. foot retail space to be occupied by a Wal-Mart Supercenter retail store.
Van Der Kooi Dairy	Agricultural	CA	Proposed Van Der Kooi Dairy district, containing 3200 milk cows.
Yucca Valley Wal-Mart	Retail	CA	Proposed Wal-Mart Supercenter retail store in the Town of Yucca Valley
Northwest Forest Plan	Forestry	WA	Forest management and species conservation plan for 24.5 million acres of forest land.
El Charro retail plan	Retail	CA	1.5 million square feet of retail space, including a factory outlet center, in the City of Livermore.
Sacramento 50 Bus/Carpool Lanes	Transportation	CA	13-mile High Occupancy Vehicle (HOV) lane.
Smith Creek Vegetation Project	Forestry	MT	35-acre Livingston Ranger District of the Gallatin National Forest; area has historically experienced wildfires. U.S. Forest Service timber removal plan challenged for effects on climate change.
March Business Center	Commercial	CA	Warehouse facility to be built as a reuse project on former March Air Force Base.
South Fowl Snowmobile Trail	Transportation	MN	Snowmobile trail connecting McFarland Lake to South Fowl Lake along a route that is adjacent to the Boundary Waters Canoe Area Wilderness in northeastern Minnesota.
Lawrence Berkeley National Laboratory	Government	CA	Proposed expansion of the Lawrence Berkeley National Laboratory.
DM&E Powder River Basin Rail Project	Transportation	WY	Dakota, Minnesota & Eastern Railroad Corporation (DM&E) proposed 280 miles of new rail line to reach the coal mines of Wyoming's Powder River Basin and to upgrade nearly 600 miles of existing rail line in Minnesota and South Dakota.
Minnesota Steel taconite mine	Industrial	MN	$1.6 billion project involving the reactivation of a taconite mine and tailings basin near Nashwauk, in Itasca County.
Columbia River Channel Improvement Project	Transportation	OR, WA	Proposed deepening of Columbia River navigation channel to increase shipping capability.
Chittenden County Circumferential Highway	Transportation	VT	Four-lane, limited access highway extending approximately 15.8 miles from I-89 in Williston, north and west through Essex to Vermont Route 127 in Colchester.

Access to and use of resources on federal lands represents another example of the difficulties faced by the private sector in the operation of a business. Approximately 60% of the national forest system is closed to timber harvesting, and between 1989 and 2005, there were 949 lawsuits filed against the Forest Service.

Another troubling aspect of all these actions taken to stop or delay economic development is that many times the parties bringing a lawsuit can and are being paid their attorneys fees under the citizen suit provisions of twelve separate federal environmental statutes.[7] The federal monies are paid from the Judgment Fund to the entity determined to be substantially prevailing (a decision made at the discretion of the Department of Justice). In a supremely non-transparent manner, there is no present accounting of what funds are paid to what parties for suits against any particular facility seeking to obtain a permit. Without such disclosure, it is extremely difficult to identify which group is stopping which project, killing jobs, and destroying economic growth.

Certainty must be brought to the climate debate

The climate debate is being fought out in every branch of the federal government as well as in the states. Figure 8 below illustrates current climate policy activity just at the federal level.



Within the executive branch climate is being regulated under the Clean Air Act, the Clean Water Act, Endangered Species Act, the National Environmental Policy

[7] Environmental statutes providing attorney's fees for prevailing parties in citizen suits include: TSCA, 15 USC § 2619; Endangered Species, 16 USC § 1540(g); Surface mining control and reclamation- control of the environmental impacts of surface coal mining, 30 USC § 1270; Water pollution prevention and control general provisions, 33 USC § 1365; The public health service safety of public water systems, 42 USC 300j-8; Noise Control, 42 USC 4911; Energy Policy and conservation improving energy efficiency, 42 USC § 6305(d).; Solid Waste disposal, 42 USC § 6972; Air pollution prevention and control General provision, 42 USC § 7604; Power plant and industrial fuel use, 42 USC § 8435(d) Comprehensive environmental response, compensation & liability, 42 USC § 9659; and Submerged lands outer continental shelf lands, 43 USC § 1845(e).

Act, and under securities laws. As to litigation there are presently pending 268 lawsuits that range from administrative challenges to EPA's regulations to federal and state common law cases, administrative law cases, permit challenges and even international claims.[8] Twenty three states are also regulating climate in some manner. As to legislative attempts, the House has passed a climate bill and the Senate has several options before it.

