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## **Hearing on H.R. 2122, the Regulatory Accountability Act of 2013**

**Subcommittee on Regulatory Reform, Commercial and Antitrust Law  
Committee on the Judiciary  
U.S. House of Representatives**

**July 9, 2013**

Mr. Chairman, Ranking Member Cohen, and members of this Subcommittee, thank you for the invitation to talk to you today about improving administrative law and the regulatory process for the benefit of our national economy. My name is Jeffrey A. Rosen, and I am a senior litigation partner and regulatory lawyer in the Washington, D.C. office of the law firm of Kirkland & Ellis LLP. I previously served as General Counsel and Senior Policy Advisor for the White House Office of Management and Budget (“OMB”) from 2006 to 2009. In that capacity, I was responsible for, among other things, advising the OMB Director and the President with regard to administrative law and regulatory activities, and within OMB I worked closely with the Office of Information and Regulatory Affairs (“OIRA”) on numerous rulemakings, as well as coordinating with many executive branch agencies that submitted proposed rules. Before my time at OMB, I served as General Counsel of the United States Department of Transportation (“DOT”) from 2003 to 2006, where I was responsible for DOT’s regulatory program, served as DOT’s Regulatory Policy Officer, and had the privilege to act as counsel to Secretary Norman Y. Mineta. I have also served from 2009-2012 on the Governing Council of the Administrative Law & Regulatory Practice Section of the American Bar Association, though I do not speak for that group or any other today.<sup>1</sup>

Having experienced the regulatory process from the perspectives of an agency lawyer, an OMB reviewer, and a lawyer for private litigants, I appreciate the opportunity to appear before this Subcommittee to discuss regulation and the opportunities to make it more efficient, more consistent and more democratic. I am aware of several legislative proposals, but want to focus on the Regulatory Accountability Act (“RAA”), H.R. 2122, which will represent a very significant set of improvements to the regulatory process. Although Congress has not altered the way administrative agencies do business in more than a decade, the executive branch has spent

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<sup>1</sup> I want to note that I am appearing today in my personal capacity, and not on behalf of my law firm or its clients. The views I express are my own, based on my own experience and observations. I would, however, like to acknowledge my colleague, Dominic Draye, who assisted me in preparing this written testimony.

decades cultivating certain “best practices” such as the use of cost-benefit analysis that now seem well-suited for codification and wider application. These practices, especially those contained in a series of executive orders, have been utilized during the terms of five different presidents from both political parties. In my view, congressional action is necessary and desirable at this juncture, and the Regulatory Accountability Act (H.R. 2122) would make significant legislative improvements to the regulatory process.

## **I. Background**

### **A. Agencies and the Administrative Procedure Act**

Senator Elihu Root of New York warned nearly 100 years ago that federal agencies “carry with them great and dangerous opportunities of oppression and wrong. If we continue a government of limited powers, these agencies of regulation must themselves be regulated.”<sup>2</sup> Courts and commentators began to express concern that the administrative agencies of the federal government were operating without constraints, except those imposed by the Constitution itself.<sup>3</sup> After several years, such concerns ultimately led Congress in 1946 to enact the Administrative Procedure Act (“APA”). As former U.S. Attorney General and Supreme Court Justice Robert Jackson explained the Act’s provenance, “[t]he conviction developed, particularly within the legal profession, that [agency] power. . . sometimes was put to arbitrary and biased use.”<sup>4</sup> The APA took an important step toward mitigating arbitrariness in agency action. But as Justice Jackson presciently observed in 1950, for all its virtues, the APA is not a perfect statute: it “contains many compromises and generalities and, no doubt, some ambiguities.”<sup>5</sup> Indeed, Justice Jackson warned that additional “[e]xperience may reveal defects” in the APA.<sup>6</sup> As predicted, some of those defects have become more apparent as the size and scope of the federal regulatory state has expanded so profoundly during the last six decades, and especially during recent years.

Remarkably, the APA has gone without any significant amendment since its enactment more than 65 years ago. During those years, Congress has enacted some supplements to administrative law, such as the Freedom of Information Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Information Quality Act. Many of these statutes were driven to some extent by the all-too-real concern that even regulation perceived as necessary can be counterproductive if the regulatory process is not undertaken with care. Some of these additional statutes were also needed to deal with issues that the APA did not address or resolve. With each enactment, however, Justice Jackson could have repeated his prediction from 1950: these supplemental statutes are helpful, but time and experience inevitably expose new areas in need of improvement.

