REGULATORY ACCOUNTABILITY ACT OF 2013

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

H.R. 2122

JULY 9, 2013

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REGULATORY ACCOUNTABILITY ACT OF 2013

TUESDAY, JULY 9, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:04 a.m., in room 2141, Rayburn Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Issa, Holding, Collins, Smith, Cohen, and DelBene.

Staff Present: (Majority) Daniel Flores, Chief Counsel; Ashley Lewis, Clerk; and (Minority) James Park, Minority Counsel.

Mr. BACHUS. Good morning. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time. We don't anticipate any recesses. We ought to go straight through.

We welcome all of our witnesses today. I am going to recognize myself for an opening statement, and other Members for an opening statement. And then the panel will give their opening remarks.

From the onset of this Committee's work on regulatory reform this Congress, I have stressed that the argument is not that we don't need any relations at all. Reasonable rules provide clear rules of the road for businesses, so they have some certainty and know what to expect. They provide safeguard for consumers and protections for the environment.

But clear, reasonable rules of the road that provide certainty are not what we have gotten from this Administration. And that has been a major contributing cause to the continuing underperformance of the U.S. economy.

To a considerable degree, President Obama has expressed agreement that regulations should be more reasonable. For example, in 2011, the President ordered regulatory agencies to consider costs and benefits, and choose the least burdensome path. The order continued: The regulatory process must be transparent and include public participation.

This sounds very commendable, but the devil is always in the details. It is in the implementation stage where the promises have failed to pan out.

Many of the new regulations fall most heavily on small businesses that are the job creators for over two-thirds of the jobs in our economy. They can be a source of tremendous cost and frustration—that is, the regulations.

Let me quote from an opinion article published in the Birmingham News this past Sunday, July 7, that was written by the Alabama state director of the National Federation for Independent Business, Rosemary Elebash. She said, and I quote, "Sometimes I think of the Federal Government as a bad boss. It barks an order, gives you an unrealistic deadline, and doesn't have a clue how you will make it happen. But if things are not absolutely perfect, there will be heck to pay."

The cost of regulatory compliance has been estimated at about $11,000 per worker. This is real money that is then not available to be reinvested to help a business grow and hire more workers. Such regulatory trade-offs do not only affect business owners and employers. They affect the employees and individuals.

If a regulation increases the price of a needed product without corresponding benefit, it takes away money that a person could spend elsewhere that would have a greater health or safety benefit. This is especially affects low-income Americans, for whom money is already tight.

The current regulatory system clearly has shortcomings. Federal agencies need to do a much better job of determining when regulation is needed and proposing smarter regulations when warranted. And when forming regulations, we absolutely do have to consider the consequences on jobs and the economy, because it is the foundation on which everything else rests.

The Regulatory Accountability Act, reintroduced this term by Chairman Bob Goodlatte, goes a long way toward ensuring that this will happen. It remedies many of the system's most glaring weaknesses, and it does so based on bipartisan regulatory reform principles.

This is sound legislation that I am proud to cosponsor and invite all of my colleagues to join me in supporting this bill.

At this time, I will recognize our Ranking Member, Mr. Steve Cohen of Tennessee, for his opening statement.

[The bill, H.R. 2122, follows:]

I

113TH CONGRESS
1ST SESSION

H. R. 2122

To reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 2013

Mr. GOODLATTE (for himself, Mr. PETERSON, Mr. SMITH of Texas, Mr. OWENS, Mr. COBLE, Mr. SCHRADER, and Mr. BACHUS) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Regulatory Account-
5 ability Act of 2013".

6 **SEC. 2. DEFINITIONS.**

7 Section 551 of title 5, United States Code, is amend-
8 ed—

9 (1) in paragraph (13), by striking "and" at the
10 end;

(2) in paragraph (14), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

"(15) 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose—

"(A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions;

"(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

"(D) significant impacts on multiple sectors of the economy;

"(16) 'high-impact rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose an annual cost on the economy of $1,000,000,000 or more, adjusted annually for inflation;

"(17) 'guidance' means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue;

"(18) 'major guidance' means guidance that the Administrator of the Office of Information and Regulatory Affairs finds is likely to lead to—

"(A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions;

"(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

"(D) significant impacts on multiple sectors of the economy;

"(19) the 'Information Quality Act' means section 515 of Public Law 106–554, the Treasury and General Government Appropriations Act for Fiscal

Year 2001, and guidelines issued by the Administrator of the Office of Information and Regulatory Affairs or other agencies pursuant to the Act; and

"(20) the 'Office of Information and Regulatory Affairs' means the office established under section 3503 of chapter 35 of title 44 and any successor to that office.".

SEC. 3. RULE MAKING.

(a) Section 553(a) of title 5, United States Code, is amended by striking "(a) This section applies" and inserting "(a) APPLICABILITY.—This section applies".

(b) Section 553 of title 5, United States Code, is amended by striking subsections (b) through (e) and inserting the following:

"(b) RULE MAKING CONSIDERATIONS.—In a rule making, an agency shall make all preliminary and final factual determinations based on evidence and consider, in addition to other applicable considerations, the following:

"(1) The legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making.

"(2) Other statutory considerations applicable to whether the agency can or should propose a rule or undertake other agency action.

"(3) The specific nature and significance of the problem the agency may address with a rule (including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction), whether the problem warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action.

"(4) Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or part.

"(5) Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including not only responses that mandate particular conduct or manners of compliance, but also—

"(A) the alternative of no Federal response;

"(B) amending or rescinding existing rules;

"(C) potential regional, State, local, or tribal regulatory action or other responses that could be taken in lieu of agency action; and

"(D) potential responses that—

"(i) specify performance objectives rather than conduct or manners of compliance;

"(ii) establish economic incentives to encourage desired behavior;

"(iii) provide information upon which choices can be made by the public; or

"(iv) incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance.

"(6) Notwithstanding any other provision of law—

"(A) the potential costs and benefits associated with potential alternative rules and other responses considered under section 553(b)(5), including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs (including an estimate of the net gain or loss in domestic jobs), economic growth, innovation, and economic competitiveness;

"(B) means to increase the cost-effectiveness of any Federal response; and

"(C) incentives for innovation, consistency, predictability, lower costs of enforcement and compliance (to government entities, regulated entities, and the public), and flexibility.

"(c) ADVANCE NOTICE OF PROPOSED RULE MAKING FOR MAJOR RULES, HIGH-IMPACT RULES, AND RULES INVOLVING NOVEL LEGAL OR POLICY ISSUES.—In the case of a rule making for a major rule or high-impact rule or a rule that involves a novel legal or policy issue arising out of statutory mandates, not later than 90 days before a notice of proposed rule making is published in the Federal Register, an agency shall publish advance notice of proposed rule making in the Federal Register. In publishing such advance notice, the agency shall—

"(1) include a written statement identifying, at a minimum—

"(A) the nature and significance of the problem the agency may address with a rule, including data and other evidence and information on which the agency expects to rely for the proposed rule;

"(B) the legal authority under which a rule may be proposed, including whether a rule mak-

ing is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making;

"(C) preliminary information available to the agency concerning the other considerations specified in subsection (b); and

"(D) in the case of a rule that involves a novel legal or policy issue arising out of statutory mandates, the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule;

"(2) solicit written data, views or argument from interested persons concerning the information and issues addressed in the advance notice; and

"(3) provide for a period of not fewer than 60 days for interested persons to submit such written data, views, or argument to the agency.

"(d) NOTICES OF PROPOSED RULE MAKING; DETERMINATIONS OF OTHER AGENCY COURSE.—(1) Before it determines to propose a rule, and following completion of procedures under subsection (c), if applicable, the agency shall consult with the Administrator of the Office of Information and Regulatory Affairs. If the agency thereafter

1 determines to propose a rule, the agency shall publish a
2 notice of proposed rule making, which shall include—
3 "(A) a statement of the time, place, and nature
4 of public rule making proceedings;
5 "(B) reference to the legal authority under
6 which the rule is proposed;
7 "(C) the terms of the proposed rule;
8 "(D) a description of information known to the
9 agency on the subject and issues of the proposed
10 rule, including but not limited to—
11 "(i) a summary of information known to
12 the agency concerning the considerations speci-
13 fied in subsection (b);
14 "(ii) a summary of additional information
15 the agency provided to and obtained from inter-
16 ested persons under subsection (c);
17 "(iii) a summary of any preliminary risk
18 assessment or regulatory impact analysis per-
19 formed by the agency; and
20 "(iv) information specifically identifying all
21 data, studies, models, and other evidence or in-
22 formation considered or used by the agency in
23 connection with its determination to propose
24 the rule;

"(E)(i) a reasoned preliminary determination of need for the rule based on the information described under subparagraph (D); and

"(ii) an additional statement of whether a rule is required by statute;

"(F) a reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule (including all costs to be considered under subsection (b)(6)), based on the information described under subparagraph (D);

"(G) a discussion of—

"(i) the alternatives to the proposed rule, and other alternative responses, considered by the agency under subsection (b);

"(ii) the costs and benefits of those alternatives (including all costs to be considered under subsection (b)(6));

"(iii) whether those alternatives meet relevant statutory objectives; and

"(iv) why the agency did not propose any of those alternatives; and

"(H)(i) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule; and

1 "(ii) if so, whether or not the agency proposes
2 to amend or rescind any such rules, and why.
3 All information provided to or considered by the
4 agency, and steps to obtain information by the agen-
5 cy, in connection with its determination to propose
6 the rule, including any preliminary risk assessment
7 or regulatory impact analysis prepared by the agen-
8 cy and all other information prepared or described
9 by the agency under subparagraph (D) and, at the
10 discretion of the President or the Administrator of
11 the Office of Information and Regulatory Affairs, in-
12 formation provided by that Office in consultations
13 with the agency, shall be placed in the docket for the
14 proposed rule and made accessible to the public by
15 electronic means and otherwise for the public's use
16 when the notice of proposed rule making is pub-
17 lished.
18 "(2)(A) If the agency undertakes procedures under
19 subsection (c) and determines thereafter not to propose
20 a rule, the agency shall, following consultation with the
21 Office of Information and Regulatory Affairs, publish a
22 notice of determination of other agency course. A notice
23 of determination of other agency course shall include in-
24 formation required by paragraph (1)(D) to be included in

1 a notice of proposed rule making and a description of the
2 alternative response the agency determined to adopt.
3 "(B) If in its determination of other agency course
4 the agency makes a determination to amend or rescind
5 an existing rule, the agency need not undertake additional
6 proceedings under subsection (c) before it publishes a no-
7 tice of proposed rule making to amend or rescind the exist-
8 ing rule.
9 All information provided to or considered by the agency,
10 and steps to obtain information by the agency, in connec-
11 tion with its determination of other agency course, includ-
12 ing but not limited to any preliminary risk assessment or
13 regulatory impact analysis prepared by the agency and all
14 other information that would be required to be prepared
15 or described by the agency under paragraph (1)(D) if the
16 agency had determined to publish a notice of proposed rule
17 making and, at the discretion of the President or the Ad-
18 ministrator of the Office of Information and Regulatory
19 Affairs, information provided by that Office in consulta-
20 tions with the agency, shall be placed in the docket for
21 the determination and made accessible to the public by
22 electronic means and otherwise for the public's use when
23 the notice of determination is published.
24 "(3) After notice of proposed rule making required
25 by this section, the agency shall provide interested persons

1 an opportunity to participate in the rule making through
2 submission of written data, views, or arguments with or
3 without opportunity for oral presentation, except that—
4 "(A) if a hearing is required under paragraph
5 (4)(B) or subsection (e), opportunity for oral presen-
6 tation shall be provided pursuant to that require-
7 ment; or
8 "(B) when other than under subsection (e) of
9 this section rules are required by statute or at the
10 discretion of the agency to be made on the record
11 after opportunity for an agency hearing, sections
12 556 and 557 shall apply, and paragraph (4), the re-
13 quirements of subsection (e) to receive comment out-
14 side of the procedures of sections 556 and 557, and
15 the petition procedures of subsection (e)(6) shall not
16 apply.
17 The agency shall provide not fewer than 60 days for inter-
18 ested persons to submit written data, views, or argument
19 (or 120 days in the case of a proposed major or high-
20 impact rule).
21 "(4)(A) Within 30 days of publication of notice of
22 proposed rule making, a member of the public may peti-
23 tion for a hearing in accordance with section 556 to deter-
24 mine whether any evidence or other information upon

1 which the agency bases the proposed rule fails to comply
2 with the Information Quality Act.
3 "(B)(i) The agency may, upon review of the petition,
4 determine without further process to exclude from the rule
5 making the evidence or other information that is the sub-
6 ject of the petition and, if appropriate, withdraw the pro-
7 posed rule. The agency shall promptly publish any such
8 determination.
9 "(ii) If the agency does not resolve the petition under
10 the procedures of clause (i), it shall grant any such peti-
11 tion that presents a prima facie case that evidence or other
12 information upon which the agency bases the proposed
13 rule fails to comply with the Information Quality Act, hold
14 the requested hearing not later than 30 days after receipt
15 of the petition, provide a reasonable opportunity for cross-
16 examination at the hearing, and decide the issues pre-
17 sented by the petition not later than 60 days after receipt
18 of the petition. The agency may deny any petition that
19 it determines does not present such a prima facie case.
20 "(C) There shall be no judicial review of the agency's
21 disposition of issues considered and decided or determined
22 under subparagraph (B)(ii) until judicial review of the
23 agency's final action. There shall be no judicial review of
24 an agency's determination to withdraw a proposed rule
25 under subparagraph (B)(i) on the basis of the petition.

"(D) Failure to petition for a hearing under this paragraph shall not preclude judicial review of any claim based on the Information Quality Act under chapter 7 of this title.

"(e) HEARINGS FOR HIGH-IMPACT RULES.—Following notice of a proposed rule making, receipt of comments on the proposed rule, and any hearing held under subsection (d)(4), and before adoption of any high-impact rule, the agency shall hold a hearing in accordance with sections 556 and 557, unless such hearing is waived by all participants in the rule making other than the agency. The agency shall provide a reasonable opportunity for cross-examination at such hearing. The hearing shall be limited to the following issues of fact, except that participants at the hearing other than the agency may waive determination of any such issue:

"(1) Whether the agency's asserted factual predicate for the rule is supported by the evidence.

"(2) Whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including all costs to be considered under subsection (b)(6)) than the proposed rule.

"(3) If there is more than one alternative to the proposed rule that would achieve the relevant statu-

1 tory objectives at a lower cost than the proposed
2 rule, which alternative would achieve the relevant
3 statutory objectives at the lowest cost.

4 "(4) Whether, if the agency proposes to adopt
5 a rule that is more costly than the least costly alter-
6 native that would achieve the relevant statutory ob-
7 jectives (including all costs to be considered under
8 subsection (b)(6)), the additional benefits of the
9 more costly rule exceed the additional costs of the
10 more costly rule.

11 "(5) Whether the evidence and other informa-
12 tion upon which the agency bases the proposed rule
13 meets the requirements of the Information Quality
14 Act.

15 "(6) Upon petition by an interested person who
16 has participated in the rule making, other issues rel-
17 evant to the rule making, unless the agency deter-
18 mines that consideration of the issues at the hearing
19 would not advance consideration of the rule or
20 would, in light of the nature of the need for agency
21 action, unreasonably delay completion of the rule
22 making. An agency shall grant or deny a petition
23 under this paragraph within 30 days of its receipt
24 of the petition.

1 No later than 45 days before any hearing held under this
2 subsection or sections 556 and 557, the agency shall pub-
3 lish in the Federal Register a notice specifying the pro-
4 posed rule to be considered at such hearing, the issues
5 to be considered at the hearing, and the time and place
6 for such hearing, except that such notice may be issued
7 not later than 15 days before a hearing held under sub-
8 section (d)(4)(B).

9 "(f) FINAL RULES.—(1) The agency shall adopt a
10 rule only following consultation with the Administrator of
11 the Office of Information and Regulatory Affairs to facili-
12 tate compliance with applicable rule making requirements.

13 "(2) The agency shall adopt a rule only on the basis
14 of the best reasonably obtainable scientific, technical, eco-
15 nomic, and other evidence and information concerning the
16 need for, consequences of, and alternatives to the rule.

17 "(3)(A) Except as provided in subparagraph (B), the
18 agency shall adopt the least costly rule considered during
19 the rule making (including all costs to be considered under
20 subsection (b)(6)) that meets relevant statutory objectives.

21 "(B) The agency may adopt a rule that is more costly
22 than the least costly alternative that would achieve the rel-
23 evant statutory objectives only if the additional benefits
24 of the more costly rule justify its additional costs and only
25 if the agency explains its reason for doing so based on

1 interests of public health, safety or welfare that are clearly
2 within the scope of the statutory provision authorizing the
3 rule.

4 "(4) When it adopts a final rule, the agency shall
5 publish a notice of final rule making. The notice shall in-
6 clude—

7 "(A) a concise, general statement of the rule's
8 basis and purpose;

9 "(B) the agency's reasoned final determination
10 of need for a rule to address the problem the agency
11 seeks to address with the rule, including a statement
12 of whether a rule is required by statute and a sum-
13 mary of any final risk assessment or regulatory im-
14 pact analysis prepared by the agency;

15 "(C) the agency's reasoned final determination
16 that the benefits of the rule meet the relevant statu-
17 tory objectives and justify the rule's costs (including
18 all costs to be considered under subsection (b)(6));

19 "(D) the agency's reasoned final determination
20 not to adopt any of the alternatives to the proposed
21 rule considered by the agency during the rule mak-
22 ing, including—

23 "(i) the agency's reasoned final determina-
24 tion that no alternative considered achieved the
25 relevant statutory objectives with lower costs

(including all costs to be considered under subsection (b)(6)) than the rule; or

"(ii) the agency's reasoned determination that its adoption of a more costly rule complies with subsection (f)(3)(B);

"(E) the agency's reasoned final determination—

"(i) that existing rules have not created or contributed to the problem the agency seeks to address with the rule; or

"(ii) that existing rules have created or contributed to the problem the agency seeks to address with the rule, and, if so—

"(I) why amendment or rescission of such existing rules is not alone sufficient to respond to the problem; and

"(II) whether and how the agency intends to amend or rescind the existing rule separate from adoption of the rule;

"(F) the agency's reasoned final determination that the evidence and other information upon which the agency bases the rule complies with the Information Quality Act; and

"(G)(i) for any major rule or high-impact rule, the agency's plan for review of the rule no less than

every ten years to determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives; and

"(ii) review of a rule under a plan required by clause (i) of this subparagraph shall take into account the factors and criteria set forth in subsections (b) through (f) of section 553 of this title. All information considered by the agency in connection with its adoption of the rule, and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the rule and made accessible to the public for the public's use no later than when the rule is adopted.

