Statement of Robert L. Glicksman
to the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial, and Antitrust Law

Hearing on "The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness"
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My name is Robert L. Glicksman. I am the J.B. & Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School. I am also a member scholar at the Center for Progressive Reform (CPR). I graduated from the Cornell Law School and have practiced and taught environmental and administrative law for more than 35 years.

This submission makes several points about the impact of regulation on society and the likely effects of proposals to dramatically alter the manner in which agencies are required to adopt regulations such as those recently introduced in Congress. First, regulations often provide great net benefits to the public interest, such as by protecting the health and safety of Americans from pollution and other harms. As a necessary corollary, proposals that would indiscriminately block regulation would reduce or eliminate these benefits. The proponents of making it more difficult for agencies to regulate tend to ignore the very real costs that result from a failure to regulate even though significant costs may flow from decisions not to regulate just as they do from decisions to regulate. Second, the existing federal regulatory system is already process heavy, characterized by multiple regulatory obstacles and burdens that result from analytical duties that are at best duplicative and sometimes of little apparent value. The legislative proposals placed on the table in recent years would make this situation worse, not better. It would create a regulatory thicket that ensnares agencies and hinders the adoption of even the most needed and beneficial regulations.

Third, despite numerous claims to the contrary, there is little reason to believe that existing federal regulations issued by agencies such as the Environmental Protection Agency are imposing disproportionate costs or inhibiting U.S. job growth and economic recovery. Studies alleging negative economic effects tend to both overestimate the costs of regulation and discount or completely ignore regulatory benefits. Fourth, legislative efforts concerning rulemaking should focus on ensuring that agencies have adequate resources to carry out the tasks assigned to them by statute, not on forcing agencies to operate on shoestring budgets while heaping ever more burdensome procedural duties on them under the guise of regulatory "reform."

I. REGULATIONS HAVE BENEFITED SOCIETY GREATLY; THE FAILURE TO REGULATE HAS CREATED SIGNIFICANT HARM

All regulations share the same starting point: A provision in a statute passed by both Houses of Congress and signed by the President that authorizes or directs an agency to regulate. Whenever an executive or independent agency issues a rule, it is acting pursuant to authority provided in duly enacted legislation for achieving a specified policy goal, although that authority often leaves room for the exercise of at least some agency discretion. The legislation from which agencies derive their authority to regulate reflect a determination by a majority of both Houses of Congress and the President that there is social problem that merits the government's attention, and that regulation is an appropriate response to that problem because it will promote the public interest in some way, such as by protecting health and the environment.

It is a good thing that Congress has directed agencies to issue regulations to achieve important social goals because these regulations have produced enormous benefits for the American people.[1] Consider the following:

- In its most recent report to Congress, the Office of Management and Budget (OMB) estimates that the total benefits of significant regulations for the past ten years exceeded theirs costs by a ratio as high as 16 to 1. The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its costs by a ratio of 25 to 1. Similarly, a study of EPA rules issued during the Obama Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1.
- Several recent catastrophes illustrate the huge costs of failing to regulate when it is appropriate and necessary. The BP oil spill has imposed tens of billions of dollars in damages to the Gulf of Mexico and affected Gulf Coast communities—far more than the cost of complying with regulations that would have prevented this tragedy. A recent Government Accountability Office (GAO) study concluded that the 2008 Wall Street collapse, which might have been avoided through more extensive financial regulation, has cost the U.S. economy as much as $22 trillion.[2]
- Dozens of retrospective evaluations of regulations adopted by the EPA and the Occupational Safety and Health Administration (OSHA) pursuant to the Regulatory Flexibility Act have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.

II. THE PROBLEM OF UNDER-REGULATION

The regulatory system created by Congress and implemented by agencies is designed to protect the American people against unacceptable risks to important values such as a safe and healthy environment, but the destructive convergence of inadequate resources, political interference, and outmoded legal authority often prevents regulatory agencies from fulfilling this task in a timely and effective manner. Unsupervised industry "self-regulation," which has often

[1] *See* Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

[2] U.S. GOV'T ACCOUNTABILITY OFFICE, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF DODD-FRANK ACT 17, 21 (2013), *available at* http://www.gao.gov/assets/660/651322.pdf.

filled the resulting vacuum, is not an adequate substitute, as the predictably catastrophic results of inadequate regulation regularly demonstrate.