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<sup>2</sup> 41 A.B.A. Rep. 355, 368-69 (1916).

<sup>3</sup> See, e.g., *Londoner v. City of Denver*, 210 U.S. 373, 385-86 (1908); see also Felix Frankfurter, *The Task of Administrative Law*, 75 U. Pa. L. Rev. 614 (1927) (expressing concern that the “the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision.”).

<sup>4</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 (1950).

<sup>5</sup> *Id.* at 40-41.

<sup>6</sup> *Id.* at 41.

## B. Executive Branch Leadership in Regulatory Reform

Perhaps surprisingly, in the years after enactment of the APA, the executive branch — rather than Congress or the judiciary — has often taken the lead in regulating America’s regulators. In some ways, relying on the executive branch to restrain executive agencies might seem upside down. After all, these agencies are more accountable to the President than they are to Congress, and their leadership is populated with presidential appointees. It is perhaps curious that Congress permits the executive branch such extensive self-regulation when one considers that the authority they exercise is delegated by Congress itself. Paradoxes aside, the executive branch has pioneered a number of helpful innovations in regulatory practice, and several key ones among these ideas have earned the support of presidents from both parties.

Historically, Presidents Nixon, Ford, and Carter during the 1970’s began the efforts to impose centralized discipline in federal government rulemaking. But “the modern development of centralized presidential review of agency regulation came about through President Reagan’s issuance of Executive Order 12291 in 1981 and Executive Order 12498 in 1985.”<sup>7</sup> As one commentator observed, those orders “mandated a whole host of procedures to be implemented when agencies proposed issuing ‘major’ rules.”<sup>8</sup> The goal was to improve agency efficiency and to ensure that agencies considered the costs they imposed on the public, for instance by using regulatory tools like cost-benefit analysis. President Clinton replaced both of President Reagan’s orders with Executive Order No. 12866 — though in substance (especially as applied) President Clinton’s order did not differ greatly from President Reagan’s. President George W. Bush, in turn, mostly left in place Executive Order No. 12866 during his presidency, and President Obama has retained it, as well.<sup>9</sup>

President Obama has continued Executive Order 12866 and added Executive Order 13563. This latest order shows how dependent American administrative law has become on executive action. For example, Executive Order 13563 continues to require agencies to use “the best available science,” “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends,” and “take into account benefits and costs, both quantitative and qualitative.”<sup>10</sup> It also requires agencies to be mindful of “redundant, inconsistent, or overlapping” burdens.<sup>11</sup> None of these commonsensical requirements are part of the APA — they all spring from the Executive Branch.

Moreover, Executive Order 13563 does more than require agencies to take account of the costs imposed on the regulated public before adopting new rules. It also mandates that “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period

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<sup>7</sup> Michael Hissam, *The Impact of Executive Order 13422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292, 1294 (2008) (citing Exec. Order No. 12291, 46 Fed. Reg. 13, 193 (Feb. 17, 1981) and Exec. Order No. 12498, 50 Fed. Reg. 1036 (Jan. 4, 1985)).

<sup>8</sup> *Id.*

<sup>9</sup> President Bush also issued Executive Order 13422, 72 Fed. Reg. 2703 (Jan. 18, 2007), which dealt with agency guidance documents and other beneficial regulatory improvements, but President Obama revoked that order without explanation in Executive Order 13497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

<sup>10</sup> Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>11</sup> *Id.* at 3822.

that should generally be at least 60 days.”<sup>12</sup> Obviously, nothing in the APA requires agencies to use the internet, which was not even invented until decades after the APA was enacted.<sup>13</sup>

Notwithstanding the positive procedural requirements they have established, executive orders ultimately are no substitute for legislation. Even apart from the desirability of beneficial reforms not yet included in executive orders and elsewhere, there are at least three reasons why enacting reform into statutory law is preferable to continued reliance on the executive branch to organize and police its own processes.