"(g) EXCEPTIONS FROM NOTICE AND HEARING REQUIREMENTS.—(1) Except when notice or hearing is required by statute, the following do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice:

"(A) Subsections (c) through (e).

1 "(B) Paragraphs (1) through (3) of subsection
2 (f).
3 "(C) Subparagraphs (B) through (H) of sub-
4 section (f)(4).
5 "(2)(A) When the agency for good cause, based upon
6 evidence, finds (and incorporates the finding and a brief
7 statement of reasons therefor in the rules issued) that
8 compliance with subsection (c), (d), or (e) or requirements
9 to render final determinations under subsection (f) of this
10 section before the issuance of an interim rule is impracti-
11 cable or contrary to the public interest, including interests
12 of national security, such subsections or requirements to
13 render final determinations shall not apply to the agency's
14 adoption of an interim rule.
15 "(B) If, following compliance with subparagraph (A)
16 of this paragraph, the agency adopts an interim rule, it
17 shall commence proceedings that comply fully with sub-
18 sections (d) through (f) of this section immediately upon
19 publication of the interim rule, shall treat the publication
20 of the interim rule as publication of a notice of proposed
21 rule making and shall not be required to issue supple-
22 mental notice other than to complete full compliance with
23 subsection (d). No less than 270 days from publication
24 of the interim rule (or 18 months in the case of a major
25 rule or high-impact rule), the agency shall complete rule

1 making under subsections (d) through (f) of this sub-
2 section and take final action to adopt a final rule or re-
3 scind the interim rule. If the agency fails to take timely
4 final action, the interim rule will cease to have the effect
5 of law.

6 "(C) Other than in cases involving interests of na-
7 tional security, upon the agency's publication of an interim
8 rule without compliance with subsections (c), (d), or (e)
9 or requirements to render final determinations under sub-
10 section (f) of this section, an interested party may seek
11 immediate judicial review under chapter 7 of this title of
12 the agency's determination to adopt such interim rule. The
13 record on such review shall include all documents and in-
14 formation considered by the agency and any additional in-
15 formation presented by a party that the court determines
16 necessary to consider to assure justice.

17 "(3) When the agency for good cause finds (and in-
18 corporates the finding and a brief statement of reasons
19 therefor in the rules issued) that notice and public proce-
20 dure thereon are unnecessary, including because agency
21 rule making is undertaken only to correct a de minimis
22 technical or clerical error in a previously issued rule or
23 for other noncontroversial purposes, the agency may pub-
24 lish a rule without compliance with subsections (c), (d),
25 (e), or (f)(1)–(3) and (f)(4)(B)–(F). If the agency receives

1 significant adverse comment within 60 days after publica-
2 tion of the rule, it shall treat the notice of the rule as
3 a notice of proposed rule making and complete rule mak-
4 ing in compliance with subsections (d) and (f).

5 "(h) ADDITIONAL REQUIREMENTS FOR HEARINGS.—
6 When a hearing is required under subsection (e) or is oth-
7 erwise required by statute or at the agency's discretion
8 before adoption of a rule, the agency shall comply with
9 the requirements of sections 556 and 557 in addition to
10 the requirements of subsection (f) in adopting the rule and
11 in providing notice of the rule's adoption.

12 "(i) DATE OF PUBLICATION OF RULE.—The required
13 publication or service of a substantive final or interim rule
14 shall be made not less than 30 days before the effective
15 date of the rule, except—

16 "(1) a substantive rule which grants or recog-
17 nizes an exemption or relieves a restriction;

18 "(2) interpretive rules and statements of policy;
19 or

20 "(3) as otherwise provided by the agency for
21 good cause found and published with the rule.

22 "(j) RIGHT TO PETITION.—Each agency shall give
23 an interested person the right to petition for the issuance,
24 amendment, or repeal of a rule.

1 "(k) RULE MAKING GUIDELINES.—(1)(A) The Ad-
2 ministrator of the Office of Information and Regulatory
3 Affairs shall establish guidelines for the assessment, in-
4 cluding quantitative and qualitative assessment, of the
5 costs and benefits of proposed and final rules and other
6 economic issues or issues related to risk that are relevant
7 to rule making under this title. The rigor of cost-benefit
8 analysis required by such guidelines shall be commensu-
9 rate, in the Administrator's determination, with the eco-
10 nomic impact of the rule.

11 "(B) To ensure that agencies use the best available
12 techniques to quantify and evaluate anticipated present
13 and future benefits, costs, other economic issues, and risks
14 as accurately as possible, the Administrator of the Office
15 of Information and Regulatory Affairs shall regularly up-
16 date guidelines established under paragraph (1)(A) of this
17 subsection.

18 "(2) The Administrator of the Office of Information
19 and Regulatory Affairs shall also issue guidelines to pro-
20 mote coordination, simplification and harmonization of
21 agency rules during the rule making process and other-
22 wise. Such guidelines shall assure that each agency avoids
23 regulations that are inconsistent or incompatible with, or
24 duplicative of, its other regulations and those of other
25 Federal agencies and drafts its regulations to be simple

1 and easy to understand, with the goal of minimizing the
2 potential for uncertainty and litigation arising from such
3 uncertainty.

4 "(3) To ensure consistency in Federal rule making,
5 the Administrator of the Office of Information and Regu-
6 latory Affairs shall—

7 "(A) issue guidelines and otherwise take action
8 to ensure that rule makings conducted in whole or
9 in part under procedures specified in provisions of
10 law other than those of subchapter II of this title
11 conform to the fullest extent allowed by law with the
12 procedures set forth in section 553 of this title; and

13 "(B) issue guidelines for the conduct of hear-
14 ings under subsections 553(d)(4) and 553(e) of this
15 section, including to assure a reasonable opportunity
16 for cross-examination. Each agency shall adopt regu-
17 lations for the conduct of hearings consistent with
18 the guidelines issued under this subparagraph.

19 "(4) The Administrator of the Office of Information
20 and Regulatory Affairs shall issue guidelines pursuant to
21 the Information Quality Act to apply in rule making pro-
22 ceedings under sections 553, 556, and 557 of this title.
23 In all cases, such guidelines, and the Administrator's spe-
24 cific determinations regarding agency compliance with
25 such guidelines, shall be entitled to judicial deference.

"(l) INCLUSION IN THE RECORD OF CERTAIN DOCUMENTS AND INFORMATION.—The agency shall include in the record for a rule making, and shall make available by electronic means and otherwise, all documents and information prepared or considered by the agency during the proceeding, including, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, documents and information communicated by that Office during consultation with the Agency.

"(m) MONETARY POLICY EXEMPTION.—Nothing in subsection (b)(6), subparagraphs (F) and (G) of subsection (d)(1), subsection (e), subsection (f)(3), and subparagraphs (C) and (D) of subsection (f)(5) shall apply to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.".

SEC. 4. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR GUIDANCE; PRESIDENTIAL AUTHORITY TO ISSUE GUIDELINES FOR ISSUANCE OF GUIDANCE.

(a) IN GENERAL.—Chapter 5 of title 5, United States Code, is amended by inserting after section 553 the following new section:

1 **"§ 553a. Agency guidance; procedures to issue major**
2 **guidance; authority to issue guidelines**
3 **for issuance of guidance**

4 "(a) Before issuing any major guidance, or guidance
5 that involves a novel legal or policy issue arising out of
6 statutory mandates, an agency shall—

7 "(1) make and document a reasoned determina-
8 tion that—

9 "(A) assures that such guidance is under-
10 standable and complies with relevant statutory
11 objectives and regulatory provisions (including
12 any statutory deadlines for agency action);

13 "(B) summarizes the evidence and data on
14 which the agency will base the guidance;

15 "(C) identifies the costs and benefits (in-
16 cluding all costs to be considered during a rule
17 making under section 553(b) of this title) of
18 conduct conforming to such guidance and
19 assures that such benefits justify such costs;
20 and

21 "(D) describes alternatives to such guid-
22 ance and their costs and benefits (including all
23 costs to be considered during a rule making
24 under section 553(b) of this title) and explains
25 why the agency rejected those alternatives; and

"(2) confer with the Administrator of the Office of Information and Regulatory Affairs on the issuance of such guidance to assure that the guidance is reasonable, understandable, consistent with relevant statutory and regulatory provisions and requirements or practices of other agencies, does not produce costs that are unjustified by the guidance's benefits, and is otherwise appropriate.

Upon issuing major guidance, or guidance that involves a novel legal or policy issue arising out of statutory mandates, the agency shall publish the documentation required by subparagraph (1) by electronic means and otherwise.

"(b) Agency guidance—

"(1) is not legally binding and may not be relied upon by an agency as legal grounds for agency action;

"(2) shall state in a plain, prominent and permanent manner that it is not legally binding; and

"(3) shall, at the time it is issued or upon request, be made available by the issuing agency to interested persons and the public by electronic means and otherwise.

Agencies shall avoid the issuance of guidance that is inconsistent or incompatible with, or duplicative of, the agency's governing statutes or regulations, with the goal

1 of minimizing the potential for uncertainty and litigation
2 arising from such uncertainty.
3 "(c) The Administrator of the Office of Information
4 and Regulatory Affairs shall have authority to issue guide-
5 lines for use by the agencies in the issuance of major guid-
6 ance and other guidance. Such guidelines shall assure that
7 each agency avoids issuing guidance documents that are
8 inconsistent or incompatible with, or duplicative of, the
9 law, its other regulations, or the regulations of other Fed-
10 eral agencies and drafts its guidance documents to be sim-
11 ple and easy to understand, with the goal of minimizing
12 the potential for uncertainty and litigation arising from
13 such uncertainty.".
14 (b) CLERICAL AMENDMENT.—The table of sections
15 for chapter 5 of title 5, United States Code, is amended
16 by inserting after the item relating to section 553 the fol-
17 lowing new item:

"553a. Agency guidance; procedures to issue major guidance; authority to issue guidelines for issuance of guidance.".

18 **SEC. 5. HEARINGS; PRESIDING EMPLOYEES; POWERS AND**
19 **DUTIES; BURDEN OF PROOF; EVIDENCE;**
20 **RECORD AS BASIS OF DECISION.**
21 Section 556 of title 5, United States Code, is amend-
22 ed by striking subsection (e) and inserting the following:
23 "(e)(1) The transcript of testimony and exhibits, to-
24 gether with all papers and requests filed in the proceeding,

1 constitutes the exclusive record for decision in accordance
2 with section 557 and shall be made available to the parties
3 and the public by electronic means and, upon payment of
4 lawfully prescribed costs, otherwise. When an agency deci-
5 sion rests on official notice of a material fact not appear-
6 ing in the evidence in the record, a party is entitled, on
7 timely request, to an opportunity to show the contrary.
8 "(2) Notwithstanding paragraph (1) of this sub-
9 section, in a proceeding held under this section pursuant
10 to section 553(d)(4) or 553(e), the record for decision
11 shall also include any information that is part of the
12 record of proceedings under section 553.
13 "(f) When an agency conducts rule making under this
14 section and section 557 directly after concluding pro-
15 ceedings upon an advance notice of proposed rule making
16 under section 553(e), the matters to be considered and
17 determinations to be made shall include, among other rel-
18 evant matters and determinations, the matters and deter-
19 minations described in subsections (b) and (f) of section
20 553.
21 "(g) Upon receipt of a petition for a hearing under
22 this section, the agency shall grant the petition in the case
23 of any major rule, unless the agency reasonably deter-
24 mines that a hearing would not advance consideration of
25 the rule or would, in light of the need for agency action,

1 unreasonably delay completion of the rule making. The
2 agency shall publish its decision to grant or deny the peti-
3 tion when it renders the decision, including an explanation
4 of the grounds for decision. The information contained in
5 the petition shall in all cases be included in the adminis-
6 trative record. This subsection shall not apply to rule mak-
7 ings that concern monetary policy proposed or imple-
8 mented by the Board of Governors of the Federal Reserve
9 System or the Federal Open Market Committee.".

10 **SEC. 6. ACTIONS REVIEWABLE.**

11 Section 704 of title 5, United States Code, is amend-
12 ed—

13 (1) by striking "Agency action made" and in-
14 serting "(a) Agency action made"; and

15 (2) by adding at the end the following: "Denial
16 by an agency of a correction request or, where ad-
17 ministrative appeal is provided for, denial of an ap-
18 peal, under an administrative mechanism described
19 in subsection (b)(2)(B) of the Information Quality
20 Act, or the failure of an agency within 90 days to
21 grant or deny such request or appeal, shall be final
22 action for purposes of this section.

23 "(b) Other than in cases involving interests of na-
24 tional security, notwithstanding subsection (a) of this sec-
25 tion, upon the agency's publication of an interim rule with-

1 out compliance with section 553(c), (d), or (e) or require-
2 ments to render final determinations under subsection (f)
3 of section 553, an interested party may seek immediate
4 judicial review under this chapter of the agency's deter-
5 mination to adopt such rule on an interim basis. Review
6 shall be limited to whether the agency abused its discre-
7 tion to adopt the interim rule without compliance with sec-
8 tion 553(c), (d), or (e) or without rendering final deter-
9 minations under subsection (f) of section 553.''.

10 **SEC. 7. SCOPE OF REVIEW.**

11 Section 706 of title 5, United States Code is amend-
12 ed—

13 (1) by striking ''To the extent necessary'' and
14 inserting ''(a) To the extent necessary'';

15 (2) in paragraph (2)(A) of subsection (a) (as
16 designated by paragraph (1) of this section), by in-
17 serting after ''in accordance with law'' the following:
18 ''(including the Information Quality Act)''; and

19 (3) by adding at the end the following:

20 ''(b) The court shall not defer to the agency's—

21 ''(1) interpretation of an agency rule if the
22 agency did not comply with the procedures of section
23 553 or sections 556–557 of chapter 5 of this title to
24 issue the interpretation;

"(2) determination of the costs and benefits or other economic or risk assessment of the action, if the agency failed to conform to guidelines on such determinations and assessments established by the Administrator of the Office of Information and Regulatory Affairs under section 553(k);

"(3) determinations made in the adoption of an interim rule; or

"(4) guidance.

"(c) The court shall review agency denials of petitions under section 553(e)(6) or any other petition for a hearing under sections 556 and 557 for abuse of agency discretion.".

SEC. 8. ADDED DEFINITION.

Section 701(b) of title 5, United States Code, is amended—

(1) in paragraph (1), by striking "and" at the end;

(2) in paragraph (2), by striking the period at the end, and inserting "; and"; and

(3) by adding at the end the following:

"(3) 'substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever

in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision.".

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act to—

(1) sections 553, 556, and 704 of title 5, United States Code;

(2) subsection (b) of section 701 of such title;

(3) paragraphs (2) and (3) of section 706(b) of such title; and

(4) subsection (c) of section 706 of such title,

shall not apply to any rule makings pending or completed on the date of enactment of this Act.

○

Mr. COHEN. Thank you. I appreciate the Chairman's opening statement and his recognition. And in my position as the Ranking Member, and in my philosophical position, which is what puts me on the side of the aisle, I think that what he said was wrong.

But I have said that before, and I will say again, we will remain friends.

We have similar bills marked up regularly that do damage to the regulatory structure that we have in this country, and it is the whole question of balancing issues, and safety vs. due process and fairness, and all those things. And it just kind of depends where you come down. And the other side tends to come down on the side of business who doesn't want to deal with regulations, but do want due process and fairness, as they see it. And then the other side looks at the public and consumers, and what is going to be fair and bright and save lives and purify the air and the water and make life better for everybody.

So it is just kind of whether you are looking at a holistic way at what is good for everybody as a family, or whether you are looking at it just for the folks who are individually particularly concerned.

And that is what we have pretty regularly in this Committee and kind of in this Congress.

The Administrative Procedure Act is really a constitution of administrative procedures. And to amend it, you have to have a high burden of proof, just as you should have a high burden of proof to amend the United States Constitution. You shouldn't be doing that without particularly good reasons, and I don't think the burden of proof which you would have in amending the Constitution, which has very high thresholds, has been met by the proponents of this bill that may have changes that need to be made in the APA.

We have all kinds of situations. We can show that workplace safety is important, and there are problems that we have now. There were 4,693 workplace deaths in 2011, according to the Bureau of Labor Statistics. That is a lot of deaths.

And not that they would all be alive and living and breathing if we had a process of regulations in place to save them. We had those, but they are there to save people and to make conditions better. And there will be more deaths, I think, if we have less regulation and less oversight at OSHA and other places.

The National Institute for Occupational Safety and Health, the American Cancer Society, and Emory School of Public Health, say they estimate 50,000 to 70,000 deaths from occupational-related diseases in the United States annually. And that is sufficient—overly sufficient.

And the joint study by the Liberty Mutual Insurance Company and health economists at UC Davis say that we have $250 billion of workplace-related injuries. Only 25 percent is covered by workers comp.

In addition, several provisions in this bill concern me. H.R. 2122's expanded use of formal rulemaking procedures for high impact rules is, to me, an unnecessary procedural expansion that will not serve to improve the quality of rulemaking, while at the same time would add major cost to the process, and effectively grind the process of rulemaking to a halt, which is probably the intent and motive of the law.

Furthermore, rulemaking largely fell out of favor more than a generation ago as its costs became were evident. Consensus developed that the notice and comment rulemaking procedures of 553, the APA, which are themselves fairly proceduralized, combined with the APA analytical requirements struck a better balance in ensuring a fair and accurate rulemaking process while maintaining agency effectiveness.

The proponents of this bill offer no study or other data indicating the use of cross-examination and other facets of the formal rulemaking process are the more effective tools for making scientific and policy judgments than the current process. If anything, history says the opposite.

An infamous example of the rulemaking procedure was before the FDA. It took more than 10 years to determine whether the FDA should require that peanut butter contain 90 percent peanuts, as opposed to 87 percent peanuts.

A government witness was examined and cross-examined for an entire day about a survey of cookbook and patented peanut butter formulas, missing recipes, and his personal preferences for peanut butter, crunchy or smooth.

While I make no judgments about crunchy or smooth, or about how many peanuts should be in peanut butter, I do think that government could do better to spend its resources than devoting 10 years to decide the question of peanut butter and peanuts.

We ought to not be returning to those days, and be wary of it.