The consequences of inadequate regulation and enforcement are apparent—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men; from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. And, of course, inadequate regulation of the financial services industry helped trigger the current economic recession and left millions unemployed, financially ruined, or both.

III. A REGULATORY PROCESS PLAGUED BY OSSIFICATION

Inadequate funding is one of the main reasons for the absence of the kinds of effective regulation that could have prevented these disasters. The proliferation of analytical and procedural requirements in the rulemaking process is another significant hindrance to effective regulation.[3] Regulatory agencies must negotiate a slew of analytical hurdles as a prerequisite to the adoption of regulations, even as their statutory responsibilities expand and their budgets remain constant or shrink. As agencies grow more "hollowed-out"—stretched thin by the demands of doing more with less—their pursuit of new safeguards becomes subject to increasing delays, while many critical tasks are never addressed at all.[4] Many of these analyses and procedures also provide powerful avenues for political interference in individual rulemakings, as the centralized regulatory review process supervised by the White House's Office of Information

[3] PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.

[4] Sidney A. Shapiro et al, *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the "Protector Agencies"* 6-8 (Ctr. for Progressive Reform, White Paper 906, 2009), *available at* http://www.progressivereform.org/articles/RegDysfunction_906.pdf.

and Regulatory Affairs (OIRA) clearly illustrates.[5] A 2011 CPR study found that OIRA frequently uses this review process to delay or weaken rules following closed-door meetings with corporate lobbyists.[6]

Careful analysis of both the need for and consequences of regulation is important, but the regulatory process has already become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete. Some studies indicate that the average time it takes to complete a rule after it is proposed is about 1.5 to 2 years, but no one thinks that any type of significant rule can be completed in such a short time frame. As my colleague Professor Richard Pierce of the GW Law School has observed, "[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later."[7] The EPA told the Carnegie Commission that it takes about five years to complete an informal rulemaking.[8] A Congressional report found that it took the Federal Trade Commission five years and three months to complete a rule using more elaborate hybrid rulemaking procedures.[9] These reports do not take into account additional analytical requirements that have been imposed since their publication date.

The fact that it may take five years or more to complete the process for adopting important rules should be no surprise, as the following, entirely realistic time schedule for significant rules indicates:

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[5] *Id*. at 12-14.
[6] Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), *available a*t http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf [hereinafter Steinzor et al., *Behind Closed Doors*]. Specifically, the study found that OIRA routinely meets corporate interests behind closed doors during the review process and then delays or changes rules that are subject of such meetings at a disproportionately higher rate.
[7] Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).
[8] CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).
[9] FEDERAL TRADE COMM'N, 98th Cong., 2nd Sess., 155-66 (Comm. Print 98-cc 1984).

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

  TOTAL: 47-95 months (3.9-7.9 years)

This estimate of 4 to 8 years assumes the comment period only takes 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities have the potential to delay a rule by another 6-12 months.

IV. PROPOSED REGULATORY PROCESS LEGISLATION FROM THE 112TH CONGRESS WOULD EXACERBATE THE OSSIFICATION PROBLEM, FURTHER AMPLIFYING THE PROBLEM OF UNDER-REGULATION AND LEAVING THE PUBLIC AND THE ENVIRONMENT AT UNNECESSARY RISK

In the 112th Congress, several bills were introduced that would have added still new layers of analytical and procedural requirements to an already excessively convoluted rulemaking process. Although these bills differed in their particulars, the end result, and the apparent aim, of such bills remained the same: to dilute or block outright the ability of agencies to put in place critical safeguards necessary for protecting people and the environment. If these

bills had been law in the 1970s, many of the most critical health, safety, and environmental protections which Americans have long enjoyed would likely never have become a reality.