Congress is the only entity that can eliminate the uncertainty that arises from the many venues in which the climate issue is being debated. To achieve this certainty Congress needs to pass a comprehensive, uniform law that displaces all of the competing regulations and lawsuits while ensuring environmental protections and a firm path forward that guarantees our nation that it will have the affordable energy supplies it needs to provide for a secure energy and economic future.

Amid the controversy, an opportunity in the West to develop a critically needed rare earth industry:

New technologies are an important component of any effort to move the United States to a cleaner energy future. Unfortunately, the U.S. currently lacks the capacity to produce and manufacture the rare earth oxides, metals, alloys and permanent magnets upon which many clean energy, defense, communication, and computer technologies rely. This situation, however, need not prevail: With the recent discovery of rare earth mineral resources in Nebraska and efforts to reopen the rare earth mine in California, the United States has the ability to re-establish on U.S. soil a viable rare earth oxide, metal, alloy and permanent magnet manufacturing supply chain.

This is an opportunity that should not be foregone. It is in the United States' interest to encourage the rapid re-establishment of a domestic rare earth materials and permanent magnet manufacturing supply chain as soon as possible. As the U.S. General Accounting Office recently reported, many U.S. defense and weapons systems are now totally dependent upon foreign-sourced rare earth materials. Moreover, the U.S. Geological Survey (USGS) has reported that high-

[8] This information can be found at: www.climatecasechart.com; To receive email updates to this chart, send a request to cullen.howe@aporter.com.

technology and environmental applications of the rare earth elements (REEs) have grown dramatically in diversity and importance over the past four decades. As many of these applications are highly specific, in that substitutes for the REEs are inferior or unknown, the REEs have acquired a level of technological significance much greater than expected from their relative obscurity.

The United States' current 97 percent dependence upon REE imports from China is becoming increasingly problematic owing to down-trending exports of REEs from that nation as it ramps up domestic activities that are rapidly increasing internal REE demand. Recent reports of finds of significant potential mineral resources in Afghanistan are in no way a guarantee that there will be a viable alternative for meeting anticipated growing United States domestic demand for REE any time in the foreseeable future. In fact, independent analysts forecast that rest-of-world REE demand will likely exceed Chinese exports by 2011.

This situation places the United States in a difficult position. Looking forward, environmental applications of REE have increased markedly, and, according to the USGS, this trend will undoubtedly continue. Several REE are essential constituents of both petroleum fluid cracking catalysts, automotive pollution-control catalytic converters, hybrid-electric vehicles and permanent magnet generator wind turbines. Use of REE magnets reduces the weight of automobiles, increasing fuel efficiency. Widespread adoption of new energy-efficient fluorescent lamps using REEs for institutional lighting applications could potentially achieve significant reductions in U.S. carbon dioxide (CO_2) emissions equivalent to removing one-third of the automobiles currently on the road. Large-scale application of magnetic-refrigeration technology, which also requires REEs, could significantly reduce energy consumption and CO_2 emissions.

Simply put, the rare earth elements are essential for a diverse and expanding array of high-technology applications, which constitute an important part of the industrial economy of the United States. As USGS notes, long-term shortage or unavailability of REEs would force significant changes in many technological aspects of American society. In short, the accomplishment of many clean energy objectives encouraged by the Administration may not be realized if critical supply chain issues are not addressed in a constructive manner that assures the availability of domestic REE sources, known and potential. Moreover, creation of

domestic REE supply chain capability also means that jobs will be created in the United States, many of them in the west.

Re-establishing a domestic REE manufacturing and supply chain is especially critical given that the U.S. is now so heavily dependent upon questionably available foreign supplies of rare earths. As noted, such a production capability also will leverage new manufacturing jobs on U.S. soil in a variety of rare-earth dependent technologies, including renewable energy, hybrid and electric vehicles, batteries, power generation, energy efficient lighting, water treatment, agriculture, communications, health care systems and many others.

Recommendations for addressing the issues discussed:

a. Consolidate all project challenges

Based on a review of the 381 projects in the Project No Project database it is common for the project permit challenges to be filed sequentially over time, essentially dragging out the permitting process interminably. Since most projects are subject to a project financing agreement the longer the time it takes to secure a permit, the greater the risk of the developer losing project financing. This problem can be addressed by analogously adopting procedures Congress has already put in place for transportation projects that were subject to similar challenges.

Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA-LU), which was signed into law on August 10, 2005, applies to environmental reviews conducted under the National Environmental Policy Act (NEPA). At its core, Section 6002 contains two key components: process streamlining, and a statute of limitations. The process streamlining component does not in any way circumvent any NEPA requirement; rather, it designates a lead agency (in this case, DOT) and requires early participation among the lead agency and other participating agencies. The goal of the process streamlining provision was not to escape NEPA, but merely to facilitate interagency and public coordination so that the process could be sped up.[9]

[9] At the time SAFETEA-LU was enacted, the average environmental review for a transportation project was taking 6 to 7 years. Because the regulatory streamlining provision has only been in effect for five years, it is difficult to determine its impact. In 2008, GAO conducted a study, at Sen. Inhofe's request, of the effect Section 6002 was having on environmental reviews. The report, "Transportation Agencies Are Acting to Involve Others in Planning

The second key element in Section 6002 is a 180-day statute of limitations to "use it or lose it" on judicial review. Without such a provision, the prevailing statute of limitations is 6 years. Many environmental and NIMBY groups wait until the very last day to file their claim, which shows that their only real motive is to exploit the law to delay projects—and they are particularly effective when they are given 6 years to file their claim. Even with the 180-day statute of limitations, groups still wait until the end of the process to file, so that the project is delayed as long as possible.[10] A good example of this happening is the Maryland Inter-county Connector.

The suggested process balances the need for a complete environmental review and related challenges to a permit with the fact that the developer is financing a project that must be completed in a reasonable amount of time or must be terminated. Without such limitation those whose sole purpose is to stop the project have the decided advantage while the community that benefits from the economic development and job creation is at a politically determined disadvantage.

b. Provide continuous oversight for the Clean Air Act Section 321 (a) mandate of continuous evaluation of potential loss or shifts of employment due to EPA air regulations.

For decades there has been controversy over the economic and job impacts of regulations published under the Clean Air Act because of their direct impact on the operations of industries and on where they are able to locate. Complicating the issue is the fact that many of the provisions of the Clean Air Act do not allow for the consideration of economic impacts. Yet while a correct interpretation of the Act, the Clean Air Act does not completely ignore concerns over jobs.

For example, Section 321 (a) of the Clean Air Act (42 U.S.C. 7621 (a)) states:

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and Environmental Decisions," did not conclude that the process achieves 'x' months of reduction in the time needed to complete the NEPA process, but it did conclude that the process appeared to be running more smoothly. Given that it was only three years since enactment of SAFETEA-LU, however, GAO concluded that its results were too preliminary to make a difference.

[10] As one example, **the United States is ranked in one recent assessment of mining projects as having the longest permitting delays in the world** (Papua New Guinea is ranked second worst). Source: Behre Dolbear, *2010 Ranking of Countries for Mining Investment – Where "Not to Invest"*, Behre Dolbear Group, Inc., 2010.

Continuous evaluation of potential loss or shifts of employment. *The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.*

On October 13, 2009, six members of the Senate[11] sent a letter to EPA concerning this matter and requested the results of EPA's continuing section 321(a) evaluation of potential shifts of employment which may result from the suite of regulations EPA has proposed or finalized that address greenhouse gases under provisions of the Clean Air Act, including threatened plant closures or reductions in employment that may result from the administration or enforcement of such regulations. EPA's response (on October 26, 2009) referenced only Section 321 (b) relating to allegations made by employees whose jobs are threatened by environmental regulations and observed that the relevant section of the committee report does not describe the provisions as applying broadly to all regulations under the Clean Air Act.

Such statements are at odds with the House Interstate and Foreign Commerce Committee Report 95-294, reporting H.R. 6161, May 12, 1977. 95 Cong. House Report 294; CAA77 Leg. Hist. 26. The House provision was adopted by the Senate in Conference. The House Committee specifically stated the purpose of the amendment is as follows:

Among the issues which have arisen frequently since the enactment of the 1970 Amendments is the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent employment opportunities.

The bill establishes a new section 319 (codified as section 321) of the Act. Under this provision, the Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to the requirements of the act. This evaluation is to include an investigation of threatened plant closures or reductions in employment allegedly due to requirements of the act or any

[11] Senators David Vitter (R-LA), Jim Risch (R-ID), Mike Johanns (R-NE), James Inhofe (R-OK), John Ensign (R-NV), and Orrin Hatch (R-UT), letter to EPA Administrator Lisa Jackson, October 13, 2009.

actual closures or reductions which are alleged to have occurred because of such requirements.