Another concern with H.R. 2122 is its codification of overly burdensome cost-benefit analysis requirements.

Every President since Ronald Reagan has required that executive agencies conduct cost-benefit analysis, and that support for such requirements has been bipartisan.

Nonetheless, the particular agency determinations required under this bill and the requirements that all these determinations be made for all rules would cause unnecessary delay and cost tremendous taxpayer resources.

I do not see the net benefit of expanding cost-benefit analysis requirements to nonmajor rules, or to guidance documents, which do not have the force of law.

Perhaps we should have a better cost-benefit analysis done of H.R. 2122, go to the source of the matter. It wouldn't be res ipsa. It could be res ipsa, the thing speaks for itself.

There are other concerns that I will not delve into in these brief opening remarks, including the bill's provision establishing less deferential judicial review under which judges could second-guess an agency's cost-benefit analysis and substitute their policy judgments for those of agency experts.

This bill does nothing to improve the rulemaking and will only serve to stymie agencies from ensuring that health safety and welfare of the American people are protected.

It will also go nowhere in the Senate. It will not become law. We are supposed to be lawmakers and not messengers.

And, therefore, I close my message and urge my colleagues to be in opposition to this bill, and this message.

I yield back the balance of my time.

Mr. BACHUS. Thank you, Mr. Cohen.

I would now like to recognize the Chairman of the full Committee, Mr. Bob Goodlatte, for his opening statement.

Mr. GOODLATTE. Mr. Chairman, thank you very much for holding this hearing on H.R. 2122, the "Regulatory Accountability Act of 2013."

For over 4 years, since the great recession officially ended, America's workers and small businesses have waited for real recovery to take hold. Last week, a new jobs report once again offered superficial reason to think good news might be growing. In June, the number of jobs added to the economy grew slightly. The number of long-term unemployed fell. And the labor force participation rate grew by 1/10 of 1 percent.

But over 4 years into nominal recovery, these signs of improvement are still far too weak. What is worse, lurking beneath the surface, bad news continues to come.

The June jobs report showed an increase of 240,000 in the number of discouraged workers, those who have simply quit looking for a job out of frustration or despair.

The number of people working part-time but who really want to full-time work passed 8.2 million. That represents a jump of 322,000 in just 1 month.

Worst of all, the truest measure of unemployment, the rate that includes both discouraged workers and those who cannot find a full-time job, continues to exceed 20 million Americans, and that rate rose from 13.8 percent back to 14.3 percent in June.

This continuing lag in recovery is distressing for all Americans. And the reason recovery has yet to fully arrive is all too easy to see: Real historical economic growth rates are missing. They have been ever since the great recession.

Some say that this is a new normal, a yearly growth rate on the order of 2 percent in contrast to America's historically higher growth rate. But a new normal of suppressed growth, lowered expectations, and more than 20 million Americans unemployed or underemployed, is something America's workers and small businesses can't accept, and America's leaders must reject.

The American people urgently need the jobs that only greater economic growth can give. One of the biggest obstacles standing in the way of growth and job creation is the growing wall of Federal regulation being built in Washington.

The Small Business Administration and the Competitive Enterprise Institute have both estimated that Federal regulations now cost our economy well over $1 trillion per year. Yet the Obama administration is continuing to add historically high numbers of new major regulations. It has just launched a new regulatory initiative that is sure to increase energy costs for America's families and job creators. This is progress in the wrong direction.

As long as America's small businesses and manufacturers continue to tell us that a hostile regulatory environment is one of the biggest challenges they face, we must look for ways to reduce unnecessary regulatory burdens.

Regulations surely has a role to play in ensuring public health, safety, and welfare. But there is no reason Americans need to choose between having regulations that keep us safe and having economic growth that allows us to prosper.

That is why I reintroduced the Regulatory Accountability Act this Congress. Its reforms to the Administrative Procedure Act, the constitution of Federal regulation, are some of the most important regulatory reforms we can pass.

Simply put, the Administrative Procedure Act is out of date and encourages regulatory overreach and excessive regulatory costs.

Enacted in 1946, it places only a handful of light restrictions on the Federal rulemaking process. Congress wrote it long before anyone imagined the reach and expense of the modern regulatory state.

The APA does not require agencies to identify the costs of their regulations before they impost them. It does not require agencies to consider reasonable lower-cost alternatives. The APA does not even require agencies to rely on the best reasonably obtainable evidence.

While the APA does require agencies to give notice of proposed rulemaking, and receive public comment on their proposals, too often that is an after-the-fact exercise.

Frequently, agencies predetermine the outcomes of rulemakings, and notice and comment serves only to paper over the record.

The Regulatory Accountability Act fixes this problem by bringing the APA up-to-date. Under its provisions, agencies are required to assess the costs and benefits of regulatory alternatives. Unless interests of public health, safety, or welfare require otherwise, agencies must adopt the least cost alternative that achieves the regulatory objectives Congress has established.

The Regulatory Accountability Act contains common-sense reforms that have bipartisan support in both the House and the Senate. In large part, that is because so many of its provisions are modeled on the terms of executive orders that Presidents Reagan, Clinton, Bush, and Obama have issued to compensate for the APA's weaknesses.

Over the past 3 decades, these bipartisan executive orders have proved that the principles of the Regulatory Accountability Act work. But the executive orders are not permanent, not judicially enforceable, do not bind independent agencies, and are too often honored in the breach.

Under the Regulatory Accountability Act, the principles of these orders would at least become binding law. Sound decisions that meet statutory objectives while they respect the economy's needs would be the order of the day, not the rare occurrence.

American jobs, American growth, and American competitiveness would all be better for it, and I urge all of my colleagues to join me and do all we can to pass the Regulatory Accountability Act.

Mr. Chairman, I am very pleased that you are holding this hearing. I am looking more forward to hearing the testimony of the witnesses.

I am particularly glad to have with us Mr. Bob Sells of Titan American Corporation, which operates a great facility in Botetourt County, Virginia, manufacturing an essential ingredient for American growth, cement.

Thank you.

Mr. BACHUS. Thank you.

I noticed he is the Tennessee Volunteer. Being a University of Alabama graduate, it was too late to scrub you from the list of witnesses. Since you had a business in Roanoke, I decided to not even try.

You know I am joking. It is a very stellar, Auburn and Alabama——

Mr. COHEN. Mr. Chairman, if I can interrupt this SEC talk, Mr. Conyers has a——

Mr. BACHUS. Absolutely. Without objection, Mr. Conyers' opening statement, he is the full Committee Ranking Member, will be made a part of the record.

And all Members' statements will be made a part of the record, opening statements, without objection.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

The so-called "Regulatory Accountability Act"—which effectively will prevent agencies from issuing regulations—is among the most seriously flawed bills we have considered to date.

My greatest concern is that H.R. 2122 will have a pernicious effect on the public health, safety, and well-being of Americans.

The ways in which it does this are almost too numerous to list here, so I will just mention a few.

For instance, H.R. 2122 would override critical laws that prohibit agencies from considering costs when public health and safety are at stake.

These statutes include the Clean Air Act, the Clean Water Act, and the Occupational Safety and Health Act.

This means that agency officials will now be required to balance the costs of an air pollution standard with the costs of how many anticipated lives and illnesses that will result in the absence of such regulations.

At the hearing on this bill's predecessor in the last Congress, our witness testified that if this measure were in effect in the 1970's, the government "almost certainly would not have required the removal of most lead from gasoline until perhaps decades later."

This is because the bill imposes numerous procedural hurdles on the rulemaking process, a process that most experts agree is already too ossified.

The bill adds roughly *60 additional analytical requirements* to the already substantial analytical process, which threatens "paralysis by analysis."

By delaying the rulemaking process, we ultimately put American citizens at risk.

Worse yet, some of these new requirements have been soundly rejected by respected administrative law academics and practitioners, such as the bill's mandate requiring formal rulemaking.

As our witness observed at this prior hearing, "Almost no serious administrative law expert regards formal rulemaking as reasonable, and it has been all but relegated to the dustbin of history."

This explains why more than 40 leading administrative law academics and practitioners as well as the American Bar Association have raised serious concerns about these new requirements.

My second concern is that many provisions in the bill will facilitate greater influence of business interests on rulemaking and agencies.

We already know that the ability of corporate and business interests to influence agency rulemaking far exceeds that by groups representing the public.

But rather than leveling the access playing field, H.R. 2122 will further tip the balance in favor of business interests by giving them multiple opportunities to intervene at various points in the rulemaking process, including through less deferential judicial review.

Finally, the bill is based on the faulty premise that regulations result in economically stifling costs, kill jobs, and promote uncertainty.

While supporters of H.R. 2122 will undoubtedly cite a study claiming the cost of regulations exceed $1.7 trillion, the Congressional Research Service, Center for Pro-

gressive Reform, *and* the Economic Policy Institute found the study to have been based on incomplete and irrelevant data.

With respect to the impact that regulations have on job creation, then-Chairman Smith said during the hearing on H.R. 2122's precedessor in the last Congress that the "American people urgently need jobs that only economic growth can give. Standing in the way of growth and job creation is a wall of federal regulation."

But the Majority's *own* witness at that hearing, Christopher DeMuth, who appeared on behalf of the conservative think tank American Enterprise Institute, clearly debunked this argument. He said that the "focus on jobs . . . can lead to confusion in regulatory debates" and that the employment effects of regulation "are indeterminate."

Another argument—regulatory uncertainty hurts businesses—has similarly been debunked.

Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations has observed:

[R]egulatory uncertainty is a ***canard*** invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment.

Regulations that promote the health of our citizens and ensure the safety of American-made products will unquestionably lead to job creation and protect the competitiveness of our businesses in the global marketplace.

Not surprisingly, the Administration issued a veto threat in the last Congress regarding the bill's substantively identical predecessor stating that it "would seriously undermine the ability of agencies to execute their statutory duties" and that it also "would impede the ability of agencies to provide the public with basic protections," among other concerns.

Rather than heeding these serious concerns, my colleagues simply want to push forward with a bill that has absolutely no political viability.

It is a shame that we *again* will waste our time on legislation that has no future.

Mr. COHEN. Thank you.

Mr. BACHUS. Thank you.

Is there anyone else who would like to make an opening statement?

Mr. COHEN. Since you all talked about Alabama and UT, I would like to hear about Vanderbilt. Excellent, thank you. That is good, that is where I went to school. It costs a lot of money, but you get good students and you get good grades and they educate you well. And we are starting to do good sports too, but academics is first.

We don't get into how we do against Alabama and UT on the scores, because it would not be any contest.

Mr. GOODLATTE. Mr. Chairman, with all this great connection that Mr. Sells has to Tennessee both as a Volunteer and his daughter attending the outstanding school of Vanderbilt, I hope that the Ranking Member will listen intently to his testimony.

Mr. COHEN. With bated breath. [Laughter.]

Mr. BACHUS. We have Virginia, Purdue graduates. We will not get too much into the Big Ten.

But we do have a panel from all over the country, including here in Washington, so it is a distinguished panel.

And I will start by introducing Mr. Sells. He is president of the mid-Atlantic business unit of Titan America, a heavy construction material producer in eight states employing 1,600 Americans. Titan America produces cement, concrete, concrete block, aggregates, sand, and beneficiated coal ash.

Mr. Sells joined Titan America in 2001 as V.P. of Florida Concrete Products and assumed the role of mid-Atlantic business unit president in 2007, making him responsible for the Roanoke Cement

Company, Titan, Virginia, Ready Mix, S&W Ready Mix, and Powhatan Ready Mix.

Mr. Sells earned his B.A. in civil engineering, and his M.S. in engineering from the University of Tennessee

Mr. Jeffrey Rosen is a senior partner in the Washington, D.C., office of Kirkland & Ellis. Mr. Rosen practiced law on a wide array of areas at Kirkland & Ellis for 21 years before leaving in 2003. He rejoined the firm in 2009 focused on regulatory and litigation matters. From 2003 to 2006, he served as general counsel for the U.S. Department of Transportation. As general counsel, he was responsible for the department's regulatory program, enforcement and litigation activities, legal issues, and legislative proposals.

From 2006 to 2009, Mr. Rosen served as general counsel and senior policy advisor for the White House Office of Management and Budget, OMB, as we call it, making him the Administration's lead lawyer for regulatory and fiscal issues.

Appreciate your being here.

Dr. Keith Hall is a senior research fellow at Mercatus Center at George Mason University. Prior to joining the Mercatus Center, Dr. Hall served as the 13th commissioner of the Bureau of Labor Statistics. In this role, he headed the principal fact-finding agency in the Federal Government in the broad field of labor economics and statistics.

Prior to his service at BLS, Dr. Hall served as chief economist with the White House Council of Economic Advisors, where he analyzed a broad range of fiscal, regulatory, and microeconomic policies, and directed a team that monitored the state of the economy and developed economic forecasts.

Dr. Hall received his B.A. from the University of Virginia, and his M.S. and Ph.D. degrees in economics from Purdue University.

Dr. Diana Thomas is an assistant professor of economics and finance at Utah State University's Jon M. Huntsman School of Business. Dr. Thomas' primary fields of research include public choice, development economics, and Australian economics—oh, you are conservative?

Prior to joining the Huntsman staff, Dr. Thomas worked as a junior portfolio manager at Allianz Global Investors in Frankfurt, Germany. Dr. Thomas earned her B.S. in finance, her M.A. in economics, and her Ph.D. in economics from George Mason University.

Maybe I shouldn't assume that just because she studied Australian—I mean Austrian economics.

Dr. Goldston is director of government affairs for the National Resources Defense Council in Washington, D.C., and responsible for its governmental strategies.

Prior to joining NRDC, Mr. Goldston served as project director for the Bipartisan Policy Center report "Improving the Use of Science in Regulatory Policy." Mr. Goldston also served as chief of staff of the House Committee on Science from 2001 to 2006.

He has been a visiting lecturer at Princeton, Harvard, and a columnist for journal Nature. He received his B.A. in history from Cornell University and completed coursework for a Ph.D. in American history at the University of Pennsylvania.

We welcome you, Mr. Goldston.

Finally, Mr. Ronald Levin has testified many times before our Committee. He is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. Mr. Levin is a co-author of a casebook, "State and Federal Administrative Law."

Previously, he chaired the section of administrative law and regulatory practice of the American Bar Association, a group of which he is still an active member. He served as the ABA's advisor to the drafting committee to revise the model state Administrative Procedure Act.

He also serves as a public member of the Administrative Conference of the United States and chair of its Judicial Review Committee. Before joining the law faculty, Mr. Levin clerked for the Honorable John C. Godbold of the U.S. Court of Appeals for the Fifth Circuit and practiced in the Washington, D.C., firm of Sutherland Asbill & Brennan.

When did you clerk——

Mr. LEVIN. 1975 to 1976 in Montgomery, Alabama. The Fifth Circuit at that time included Alabama.

Mr. BACHUS. Yes, he is a very distinguished judge.

Mr. Levin received his B.A. from Yale and J.D. from University of Chicago.

I was trying to figure out if I had tried cases maybe when you were a clerk.

Mr. LEVIN. Hopefully, you had that privilege.

Mr. BACHUS. But that is a tremendously distinguished panel.

At this time, Chairman, do you have any questions you would like to ask?

Wait, we have to have our opening statements.

Barney Frank used to start asking questions before we heard the opening statements. I can't believe I just did it. [Laughter.]

Barney lives. His ghost, he came back. We had his portrait unveiling last week.

TESTIMONY OF ROBERT A. SELLS, PRESIDENT, TITAN AMERICA MID-ATLANTIC BUSINESS DIVISION

Mr. SELLS. Thank you, Chairman Bachus.

Distinguished Congressional Committee Members, my name, as the Chairman mentioned, is Robert Sells. I serve as president of the mid-Atlantic business unit of Titan America, a heavy construction material producer in eight states. We employ over 1,600 Americans, and Titan America does produce cement, concrete, concrete block, aggregates, sand, and beneficiated coal ash, which are vital materials America needs as it recovers from the great recession and moves forward in a new era of resilient, sustainable construction and infrastructure.

The construction materials we produce create the foundation of America. As a business that is highly regulated under Federal agencies, Titan America supports H.R. 2122, the Regulatory Accountability Act. We believe the process for justifying regulations, identifying the alternatives, evaluating the impact on jobs and the economy, assessing the cost-benefit impact of the regulations, and incorporating input from the regulated business community will be more robust and transparent under this legislation.

The result will be greater certainty in business for planning new investments, expansion, and job creation.

While at times we have enjoyed good working relationships with agencies such as EPA, MSHA, OSHA, and the DOT, there are times, particularly during rulemaking, where the input of the regulated community has not been sufficiently requested, accepted, or considered, resulting in regulations requiring significant revisions or that ultimately are challenged in court and remanded or vacated.

One example is the Portland cement NESHAP rule finalized in 2010, which included some conditions that were technically unattainable and other conditions that were not considered in or vastly changed from the final proposal.

After various challenges, this rule was reconsidered in 2013, but is now under legal challenges from environmental groups.

Another example is MSHA's pattern of violations rule. Safety is our number one value at Titan America. This rule was implemented this spring and goes too far in removing due process and could close a business without the opportunity to contest the allegations. At the present time, when a MSHA citation is issued, the company is required to implement the MSHA officer's corrective action before the company can protest the citation.

Under H.R. 2122, legislation would provide greater opportunities to consider input from the regulated community to make more achievable and rational regulations.

We believe it is important for a regulation to be justified by aspects directly related to the regulatory statute for the regulation in question.

However, co-benefits for aspects that are not attributable to a given regulatory statute are often used as justification.

We experienced this in the Portland cement NESHAP, where a limit on hydrochloric acid, which was previously determined to be less than health-based standards, is now justified because of the co-reduction of sulfur dioxide, which is regulated under other statutes. There are cases where cement plants have naturally low sulfur dioxide emissions, and there is little if any co-benefit for meeting an arbitrarily low costly hydrochloric acid limit.

If there is a benefit for reducing sulfur dioxide emissions, then it should be addressed under the statutes for that emission, not by an expensive backdoor approach.

This legislation will require that regulations be justified by their own direct benefits and that proper rulemaking be followed if there is justification for co-benefits.

Greater input from the regulated community earlier in the process through advanced notice of proposed rulemaking and hearings during the proposed rule stage will provide the regulators with greater understanding of how the proposed regulations may impact businesses, what alternatives may be applicable, and what obstacles may prevent effective implementation of the regulations.