**First**, executive orders are not permanent, but can be changed unilaterally and without the public’s participation, as occurred for example with President Obama’s revoking of Executive Order 13422, which had required OIRA review of significant guidance documents, among other things. (President Obama’s OMB Director later reinstated OIRA review of significant guidance documents by memorandum M-09-13, dated March 4, 2009.) Given this reality, executive orders convey less certainty to the marketplace, which in turn has several drawbacks. For one, regulatory uncertainty is a hidden tax on the economy that is unhelpful to job creation; if businesses and other regulated parties do not know what the law will be, they quite rationally act with an added measure of caution.<sup>14</sup>

**Second**, executive orders are not usually subject to judicial review. This difference is crucial. No matter what an executive order says that agencies *ought* to do, the affected public generally has no right to go to court to make sure that agencies *actually* do it. In other words, if an agency violates an executive order — for instance, if an agency were to disregard President Obama’s command that agencies use “the best, most innovative, and least burdensome tools for achieving regulatory ends”<sup>15</sup> — an affected party cannot ask a federal court to compel the agency to make good on the President’s promise. Indeed, Executive Order No. 13563, like previous executive orders from other Presidents, could not be more clear on this point: “This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States ...”<sup>16</sup> This disclaimer of judicial review stands in marked contrast to the APA, for example, which expressly authorizes a day in court for any “person suffering legal wrong because of agency action.”<sup>17</sup> The APA is meant to ensure some measure of due process. By contrast, executive orders must be understood as acts of executive self-management — not legal obligation.

**Finally**, as peculiar as it may seem, some advocacy groups actually *criticize* agencies for coordinating rules with the Office of Management and Budget (“OMB”). While most courts

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<sup>12</sup> *Id.* at 3821-22.

<sup>13</sup> See also Barack Obama, *Toward a 21st-Century Regulatory System*, Wall St. J., Jan. 18, 2011, at A17 (noting the importance of “writing rules with more input from experts, businesses and ordinary citizens.”).

<sup>14</sup> See, e.g., Geoff Colvin, *Uncertain of future regulation, businesses are paralyzed*, FORTUNE, Oct. 20, 2010, available at [http://money.cnn.com/2010/10/19/news/economy/business\\_paralysis.fortune/index.htm](http://money.cnn.com/2010/10/19/news/economy/business_paralysis.fortune/index.htm) (“As I travel around the country, businesspeople tell me they’ve rarely felt so unsure of what the laws and rules governing their business will be. ... So instead of investing and hiring as usual in a recovery, U.S. companies are sitting on more cash than ever. We shouldn’t be surprised. It has always been true that the more activist the administration in Washington, the more uncertainty it spawns.”).

<sup>15</sup> Exec. Order 13563 §1(a), 76 Fed. Reg. 3821.

<sup>16</sup> *Id.* at 3823.

<sup>17</sup> 5 U.S.C. § 702.

recognize the importance of executive branch review and coordination, such consultation is not legally protected when it rests on executive orders alone. If principles of effective regulation, and the vital role of OMB/OIRA, are codified into statutory law, agencies will be able to adhere to OMB review requirements without fear that the resulting agency action might be struck down by a federal court.<sup>18</sup>

In sum, there is much to be gained by Congress acting to codify the best regulatory review requirements of the executive branch, as well as to expand public participation, demand greater rigor and accountability, and ensure adequate judicial review as a due process check on executive branch errors where congressional oversight alone does not suffice. Only Congress can take these steps; as addressed below, they are timely and beneficial.

## II. Some Concerns About Regulation

H.R. 2122 offers a chance to modernize the regulatory process to require (a) *all* agencies to consider cost-benefit analysis, (b) more input from stakeholders in regulated sectors, and the public generally, and (c) adequate process to avoid futile and factually-mistaken imposition of huge costs on our economy. It is widely perceived that the amount and complexity of federal regulation has been ballooning in recent years. The costs of compliance are up; certainty is down; and the effect of regulation that former OIRA Administrator Cass Sunstein earlier described as “myopia, interest group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion”<sup>19</sup> is predictably bad for economic growth.

One concern that many have raised is the proliferation of costly new regulations. Tracking the regulatory burden on the economy across time is difficult, due in part to limitations on available data; perhaps ancillary to the RAA, Congress could legislate greater transparency to require the public release of more detailed data regarding federal rulemaking in a neutral and unbiased manner. Nevertheless, the current available data illustrate why these concerns are so often raised. In the Administration’s current regulatory agenda, 4,062 new regulations are making their way toward adoption, and 224 of them are “economically significant,” meaning that they have an estimated impact on the economy of \$100 million or more.<sup>20</sup> As of last week, 136 significant new proposed or final rules from agencies are presently under review at OMB. And as shown in Figure 1 below, from Wayne Crews’ annual study, for many years and across many Administrations the Federal Register continues to grow:

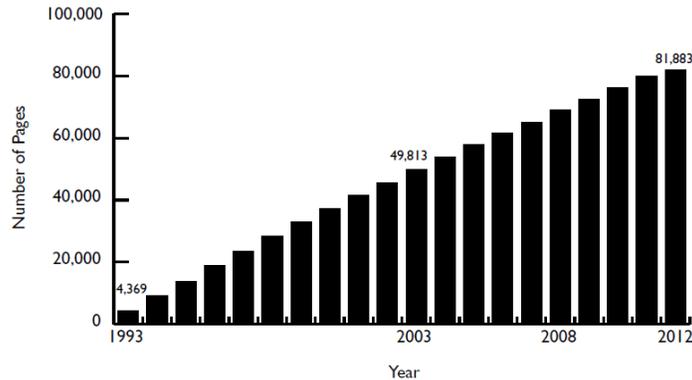
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<sup>18</sup> See, e.g., *Public Citizen, Inc. v. Mineta*, 340 F.3d 39 (2d Cir. 2003) (striking down agency action as arbitrary and capricious where agency had consulted with OMB, though the agency had declined to follow most of the OMB suggestions).

<sup>19</sup> Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 4 (1995).

<sup>20</sup> Clyde W. Crews, Jr., “Ten Thousand Commandments,” Competitive Enterprise Institute, at 3, *available at* <http://cei.org/studies/ten-thousand-commandments-2013>.

Figure 1: Growth in the *Federal Register*<sup>21</sup>



For its part, the Code of Federal Regulations now stands at 174,545 pages (and 238 volumes), compared to 22,877 pages in 1960. For perspective, consider economic historian Niall Ferguson’s observation that in the past 10 years, “final rules” with the effect of law from administrative agencies have outnumbered laws passed by Congress 223:1.<sup>22</sup>

The economic burden of regulation is substantial. Though the precise figure is contested by some, the Small Business Administration has published a study indicating that Americans spend over \$1.75 trillion per year to comply with federal regulations<sup>23</sup> — an amount that equals approximately \$15,000 per family.<sup>24</sup> As shown in Figure 2 below, again from Wayne Crews’ annual study, the SBA numbers suggest that regulatory compliance costs now exceed what the federal government collects in income and payroll taxes.<sup>25</sup> If one combines these regulatory costs with conventional government spending, the federal government in effect now controls 34.4% of GDP.<sup>26</sup>

<sup>21</sup> Crews, *supra* note 20 at 17.

<sup>22</sup> Niall Ferguson, *The Regulated States of America*, Wall St. J., June 19, 2013 at A15.

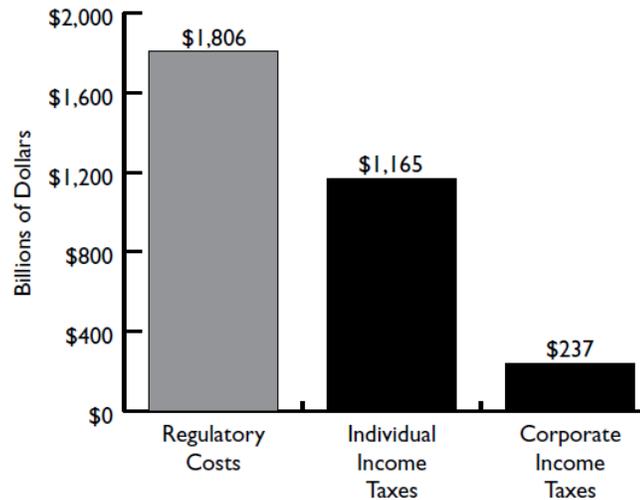
<sup>23</sup> Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, report prepared for the Small Business Administration, Office of Advocacy September 2010, available at [http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\)\\_0.pdf](http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf), at iv.

<sup>24</sup> Crews, *supra* note 20 at 2.

<sup>25</sup> *Id.* at 6, 11.

<sup>26</sup> *Id.* at 10.

Figure 2: Regulatory Costs v. Taxes<sup>27</sup>



While it is true that families need not write a check for all of this cost, the portion they do not pay directly nonetheless often arrives through higher prices. But the businesses that pass along those costs do not bear the burden evenly. Small businesses feel the most pain. The SBA’s study suggests that the costs of regulatory compliance for a business with fewer than 20 employees is 36% higher than it is for larger businesses.<sup>28</sup> President Obama has acknowledged “the burdens regulations may place on small business” and directed federal agencies “to do more to account for -- and reduce” those burdens.<sup>29</sup> Government itself also faces costs associated with writing and enforcing the many rules its agencies generate. According to research published by the George Washington University and Washington University in St. Louis, the cost of such regulatory activity increased 3.6% in 2012 to an estimated \$61 billion.<sup>30</sup> Whether in the household, industrial or public sector, the cost of regulations is high and growing.