A. The REINS Act

The REINS Act would change the rulemaking process by requiring that "economically significant" regulations—generally, those with annual economic impact of $100 million or more—receive Congress's affirmative approval—by means of a joint congressional resolution of approval signed by the President—before they can go into effect. This bill would effectively bar agencies from relying on existing statutory authority, often enacted by overwhelming congressional majorities, to implement almost any large regulation—no matter how beneficial they would be for the public.

By design, the REINS Act would make Congress the final arbiter of all significant regulatory decisions. While superficially this may seem like a good idea—after all, Members of Congress are elected and regulators are not—the REINS Act would replace what is good about agency rulemaking with what is bad about the legislative process.

Neither most Members of Congress nor their staffs are likely to have sufficient expertise regarding complex regulatory matters to make a considered decision whether to adopt a regulation, and if so, what kind, particularly within the limited time frame legislators would have to act. Congress has scaled back staffing levels and, unlike agencies, Congressional offices do not employ doctors, epidemiologists, botanists, or statisticians. The result would likely be mistaken judgments about the need for regulation and the potential benefits it would provide, even assuming good faith efforts by legislators to assess the merits of agency regulatory proposals. In fact, it is not hard to imagine the approval process becoming a nakedly political

exercise, reflecting the political power of special interests rather than a fair and informed evaluation of the costs and benefits of regulation. Rulemaking needs to become less politicized, not more.

Even if Congress did have the necessary expertise to review regulations, the type of careful and time-consuming review that would be required would impose significant analytical burdens on it, diverting members and their staffs from other business. Because this review would have to occur within a short time frame, the REINS Act has the potential to stop (or at least slow down) important other business, assuming that legislators and their staffs actually spent the time necessary to understand complex regulations.

B. The Regulatory Accountability Act

The Regulatory Accountability Act would drastically overhaul the Administrative Procedure Act (APA), by amending the statute to add over 60 new procedural and analytical requirements to the agency rulemaking process. The bill would make more than 30 pages worth of changes to the current, relatively simple structure of the APA.

The Regulatory Accountability Act would change the rulemaking process in the following ways:

- Agencies would have to make a series of "preliminary and final determinations" with respect to several different "rulemaking considerations." Although agencies already account for some of these considerations, others are new, and would require highly complex, resource-intensive, and time-consuming analyses by the agencies.
- Reviewing courts would be empowered to review the adequacy of agency determinations of the "rulemaking considerations." If a court determines that an agency has failed to adequately conduct a required determination, and finds that this failure is prejudicial, it would be empowered to torpedo the entire rule, resulting in more delay and waste of agency resources.
- The Regulatory Accountability Act would overrule more than 25 environmental, health, and safety statutes by requiring that regulatory agencies justify their final rules by balancing questionable regulatory cost estimates against hard to quantify regulatory benefits, even though most of these statutes direct agencies to make

regulatory decisions based on other factors. It would also require agencies to choose the least-cost alternative available to it. Most environmental, health, and safety statutes direct agencies to make regulatory decisions according to different criteria, including identifying standards that are based on the best existing technology or that are necessary to achieve certain public health outcomes.