Often, inconsistencies between regulations, and sometimes just lack of common sense, create complications for business without creating any additional benefit or protection intended by the regulation.

One example is cement kilns using tires as an alternative fuel, which has many positive environmental benefits. If a tire is from a State collection program, it is legitimate fuel. But the exact same tire from a tire dump or landfill triggers a completely different set of regulations.

Another example is DOT's hours of service regulations, which were intended to provide adequate rest for over-the-road drivers. This has affected our local delivery professionals who spend less than 40 percent of their time behind the wheel.

Finally, this legislation addresses the propensity of agencies to issue guidance and move formal rules, with the effect being that regulators at State and regional levels use this guidance with the weight of regulations. We have seen this in draft guidance and judicial waters.

In closing, I would like to thank this Committee for hearing my testimony and would like to thank each of you for your service in the United States Congress, representing the citizens of your district and our great Nation.

I will be happy to answer questions at the end of our testimony.

[The prepared statement of Mr. Sells follows:]*

*See Appendix for supplemental statement submitted by this witness.

Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Robert A. Sells, President, Titan America MABU
July 9, 2013

Chairman Bachus, distinguished congressional committee members, my name is Robert Sells. I serve as President of the Mid-Atlantic Business Unit of Titan America, a heavy construction materials producer in 8 states, employing over 1,600 Americans. Titan America produces cement, concrete, concrete block, aggregates, sand and beneficiated coal ash, which are vital materials needed as America recovers from the recent Great Recession and moves forward in a new era of resilient, sustainable construction and infrastructure. The construction materials we produce create the "Foundation of America".

As a business that is highly regulated under numerous Federal agencies, Titan America supports the HR 2122 – the Regulatory Accountability Act. We believe the process for justifying the regulations, identifying alternatives, evaluating the impact on jobs and the economy, assessing the cost-benefit impact of the regulations, and incorporating input from the regulated business community will be more robust and transparent under this legislation. The result will be greater certainty in business for planning new investments, expansions, and job creation.

While at times we have enjoyed good working relationships and cooperation with such agencies as the EPA, MSHA, OSHA and DOT, there are times, particularly during rule making, where the input of the regulated community has not been sufficiently requested, accepted or considered, resulting in regulations requiring significant revisions or that ultimately are challenged in court and remanded or vacated. One example is the Portland Cement NESHAP (National Emissions

Standards for Hazardous Air Pollutants) rule finalized in 2010 which included some conditions that were technically unattainable and other conditions that were not considered in, or were vastly changed from, the proposal. After various challenges this rule was reconsidered in 2013, but is now under legal challenges from environmental groups. Another example is the MSHA Pattern of Violations Rule. Safety is our number one value at Titan America. This rule, which was implemented this spring, goes too far in removing due process and could close a business without an opportunity to contest the allegations. At the present time, when an MSHA citation is issued, the company is required to implement the MSHA officer's corrective action before the company can protest the citation. Under the HR 2122 legislation there will be greater opportunities to consider input from the regulated community to make for more achievable and rational regulations.

We believe it is important for a regulation to be justified by aspects directly related to the regulatory statute for the regulation in question. However, co-benefits for aspects that are not attributable to a given regulatory statute are often used as justification. We have experienced this in the Portland Cement NESHAP where a limit for hydrochloric acid, which was previously determined to be less than health-based standards, is now justified because of the co-reduction of sulfur dioxide, which is regulated under other statutes. There are cases where cement plants have naturally low sulfur dioxide emissions and there is little if any co-benefit for meeting an arbitrarily low, and costly, hydrochloric acid limit. If there is a benefit for reducing sulfur dioxide emissions, then it should be addressed under the statutes for that emission, not by an expensive backdoor approach. This legislation will require that regulations be justified by their

own direct benefits and that proper rulemaking be followed if there is justification for co-benefits.

Greater input from the regulated community earlier in the process through advanced notice of proposed rulemaking and hearings during the proposed rule stage will provide the regulators with greater understanding of how the proposed regulation may impact businesses, what alternatives may be applicable, and what obstacles may prevent effective implementation of regulations. Often inconsistencies between regulations, or sometimes just lack of common sense, create complications for business without creating any additional benefit or protection intended by the regulation. One example is a cement kiln using tires as an alternative fuel, which has many positive environmental benefits. If a tire is from a state collection program, it is a legitimate fuel, but the exact same tire from a tire dump or landfill is solid waste, triggering a completely different set of regulations. Another example is DOT's Hours of Service regulation which is intended to provide adequate rest for commercial "over the road" drivers who spend considerable time behind the wheel, but it now also applies to local delivery drivers, which includes delivering ready mix concrete for construction, Our delivery professionals will drive an average of 15 to 30 miles for each delivery and in a normal day spend less than 40% of their time behind the wheel Due to the nature of construction work and delays caused by scheduling, weather and traffic, which were not considered in the making of this rule, the result is vastly increased record keeping and a limitation on the hours worked and thus the wages of many ready mix concrete drivers.

Finally, this legislation addresses the propensity of agencies to issue guidance in lieu of formal rules with the effect being that regulators at the regional and state levels often accord this guidance with the weight of a regulation. We have seen this in draft guidance for determining jurisdictional waters, implementing air quality standards, and interpreting standards for guarding on machinery. This legislation would assure that guidance be treated as guidance and rules go through proper rulemaking.

In closing, I would like to say that we understand the need for, and the protections and benefits provided by, regulations. What we are asking for is a balanced and common-sense approach that provides for justifiable, achievable and cost-effective regulations. We believe that this will result in greater certainty for business, increase investment in American manufacturing, construction and infrastructure, and create jobs as we face the challenges before us.

Thank you for this opportunity to testify. I also want to thank each of you for your service in the United States Congress representing the citizens of your district and our great nation. I would be happy to address any questions you may have.

Mr. BACHUS. Thank you.
Mr. Rosen?

TESTIMONY OF JEFFREY A. ROSEN, PARTNER, KIRKLAND & ELLIS LLP

Mr. ROSEN. Chairman Bachus, Ranking Member Cohen, Chairman Goodlatte, and other distinguished Members of the Subcommittee, thank you for inviting me here today to address the Regulatory Accountability Act, which represents an important set of well-considered improvements to administrative law and regulatory practice.

My name is Jeff Rosen. I am currently a partner at the law firm of Kirkland & Ellis. And as you heard, I previously served as general counsel at the U.S. Department of Transportation, and as general counsel and senior policy advisor at the White House Office of Management and Budget.

The views and observations I am offering today, however, are entirely my own, based on my own experiences in and out of government.

So let me say first, the regulatory process is one that is not always well understood, but it often produces results that produce strong reactions. Some rules are sensible and beneficial. Others are not.

We need to remember that regulation affects not only businesses but also municipalities, hospitals, universities, farmers, airports, and others, including individuals.

Now, when the Administrative Procedure Act was enacted in 1946, it was meant to restrict some excesses and arbitrariness. And in many ways, the APA has worked well. But over time, agencies have been able to promulgate more and more costly regulations with seemingly few real inhibitions or meaningful restrictions on their doing so.

The Code of Federal Regulations is now 238 volumes and nearly 175,000 pages. That troubles people who agree with Winston Churchill's warning back in 1949 that "if you make 10,000 regulations, you destroy all respect for the law."

And even individual Federal rules can be hugely consequential to our economy.

For example, in 2011, EPA proposed and then postponed a new rule regarding ozone. The agency itself had estimated the rule could have added cost of as much as $90 billion per year, even though there are States like California that have not even complied with the existing ozone rule.

Consider this, Federal agencies by rulemaking can issue new laws involving costs of more than $1 billion with only 30 days' public notice and only one chance for public comment with no hearing, no rebuttals of comments submitted by others, and no other debate or dialogue of any kind.

Last December, the GAO even reported that during a 7-year time period in which it reviewed rules from 52 Federal agencies, the agencies did not even provide advanced public notice or allow any public comment for approximately one-third of major rules that involved more than $100 million each.

That is probably not the best way for things to work, especially when the stakes to our economy our highest.

Sometimes, the existing process works fine. But for significant rules, we need more opportunities for public input, more assurances of the accuracy of the information being relied upon, more basis to know the rules don't impose more costs than is necessary or worthwhile, and some strengthening of the checks and balances on regulations that are already in place.

The Regulatory Accountability Act addresses these issues with about a half-dozen really key improvements, which are described in my written statement. These involve the use of advanced notices for significant rules, requiring cost-benefit analysis by all agencies using guidelines set by OMB, applying the Information Quality Act to rulemaking, allowing focused hearings for rules involving more than $1 billion of impacts, giving OMB additional authority over agency guidance documents, and strengthening judicial review in some circumstances.

These build on existing law and practice, including requirements of executive orders from Presidents of both parties over the last 30 years, and the improvements are well-grounded in actual experience and in common sense.

It is also a virtue of this bill that it has bipartisan sponsors both in the House and in the Senate.

With respect, I will say there are always some who will oppose any change to the Administrative Procedure Act, just as there were some who opposed the APA itself in 1946.

But the Regulatory Accountability Act represents a very useful step forward. It deserves to move ahead in this Congress.

So thank you for the opportunity to appear here today. And I will look forward to addressing any questions you may have.

[The prepared statement of Mr. Rosen follows:]*

*See Appendix for supplemental material submitted by this witness.

Prepared Statement of Jeffrey A. Rosen
Senior Litigation Partner and Regulatory Lawyer
Kirkland & Ellis LLP, Washington, D.C.

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.[1]

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

[1] 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."[2] 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.[3] 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."[4] 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."[5] Indeed, Justice Jackson warned that additional "[e]xperience may reveal defects" in the APA.[6] 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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2 41 A.B.A. Rep. 355, 368-69 (1916).

3 *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.").

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

5 *Id.* at 40-41.

6 *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."[7] As one commentator observed, those orders "mandated a whole host of procedures to be implemented when agencies proposed issuing 'major' rules."[8] 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.[9]

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."[10] It also requires agencies to be mindful of "redundant, inconsistent, or overlapping" burdens.[11] 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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[7] 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)).

[8] *Id.*

[9] 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).

[10] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[11] *Id.* at 3822.

that should generally be at least 60 days."[12] Obviously, nothing in the APA requires agencies to use the internet, which was not even invented until decades after the APA was enacted.[13]

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.[14]

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"[15] — 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 ...."[16] 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."[17] 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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12 *Id.* at 3821-22.

13 *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.").

14 *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 ("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.").

15 Exec. Order 13563 §1(a), 76 Fed. Reg. 3821.

16 *Id.* at 3823.

17 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.[18]

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"[19] 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.[20] 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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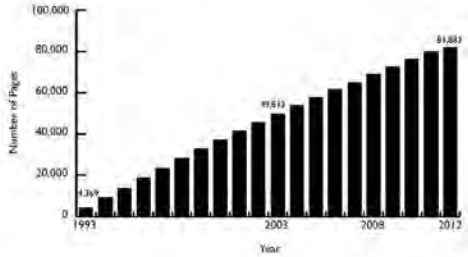
[18] *See, e.g., Public Citizen, Inc. v. Mineta*, 340 F.3d 39 (2d Cir. 2003) (striking down agency action as arbitrary and capricious where agency had consulted with OMB, though the agency had declined to follow most of the OMB suggestions).

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

[20] 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*[21]



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.[22]

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[23] — an amount that equals approximately $15,000 per family.[24] 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.[25] If one combines these regulatory costs with conventional government spending, the federal government in effect now controls 34.4% of GDP.[26]

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21 Crews, *supra* note 20 at 17.

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

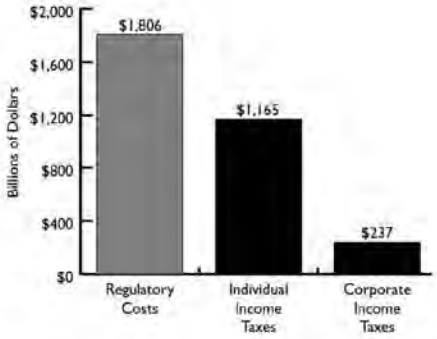
23 Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, report prepared for the Small Business Administration, Office of Advocacy September 2010, *available at* http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf,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

24 Crews, *supra* note 20 at 2.

25 *Id.* at 6, 11.

26 *Id.* at 10.

Figure 2: Regulatory Costs v. Taxes[27]



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.[28] 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.[29] 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.[30] 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."[31] 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

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27 *Id.* at 9.

28 Crain and Crain, *supra* note 23 at 8.

29 Obama, *supra* note 13.

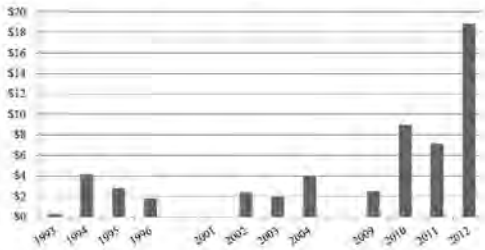
30 Susan Dudley & Melinda Warren, *Growth in Regulators' Budget Slowed by Fiscal Stalemate: An Analysis of the U.S. Budget for Fiscal Years 2012 and 2013* Regulators' Budget Report 34, published jointly by the Regulatory Studies Center at George Washington University and the Weidenbaum Center at Washington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

31 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; *see also* Susan E. Dudley, *OMB's Reported Benefits of Regulation: Too Good To Be True?*, Regulation, 26-30 (2013).

administrations.[32] 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.[33] 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[34]



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.[35]

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.

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32 *Id.*

33 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.

34 Dudley, *Costs of the New Regulations*, *supra* note 31.

35 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.

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.[36] 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.[37] The RAA also has bipartisan sponsors in the Senate, and was endorsed previously by

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[36] 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)

[37] 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.[38] It likewise received strong support from groups representing a very wide cross-section of our economy.[39] 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,[40] 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.[41] The RAA, like the executive orders, also requires that agencies consider the costs and benefits of *not* regulating at the federal level.[42] 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."[43]

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.[44] 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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38 *See* Letter from Alan Charles Raul, *et al.*, to House Judiciary Committee (Nov. 2, 2011) (attached as Exhibit C).

39 *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.

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

41 H.R. 2122, § 3(f)(3).

42 *Id.* at § 3(b)(5).

43 *Id.* at § 3(k).

44 *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.[45] 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.[46] 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.[47] For rules with at least $1 billion in economic impact, focused public hearings are required.[48] 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."[49] Agencies must also make public "all data, studies, models, and other evidence or information considered or used by the agency."[50] The RAA also recognizes that government does not have a monopoly on

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[45] Obama, *supra* note 13.
[46] Executive Order 13563, 76 Fed. Reg. at 3821-22
[47] H.R. 2122 at §3(c).
[48] *Id.* at § 3(e).
[49] *Id.* at § 3(f)(2).
[50] *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."[51] 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.[52] 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,[53] and again before adopting any final rules, in order "to facilitate compliance with applicable rule making requirements."[54] 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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[51] *Id.* at § 3(e)(1).

[52] *See* "Formal Rulemaking and Judical 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).

[53] *Id.* at § 3(d)(1).

[54] *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.

* * *

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.

Mr. BACHUS. Thank you.

Dr. Hall, you are recognized.

TESTIMONY OF KEITH HALL, MERCATUS CENTER AT GEORGE MASON UNIVERSITY

Mr. HALL. Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Bachus, Subcommittee Ranking Member Cohen, and Members of the Committee, thank you for the chance to discuss regulations and the current state of the U.S. labor market. I appreciate the opportunity to testify today.

It has now been a full 4 years since the end of the great recession. Unfortunately, the U.S. labor market is far from recovery. At the end of the recession, just 59.4 percent of working age Americans had employment. Today that number is even lower at 58.7 percent.

Over 100 million people are now jobless, and there are about 4.5 million long-term unemployed, and there are likely millions more long-term jobless that are not being counted.

We may well be looking at a decade before the labor market is fully recovered. Even then, many of the long-term jobless may never fully recover their lost earnings or even find employment. Our primary focus should be on encouraging the economic growth that we need to push our labor market into full recovery mode.

The biggest problem with the U.S. labor market is a lack of economic growth. According to our biggest job creators, small-business owners, government is playing a role in holding back the economy.

Remarkably, surveys of small-business owners show they are more worried about the government than the weak economy.

For example, according to the Gallup-Wells Fargo Small Business Index, a third of respondents reported that their most important challenge is government regulation, taxes, health care/Obamacare, or just government generally, more than are concerned about attracting new customers or the economy generally.

According to the National Federation of Independent Business, nearly half of all small-business owners cite either taxes or government regulation as their biggest single problem. According to both surveys, only 6 percent of owners are primarily worried about the quality of their employees.

The most important thing we can do now is to eliminate the tremendous amount of uncertainty over economic policy that is holding back consumers and the economy.

One serious concern of business seems to be the potential for new regulations. It is clear that poorly designed regulation can cause significant economic distortions that affect labor market. It is also true that even a well-designed regulation where there are significant benefits has an economic cost that needs to be considered.

Any regulation that raises the cost of production for an industry lowers productivity and likely creates unemployment.

Unemployment at anytime is costly for those involved. But in a bad labor market like today's, it can be devastating.

For decades now, there has been a significant amount of economic evidence that unemployment results in a significant and sustained earnings loss for individuals. The immediate impact of job loss includes lost wages, job search costs, and retraining costs.

Even after being reemployed, the permanent lost earnings for the jobless will be significant.

Studies have shown it can take as long as 20 years for reemployed workers to catch up on lost earnings, largely due to skill mismatches between the jobs lost and the new jobs created in the economy.

These losses occur for workers with different lengths of previous job tenure and all major industries, and for workers of any age.

I anticipate that the poor performance of the labor market over the past 4 years will lead to an even greater earnings loss for the currently unemployed.

At this time, we should also be particularly concerned with who bears the unemployment burden of regulatory changes. Youth and older workers have been particularly hard-hit by the recession and weak economic recovery.

Youth have a higher unemployment rate, and despite their youth, are overrepresented in the long-term unemployed.

For older workers, unemployment can be even costlier. It now takes an average of over 30 weeks for someone over 55 years old to find new work.

Despite clear evidence of the devastating effects of unemployment on U.S. workers, it is routine practice for regulatory agencies to estimate the benefits and costs of regulatory changes under what economists generally refer to as the full unemployment assumption.

This is literally the view that involuntary unemployment never exists because any individuals that become unemployed are instantly and costlessly reemployed in nearly identical jobs. If ever it was obvious that this is an inappropriate assumption, it is now in the aftermath of the great recession. This of course results in a systematic and significant underestimation of the cost of regulatory change.

I have several recommendations for consideration.