At the same time, scholars have expressed concern that some claimed benefits of regulations are unjustified and exaggerated. For example, a recent report from former OIRA Administrator Susan Dudley of the George Washington University Regulatory Studies Center explained that the benefits agencies attribute to their new rules “are very different in character from the costs.”<sup>31</sup> The proffered benefits include substantive “assumptions that many scholars find questionable” as well as methodological gimmicks like counting the benefits of rules that were vacated by the courts for the purpose of comparing regulatory costs and benefits across

<sup>27</sup> *Id.* at 9.

<sup>28</sup> Crain and Crain, *supra* note 23 at 8.

<sup>29</sup> Obama, *supra* note 13.

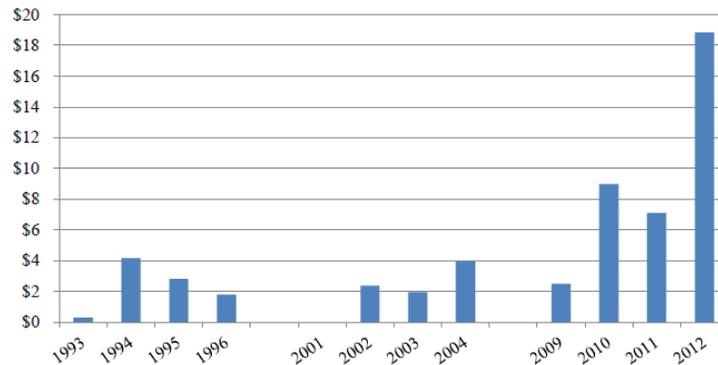
<sup>30</sup> Susan Dudley & Melinda Warren, *Growth in Regulators’ Budget Slowed by Fiscal Stalemate: An Analysis of the U.S. Budget for Fiscal Years 2012 and 2013* Regulators’ Budget Report 34, published jointly by the Regulatory Studies Center at George Washington University and the Weidenbaum Center at Washington University (July 2012) available at <http://wc.wustl.edu/files/wc/imce/2013regreport.pdf>.

<sup>31</sup> Susan E. Dudley, *Costs of the New Regulations Issued in 2012 Dwarf Those of Previous Years, According to OMB Report*, Regulatory Studies Center, the George Washington University (Apr. 22, 2013), available at [http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/20130422\\_OMB\\_Report.pdf](http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/20130422_OMB_Report.pdf); see also Susan E. Dudley, *OMB’s Reported Benefits of Regulation: Too Good To Be True?*, Regulation, 26-30 (2013).

administrations.<sup>32</sup> There is concern that mismeasurement of benefits will justify a growing regulatory state when in fact such regulations are not beneficial to the American public.

The number of “economically significant” rules (*i.e.*, those with economic effects over \$100 million per year) has increased from an average of 20 during the Regan Administration to 45 during the Administrations of George H.W. Bush, Bill Clinton, and George W. Bush to 54 during the first term of the Obama Administration.<sup>33</sup> As shown in Figure 3 below, published by Susan Dudley from data made public by OMB, the mounting cost of these new regulations is readily discerned:

Figure 3: Annual Costs (in \$ Billions) of New Regulations<sup>34</sup>



Last year, W. David Montgomery and a team of economic researchers at NERA Economic Consulting published a study indicating that manufacturing regulation alone has a significant negative impact on wages, employment, consumption, GDP, and our overall economy.<sup>35</sup>

In sum, the current regulatory process is not adequate in all cases for the task of ensuring that regulation is worthwhile and not counterproductive. It is evident that a concern for our economy readily warrants legislative efforts to improve the regulatory process to function better, while avoiding unnecessary harm to our national economy and to jobs and wages.

<sup>32</sup> *Id.*

<sup>33</sup> Cassidy West, *Pace of New Regulations Up in President Obama’s First Term*, Regulatory Studies Center, the George Washington University (May 15, 2013), available at <http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u43/West-%20Pace%20of%20E.S.%20Rule%20Increased-2.pdf>.

<sup>34</sup> Dudley, *Costs of the New Regulations*, *supra* note 31.