- The Regulatory Accountability Act would require agencies to complete an advanced notice of proposed rulemaking (ANPRM) for all of their bigger rules, even where this step would add little value to the process of adopting rules.
- The Regulatory Accountability Act would require Information Quality Act (IQA) hearings to resolve disputes over underlying regulatory science and data. These hearings unnecessarily duplicate the notice-and-comment process under the APA, which already provides a mechanism for ensuring that agencies establish the reliability of the evidence and information upon which they rely.
- The Regulatory Accountability Act would greatly expand the circumstances under which agencies would be required to employ formal rulemaking hearings. Because of the great expense of these hearings and the modest value they add to the rulemaking process, almost no serious administrative law expert regards formal rulemaking as reasonable in many of the contexts in which the Act would mandate it. Precisely because of its limited value in regulatory areas such as public health and environmental protection, where determinations are based on broad social judgments rather than the kinds of individualized factual determinations characteristic of trial-type adjudication, the use of formal rulemaking hearings has been all but relegated to the dustbin of history.
- The Regulatory Accountability Act would require burdensome ongoing look-back procedures for existing regulations. Such look-backs can be very useful if designed properly and if agencies are provided with the necessary budgetary and personnel resources for conducting them, but the Regulatory Accountability Act's look-back procedures failed to meet either of these criteria. As proposed, the Act as a practical matter would require diverting some agency staff away from working on developing new rules to address unaddressed high priority threats and toward reanalysis of matters the agency may consider to be less important.
- The Regulatory Accountability Act would establish onerous judicial review requirements. These requirements would authorize courts to review complex policy matters that are well beyond the ken of generalist judges. In addition, the Regulatory Accountability Act would alter the APA's judicial review provisions by directing reviewing courts not to defer to agency determinations or interpretations under certain circumstances.
- The Regulatory Accountability Act would require agencies to account for several complex policy considerations and to consult with OIRA before they can issue "major" guidance documents. These one-size-fits-all requirements would deprive agencies of the flexibility needed for issuing these guidance documents in a timely fashion. The result would be harm to regulated industries that rely on these documents to minimize regulatory uncertainty.

All of these additional analytical and procedural requirements would add significant delays to the rulemaking process. In fact, for bigger rules, the Regulatory Accountability Act would likely add at least 21-33 months to the already bloated rulemaking process under current law:

- 6-12 months to complete the additional analytical requirements
- 3 months for the Advanced Notice of Proposed Rulemaking (ANPRM) process
- 6-12 months to respond to comments received after the ANPRM
- 6-12 months to complete the formal rulemaking procedures

  Total: 21-39 months (1.75-3.25 years) extra

As noted above, it already takes four to eight years for an agency to promulgate and enforce many significant rules, and the proposed procedures could potentially add another 21 to 39 months to that process. Under the Regulatory Accountability Act, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete.

V. THE PROPOSED REGULATORY PROCESS LEGISLATION AMOUNTS TO A SOLUTION IN SEARCH OF PROBLEM

The justification commonly given for the proposed regulatory process legislation such as the bills discussed above is that federal regulatory agencies are issuing too many burdensome regulations, which in turn are inhibiting U.S. job growth and economic recovery. The goal of the proposed legislation purports to be the creation of new processes and procedures that would prevent agencies from issuing too many regulations, or regulations that are excessively burdensome. Upon closer examination, however, this narrative concerning what ails the U.S.

regulatory system, and the underlying assumptions on which it is based, is completely off the mark.

A. The Rulemaking Process is Already Fair and Accountable

Administrative agencies are already subject to a thick web of analytical and procedural requirements to prevent agencies from issuing unnecessary or excessively burdensome regulations. If anything, there are already too many of these overlapping and duplicative requirements, resulting, as indicated above, in the need to conduct years of analysis before significant rules may be adopted. In addition, existing federal laws that govern the rulemaking process already provide many opportunities for stakeholders to participate to make their views known, inform the agency if its regulatory proposals reflect factual misunderstandings, and protect their interests.

The APA requires agencies to provide persons potentially affected by their regulations a fair opportunity to influence the rulemaking process, and several mechanisms exist for holding agencies accountable for their regulatory actions. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it. If an agency adopts a rule without taking into account relevant public comments, the court in a challenge to the validity of the rule has the power to send the rule back to the agency and preclude its implementation.

The APA has provided these protections during the rulemaking process for affected interests since 1946, but statutes and executive orders adopted beginning in the 1980s have added multiple layers of new rulemaking procedures and analytical requirements not required by the APA. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to as many as 110 separate procedure requirements in the rulemaking process.[10] Additional procedural requirements have been added since 2000.[11]
- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.[12]

Regulated businesses not only take full advantage of these existing participatory opportunities. All of the available evidence demonstrates that corporate and business entities dominate the rulemaking process in doing so. For example, when Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the EPA, they found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule.[13] These included meetings, phone calls, and letters.