Congress has mandated that EPA begin developing information on potential loss or shifts of employment in 1977, when the CAA was in its infancy. Now that the CAA is in full operation it is more important than ever for Congress to know about the impacts on jobs of our citizens.

c. Foreign emissions need to be taken into account when determining non-attainment.

EPA's implementation timeline for the proposed ozone standards requires states to meet the primary ozone standard, between 2014 and 2031, with deadlines depending on the severity of the problem.[12] During this time period, overseas long-range pollution transport impacts will increase significantly as the world's economy grows.[13] It is possible that if EPA were to take into account these long-range pollution transport impacts, efficacy of the recently proposed ozone NAAQS rule may vanish, the projected benefits of the tightened standard would be found to be much reduced, and quite possibly costs would outweigh benefits with much less ambiguity than EPA has so far portrayed. It is not apparent that in its rulemaking EPA has performed a reasonable quantitative assessment of this issue taking account of the above observations and cited literature. The Agency should undertake to do this assessment, for as observed in my testimony, EPA cannot continue to ignore this issue, for even the news media is aware of the potential depth of this concern, and the impact on our Western states ability to attract business and create jobs.

d. There must be a clear and transparent accounting of the monies paid to citizens for bringing lawsuits against the federal government.

Such transparency should include the name of the recipient, the amount paid to the recipient and for what reasons, including the identification of the lawsuit.

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[12] Environmental Protection Agency "National Ambient Air Quality Standards for Ozone" 75 *Fed. Reg.* 2,938-3,052 (January 19, 2010).

[13] O.R. Cooper et al, "Increasing springtime ozone mixing ratios in the free troposphere over western North America," *Nature*, Vol. 463, pp. 344-348, January 21, 2010; National Research Council of the National Academy of Science, *Global Sources of Local Pollution: An Assessment of Long-Range Transport of Key Air Pollutants to and from the United States*; p. 40, 2009; *available at* http://www.nap.edu/catalog/12743.html.

Such an accounting is required by Article I, section 9 of the U.S. Constitution which reads:

> *No money shall be drawn from the Treasury, but in consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.*

This concludes my testimony, and again, I thank you for the opportunity to testify before this Joint Meeting of the Western Caucuses.

NFIB SMALL BUSINESS NEWS

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CONTACT: Melissa Sharp
202-314-2068

Small Business Optimism Declines in June

WASHINGTON, July 13, 2010 – The National Federation of Independent Business Index of Small Business Optimism lost 3.2 points in June falling to 89.0 after posting modest gains for several months[1]. The Index has been below 93 every month since January 2008 (30 months), and below 90 for 23 of those months, all readings typical of a weak or recession-mired economy. Seventy percent of the decline this month resulted from deterioration in the outlook for business conditions and expected real sales gains. Owners have no confidence that economic policies will fix the economy.

"The U.S. economy faces hurricane force headwinds and the government is at the center of the storm, making an economic recovery very difficult," said William Dunkelberg, NFIB's chief economist.

Optimism Components	Net %	Change
PLAN TO INCREASE EMPLOYMENT	1	0
PLAN TO INCREASE CAP. OUTLAYS*	19	-1
PLAN TO INCREASE INVENTORIES	-3	-5
EXPECT ECONOMY TO IMPROVE	-6	-14
EXPECT HIGHER REAL SALES	-5	-10
CURRENT INVENTORY SATISFACTION	-1	-1
CURRENT JOB OPENINGS*	9	0
EXPECTED CREDIT CONDITIONS	-13	-1
NOW A GOOD TIME TO EXPAND*	6	1
EARNINGS TRENDS	-32	-4

*Note: These components are measured as actual percentages of all respondents and are not net percentages. A net percentage is the percent positive minus percent negative.

Employment
Average employment growth per firm turned negative in April of 2007 and has remained negative for 10 of the 12 following quarterly readings ending with a negative .18 in April (seasonally adjusted). May and June show no reversal in the bad news, posting average declines of negative .48 and negative .28 workers per firm respectively.

In June, 9 percent (seasonally adjusted) reported unfilled job openings, unchanged from May and historically very weak. Over the next three months, 8 percent plan to reduce employment (up one point), and 10 percent plan to create new jobs (down four points), yielding a seasonally adjusted net 1 percent of owners planning to create new jobs, unchanged from the May reading and positive for the second time in 20 months.