<sup>35</sup> NERA, *Macroeconomic Impact of Federal Regulation on the Manufacturing Sector* (Aug. 21, 2012), available at [http://www.mapi.net/system/files/NERA\\_MAPI\\_FinalReport\\_0.pdf](http://www.mapi.net/system/files/NERA_MAPI_FinalReport_0.pdf).

### III. Legislative Proposals to Improve Regulation

In the last Congress, after numerous hearings, the House passed more than a dozen regulatory reform and regulatory relief bills.<sup>36</sup> For example:

- Regulatory Accountability Act, H.R. 3010, 112th Cong. (2011)
- Regulatory Flexibility Improvement Act, H.R. 527, 112th Cong. (2011)
- Reducing Regulatory Burdens Act, H.R. 827, 112th Cong. (2011)
- Protecting Jobs From Government Interference Act, H.R. 2587, 112th Cong. (2011)
- Transparency in Regulatory Analysis of Impacts on the Nation Act, H.R. 2401, 112th Cong. (2011)
- Cement Sector Regulatory Relief Act, H.R. 2681, 112th Cong. (2011)
- EPA Regulatory Relief Act, H.R. 2250, 112th Cong. (2011)
- Coal Residuals Reuse & Management Act, H.R. 2273, 112th Cong. (2011)
- Farm Dust Regulation Prevention Act, H.R. 1633, 112th Cong. (2011)
- Gasoline Regulations Act, H.R. 4471, 112th Cong. (2012)
- Red Tape Reduction and Small Business Job Creation Act, H.R. 4878, 112th Cong. (2012), including:
  - Midnight Rule Reduction Act, H.R. 4607, 112th Cong. (2012)
  - RAPID Act, H. R. 4377, 112th Cong. (2012)
  - Regulation Moratorium and Jobs Preservation, H.R. 2898, 112th Cong. (2011)
  - SEC Regulatory Accountability Act, H.R. 2308, 112th Cong. (2011)
  - Sunshine for Regulatory Decrees and Settlements Act, H.R. 3862, 112th Cong. (2012)
  - Unfunded Mandates Information and Transparency Act, H.R. 373, 112th Cong. (2011)

For making across-the-board improvements to the regulatory process, the bipartisan Regulatory Accountability Act (RAA) was plainly vital, and deserves renewed consideration at this juncture.<sup>37</sup> The RAA also has bipartisan sponsors in the Senate, and was endorsed previously by

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<sup>36</sup> Some important concepts and suggestions for improvements to the rulemaking process have been made in recent years by a number of respected organizations, such as the President's Council on Jobs and Competitiveness, and the Business Roundtable. The Business Roundtable report, titled "Achieving Smarter Regulation" (Sept. 2011), is attached as Exhibit A. My own suggestions, which have been shared with those two organizations and others, were submitted previously to this Subcommittee. See The APA at 65 — Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs: Hearing before the Subcommittee on Courts, Commercial and Administrative Law, 112th Cong. 25-40 (Statement of Jeffrey A. Rosen) (Feb. 28, 2011)

<sup>37</sup> H.R. 2122, 113th Cong., 1st Session (May 23, 2013); see also Jeffrey A. Rosen, *Rein on Federal Regulations Will Only Benefit Economy*, Cincinnati Enquirer, Nov. 9, 2011, at A11 (attached as Exhibit B).

a prominent group of scholars and former public officials.<sup>38</sup> It likewise received strong support from groups representing a very wide cross-section of our economy.<sup>39</sup> Among its key improvements, the RAA would standardize cost-benefit analysis and extend it to independent agencies, increase public participation in important rulemakings, placed additional focus on the most costly rulemakings to ensure their factual and scientific bases are accurate, codify the longstanding role of OMB in the regulatory process, and strengthen judicial review of agencies' adherence to good rulemaking procedures. Unfortunately, the Senate did not act on any of the House's regulatory bills before the 112th Congress ended. But the RAA's key improvements to administrative law deserve to be considered further in this Congress.

Below I briefly address some of the key improvements that would be made by the RAA.

#### **A. Cost-Benefit Analysis Required of All Agencies**

As described above, during the last thirty years cost-benefit analysis has become an established, bipartisan tool for improving regulation, designed to prevent rules that do more harm than good. Because it was the product of executive order, however, it does not extend to so-called independent agencies. While independent agencies sometimes assert that the President's authority over them is limited,<sup>40</sup> legislation can prescribe rules that apply across all agencies, as in the APA itself. The RAA, as an amendment to the APA, requires some amount of cost-benefit analysis for most categories of rules, and would reach both executive-branch and independent agencies.