First, regulatory changes create unemployment, and unemployment in a bad labor market is much costlier than at other times. We should, therefore, consider suspending all but the most important regulatory changes until we are much further along into a labor market recovery.

Second, I don't know of a single instance where a regulatory agency estimated that unemployment cost of a regulatory change. This practice is misleading to the public and to Congress. It should stop. Every new and significant regulatory change proposal should be accompanied by an economic impact analysis that includes a genuine attempt to project its unemployment costs.

Third, when regulatory agencies estimate the cost of unemployment, they shouldn't limit themselves to the employment effect within the regulated industry. The unemployment created by regulatory changes can be much higher outside the regulated industry than inside.

Fourth, we should stop discussing hiring created by regulations as if that is part of the economic benefit. It is not. It is part of the cost. Every compliance job lowers productivity and output in the regulated industry. It therefore comes at the expense of production

jobs. The goal of any regulation should be to achieve its goals with the least use of additional resources, including labor resources.

And fifth, since agencies make no effort to estimate the unemployment effect of regulations, they have no idea of who loses work and, therefore, of who is bearing the economic burden through job loss.

Since regulation impacts industries unevenly, there may sometimes be real issues about its distribution effects, exactly what occupations are impacted, and where the jobs are currently located.

Thank you.

[The prepared statement of Mr. Hall follows:]

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TESTIMONY

REGULATION, GROWTH, AND LABOR MARKET RECOVERY

BY KEITH HALL

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

Hearing on the "Regulatory Accountability Act of 2013"

July 9, 2013

Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Bachus, Subcommittee Ranking Member Cohen, and members of the committee, thank you for the chance to discuss regulation and the current state of the US labor market. I appreciate the opportunity to testify today.

INTRODUCTION

It has now been a full four years since the end of the Great Recession. Unfortunately, the US labor market is far from recovery. At the end of the recession, just 59.4 percent of working age Americans had employment. Today that number is even lower, at 58.7 percent. Over 100 million people are now jobless and there are about four and a half million long-term unemployed. There are likely millions more long-term jobless that are not being counted. We are looking at a decade before the labor market is close to fully recovered. Many of the long-term jobless will never fully recover their lost earnings. Our primary focus should be on encouraging the economic growth that we need to push our labor market into full recovery mode.

The biggest problem with the US labor is a lack of economic growth. And according to our biggest job creators, small business owners, government is playing a big role in holding back the economy. Remarkably, surveys of small business owners show they are more worried about government than the weak economy. For example, according to the Gallup/Wells Fargo Small Business Index, a third of respondents reported that their most important challenge is government regulation, taxes, healthcare/Obamacare, or just government generally—more than are concerned about attracting new customers or the economy generally.[1] According to the National Federation of

1. "Small Business Survey Topline," Gallup, Wells Fargo, Quarter 2, 2013, https://wellsfargobusinessinsights.com/File/Index/y1o9AemryEuwEcD31jekgA.

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The ideas presented in this document do not represent official positions of the Mercatus Center at George Mason University.

Independent Business, nearly half of all small business owners cite either taxes or government regulation as their biggest single problem.[2] According to both surveys, only six percent of owners are primarily worried the quality of their employees.

So the answer to our labor market problems right now is doing what we can to eliminate the tremendous amount of uncertainty over economic policy that is holding back consumers and the economy. One important thing that we need to realize is that regulation has a cost. Poorly designed regulation can cause significant economic distortions that affect labor markets. Even a well-designed regulation where there are significant benefits has an economic cost that needs to be considered. For example, any regulation that raises the cost of production for an industry lowers productivity and likely creates unemployment. Unemployment any time is costly for those involved, but in a bad labor market like today's it can be devastating. At this time we should also be particularly concerned with who bears the unemployment burden of regulatory changes. Youth and older workers have been particularly hard hit by the recession and weak recovery. Youth have a higher unemployment rate and are overrepresented in the long-term unemployed, while it takes on average over 30 weeks for someone over 55 years old to find new work. The disparate impact of the recession on demographic groups is a matter of concern.

THE EMPLOYMENT COST OF REGULATION

Regulation has a cost. Economic studies have made it clear that ill-designed regulation can cause significant economic distortions that damage investment and entrepreneurship, reduce competition, lower productivity and economic growth, and raise unemployment. Even well-designed regulation that addresses a significant market failure, such as the existence of externalities, incomplete markets, information asymmetries, or public goods, has a cost. This fundamental economic principal has been acknowledged in presidential executive orders for decades now. In particular, Executive Order 12866 in 1993 and Order 13563 in 2011 direct US regulatory agencies to follow some basic principles that include:

1. Identify the problem that a regulation intends to address (e.g., identify the market failure) and state regulatory objectives
2. Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs
3. Tailor regulations to impose the least burden on society, consistent with regulatory objectives
4. Maximize net benefits (benefits minus costs), taking into account distributive impacts and equity

An important part of tbe cost of regulation is its effect on labor markets. Botb of the above referenced executive orders explicitly mention employment effects. Most recently, the Office of Management and Budget made this very clear when they stated that "job creation is an important consideration in regulatory review" in their Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities.[3]

The employment impact of a regulatory change that raises the cost of production in an industry is basic economics. Higher production costs from a regulatory change lower productivity in the regulated industry. This raises market prices, and the higher prices lower demand. Lower production means lower demand for labor, and production workers become unemployed. Production is lowered by more if substitute products exist, particularly if they are imported goods and services. If additional labor is hired as a result of compliance efforts, this raises the economic

2. "Small Business Economic Trends," National Federation of Independent Businesses, June 2013, http://www.nfib.com/research-foundation/surveys/small-business-economic-trends.
3. Office of Management and Budget, *Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC, April 2013), http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

cost of the regulation as labor is pulled from other uses in the economy. There is no reason to believe that any of the production workers in the industry that become unemployed will be rehired into compliance occupations. In summary, within the regulated industry:

1. Productivity is reduced as more resources are used to produce less output. Some of these resources may be labor resources.

2. Industry prices rise and production is lowered in the industry.

3. Unemployment is created as employment of production workers declines.

In addition to the direct effects in the regulated industry, there will be indirect effects on other industries and on consumers. If the regulated product is purchased by other industries, then their costs rise, prices will rise, demand for their products will fall, and there will be an increase in unemployment. If consumers purchase the regulated product, then their buying power declines and there will be a loss of employment as consumers buy less. Although the price increases can be small in percentage terms, the potential employment effect can be quite large. For example, the EPA estimated that a proposed Toxics Rule would raise electricity prices by nearly four percent, and this would raise costs of production in at least 19 downstream industries. Though the reduction in consumption could be very small in percentage terms in most industries, the employment in those industries is so high that the job loss could be significant. In fact, by my calculation, for every one production job lost in the electrical generation industry by this regulatory change, an additional eleven workers in other industries could become unemployed. Several points about the employment cost of regulation are worth making:

1. Unemployment is created. The economic cost of that unemployment is not trivial, especially with a bad labor market.

2. While there may be increased demand for occupations needed in compliance, this is not a benefit to the economy but part of the cost, as these resources are unavailable for producing other goods and services.

3. Compliance hiring comes at the expense of production workers in other occupations. There is therefore a redistributive effect of regulation that places a burden on particular workers in particular occupations.

4. There may be long-run impacts of regulation on overall economic growth, job growth, and even the long-run unemployment rate. Economic studies comparing countries with different regulation levels make this clear. Because these macroeconomic and dynamic effects are impossible to project for individual regulatory changes, we run the risk of a "death by a thousand cuts" if we do not at least occasionally look at regulation levels and try to assess their cumulative effects.

THE COST OF UNEMPLOYMENT

For years now there has been a significant amount of economic evidence that unemployment is very costly and results in significant and sustained earnings losses for individuals. The immediate impact of job loss includes lost wages, job search costs, and retraining costs (sometimes with taxpayer assistance). Even after being reemployed, the permanent lost earnings for the jobless will likely be significant. Studies have shown that it can take as long as 20 years for reemployed workers to catch up on lost earnings, largely due to skill mismatches between the jobs lost and the new jobs created in the economy. These losses occur for workers with different lengths of previous job tenure, in all major industries, and for workers of any age. One recent estimate using data between 1974 and 2008 found that permanent earning losses range from 1.4 years of earnings in good times to 2.8 years during times

of high unemployment.[4] I anticipate that the poor performance of the labor market since 2008 will lead to an even greater earnings loss for the currently unemployed. Even beyond these direct effects, there is evidence of future job instability, increased earnings volatility, and a reduction in life expectancy for unemployed workers. There are even negative impacts on family outcomes such as the educational and future labor market performance of children and bad spillover effects on communities that experience significant unemployment.

Despite this clear evidence of the horrible effects of unemployment on US workers, it is routine practice for regulatory agencies to estimate the benefits and costs of regulatory changes under what economists generally refer to as the "full employment" assumption. This is literally the view that there is no unemployment either before or after a regulatory change. In other words, this is the assumption that any individuals that become unemployed are instantly and costlessly reemployed in nearly identical jobs. This, of course, results in a systematic and significant underestimation of the cost of regulatory changes.

CURRENT STATE OF THE US LABOR MARKET

It has now been four years since the end of the Great Recession. However, these four years have not been kind to millions of American workers. In the immediate aftermath of the recession, just 59.4 percent of us had employment. Now, that number is even lower—58.7 percent. Over 100 million people are now jobless. At 200,000 jobs per month, the labor market is growing but leaving millions of long-term jobless behind. At this rate, it could take a decade for the labor market to fully recover. Our biggest economic concern should be encouraging enough economic growth to push the labor market into a full recovery.

Joblessness is costly, particularly for high-tenure workers who have invested time and resources in job-specific knowledge and skills. Studies consistently show that the longer someone is unemployed, the less likely they are to find new work. They may have lost job skills over time, have less connection with informal job networks, and may face potential employers more reluctant to hire the long-term jobless. And because those with job skills in shortest supply will be reemployed first, the ranks of the long-term jobless may accumulate those that worked in permanently declining industries and those that have job skills that don't translate well to new employers or industries.

There are currently about 4.5 million long-term unemployed in the Unites States. Two-thirds of these people have been jobless for over a year and might be classified as "very long-term unemployed." Large as these numbers are, they dramatically underestimate the long-term jobless problem. Millions of people, after struggling unsuccessfully to find work, have stopped looking altogether. This disengagement from the labor force has driven down the unemployment rate without reducing joblessness. To be counted as "long-term unemployed" (as opposed to "long-term jobless"), an individual needs to have no work whatsoever for six months, be nearly instantly available if offered work, and be actively looking for work. By actively looking, he or she must send out a resume, interview for a job, engage an employment agency, or engage in some other sort of activity that, by itself, could result in employment. Checking for new job openings on the Internet or in the newspaper alone does not qualify as active job search.

This sets a high bar for someone to remain unemployed for long enough to be considered long-term unemployed. In 2007, the average unemployed person who eventually exited the labor force looked unsuccessfully for work for just under 9 weeks. In 2011, this had risen to over 21 weeks. That means the average person that left the labor force did so before being even classified as long-term unemployed and almost certainly could eventually be called long-term jobless. Millions of people have dropped from the labor force over the past five years who perhaps should still be counted as long-term unemployed.

The impact of long-term joblessness has not been even. Youth have been particularly hard hit by the recession and slow recovery. They are less likely to be in the labor force, more likely to be unemployed, and despite their

4. Steven J. Davis and Till M. von Wachter, "Recessions and the Cost of Job Loss" (NBER Working Paper No. 17638, National Bureau of Economic Research, Cambridge, MA, 2011).

Figure 1: Share of Unemployed Accounted for by Long-Term Unemployment

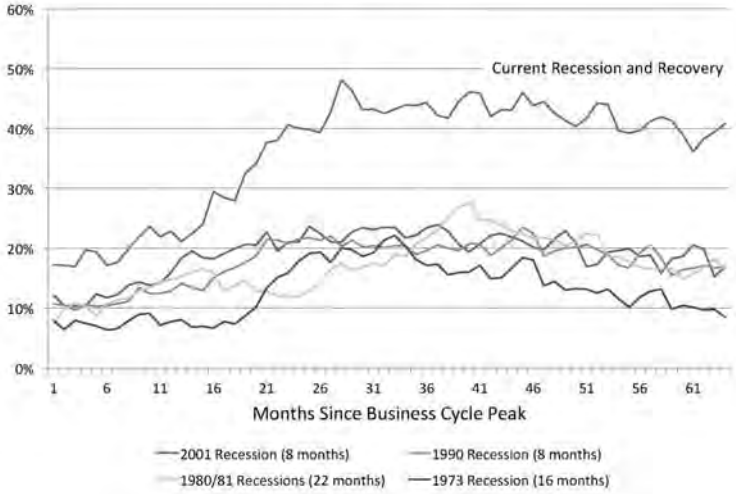


Figure 2: Share of Long-Term Unemployed by Age

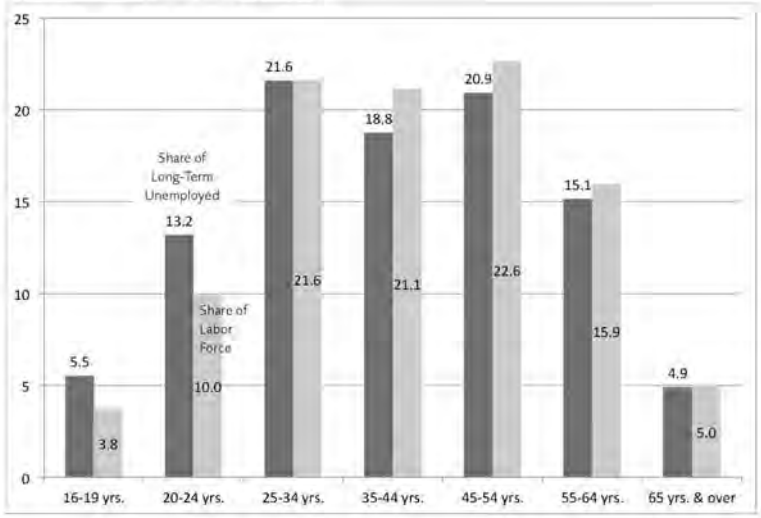


Figure 3: Median Number of Weeks Unemployed by Age

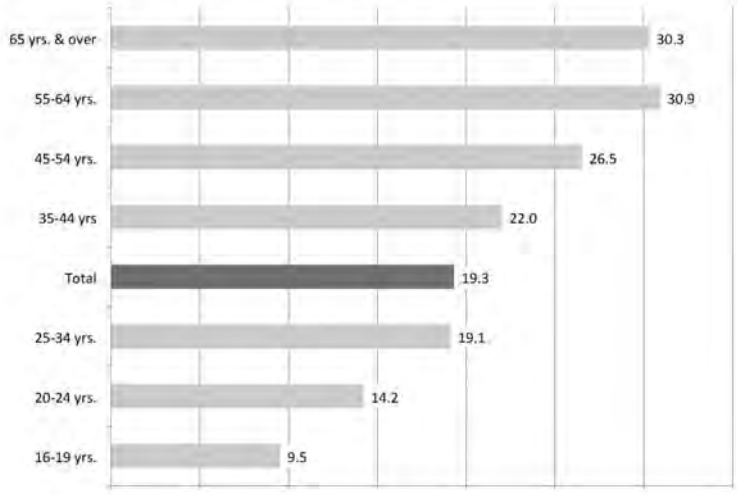
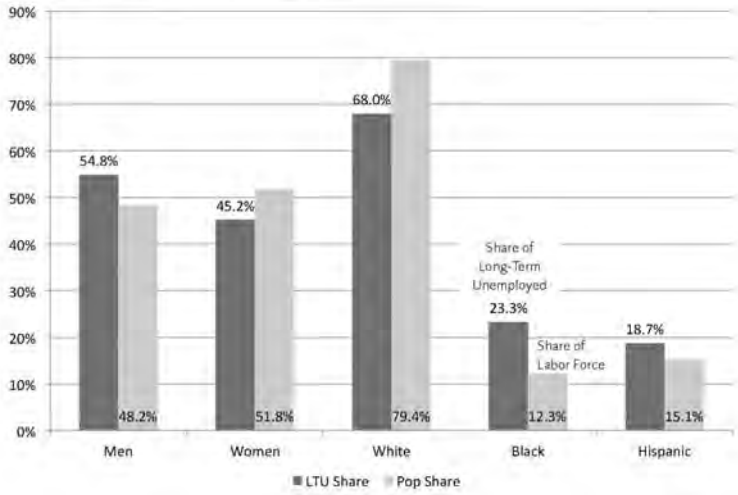


Figure 4: Share of Long-Term Unemployed by Select Group



age, more likely to be long-term unemployed. Less than half (46 percent) have employment. Their unemployment rate, at 16.1 percent, is over twice the national average. Those age 20 to 24 years old make up 13.2 percent of the long-term unemployed but just 10.0 percent of the labor force. This problem of high youth unemployment is not necessarily an indication of anything lacking in education or skills. In a sense, youth are taking a double hit from this recession. First, when employers cut jobs, they do what they can to let attrition reduce employment levels and don't generally layoff more than they need to. This leaves fewer open positions for new graduates attempting to enter the labor force. As a result, youth unemployment rises by more than for older cohorts. Second, experienced workers have been much less likely to be able to shift jobs as they normally do to advance in their careers. Older workers have even delayed retirement as their wealth has taken a big hit from the recession. This slowdown in advancement may continue to severely impact younger workers for years. According to the Bureau of Labor Statistics, two-thirds of new jobs are replacement jobs. This means that even when younger workers find jobs, many will likely remain behind in their careers and suffer from years or even decades of lower earnings growth as they have fewer opportunities for advancement.

Older workers have also been particularly affected by the slow recovery. Not only have many had their retirement delayed because of lost wealth from the financial market collapse, but once an older worker becomes unemployed, he or she is more likely to remain unemployed. In fact, they are the only age group more likely to become long-term unemployed once losing a job. The median number of weeks unemployed nationally has surged since the start of the recession. It rose from 8.5 weeks in 2007 to well over 20 weeks—over double the previous record. It remained at 19.3 weeks last year. For workers over 55 years old, the median time unemployed is a remarkable 30 weeks.

There are other groups that have also been particularly hard hit. The lower the educational attainment, the higher the unemployment rate and the lower the labor force participation. Today, only 39.6 percent of those without a high school degree have employment. African Americans are more likely to be unemployed and much more likely to be long-term unemployed. Their unemployment rate is 13.2 percent, well above the national average, and they represent 23.3 percent of the long-term unemployed but only 11.9 percent of the labor force. Similarly, Hispanics have a higher unemployment rate (9.0 percent) and represent 18.7 percent of the long-term unemployed but just 15.7 percent of the labor force.