Data available on the OIRA website indicate that regulated industry participates far more frequently in meeting concerning rules undergoing OIRA review than do public interest groups. A CPR white paper analyzed these data and found that 65 percent of meeting participants

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[10] *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), *available at* http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf.
[11] *See, e.g.*, Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).
[12] *See* PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.
[13] Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

represented corporate interests compared to just 12 percent who represented public interest groups.[14]

These data unequivocally confirm that interested parties—particularly regulated industries—have fair, if not sometimes excessive, access to agencies and OIRA to influence the outcome of proposed rules. Moreover, since agencies have to justify rules by responding to every comment they receive, it is simply not plausible to contend that they are not accountable for the decisions that they make. Finally, since agencies are subject to a host of analytical requirements, it is beyond dispute that they are required to think carefully about what they do before they do it.

The regulatory reform proposals discussed above would therefore add clutter to the rulemaking process and increase the time required to regulate without increasing the likelihood of better informed or wiser rules.

B. Regulations Do Not Impose Unreasonable Costs

Over the past few years, regulatory opponents have attempted to make the case that regulations impose unreasonable costs by citing a string of studies purporting to demonstrate the magnitude of total regulatory burdens. Each of these reports suffers from such extensive methodological flaws as to render them unsuitable for consideration in serious debate regarding regulatory policy.

A 2010 study by Nicole Crain and Mark Crain—performed under contract for the Office of Advocacy of the Small Business Administration (SBA)—is among those most frequently cited by regulatory opponents to support the proposition that regulations impose unreasonable costs on the U.S. economy. Among its many conclusions, the Crain and Crain study purported to find

[14] Steinzor et al., *Behind Closed Doors*, *supra* note 6 at 15-27.

that the total annual cost of federal regulations in 2008 was about $1.75 trillion.[15] A CPR White Paper found that the methods used by Crain and Crain to arrive at their cost figure were so flawed that their estimate must be regarded as unreliable.[16] More generally, the Crain and Crain study failed to provide any accounting of regulatory benefits. Thus, even if its estimate of regulatory costs were reliable, the study would provide no useful information regarding the value of the U.S. regulatory system. After all, a discussion of any investment is inherently incomplete if it focuses on costs without considering benefits. Under such an approach, almost any economic transaction—from the purchase of a loaf of bread to the construction of a manufacturing plant—would be counted as a drain on the economy, because they only include the costs not the benefits. The point of regulatory impact analysis is to compare the costs imposed by regulation with the resulting regulatory benefits. If a regulation's benefits exceed its costs, it represents an obvious net gain to society. Concluding that a regulation is detrimental to society because of its costs, while ignoring the benefits of regulation and their relationship to costs, is nonsensical. It provides a skewed and distorted picture of the value of regulation that bears no relation to reality.

The significance of this failure to consider regulatory benefits cannot be overstated: Several studies to consider both cost and benefits of various regulations have found that the benefits outweigh costs several times over.[17] Indeed, when full costs and benefits are considered, it is clear that federal regulations are—from a strictly economic perspective—among the best government programs in existence.

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[15] NICOLE V. CRAIN AND W. MARK CRAIN THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) *available at* http://www.sba.gov/sites/default/files/rs371tot.pdf.

[16] Sidney A. Shapiro et al., *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Ctr. for Progressive Reform, White Paper 1103, 2011) *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

[17] *See supra* text accompanying note 1.

Subsequently, the nonpartisan Congressional Research Service (CRS) published its own report examining the Crain and Crain study, which found the same flaws as identified in the CPR White Paper, and additional problems as well.[18] Former OIRA Administrator Cass Sunstein has characterized the Crain and Crain study as "deeply flawed," characterizing it as an "urban legend."[19]

A more recent study by the American Action Forum (AAF) claims that federal regulators added more than $236 billion in regulatory costs in 2012.[20] In reaching this finding, the AAF study employs inherently flawed data—that is, it relies exclusively on agency *ex ante* cost estimates, even though experience indicates that these estimates tend to systematically overstate the costs that regulations actually impose following implementation.