Whereas President Clinton's Executive Order 12866 and President Obama's Executive Order 13567 require use of cost-benefit analysis to justify rules, the RAA even more directly requires agencies to "adopt the least costly rule . . . that meets relevant statutory objectives" and permits the adoption of a more costly alternative only if additional benefits justify the additional cost.<sup>41</sup> The RAA, like the executive orders, also requires that agencies consider the costs and benefits of *not* regulating at the federal level.<sup>42</sup> Just as important as the requirement that agencies perform cost-benefit analysis is the requirement that they do so in a reliable way. The RAA charges the Administrator of the Office of Information and Regulatory Affairs within OMB with establishing guidelines "for the assessment, including quantitative and qualitative assessment, of the costs and benefits of proposed and final rules."<sup>43</sup>

By authorizing and standardizing a robust version of the cost-benefit process currently mandated by executive order, the RAA will strengthen requirements to avoid potential abuses that have concerned me and others.<sup>44</sup> By codifying the cost-benefit analytical process, ensuring OIRA review and allowing judicial review of its application, the RAA will strengthen well-

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<sup>38</sup> See Letter from Alan Charles Raul, *et al.*, to House Judiciary Committee (Nov. 2, 2011) (attached as Exhibit C).

<sup>39</sup> See Letter from the U.S. Chamber of Commerce, *et al.*, to Hon. Lamar Smith, *et al.* (Sept. 22, 2011) (attached as Exhibit D). I understand that a similar letter from 87 trade groups supporting the RAA was sent to Congress on June 6, 2013. See <http://www.uschamber.com/issues/letters/2013/multi-industry-letter-regulatory-accountability-act-2013>.

<sup>40</sup> See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>41</sup> H.R. 2122, § 3(f)(3).

<sup>42</sup> *Id.* at § 3(b)(5).

<sup>43</sup> *Id.* at § 3(k).

<sup>44</sup> See Jeff Rosen, "Fishing for a Reason to Regulate," *The Hill Online* (Apr. 10, 2013) (attached as Exhibit E).

intentioned executive orders with stronger checks and balances. The RAA also ensures that the cost-benefit analysis requirements ordered by five presidents of both parties operates across all agencies in the federal government, including the independent agencies.

## **B. Public Participation**

President Obama has rightfully called for “more input from experts, businesses and ordinary citizens” in the administrative rulemaking process.<sup>45</sup> To that end, Executive Order 13563 directs agencies to “afford the public a meaningful opportunity to comment through the Internet on any proposed regulation” and to “seek the views of those who are likely to be affected” by a proposed rule.<sup>46</sup> The RAA embraces these ideas in several requirements that require public notice of proposed rules and provide greater opportunity for comments from the public. For rules with an economic impact of at least \$100 million or that raise “novel legal or policy issues,” the RAA requires agencies to receive written comments by an advance notice before even setting out a formal notice of proposed rulemaking, allowing the public to provide input on how the rule is best shaped.<sup>47</sup> For rules with at least \$1 billion in economic impact, focused public hearings are required.<sup>48</sup> As the cornerstone of democratic government, increased public participation makes sense when agencies are considering their most consequential proposals, and helps ensure that the most efficient means are chosen for achieving beneficial ends.

## **C. Information Quality Act Application to Rulemaking**

The RAA clarifies two aspects about the Information Quality Act of 2000 (IQA). First, it clarifies that the IQA is subject to judicial review. Second, it clarifies that the requirements of the IQA apply directly to rulemakings. The RAA provides an opportunity for participants in a rulemaking to petition for very expedited opportunities to contest unreliable information being used by an agency in a rulemaking as inconsistent with IQA requirements. (The petition must be submitted within 30 days, the agency’s grant or denial of the request for a hearing must be determined in 30 days, and the agency’s resolution of the contested information must be resolved within 60 days if it grants the request for a hearing.) This efficient process would help to avoid rules being based on false information, to the detriment of all.

## **D. Hearings on Factual and Scientific Questions**

The RAA also raises the standard for agency assessments of technical and scientific information. The Act requires that an “agency shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule.”<sup>49</sup> Agencies must also make public “all data, studies, models, and other evidence or information considered or used by the agency.”<sup>50</sup> The RAA also recognizes that government does not have a monopoly on

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<sup>45</sup> Obama, *supra* note 13.