Thank you for your time, and I look forward to your questions.

ABOUT THE AUTHOR

Keith Hall is a senior research fellow at the Mercatus Center at George Mason University. From 2008 until 2012 he served as the thirteenth Commissioner of the Bureau of Labor Statistics. In this role, he headed the principal fact-finding agency in the Federal Government in the broad field of labor economics and statistics. The BLS is an independent national statistical agency that collects, processes, analyzes, and disseminates essential statistical data to the American public, the US Congress, other Federal agencies, State and local governments, business, and labor.

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Mr. BACHUS. Thank you.
Dr. Thomas?

TESTIMONY OF DIANA THOMAS, DEPARTMENT OF ECONOMICS AND FINANCE, HUNTSMAN SCHOOL OF BUSINESS

Ms. THOMAS. Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Bachus, and Subcommittee Ranking Member Cohen, and Members of the Committee, thank you for the chance to testify on the effects of regulation on low-income households today. I appreciate the opportunity to be here.

My research shows that regulation has unintended consequences that are particularly detrimental to low-income households. These unintended consequences are as follows.

Regulation of health and safety and the environment often represents the preferences of high-income households, but it increases prices and lowers wages for all households. As a result, low-income households are forced to pay for the mitigation of risks that are not their priorities.

In this sense, regulations can have a regressive effect. Because of this regressive effect, it should be subject to a cost-benefit test that takes into consideration potential regressive effects.

So let me explain that in a little bit more detail. According to the CDC, the top two causes of death in the United States are cancer and heart disease. And we spend billions of dollars every year to try to privately mitigate those risks. In doing so, we have some effect at least on the risk that we face.

Just to give you a point of reference, in 2002, the mortality risk associated with heart disease was roughly 19 in 10,000 of population, so 19 individuals out of 10,000 died from heart disease.

Regulation, on the other hand, often addresses risks that are significantly lower. There are numerous OSHA rules that address occupational safety, but work-related fatalities only happen with the frequency of roughly 0.36 in 10,000 of population, so much lower.

When people make private decisions to reduce risks, they start out with the highest risks that affect them the most. That just makes sense. As your income increases, you will also consider lower probability risks. What that means is then ultimately high-income households will already be concerned with low-probability risks, but low-income households are still dealing with high-probability risks that affect them the most.

When regulation is directed at small probability risks that are costly to mitigate, it, therefore, represents the preferences of the wealthy. But it applies to everybody, regardless of income. So that means everybody has to pay the higher prices.

Because low-income households have limited resources, that means that regulation forces them to transfer resources from mitigating high-probability, high-priority risks to the mitigation of low-priority, low-probability risks.

Essentially, they have less money to spend on the mitigation of risk that actually matters to them because they are forced to pay for the priorities of higher income households.

Take, for example, the 2005 removal of the essential use designation for CFC as a propellant in medical inhalers by the FDA. CFC is a greenhouse gas, and it was regulated because of its con-

sequences on the ozone layer. Medical inhalers that use CFC had previously been exempted from the 1987 Montreal Protocol, which phased out ozone-depleting substances, and the Montreal Protocol was actually pretty successful at achieving its goal. The World Meteorological Organization estimated in 2002 that the ozone layer is expected to return to pre-1980 levels by the middle of the 21st century.

Now that same research report also pointed out that additional reduction in CFC emissions would produce only small improvements, and that nonindustrial sources of CFC emissions were insignificant.

So basically, what the WMO research indicated was that the benefits of banning CFCs as a propellant in medical inhalers were uncertain and at best negligible. The cost of the ban to consumers were real and significant, however. The price of the asthma inhalers, for example, have roughly tripled since this rule has been implemented. And that affects several million Americans. And low-income households, in particular, as you can imagine, are affected by this a lot.

So when regulation is directed at small risks that are expensive to mitigate, it can have regressive effects on household income. And low-income households have fewer resources on hand to address their private high-priority concerns a result of that.

This unintended consequence of regulation is real, but it is foreseeable, which is why it is important for agencies who are tasked with public welfare to consider the regressive effects of the regulations that they are considering, and to analyze the cost and benefit before they make decisions that affect people.

Thank you very much for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Ms. Thomas follows:]

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TESTIMONY

THE EFFECTS OF REGULATION ON LOW-INCOME HOUSEHOLDS

BY DIANA THOMAS

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

Hearing on the "Regulatory Accountability Act of 2013"

July 9, 2013

Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Bachus, Subcommittee Ranking Member Cohen, and members of the committee, thank you for the chance to discuss the regressive effects of regulation on low-income households. I appreciate the opportunity to testify today.

In the following, I will argue that regulation has unintended consequences that are particularly detrimental to low-income households. Because of these unintended consequences, at a minimum all regulation should be subjected to a cost-benefit test that considers potential regressive effects.

More specifically, I will make the following three points:

1. Regulation of health, safety, and the environment often represents the preferences of high-income households but increases prices and reduces wages for all households.

2. Low-income households cannot spend as much on the private mitigation of risks that are of greater severity and probability than some regulated risks because they are forced to pay for regulation that represents the preferences of high-income households.

3. Because regulation often represents the preferences of high-income households and reduces the disposable income of low-income households, regulation has a regressive effect.

We spend billions of dollars every year to reduce life-threatening risks that arise from everyday activities such auto travel, air travel, diet, drugs, construction, and many other potential perils of modern life. We do this privately through our dietary, exercise, housing, and transportation choices. We do it publicly through regulation. Both private risk mitigation and public risk mitigation through regulation seek to lower health, safety, and mortality risks. Regulation often addresses low probability risks, while many of the risks we manage privately are significantly larger. For example, people make private decisions determining their diets and exercise routines, which have significant effects on their private risks of heart disease or cancer. Heart disease and cancer were the top two causes

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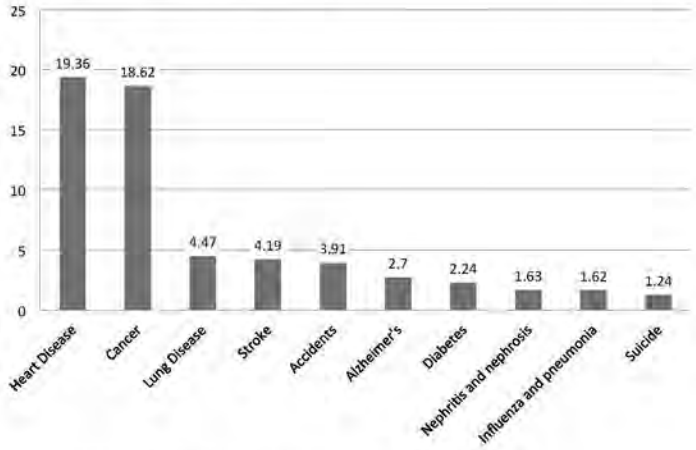
of mortality in 2010, with 19.36 in 10,000 people dying from heart disease and 18.62 in 10,000 people dying from cancer. Individuals determine how safe of a car to buy, whether to install smoke detectors in their home, or the type of neighborhood in which to live, which all affect various injury and accident risks. Accidents were the 5th leading cause of death in the United States in 2010, with a mortality risk of 3.9 in 10,000 of population. Regulation, on the other hand, often addresses risks that are much less probable. Work-related fatalities, for example, happen with an annual frequency of 0.36 in 10,000,[1] but there are innumerable OSHA rules that address occupational safety.

Chart 1 lists the major causes of death from various activities and events and their annual fatality rate per 10,000 people for 2009.[2] Overall, Americans faced about an 80 in 10,000 chance of dying in 2010. The major causes of death were heart disease (19.36 in 10,000), cancer (18.62 in 10,000), lung disease (4.47 in 10,000), stroke (4.19 in 10,000), accidents (3.91 in 10,000), and Alzheimer's (2.7 in 10,000). Among the accidents or unintentional causes of death, motor-vehicle accidents lead (1.14 deaths in 10,000 of population). Following motor-vehicle fatalities are poisoning, at 1 death per 10,000, and falls, at 0.8 deaths per 10,000. Many of these risks, including heart disease, cancer, and accidents, are the result primarily of private choices and expenditures (diet, transportation choices, etc.).

Figure 1: Annual Death Rate per 10,000 population



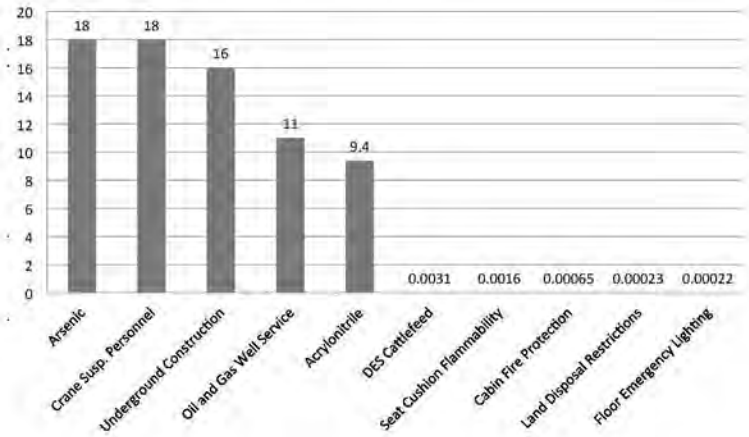
Source: Murphy et al. (2013), Deaths: Final Data for 2010, National Vital Statistical Reports 61, no. 4, Table B, p. 58.

In comparison, the initial death rates for risks mitigated by regulation are much lower than risks individuals face from activities they personally control. As mentioned above, work-related fatalities, which are often the target of regulation, happen with an annual frequency of only 0.36 in 10,000 people. Some types of occupational health and safety regulation seem to target greater probability risks: regulation of occupational arsenic exposure, for example, mitigates an initial annual risk of death of 18 in 10,000.[3] This risk applies only to the exposed popula-

1. United States Census, 2010.
2. K. M. Murphy and R. H. Topel, "The Value of Health and Longevity," *Journal of Political Economy* 114, no. 5 (2006): 871–904.
3. J. F. Morrall, "Savings Lives: A Review of the Record" (Office of Management and Budget Working Paper 03-6, Washington, DC, 2003).

tion, however; the risk to the general population is much lower and is due primarily to arsenic in drinking water. Two examples of regulation that target even lower initial annual risks are floor emergency lighting on airplanes and regulations regarding seat-cushion flammability. Chart 2 lists the top and the bottom five types of regulation in order of associated initial annual risk of death.[4]

Figure 2: Annual Death Rate per 10,000 of Exposed Population



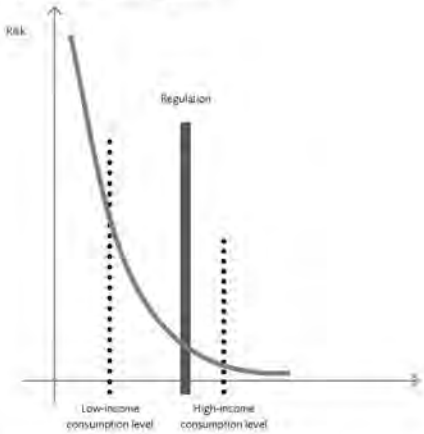
Empirical evidence suggests that people spend additional income in ways that lower their private mortality risk. With increasing income, individuals will spend greater amounts of money to mitigate risks privately. Wealthier households, therefore, spend more money on health and safety, while low-income households spend less. In addition, the marginal benefit of increasing expenditures on health and safety has to be decreasing, as households address high-probability, high-severity risks first (taking costs of risk mitigation into account), before addressing lower-probability and lower-severity risks, for which the benefit of risk reduction to the households is lower. This suggests that low-income households will focus on the mitigation of high-probability, high-severity risks that deliver the greatest reduction in risk per dollar spent. They are less likely to pay to reduce small-probability risks with higher costs per unit of risk because their budgets are limited. Higher-income households, on the other hand, have sufficient resources to eliminate lower-level risks that are more expensive to mitigate. Graph 1 illustrates these different risk mitigation preferences.

Public risk reduction through regulation often involves the mitigation of low-probability risks that are more costly to mitigate. It therefore represents the preferences of the wealthy. For example, many states require childcare providers to install child-size lavatories and outdoor playground equipment. In addition, strict child-staff ratios limit the size of childcare groups. While such requirements may lead to slight improvements in childcare quality, they do not seem to have a significant effect on long-term childcare outcomes. They do significantly drive up the price of childcare services, however, which has particularly negative consequences for low-income households. For example, for a family with less than $1,500 monthly income, the cost of childcare makes up 30 percent of the family budget. The same cost of childcare represents only 7 percent of the budget of a family with a monthly income of $4,500 or more.[5]

4. Ibid.

5. "Low Income and Impoverished Families Pay More Disproportionately for Child Care," Carsey Institute. Policy Brief 16 (2010): 2.

Figure 3: Private Risk Mitigation



When higher prices do not preclude consumption, public risk-reduction strategies crowd out private risk-mitigation strategies of low-income households. This is the case when there are no cheap substitutes for regulated goods and poor households have no choice but to pay the higher price. As regulatory agencies address smaller and smaller risks, they drive up the prices of many consumer goods. Consequently, households have to spend more on consumables than they otherwise would have. This expenditure on public risk mitigation crowds out private risk mitigation expenditure, which can address larger risks that are particular to the individual consumer. Low-income households will remain exposed to relatively high-probability, high-severity risks that they cannot afford to mitigate privately, because they are forced to pay for the mitigation of low-probability, low-severity risks through regulation.

Take for example the 2005 removal of the essential-use designation for ozone-depleting substances (ODS) by the FDA.[6] This rule banned the use of ozone-depleting chlorofluorocarbons (CFC) as propellants in medical inhalers, which had previously been exempted from the 1987 Montreal protocol rules which were intended to limit ODS emissions. The Montreal protocol was overall successful in reducing ODS emissions and the World Meteorological Organization estimated in a research report published in 2002 that the Ozone layer was expected to return to pre-1980 levels by the middle of the 21st century. The same research report also indicated that additional reductions in ODS emissions would produce only "small improvements."[7] It furthermore concluded that nonindustrial sources of ODS emissions were "insignificant."[8] The FDA did not estimate the benefits of its 2005 removal of the essential-use designation. While the benefits of this removal of the essential-use designation for medical inhalers are uncertain and at best negligible, the cost of the rule for consumers of medical inhalers were certain and significant. The average price of asthma inhalers, which are used by several million Americans, has tripled since the implementation of the ban.[9]

6. See Federal Register 70 (63), 17168, http://www.fda.gov/OHRMS/DOCKETS/98fr/05-6599.pdf.
7. Ibid., 17180 as well as National Oceanic and Atmospheric Administration, "Executive Summary - Scientific Assessment of Ozone Depletion: 2002," 5, http://www.esrl.noaa.gov/csd/assessments/ozone/2002/ExecSum02.pdf.
8. Ibid., 1.
9. Laurie Tarkan, "Rough Transition to New Asthma Inhalers," *New York Times*, May 13 2008, http://www.nytimes.com/2008/05/13/health/13asth.html?_r=0.

In this sense, regulation of health and safety risks, particularly regulation of small risks that are expensive to mitigate, can have a regressive effect on household income. By driving up the prices of the goods and services people consume and by lowering wages, such regulation forces low-income households to contribute financially to the mitigation of risks they would not choose to mitigate privately. This implies that low-income households are essentially subsidizing the risk-reduction preferences of the wealthy. Put differently, regulation has a regressive effect: it redistributes wealth from lower-income households to higher-income households by forcing lower-income households to pay for risk reduction efforts that are worth more to the wealthy.

Consider the example of the recently delayed rearview camera mandate. In December of 2010, the National Highway Traffic Safety Administration (NHTSA) proposed a mandate requiring all automakers to put rearview cameras in all passenger vehicles by 2014. Currently, such features can be found only in luxury models or as a part of an upgrade package, suggesting that the demand for them is limited to higher-income households. The expected benefit of this particular regulation would have been a reduction in the number of fatalities resulting from drivers backing up and hitting pedestrians. Approximately 228 individuals die annually in such accidents (44 percent are under age five). This particular regulation was expected to reduce the number of fatalities to between 133 and 116 individuals per year.[10] This would have been equivalent to a reduction in the risk of being a victim of a backover accident from 1 in every 200,000 children under age five to roughly 1 in every 400,000 children under age five. For the overall number of fatalities without consideration of age, it would have represented a reduction in the risk of being a victim of a backover accident from currently roughly 1 in every 1.5 million people to 1 in every 3 million people. In comparison, the mortality risk associated with pregnancy is roughly 1 in every 300,000. The risk of being in a backover accident is much smaller.

While such accidents are certainly terrible, it is questionable whether efforts to mitigate them through regulation are socially desirable. As long as the unintended consequences of rules like this one cause greater harm than the rules themselves avoid, it seems reasonable to refrain from intervening. In the example of rearview cameras, the cost per life saved would have be roughly $24 million.[11] The NHTSA estimates the total cost of the measure for the auto industry at roughly $2.7 billion, or $200 per vehicle. These costs would have been passed on to consumers,[12] and low-income households would have had the least resources to absorb and manage them. The decision by the DOT to delay this mandate provides an opportunity to mitigate or avoid foreseeable but unintended regressive effects.

In my study, I estimate the costs and benefits of 36 different kinds of regulation per household to illustrate how costly regulation actually is. I compare these costs of regulation to the cost of privately mitigating mortality risk by moving to a higher-income neighborhood (Table 1 summarizes the results of my study). Many low-income households could significantly reduce the probability of several injury and mortality risks they are exposed to by moving to a slightly higher-income neighborhood. They are often unable to do so for financial reasons, however.

The rough estimation of the benefits of these 36 different kinds of regulation suggests that they result in a total reduction in the risk of a fatality of 0.18 in 10,000 of population. The total cost of the 36 regulation is approximately $604 per household. Together, these numbers translate to a cost of $3,359 for a 1 in 10,000 reduction in mortality through regulation. Privately reducing risks by moving to a higher-income neighborhood,[13] by comparison, would result in a reduction of adult mortality risk of roughly 8.3 in 10,000 of population and a reduction of 1 in 10,000 of pediatric injury risk at a total cost of $6,000 per household. Together, these numbers translate into a cost of $645.16 for a 1 in 10,000 of population reduction in mortality risk. It is immediately obvious that the private risk-mitigation strategy of moving is much more cost-effective than public risk mitigation through regulation.