To generate these *ex ante* cost estimates, agencies primarily rely on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[21] Examples of such overstatement include the industry estimates of the costs of complying with the acid rain control provisions of

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[18] Curtis W. Copeland, *Analysis of an Estimate of the Total Costs of Federal Regulations* (Cong. Research Serv., R41763, Apr. 6, 2011)

[19] *Unfunded Mandates, Regulatory Burdens and the Role of Office of Information and Regulatory Affairs, Hearing Before the Subcomm. on Tech., Info. Pol'y, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011) (testimony of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs), *available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=1299%3A5-25-2011-qunfunded-mandates-regulatory-burdens-and-the-role-of-office-of-information-and-regulatory-affairsq&catid=14&Itemid=1; James Goodwin, *Sunstein Denounces SBA's 'Deeply Flawed' Study of Regulatory Costs*, CPRBlog, http://www.progressivereform.org/CPRBlog.cfm?idBlog=5758C6D6-AC7E-4BAF-CF1DA8672B3AB937 (last visited June 21, 2011).

[20] Sam Batkins, *Piling On: The Year in Regulation* (American Action Forum, 2013), http://americanactionforum.org/topic/piling-year-regulation (last visited Feb. 25, 2013).

[21] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).

the 1990 Clean Air Act amendments.[22] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment often ends up reflecting the maximum possible cost, rather than the mean.[23]

To make matters worse, industry cost estimates—and therefore the *ex ante* cost estimates that agencies develop—do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity.[24] When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to

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[22] *See* Douglas Bohi & Dallas Burtraw, *SO_2 Allowance Trading: How Experience and Expectations Measure Up* (Resources for the Future, Discussion Paper 97-24, 1997).

[23] McGarity & Ruttenberg, *supra* note 21, at 2046.

[24] To take one example, a look-back review of OSHA's 1978 cotton dust rule concluded that complying with the rule had actually improved the textile industry's productivity, making it more profitable. Between 1972 and 1979, industry productivity grew by about 2.5 percent per year; between 1979 and 1991, the productivity growth rate increased to 3.5 percent per year. The review found that, in order to comply with the standard, textile factories had to make technological investments in their equipment. With modernized facilities, textile factories were able to significantly increase productivity and earn far greater profits. OCCUPATIONAL SAFETY & HEALTH ADMIN., OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD 22, 35-38 (2000), *available at* http://www.osha.gov/dea/lookback/cottondust_final2000.pdf. At the same time, OSHA's cotton dust rule significantly reduced the incidence of byssinosis (commonly referred to as "brown lung disease"), a debilitating and potentially fatal disease that significantly impairs a lung function, in textile workers. The look-back review found that the number of byssinosis cases declined from approximately 50,000 in the early 1970s to around 700 in the mid-1980s, a decline of 99 percent. *Id*. at ii, 28-33.

achieve in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[25]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[26]	Sector level capital expenditures for pollution controls	− EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[27]	Total, annual, or capital expenditures for occupational safety & health regulations	− OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[28]	Various measures of cost for pollution prevention	− Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[29]	Various measures of cost for environmental regulations	− Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

[25] McGarity & Ruttenberg, *supra* note 21, at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 24 (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

[26] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[27] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[28] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[29] Harrington, Morgenstern, & Nelson, *supra* note 26. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id*. at 14-15.

More generally, the AAF study also replicates the Crain and Crain study's error of only considering regulatory costs while ignoring regulatory benefits. As noted above, this inherently incomplete evaluative approach would make any economic transaction appear to be a poor investment.