<sup>46</sup> Executive Order 13563, 76 Fed. Reg. at 3821-22

<sup>47</sup> H.R. 2122 at §3(c).

<sup>48</sup> *Id.* at § 3(e).

<sup>49</sup> *Id.* at § 3(f)(2).

<sup>50</sup> *Id.* at § 3(d)(D)(iv).

scientific and technical expertise. For “high-impact rules” (those with over \$1 billion annual impact on the economy), the Act restores an earlier expectation of practice under the APA by requiring a hearing at which interested parties may present information and conduct cross-examination on, among other things, “[w]hether the agency’s asserted factual predicate for the rule is supported by the evidence.”<sup>51</sup> The combination of increased disclosure and an opportunity for experts from regulated industries and the public to participate in ensuring accurate empirical premises represents a major improvement over the present functioning of the system.<sup>52</sup> When the stakes are highest for our economy, this process will better avoid major and costly errors in the factual, scientific and cost assumptions used by our government. While billion-dollar rules are a subset of the total rules issued every year, they matter a great deal to our economy.

### **E. Judicial Review**

One key way to ensure agency compliance — especially among independent agencies that are not even accountable to the President — is through judicial review. The RAA clarifies that judicial review is available for failure to comply with the Information Quality Act. The RAA also applies a “substantial evidence” test for judicial review of rulemakings. The RAA also provides expanded judicial review of certain agency actions by: (a) precluding deference to agencies’ own interpretations of their rules when those interpretations were not adopted using the rulemaking process, (b) precluding deference to agencies for rules that were not adopted in compliance with the OIRA Administrator’s guidelines on cost-benefit analysis, and (c) precluding deference to agency guidance documents. In this way, the RAA also closes a potential loophole by preventing the use of “guidance” as *de facto* regulations created without the required rulemaking process. (The RAA also provides new clarity about judicial review of interim final rules, issued without advance public notice and comment.) Just as the RAA makes agency rulemaking more democratic through increased opportunities for public comment, it also preserves the virtues of the separation of powers by strengthening judicial review where Congress has delegated lawmaking authority to federal agencies.

### **F. Formalization of OIRA’s Role**

Finally, the RAA assures consistency across agencies by formalizing the role of OIRA within OMB to coordinate rulemakings. At two points in the regulatory process, the RAA would require agencies to consult with OIRA. First, before issuing a notice of a proposed rule,<sup>53</sup> and again before adopting any final rules, in order “to facilitate compliance with applicable rule making requirements.”<sup>54</sup> As discussed above, OIRA would also assume responsibility for formulating guidelines for cost-benefit calculations, as well as for guidelines about adhering to information quality standards, for ensuring coordination between agencies, and other similar rulemaking topics. The RAA also sets standards regarding agencies’ issuance of guidance

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<sup>51</sup> *Id.* at § 3(e)(1).

<sup>52</sup> See “Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability”, Hearing before the Subcommittee on Courts, Commercial and Administrative Law, 112th Cong, 29-184g (Statement s of Edward W. Warren and Noel J. Francisco) (May 31, 2011). See also W. Dixon, “Rulemaking and the Myth of Cross-Examination”, 34 *Administrative Law Review* 389 (Summer 1982).

<sup>53</sup> *Id.* at § 3(d)(1).

<sup>54</sup> *Id.* at § 3(f)(1).

documents, and assigns OIRA responsibility for providing guidelines to agencies about their issuing such guidance documents. Each of these opportunities for centralized OIRA review improves consistency across agencies and involves responsible OMB officials in more direct oversight of disparate agencies' actions.

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In part because our economy has struggled so significantly during the last few years, regulation and its reform is again a subject of vital public interest. There are and ought to be substantive debates about the content and merit of individual proposed regulations. But the time is right for people of varied points of view to consider meaningful improvements to our federal administrative law and regulatory process that would be beneficial across a range of agencies and potential regulations. Doing so would be good government. It would also reduce excessive regulatory unpredictability, remove impediments to economic growth, and would be beneficial to the economy and job creation. It was understood when the APA was enacted 65 years ago that it was not perfect. It has worked well, but experience tells us there are opportunities to improve the regulatory process. The "best practices" and learning from recent decades are certainly a sensible place to start. The RAA would represent an important advance for administrative law and regulatory practice, and would therefore benefit Americans from all walks of life, as well as our overall national economy.

Thank you for the opportunity to appear here today. I hope my comments will prove helpful to the Subcommittee, and I will be pleased to answer any questions.