10. US Department of Transportation, *Rearview Mirrors; Federal Motor Vehicle Safety Standard, Low-Speed Vehicle Phase-In Reporting Requirements*. Federal Register, 75 (234), 76186-76250. Washington DC.

11. This is roughly four times the value that DOT uses to calculate the average benefit on ex ante lives saved, $5.8 million.

12. Ibid.

13. The data used in this study control for individual level characteristics and therefore give us an indication of how much an individual's mortality and injury risks could be reduced by moving to a different neighborhood without changing any of their private choices.

In summary, regulation often represents the preferences of high-income households. All households, whether poor or wealthy, pay for regulation through higher prices and lower wages, however. Having to pay for small risk reductions through regulation may prevent low-income households from taking more beneficial, private risk-reduction strategies that would result in a greater reduction in mortality. Regulation therefore often has a regressive effect on the income of poor households.

The best way to avoid forcing low-income households to pay for the preferences of high-income households is to allow them to make their own choices when it comes to the mitigation of risks they experience. Unintended consequences of regulation, like the regressive effect identified here, will often result in greater harm than the harm the regulation seeks to avoid in the first place. Regulators should heed the medical ethics maxim "first, do no harm" and at a minimum subject all regulation to a cost-benefit test that considers potential regressive effects.

Table 1: Cost and Benefits of Regulation vs. Private Risk Reduction

		Risk Reduction (per 10,000 population)	Cost per household per year	Cost for a 1 in 10,000 reduction in mortality risk
Private Risk Reduction Regulation (36 measures reported in Morrall [2003])	Moving from a largely low-income neighborhood to a neighborhood with fewer low-income households	1 from severe pediatric injury; 8.3 for adult mortality	$6,000.00	$645.16
	Low-income household if cost borne is proportional to income	0.18 for exposed population	$319.01	$1,772.28
	High-income household if cost borne is proportional to income	0.18 for exposed population	$1,664.18	$9,245.44
	If cost is distributed equally among all households	0.18 for exposed population	$604.62	$3,359.00

Note: The cost for a 1 in 10,000 reduction in mortality risk is calculated as cost per household per year divided by the risk reduction per 10,000 people. For example, for the private risk-reduction strategy, I divide $6,000 by 9.3 (reduction in pediatric injury plus reduction in adult mortality).

Source: Author's calculations and Morall (2003), Keeney (1997), Durkin, et al. (1994), and Cubbin, LeClere, and Smith (2000)

I thank you again for inviting me here today and would be happy to take any questions.

ABOUT THE AUTHOR

Diana Thomas is an assistant professor of economics at the Jon Huntsman School of Business at Utah State University. She received a diploma in business administration from Fachhochschule Aachen and a BS in finance from George Mason University. She received a PhD in economics from George Mason University in 2009. Her primary fields of research are in the areas of public choice, development economics, and Austrian Economics.

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Mr. BACHUS. Thank you.
Mr. Goldston?

TESTIMONY OF DAVID GOLDSTON, DIRECTOR OF GOVERNMENT AFFAIRS, NATURAL RESOURCES DEFENSE COUNCIL

Mr. GOLDSTON. Thank you, Mr. Chairman, Mr. Cohen, Chairman Goodlatte, and Members of the Committee. Thank you for inviting me to testify today.

NRDC believes H.R. 2122 is a fundamentally flawed bill.

Though designated the Regulatory Accountability Act, the measure might be better named the "regulatory atrophy act" because its primary effect would be to prevent the government from exercising its responsibility and duty to protect the public.

The title is also misleading because it implies that the current system lacks checks and balances when, in reality, Congress and the courts already have ample authority to hold agencies to account, and the entire system gives industry and others numerous opportunities, formal and informal, to influence the development of regulations.

But the bill is not designed to codify an objective sense of accountability in any event. There is nothing in the bill that would enable anyone to take an agency to task if it failed to recognize a problem or to safeguard the public. No provision of the bill would make an agency more likely to, say, deal with shoddy lending practices that could cause an economic meltdown or prevent an outbreak of a foodborne illness or limit emissions of a pollutant.

H.R. 2122 instead would make it much more difficult and time-consuming to address such problems.

Indeed, the bill is a kind of anthology of bad ideas that have already proven to interfere with efforts to protect the public.

For example, H.R. 2122 would require agencies to hold formal hearings on many proposals. Formal hearings are a procedure that fell into disuse years ago because experience showed that they ate up huge quantities of time without contributing much to the quality of regulations. But apparently, the potential for inordinate delay is a good enough reason to bring hearings back with a vengeance in H.R. 2122.

Even more pernicious is the reasonable sounding requirement that agencies "adopt the least costly rule" to deal with the problem. Now, no one objects to the notion that safeguards should achieve their goals as inexpensively as possible, and there are plenty of existing incentives, administrative and political, to do just that.

But the bill's language sets up a nearly impossible legal hurdle. For a rule to be upheld, the agency would have to prove that it had carried out an exhaustive analysis of virtually any and every alternative, including any alternative thrown in its way to sidetrack the process.

We don't have to guess what the impact of this would be, because similar language has already made a dead-letter of key provisions of TSCA, the Toxic Substances Control Act. A court ruled that EPA could not ban asbestos, a material with cancer-causing properties that are beyond dispute, because it could not prove that it had analyzed every alternative.

It is ironic, if unsurprising, that some conservatives are embracing alternatives analysis in H.R. 2122 given that, at the same time, they are trying to remove the much simpler and more reasonable alternatives analysis from NEPA, and there will be a hearing before the Subcommittee on that on Thursday.

But that is just more evidence that the alternatives provision in H.R. 2122 are expected to be hurdles to block progress rather than pathways to facilitate reaching a goal.

There are other ironies in H.R. 2122. Conservatives often make a whipping boy of the Federal courts, but the bill requires the courts to take on a more activist role, substituting their judgment for the agency's, even on highly technical and scientific matters.

And the bill claims to seek transparency, requiring agencies to make public virtually anything they have touched during the regulatory process, yet H.R. 2122 shields the involvement of the Office of Information and Regulatory Affairs, OIRA, from scrutiny, even while expanding its role and enshrining it in law.

Under the bill, OIRA will likely play the most political and determinative part in the entire regulatory process, yet its guidelines are not subject to comment and its workings can remain private.

All of this would be inexplicitly inconsistent if its overall purpose were not so abundantly clear, to block new safeguards with an ornate process and to slow anything that cannot be stopped entirely.

This is not accountability, not an effort to ensure that agencies are effectively and efficiently carrying out their legal duties. Rather, this is an effort to amend and weaken existing law, and future statutes to boot, by overlaying a suffocating blanket of anti-regulatory bias.

The result will be fewer needed safeguards despite public support for protection, and study after study showing that the benefits of regulation far outweigh the cost.

Moreover, studies have found regulation to have a neutral to positive impact on employment.

Time prevents me from describing all the problematic provisions of H.R. 2122, which I should say include overriding many existing statutes, including provisions of the Clean Air Act.

But let me close by saying that it is appropriate to hold a hearing during the summer movie season. H.R. 2122 has a plot a bit like a summer suspense movie or novel, where a pleasant-seeming character insinuates his way into a household and slowly but surely begins annihilating it.

H.R. 2122 traffics in reasonable concepts and unthreatening language, but its cumulative effects on regulatory law will leave agencies hamstrung and the public exposed.

Thank you.

[The prepared statement of Mr. Goldston follows:]

David Goldston
Director of Government Affairs
Natural Resources Defense Council

Testimony
House Judiciary Subcommittee
on Regulatory Reform, Commercial and Antitrust Law

July 9, 2013

Mr. Chairman, Mr. Cohen and Members of the Committee,

Thank you for inviting me to testify today on H.R. 2122.

NRDC believes H.R. 2122 is a fundamentally flawed bill. Though designated the "Regulatory Accountability Act (RAA)," the measure might be better named the "Regulatory Atrophy Act" because its primary effect would be to prevent the government from exercising its responsibility and duty to protect the public. The title is also misleading because it implies that the current system lacks checks and balances when, in reality, Congress and the courts already have ample authority to hold agencies to account, and the entire system gives industry and others numerous opportunities, formal and informal, to influence the development of regulations.

But the bill is not designed to codify an objective sense of "accountability," in any event. There is nothing in the bill that would enable anyone to take an agency to task if it failed to recognize a problem or to safeguard the public. No provision of the bill would make an agency more likely to, say, deal with shoddy lending practices that could cause an economic meltdown, or prevent an outbreak of a food-borne illness or limit emissions of a pollutant. H.R. 2122 instead would make it much more difficult and time consuming to address such problems.

Indeed, the bill is a kind of anthology of bad ideas that have already proven to interfere with efforts to protect the public. For example, H.R. 2122 would require agencies to hold formal hearings on many proposals. Formal hearings are a procedure that fell into disuse years ago

because experience showed that they ate up huge quantities of time without contributing much to the quality of regulations. But apparently the potential for inordinate delay is a good enough reason to bring hearings back with a vengeance in H.R. 2122.

Even more pernicious is the reasonable-sounding requirement that agencies "adopt the least costly rule" to deal with a problem. Now, no one objects to the notion that safeguards should achieve their goals as inexpensively as possible, and there are plenty of existing incentives – administrative and political – to do just that. But the bill's language sets up a nearly impossible legal hurdle: for a rule to be upheld, an agency would have to prove that it had carried out an exhaustive analysis of virtually any and every alternative, including any alternative thrown in its way to sidetrack the process.

We don't have to guess what the impact of the bill's language would be because similar wording has already made a dead letter of key provisions of the Toxic Substances Control Act, the law that is supposed to regulate most chemicals. A court ruled that the Environmental Protection Agency (EPA) could not ban asbestos – a material with cancer-causing properties that are beyond dispute – because it could not prove that it had analyzed every alternative.

It's ironic, if unsurprising, that conservatives are embracing alternatives analysis in H.R. 2122, given that at the same time, they are trying to remove the much simpler and more reasonable alternatives analysis from the National Environmental Policy Act. But that's just more evidence that the alternatives provisions in H.R. 2122 are expected to be hurdles to block progress rather than pathways to facilitate reaching a goal.

There are other ironies in H.R. 2122. Conservatives have often made a "whipping boy" of the federal courts, but the bill requires the courts to take on a more activist role, substituting their judgment for the agencies' – even on technical and scientific matters.

And the bill claims to seek transparency – requiring agencies to make public virtually anything they've touched during the regulatory process – but H.R. 2122 shields the involvement of the Office of Information and Regulatory Affairs (OIRA) from scrutiny, even while expanding its role and enshrining it in law. Under the bill, OIRA will likely play the most political and determinative part in the entire regulatory process, yet its guidelines are not subject to comment, and its workings can remain private.

All of this would be inexplicably inconsistent if its overall purpose were not so abundantly clear – to block new safeguards with an ornate process and to slow anything that cannot be stopped entirely. This is not "accountability" – not an effort to ensure that agencies are effectively and efficiently carrying out their legal duties. Rather, this is an effort to amend and weaken existing law and future statutes to boot, by overlaying a suffocating blanket of anti-regulatory bias. The result will be fewer needed safeguards despite public support for protection and study after study showing that the benefits of regulation have far outweighed the costs. Moreover, studies have found regulation to have a neutral to positive impact on employment.

Time prevents me from describing all the problematic provisions of H.R. 2122. But let me close by saying that it's appropriate to hold this hearing during the summer movie season. H.R. 2122 has a plot a bit like a summer suspense movie or novel, where a pleasant-seeming character insinuates his way into a household and slowly but surely begins annihilating it. H.R. 2122 traffics in reasonable concepts and unthreatening language, but its cumulative effects on regulatory law will leave agencies hamstrung and the public exposed.

Mr. BACHUS. Thank you.

Professor Levin, I want to apologize to you. I was reading your bio, but I think I called you "Levine."

Mr. LEVIN. Levin is correct.

Mr. BACHUS. I know it is Levin, so I want to apologize. It is Ron Levin. I am reading your biography like I don't know who you are.

Mr. LEVIN. No offense taken.

Mr. BACHUS. I apologize for that.

TESTIMONY OF RONALD M. LEVIN, WILLIAM R. ORTHWEIN, DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY IN ST. LOUIS

Mr. LEVIN. Chairman Goodlatte, Chairman Bachus, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me to testify before you again.

My primary message today is one of caution. The bill before you has some positive features, but it also contains a host of provisions that would burden and disrupt the rulemaking process, or that do not seem very well thought out.

The corresponding bill in the previous Congress, H.R. 3010, raced through the House in only 3 months from introduction to final passage. And the House did not respond to numerous criticisms from administrative lawyers. So I hope the current bill will get closer vetting this time around.

I do not have time to discuss all aspects of the bill, but I want to commend to your attention the comments of the ABA Administrative Law Section, which did analyze H.R. 3010 in detail 2 years ago. I have appended that report to my testimony. I am not speaking for the ABA or the section today, but I did work actively on those comments. So if you questions about the issues the section raised, I would probably be in a good position to respond as an individual.

For now, I want to highlight a few key troubling areas in the bill. My core concern about the bill is that it would greatly complicate the rulemaking process and make it impossible for agencies to carry out the missions that Congress has assigned to them.

Many students of the administrative process believe that rulemaking is already too cumbersome. I believe that 2 weeks ago, Public Citizen presented a humongous chart* documenting all that. I think you saw it at that time.

That is the chart, in case you don't remember it.

But this bill would make Section 553—it does. But that is the modern rulemaking process.

But this bill would make Section 553 ten times longer and it would aggravate that situation enormously. One way it would do this is by specifying a range of considerations that an agency would have to take into account in every rulemaking proceeding, whether it is significant or not, including costs and benefits of the proposed rule and all reasonable alternative rules; estimated effect of the rule on jobs, innovation, and competitiveness; whether the agency

*The Public Citizen chart referred to is not reprinted in this hearing record but is available at http://www.citizen.org/documents/Regulations-Flowchart.pdf (7/18/13).

thinks it is required to adopt the rule or merely has discretion to adopt it; whether existing rules created the problem; and so forth.

And some of those inquiries would be fine in a proceeding to consider a very elaborate and costly rule. But it is wasteful to require them in every rulemaking proceeding.

Usually, if an issue is relevant and important to a particular rulemaking, some stakeholder will raise the issue in the comment period and the agency will then be required under current law to respond. But this bill requires the agency to address every item on the laundry list, whether it is significant in that case or not. And this is a waste of limited resources, which is especially worrisome in these days of serious budget-cutting.

Second, the bill instructs agencies to consider some of these factors, even where the agency's enabling statute would otherwise forbid it to consider them. Super-mandates of this kind, as they are called, not only oversimplify the enormously diverse range of problems that various agencies regularly face, but also would give rise to a large amount of confusion and litigation. So unelected judges would have to sort out those mixed congressional messages.

Third, for high-cost rules, parties would have the right to trigger trial type hearings under the APA's formal rulemaking provisions. Over 30 years' time, courts, agencies, scholars, and professional organizations have overwhelmingly concluded that formal rulemaking is obsolete, and they have abandoned it where they are not required to use it by statute.

They conclude the courtroom methods are usually not effective tools for resolving highly technical policy disputes in regulatory contexts, but they do lead to unwarranted delays in completing the agency's business.

And formal rulemaking is also subject to ex parte contact rules that would impede agency decisionmakers from conducting free-flowing dialogue with the public, with OIRA, and with Congress itself.

But nevertheless, this bill would bring this dinosaur back from near extinction.

Fourth, the bill contains some truly radical provisions expanding judicial review of agency action. These provisions would turn courts into policymakers in various contexts, although judges don't have political accountability or subject matter specialization to assume that role.

In all of these areas and others we might have a chance to discuss today, I hope the Subcommittee will tread carefully and make sure the balance between accountability and effectiveness doesn't become skewed as this bill threatens to do.

And with that, I will conclude my remarks and be happy to respond to your questions.

[The prepared statement of Mr. Levin follows:]*

See Appendix for supplemental material submitted by this witness.

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

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

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

July 9, 2013

Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee, it is a privilege for me to be able to appear before you today to discuss H.R. 2122, the proposed Regulatory Accountability Act of 2013.

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

Overview

The Administrative Procedure Act (APA)[1] is generally regarded as a success story. It provides a framework for a wide variety of agency activities. Although its rulemaking language is brief, the courts, executive authorities, agencies, and the administrative law community have developed an extensive case law and practice norms that, on the whole, work quite effectively. The APA system has enough flexibility to give the executive a reasonable shot at carrying out its constitutional function of implementing congressional mandates. At the same time, it prescribes and coexists with a number of safeguards against executive abuses. These safeguards include judicial review, oversight by Congress and by Executive Branch leadership, and public opinion. Continuity in the APA has been a source of stability in our legal order, yet evolution at a nonstatutory level has allowed for adaptations to meet the changing needs of society.

It is reasonable for Congress to consider whether it can craft legislation that would codify widely accepted developments in the rulemaking process and make that process fairer and more efficient. However, I do not see H.R. 2122 as headed in the right direction. It contains some provisions that could be beneficial or at least innocuous, but they are combined with a host of

[1] 5 U.S.C. § 551 et seq.

features that would be highly burdensome to the rulemaking process, or that are simply not well thought out.

H.R. 2122 is almost identical to the former H.R. 3010, which passed the House of Representatives during the 112th Congress. This 34-page bill, which would have made numerous changes in the APA, sped through the House, from introduction to final passage, in only three months. I was dismayed to see the House rush forward with major legislation that raised so many unanswered concerns. The bill received much less vetting than it deserved. Where the subject matter is a foundational statute that will apply government-wide to agency actions of all kinds, it is important to get the details right. I hope the committee and the House will proceed more deliberatively this time around.

I cannot address all of the bill's complexities in my testimony. I am attaching to this statement the detailed comments that the ABA Administrative Law Section filed regarding H.R. 3010.[2] These comments did provide a point-by-point critique of nearly every provision of that bill, and they merit close attention from your subcommittee. To repeat, I am not speaking for the Section today. However, I did participate actively in the drafting of those comments, and I should be in a good position to respond as an individual to questions that you may have about the issues the Section raised.

In the remainder of this statement, I will highlight a few areas of particular concern about the bill. I am not convinced of the need for an APA revision bill at this time. However, if the subcommittee does decide to proceed with this initiative, I hope to persuade you of the need to pare down the bill to manageable dimensions and to analyze the remaining provisions with greater attention to problem areas than has apparently occurred to date.