Regulatory opponents' unrelenting focus on the allegedly high costs of regulation suffers from an even more fundamental problem, however. Regulations, strictly speaking, typically do not impose *new* costs on society, as Robert Adler, one of the current commissioners of the Consumer Product Safety Commission (CPSC), observed in a *New York Times* op-ed. Rather, they "simply re-allocate who pays the costs."[30] In other words, when an environmental regulation is blocked, the costs to society of that regulation do not vanish into thin air simply because industry is relieved of the obligation to incur compliance costs. Instead, those costs take a different form and are shifted to the general public, in terms of lives lost, preventable cancers, and lost work days. These costs can be just as or more damaging to economic productivity as the industry compliance costs would have been.

For example, a 2011 study of the environmental and public health externalities generated by different industries found that coal-fired power plants create air pollution damage that is much larger than the value these plants provide to society.[31] The general public bears the costs of inadequately regulated polluting activities in the form of adverse health consequences and ensuing productivity declines. Improved regulation of coal-fired power plants would shift some or all of these costs to the power plant owners. If the plants' owners increase the costs of the

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[30] Robert S. Adler, Op-Ed, *Safety Regulators Don't Add Costs. They Decide Who Pays Them*, N.Y. TIMES, Oct. 16, 2011, *available at* http://www.nytimes.com/2011/10/17/opinion/safety-regulators-dont-add-costs-they-decide-who-pays-them.html?_r=2&partner=rssnyt&emc=rss.

[31] Nicholas Z. Muller, Robert Mendelsohn & William Nordhaus, *Environmental Accounting for Pollution in the United States Economy*, 101 AM. ECON. REV. 1649 (2011), *available at* http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.101.5.1649.

products they supply to account for the increased costs of regulation, the question is whether the higher prices consumers must pay for electricity are outweighed by the public health protections provided by the regulation. To blast the regulation because of the increased costs it imposes on plant owners and their customer without comparing those costs with the value of avoided illnesses and related regulatory benefits is to engage in an incomplete, misleading, and inaccurate evaluation of the effects of regulation.

C. Regulations Do Not Inhibit Economic Growth

Regulatory opponents contend that regulations slow economic growth and contribute to job losses, but existing studies do not support this claim. Instead, the studies find either no overall impact or, in some cases, an actual increase in net employment.[32] For example, one economic analysis found that the EPA's strict proposal to regulate coal ash waste would result in a net increase of 28,000 jobs.[33] Further, Department of Labor data suggest that few jobs are lost because of regulation.[34] The Department issues reports on "extended mass layoffs" – events in which a firm lays off 50 or more employees within 30 days. From 2007-2009, more than four million workers were laid off in such events. In 99.7 percent of the cases, the cause of the layoffs was something other than regulations – according to the firms themselves. This result is

[32] *See* Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011) (summarizing the evidence), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf; Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Global Dev. & Env't Inst., Working Paper, 2002) (same), *available at* http://www.healthytomorrow.org/attachments/prosper.pdf.

[33] FRANK ACKERMAN, EMPLOYMENT EFFECTS OF COAL ASH REGULATION (Stockholm Environment Institute – U.S. Center, Tufts University, 2011), *available at* http://sei-us.org/Publications_PDF/Ackerman-coal-ash-jobs-Oct2011.pdf. While higher electricity prices caused by the regulation would lead to some job losses, these losses are more than offset by the job gains that would result from the expenditures by industry to come into compliance with the strict standard. In particular, coal-fired power plants would need to spend money on waste management, wastewater treatment, and construction and operation of facilities and equipment—all of which are labor-intensive activities and would generate significant increases in employment.

[34] Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* 20 (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf;.

similar to data concerning layoffs before 2007.[35] By comparison, the same data find that extreme weather events to which climate change may have contributed have caused more extended mass layoffs.[36]

D. Regulatory Uncertainty Is Not An Obstacle to Economic Growth

A shopworn refrain among regulatory opponents is that regulatory uncertainty is holding back the economy, preventing the United States from completing emerging from the Great Recession. All of the available evidence directly contradicts this claim:

- The sectors of the economy in which the most regulatory activity is taking place—the healthcare industry, mining, and the financial sector—have among the lowest levels of unemployment in the country, and the unemployment rate in these sectors is significantly lower than the national average.[37]
- Surveys of business owners reveal relatively little anxiety over the current regulatory climate. Instead, many business owners cite the lack of demand as the biggest impediment to economic growth and hiring.[38]
- The experience of other countries with similar economies further calls regulatory uncertainty arguments into question. Those countries that are not planning any major regulatory initiatives are experiencing the same anemic economic recovery as the United States.[39]

Even assuming the facts supported the regulatory uncertainty argument, the REINS Act, the Regulatory Accountability Act, and other similar regulatory process legislation would exacerbate regulatory uncertainty rather than alleviate it. Their new analytical and procedural

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[35] *Id. See also* EBAN GOODSTEIN, THE TRADE-OFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT 35-37 (1999). (summarizing data from 1970-90 and finding similarly small numbers of workers being laid off because of environmental regulations).
[36] *Regulations Do Not Hinder U.S. Job Market, Paper Finds*, OMB WATCH, http://www.ombwatch.org/node/11615 (last visited Oct. 21, 2011).
[37] *See* Matthew Yglesias, *Where Is The Evidence That 'Regulatory Uncertainty' Has Increased? What Would Decrease It?*, THINKPROGRESS, Sept. 8, 2011, http://thinkprogress.org/yglesias/2011/09/08/314950/where-is-the-evidence-that-regulatory-uncertainty-has-increased-what-would-decrease-it/ (last visited Oct. 18, 2011).
[38] *See, e.g.*, Kevin G. Hall, *Regulations, Taxes Aren't Killing Small Business, Owners Say*, MCCLATCHY, Sept. 1, 2011, *available at* http://www.mcclatchydc.com/2011/09/01/122865/regulations-taxes-arent-killing.html.
[39] *See* Daniel Farber, *Ten Fatal Flaws in the "Regulatory Uncertainty" Argument*, CPRBLOG, Sept. 12, 2011, http://www.progressivereform.org/CPRBlog.cfm?idBlog=5DF93B0F-D47C-D726-57628120754ECD93 (last visited Oct. 18, 2011).

requirements would delay significant new regulations and cast doubt on whether regulatory proposals will ever be completed, thereby amplifying existing regulatory uncertainty.

VI. TO IMPROVE THE REGULATORY SYSTEM, EXECUTIVE AGENCIES MUST BE REENERGIZED

The supporters of the proposed regulatory process bills discussed above are right about one thing: The U.S. regulatory system is not promoting the public interest as well as it should be. But their diagnosis of the problem could not be farther from the mark, and their proposed bills would only make the situation worse.

To fix the regulatory system, we should instead focus on finding ways to help agencies effectively achieve their statutory missions, such as protecting people and the environment. Here are some places to start:

Provide agencies with the resources they need. One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, forcing these agencies to effectively do more with less. Many agencies' budgets have stagnated for decades, while the job at hand – more food and imported toys to inspect, for instance – has grown. And the situation is getting worse, not better. For example, the looming sequestration would cut $700 million from the EPA's $8.4 billion budget. Among other things, these cuts would force the agency to scrap several air pollution monitoring sites and scale back its program for assessing the human health impacts of several potentially harmful chemicals.

Provide agencies with enhanced legal authority. For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The

intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. In some cases, agencies lack the authority they need to tackle these issues. It is time to end the political gridlock that has prevented the adoption of legislative changes to accommodate shifting social needs.

Free agencies from unnecessary analytical requirements. Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making. Regulatory process legislation of the kind introduced in Congress during the last few years would exacerbate this situation, creating a rulemaking process so laden with unnecessary and unhelpful requirements that the process would become completely dysfunctional. Perhaps that is the true aim of those who advocate an overhaul of regulatory process requirements – to construct a system that is so burdensome for agencies to navigate that they become incapable of adopting even urgently needed regulatory protections whose social benefits greatly exceed their costs. Even taking the reformers' aims at face value, they have misdiagnosed the problems with existing regulatory processes and proposed solutions that are ill-equipped to achieve the socially optimal levels of regulation they seek.