Capital Spending and Outlook
The freqnency of reported capital outlays over the past six months was unchanged at 46 percent of all firms, two points above the 35-year record low (reached most recently in December 2009). Of those making capital expenditures, 30 percent reported spending on new equipment (down two points), 15 percent acquired vehicles (down two points), and 11 percent improved or expanded facilities (unchanged). Four percent acquired new buildings or land for expansion (down one point), and 9 percent spent money for new fixtures and furniture (down one point).

[1] The survey was conducted through June 30 and represents 805 small business owner respondents.

The percent of owners planning to make capital expenditures over the next few months fell one point to 19 percent, 3 points above the 35 year record low. Six percent characterized the current period as a good time to expand facilities, up 1 point. But a net negative 6 percent expect business conditions to improve over the next six months, down 14 points from May.

"Owners do not trust the economic policies in place or proposed, and they are distressed by global and national developments that make the future more uncertain," said Dunkelberg.

Sales and Inventories
The net percent of all owners (seasonally adjusted) reporting higher nominal sales in the past three months lost four points, falling to a net-negative 15 percent, 19 points better than June 2009, but still far more firms are reporting negative sales trends quarter-to-quarter than positive. The net percent of owners expecting real sales gains lost 10 points, falling to a net-negative 5 percent of all owners (seasonally adjusted).

"Hiring and capital spending depend on expectations for growth in future sales, so the outlook for improved spending and hiring is not good," said Dunkelberg.

Small business owners continued to liquidate inventories and weak sales trends gave little reason to order new stock. A net-negative 21 percent of all owners reported gains in inventories (more firms cut stocks than added to them, seasonally adjusted), one point worse than May. Plans to add to inventories declined five points to net-negative 3 percent of all firms (seasonally adjusted).

Inflation
The weak economy continued to put downward pressure on prices. Thirteen percent of owners (down one point) reported raising average selling prices, and 27 percent reported average price reductions (down one point). Seasonally adjusted, the net percent of owners raising prices was a negative 13 percent, a two point increase in the net percent raising prices. June is the 19th consecutive month in which more owners reported cutting average selling prices rather than raising them. Plans to raise prices fell three points to a seasonally adjusted net 11 percent of owners.

Earnings
A net-negative 32 percent of small business owners reported positive profit trends, three points worse than in June and 28 points worse than the best expansion reading reached in 2005. The persistence of this imbalance is bad news for the small business community. Profits are important for the support of capital spending and expansion.

Owners continued to hold the line on compensation, with 8 percent reporting reduced worker compensation, and 13 percent reporting gains. Seasonally adjusted, a net 4 percent reported raising worker compensation, only six points better than February's record low reading of net-negative 2 percent.

"In past recovery periods, compensation improved at a much faster pace than we have experienced in this recovery period," said Dunkelberg.

Credit
Regular NFIB borrowers (29 percent accessing capital markets at least once a quarter, a survey record low) continued to report difficulties in arranging credit. A net 13 percent reported loans harder to get than in their last attempt, unchanged from May. Overall, 90 percent of the owners reported all their credit needs met (or they did not want to borrow).

"The small business sector is not on a positive trajectory and with this half of the private sector missing-in-action, the economy's poor growth performance is no surprise," said Dunkelberg. "Small business owners are not happy about the future of the economy being painted by the administration or economic events. Confidence is lacking and the news out of Washington is discouraging. Until this changes, don't expect small businesses to start hiring."

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NFIB's Small Business Economic Trends is a monthly survey of small business owners' plans and opinions. Decision makers at the federal, state and local levels actively monitor these reports, ensuring that the voice of small business is heard. The NFIB Research Foundation conducts some of the most comprehensive research of small business issues in the nation. The National Federation of Independent Business is the nation's leading small business association. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its members in Washington and all 50 state capitals.

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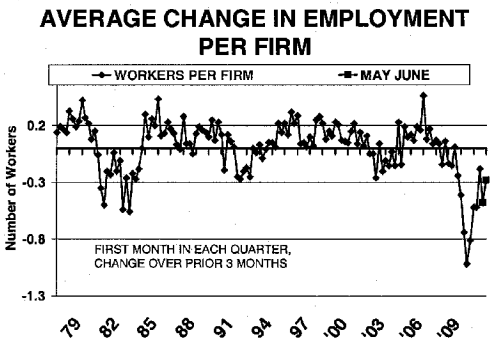
FOR IMMEDIATE RELEASE

CONTACT: Melissa Sharp 202-314-2068

NFIB Jobs Statement: Small Businesses Still Not Hiring

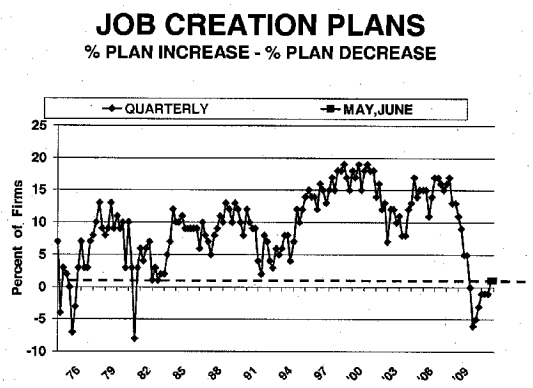
WASHINGTON, July 1, 2010 — *William C. Dunkelberg, chief economist for the National Federation of Independent Business, the nation's leading small business organization, issued the following statement on June job numbers based on NFIB's monthly economic survey that will be released on Tuesday, July 13. The survey was conducted through June 30 and reflects 805 small business owner respondents:*

"Job creation still hasn't crossed the 0 line in the small business sector. Since January 2008, the seasonally adjusted average change in employment per firm has been negative or 0, with a seasonally adjusted loss of negative 0.3 workers per firm reported in June for the prior three month period. Most firms did not change employment, 5 percent (down 3 points from May) increased average employment by 3.4 employees, but 15 percent (down 5 points) reduced their workforces by an average of 3.3 workers.



"The number of small business owners with unfilled (hard to fill) openings was unchanged at 9 percent of all firms, historically a weak showing. Over the next three months, 8 percent plan to reduce employment (up one point), and 10 percent plan to create new jobs (down four points), yielding a seasonally adjusted net 1 percent of owners planning to create new jobs, unchanged from May and the second positive reading in 20 months.

"Overall, the job creation picture is still bleak. Weak sales and uncertainty about the future continue to hold back any commitments to growth, hiring or capital spending. Job creation plans have been running far below comparable quarters in the recovery periods following two other major recessions."



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NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB gives small and independent business owners a voice in shaping the public policy issues that affect their business. NFIB's powerful network of grassroots activists send their views directly to state and federal lawmakers through our unique member-only ballot, thus playing a critical role in supporting America's free enterprise system.

NFIB's mission is to promote and protect the right of our members to own, operate and grow their businesses. More information is available online at www.NFIB.com/newsroom.

July 27, 2010

The Honorable Steve Cohen
Chair
Subcommittee on Commercial and
Administrative Law
House Judiciary Committee
H2-362 Ford House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Trent Franks
Ranking Member
Subcommittee on Commercial and
Administrative Law
House Judiciary Committee
B-351 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Cohen and Ranking Member Franks:

On behalf of Associated Builders and Contractors (ABC), a national association with 77 chapters representing 25,000 merit shop construction and construction–related firms with 2 million employees, we appreciate the House Judiciary Subcommittee on Commercial and Administrative Law for holding a hearing regarding the federal rulemaking and regulatory process. Small business owners, those who create the vast majority of jobs in America, often face costly regulations that impede their business' ability to compete. ABC believes that overly burdensome regulations negatively impact the economy, often without achieving the intended benefits.

Research from a 2005 study, released by the Office of Advocacy, illustrates that the small business community is disproportionately affected by burdensome federal regulations. The study found that small businesses spend more than $7,000 per employee annually to comply with federal regulations. In fact, the study concluded that complying with federal regulations costs small businesses 60 percent more that it would a company employing 500 or more employees. For the construction industry, excessive regulations translate into higher costs that are eventually passed on to the consumer.

The construction industry is already strained with job loss, with unemployment over 20 percent, and adding more bureaucratic layers to an already burdened industry is not conducive to an expedient economic recovery. ABC strongly supports comprehensive regulatory reform, including across-the-board requirements for agencies to evaluate the risks, weigh the costs, and assess the benefits of regulations. Regulations should be reviewed periodically to ensure that they are not outdated, unnecessary, or too costly. Additionally, federal agencies must comply with the Regulatory Flexibility Act when promulgating regulations to ensure that the proposed rule does not significantly impact a substantial number of small businesses.

Small and family-owned businesses are the backbone of our economy and give Americans a sense of pride and accomplishment. ABC remains committed to reforming duplicative and burdensome regulations imposed on small businesses.

Sincerely,

Brewster B. Bevis
Senior Director, Legislative Affairs

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