Rulemaking Considerations

A core concern about the bill is that it would greatly complicate the rulemaking process and make it difficult for agencies to carry out the missions that Congress has assigned to them. Many students of the administrative law believe that the rulemaking process is already too cumbersome, and the bill would aggravate that situation enormously. One way in which it would do so is by prescribing in § 553(b) a large number of "considerations" that an agency would have to address in *every* rulemaking proceeding (except where an exemption from all rulemaking procedure applies). Among these considerations are: the costs and benefits of the proposed rule *and* of all reasonable alternative rules (including direct, indirect, and cumulative costs and benefits); the estimated impact of the rule on economic growth, jobs, innovation, and

[2] ABA Section of Admin. Law and Reg. Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 Admin. L. Rev. 619 (2012) (hereinafter *ABA Section Comments*). These comments related to H.R. 3010 as introduced, which was similar but not identical to the version later passed by the House.

competitiveness; whether the agency thinks it is *required* to adopt the rule, or only has discretion to adopt it; whether existing rules created the problem and could be fixed; and the list goes on. Subsections 553(d) and 553(f) add to the list by specifying additional matters that the agency must address at the proposal and final rule stages, respectively.

Some of these inquiries would be perfectly appropriate for a very elaborate and costly rule, but it is overkill to apply them to virtually *every* rulemaking proceeding. The proponents of these requirements do not seem to take sufficient account of the fact that agency resources are finite – a particularly glaring problem in these days of budget-cutting. Moreover, the list of required considerations is decidedly onesided. Overwhelmingly, the listed items relate to possible objections to the rule, rather than its potential benefits.

Proponents of the Regulatory Accountability Act have minimized these concerns by arguing that most of the "considerations" that would be prescribed by the bill are already found in presidential executive orders.[3] However, this is a misleading comparison, for reasons explained by the Administrative Law Section in its comments:

> [S]everal of the considerations in § 553(b) appear to be modeled closely on the language of § 1 of Executive Order 12,866, the currently operative order. However, these executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases. Moreover, compliance with the order is not judicially reviewable. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and OIRA, but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them. In contrast, under the bill, an agency's failure to discuss the prescribed matters to the satisfaction of a reviewing court would expose the agency to reversal for procedural error (subject to the court's judgment as to whether the error was prejudicial). The unpredictability of such appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion. The burden on the agencies and the resources demanded, therefore, would far exceed that of the corresponding language of the executive orders.[4]

More specifically, a number of the prescribed considerations would introduce issues that would be of little relevance or no relevance to many or most rulemaking proceedings; nevertheless, a rulemaking agency would routinely have to expend additional resources in order to jump through the extra hoops. For example, I do not see why an agency should regularly be required to address "whether a rulemaking is required by statute . . . or whether the agency has

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[3] *See, e.g., Regulatory Accountability Act of 2011*, H.R. Rep. 112-294, at 22-25 (2011) (hereinafter *2011 House Report*).

[4] *ABA Section Comments* at 634.

discretion."[5] If the agency *wants* to rely on authority that the statute at least permits it to use, I see no functional justification for forcing it to discuss the counterfactual question of whether it could have declined to use that authority if it had desired otherwise.

Similarly, the question of whether "existing rules have created or contributed to the problem" and "could be amended or rescinded"[6] does not belong in across-the-board legislation such as the APA. This issue might be important in a small minority of cases, but it would be a distraction most of the time. For this reason it should be deleted. As the Section explained in its comments, the notice-and-comment system is self-policing. If the question of revising other agency regulations really were important in a particular situation, some stakeholder would be likely to raise it during the comment period; and, under the case law, the agency must respond to all material and significant comments.[7] But one simply cannot say that touching this base in *every* rulemaking proceeding is essential to rational decisionmaking. In short, although a major emphasis in the bill is encouragement of cost-benefit analysis, many of the steps that the bill would add to the rulemaking process are simply not cost-justified.

Supermandates

An additional problem is that some of the factors the agency would be directed to consider may be contrary to a given agency's enabling statute, but the bill says that the agency must consider them nevertheless. For example, the bill requires the agency to conduct a detailed cost-benefit analysis of every proposed rule, "notwithstanding any other provision of law."[8] This "supermandate" would override a great deal of substantive law, including portions of the Clean Air Act, Clean Water Act, Occupational Safety and Health Act, Food and Drug Act, and other protective measures. For example, some health and safety statutes direct an agency to use the "best technology available" and *not* to weigh costs against benefits, but the Act would require the agency that implements those statutes to conduct a cost-benefit analysis anyway.[9] Furthermore, the bill would require an agency, in making its final decision, to choose the "least costly" rule that serves relevant statutory objectives unless a higher cost alternative would serve "interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule."[10]

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[5]H.R. 2122, § 553(b)(1). All citations to bill sections refer to the APA as it would be amended.

[6]*Id.* § 553(b)(4).

[7]*See ABA Section Comments* at 633-34.

[8]H.R. 2122, § 553(b)(6)(A).

[9]*See ABA Section Comments* at 639-40.

[10]H.R. 2122, § 553(f)(3).

These sweeping provisions do not take sufficient account of the complexities of administrative decisionmaking. As the ABA Section wrote in its comments, "[a] government-wide edict such as the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts."[11] Cost-benefit analysis, for example, has inherent limitations, including the difficulty of quantifying certain types of benefits, and the inherently speculative nature of some of the costs. These limitations counsel against trying to extend the domain of such analysis too widely and indiscriminately. Consider, for example, the challenge of applying cost-benefit criteria to decisions regarding antidiscrimination policy, preservation of historical landmarks, children's education, or payment of moral debts to veterans. And, in the context of Social Security or Medicare, is the "least costly" rule a regulation that provides the stingiest possible payments to beneficiaries? I am concerned that the supermandate provisions in the bill would give rise to considerable uncertainty and litigation, potentially enabling the judicial branch to exert an unprecedented and inappropriate degree of control over administrative policymaking.

Formal Rulemaking

I said above that rigorous regulatory analysis requirements can be justified for the most expensive and consequential rules – "major" and "high-impact" rules, in the language of H.R. 2122. Unfortunately, the bill would go much further. It would subject virtually all high-impact rulemaking, and much major rulemaking, to the burdensome requirements of "formal rulemaking" under sections 556 and 557 of the APA.[12] This is a serious mistake.

I will briefly summarize the analysis that is set forth in detail in the Section comments.[13] As that report explained, courts, administrative agencies of both Democratic and Republican administrations, and the academic community have overwhelmingly supported the abandonment of this technique during the past thirty years, except where statutorily required. Indeed, ACUS has called for all existing formal rulemaking mandates to be repealed, and Congress has indeed repealed some of them and stopped enacting others. The committee's report on H.R. 3010 acknowledged the breadth of this repudiation,[14] but it did not draw what I would have thought was the obvious implication of this track record – that there have been solid reasons for this abandonment.

One of those reasons, administrative law authorities widely agree, is that trial-type hearings are not well designed to resolve the issues in rulemaking, especially the issues in a

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[11] *ABA Section Comments* at 640

[12] H.R. 2122, §§ 553(e) [introductory paragraph], 553(e)(6).

[13] *ABA Section Comments* at 650-54.

[14] *2011 House Report* at 34-36.

complex proceeding involving health or safety regulation. Typically, those issues turn less on witness demeanor than on whether the substance stands up to rigorous analysis. Exchanges of documents over time, in a notice and comment proceeding, is the most effective way to iron out these disputes. After all, the end product will not be a jury verdict; it will be a lengthy, dry document published in the Federal Register. Very little will turn on whether there was a "Perry Mason moment" at a live hearing. There simply is no literature indicating that the notice and comment process will not allow full development of the issues.

On the other hand, the resource costs of rulemaking increase dramatically when a trial type hearing is required. That conclusion is supported by studies conducted during the era when formal rulemaking was common. In any event, it should be self-evident that preparing for a trial is much more time-consuming than participating in a notice and comment proceeding. The classic illustration of this problem is the infamous peanut butter rulemaking proceeding, in which the Food and Drug Administration spent nine years (not counting two years for judicial review) on hearings to decide whether peanut butter should be required to have 87 or 90 percent peanuts.[15]

Against this background, I cannot see why revival of this discredited procedure should be pursued. To my knowledge, neither the committee nor other proponents of the proposed § 556(e) have pointed to a body of regulatory decisions reached during the past three decades that supposedly were not made wisely or adequately because trial-type techniques were unavailable. That very telling gap in the arguments in favor of formal rulemaking brings to mind the pointed words of one of the great administrative law jurists of the mid-twentieth century, Judge Harold Leventhal. Rejecting an argument that notice-and-comment rulemaking was insufficient to illuminate the policy issues raised in a Civil Aeronautics Board proceeding, Judge Leventhal wrote for the en banc D.C. Circuit: "[T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay."[16]

Finally, the APA structure for formal rulemaking would bring along a good deal of procedural rigidity that is incompatible with the way in which the rulemaking process has developed in the modern era. For one thing, formal rulemaking is subject to the ex parte contacts ban in the APA.[17] This means that, in such a proceeding, no interested person outside the agency may communicate ex parte with an agency decisionmaker outside the public record. This prohibition is drastically at odds with the open dialogue that is customary in the rulemaking

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[15]Corn Products Co. v. FDA, 427 F.2d 511 (3d Cir. 1970).

[16]American Airlines, Inc. v. CAB, 359 F.2d 624, 632-33 (D.C. Cir. 1966) (en banc).

[17]5 U.S.C. § 557(d)(1)(A).

process. The ban would apply not only to private persons but also to OIRA. This would be incompatible with the emphasis elsewhere in H.R. 2122 on expanding OIRA oversight. Surely OIRA should not be excluded from consulting with an agency about a rule that would entail a billion dollars in costs to the economy.

For that matter, the prohibition would also apply to Congress itself. I imagine that many members of this House, in both parties, would be unhappy to learn that the bill would make it illegal for a member to call up an agency administrator and express an opinion about the merits of a billion-dollar rule. Yet that is the clear consequence of triggering the formal rulemaking process. This is one more example of a problem that did not get the attention it deserved when H.R. 3010 was passed by the House in 2011.

Judicial Review Provisions

Finally, I am concerned about the judicial review provisions in § 706(b) of H.R. 2122. That section contains several provisions that would alter the scope of judicial review of administrative action. All of them fall well outside the range of doctrines that can find support in the current case law. I would urge caution in this area. The judicial review system that we have now has been decades in the making. It combines principles of judicial restrain with the careful scrutiny that goes by the nickname "hard look review." However, the courts' pronouncements in this area are often confusing, if not self-contradictory, and nuances in the doctrine are difficult to capture in statutory language. If Congress legislates too hastily in this area, the potential for unanticipated consequences is high.[18] I suspect that, indeed, these measures in § 706(b) have not gotten the careful consideration they deserve. Here I will briefly summarize and expand upon the analysis in the Section comments.[19]

First, § 706(b)(1) would, in effect, abolish all judicial deference to agencies' interpretations of their own regulations. It is true that some commentators, whose work was cited in the committee's report on H.R. 3010,[20] have argued that the degree of judicial deference accorded to such interpretations should be *reduced*. However, the bill goes much further, because it says flatly that the court "shall not defer." Many regulations are quite technical, and the relationship between a single regulation and the overall statutory scheme is often hard for a generalist judge to penetrate. I do not think it would be wise (let alone consistent with the case law) to say that when a reviewing court needs to interpret such regulations, it may not give any

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[18] I have recommended legislative restraint on the issue of scope of review for a long time. *See* Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 Wake Forest L. Rev. 647, 665-66 (1996).

[19] *ABA Section Comments* at 667-69 (discussing proposed §§ 706(b)(1)-(2)).

[20] *2011 House Report* at 30-31.

weight to the views of the agency that administers the program.

Second, the bill provides in § 706(b)(2) that "the court shall not defer to" an agency's "determination of the costs and benefits of a rule or economic or risk assessment of the action" if the agency failed to conform to guidelines prescribed by OIRA. This provision is unwise. OIRA's principal guidance document on cost-benefit analysis, called Circular A-4,[21] contains forty-eight pages of abstract, technical prose. It would not be difficult for a reasonably competent private lawyer to find some basis for claiming on appeal that an agency failed to comply with some provision in that document. This controversy would plunge the reviewing court into difficult and complex territory, considerably complicating the judicial review proceeding. But, furthermore, suppose that in a given case the court decides that the agency did not comply. Then the court apparently would be expected to weigh the costs and benefits of the rule on its own – a thoroughly inappropriate role for the judicial branch. As the ABA Section noted:

> Such judicial overrides [of the agency's conclusions] would defeat the purposes of the enabling legislation, because they would effectively mean that the court would make policy judgments that Congress has entrusted to the judgment of an administrative agency (subject to traditional political and judicial oversight). This development would dramatically increase the policymaking power of federal judges who do not have experience in the relevant subject area and have no political accountability to Congress or the public. Moreover, scattered judicial interventions of this kind would inevitably tend to undermine the coherence of major regulatory programs.[22]

Third, § 706(b)(3) states that a court "shall not defer" to an agency's "determinations made in the adoption of an interim rule." This language is, I believe, ambiguous. The drafters might simply mean to say that the court shall make a nondeferential assessment of whether the agency properly invoked the APA exemption that allows the issuance of interim rules without prior notice and comment. If that is what they intended, the provision is superfluous, because, as the Section comments noted, courts already review APA questions independently.[23] However, § 706(b)(3) can also be read as saying that, on a petition to review an interim rule, the court may freely second-guess the merits of the rule itself. In effect, this would turn the court into a super-regulator whenever it reviews a rule that an agency promulgated on an interim basis because of an emergency or other perceived urgency. I cannot discern any plausible justification for such a measure.

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[21]OMB Circular A-4, http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

[22]*ABA Section Comments* at 667-68.

[23]*Id.* at 663.

Finally, § 706(b)(4) would provide that a court "shall not defer" to an agency's "guidance." An important objection to this provision is that some guidance documents, constituting what are commonly called "policy statements," express an agency's discretionary judgments. If a court were to redecide these matters without deference – that is, "de novo" – it would be exercising the agency's discretion. On this issue I cannot improve on the critique of the late Professor Robert Anthony of George Mason University School of Law. Until his recent passing, he was considered the leading scholarly critic of agencies' real or perceived abuses of guidance documents. But even he recognized that a review standard like § 706(b)(4) would be extravagant as applied to policy statements. As he and a coauthor wrote: "De novo review seems to us to be manifestly inappropriate and impractical. It would place the court in the policy-making position of an agency, without the agency's expertise. Especially in a technical area, the court would possess no resources with which to form an independent evaluation of the agency's effort, let alone to form an independent policy of its own devising. Any effort to do so would be unbecoming to the judicial role."[24]

In short, these judicial review provisions in § 706(b) are far removed from modern judicial review practice. They are not supported by any detached assessment of how they would work or why they are needed. I believe they should be deleted from the bill.

Conclusion

I commend the subcommittee for its continued interest in improvement of the administrative process. However, the actual bill that is before you today would, in my judgment, make a number of drastic and untested alterations in a rulemaking process that is stable and actually works fairly well. I would think that legislators who think of themselves as "conservative" should want to resist, or at the very least be cautious about, the radical experimentalism that pervades much of this bill. Because of the APA's government-wide reach, the potential for unanticipated consequences is high. I hope that this testimony has raised some red flags for your consideration, and I would encourage close engagement with the ABA Section comments and other critiques of the bill. An inclusive decisional process is essential if Congress is to produce a revised APA that will be realistic, workable, and durable.

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

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[24]Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 Wake Forest L. Rev. 667, 687-88 (1996). The authors added: "No case has been found in which a court expressly endorsed or applied a de novo standard." *Id.* at 688 n.90.

Mr. BACHUS. Thank you.

At this time, we will recognize Members for their questions. And I will start by recognizing the Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you very much, Mr. Chairman. I appreciate your recognizing me.

And I want to thank all of our witnesses for their testimony. I do have some questions for them.

First of all, again, welcome Mr. Sells. I appreciate your testimony. And I wonder if you would tell us if the terms of the Regulatory Accountability Act were enacted and enforceable by judicial review, do you think that agencies would promulgate more flexible regulations that would make it easier for you and business people like you to grow your businesses and create jobs?

Mr. SELLS. Congressman, that would be a direct result of H.R. 2122.

We feel like common sense and the issues that you bring up there would be beneficial to us in moving forward and making investments, growing our businesses, and growing jobs.

Mr. GOODLATTE. Do you think that the legislation would also produce more efficient and effective regulations, and promote more buy-in and compliance by regulated entities, which would then improve the achievement of the regulatory objectives in the first place?

Mr. SELLS. Yes, sir, they would. One of the things that we believe very openly about is transparency needs to be in all of these aspects.

When you give the business community opportunity to meet with the regulators, meet with environmental groups, and discuss what the issues are, and what the end result, the endgame is that you are trying to achieve, which is the health and well-being of society, the growth of our economy, and employment of American citizens, then you can bring all these things together. And by allowing that information to come forward early in the system, it would allow for better regulations.

Mr. GOODLATTE. Thank you.

Mr. Rosen, doesn't the Regulatory Accountability Act align rulemaking incentives in the right direction by encouraging a race between agencies and stakeholders to see who can propose the lowest-cost alternatives and create the most possible benefits?

Mr. ROSEN. That is right, Mr. Chairman. I would agree with that, Mr. Chairman.

That is one of the big benefits of increasing public participation, is trying to find solutions that accomplish the statutory regulatory objectives, but do so in a way that is more efficient, more effective, and better for everybody.

Mr. GOODLATTE. Thank you.

Mr. Goldston, your central criticism of the Regulatory Accountability Act is that it hampers regulations by "overlaying a suffocating blanket of procedures on agency rulemaking." But isn't that the same as claiming the bill would overregulate the regulators?

I mean, the fact of the matter is, put yourself in Mr. Sells' shoes and figure out what is going on in terms of the operation of his business when confronted with the massive regulations that come

out at him literally every day of every business day of the year that they have to confront and deal with. Shouldn't there be some greater sense brought to that regulatory process than what I would call overkill that is taking place right now?

Mr. GOLDSTON. Thank you, Mr. Chairman.

I would say the issue right now isn't whether there are any possible reforms to the regulatory system, but whether this bill would actually reform the regulatory system. So I would say, in this particular case, this bill is indeed overkill.

First of all, as Professor Levin mentioned——

Mr. GOODLATTE. Well, let's go to your first comment. What are the regulation changes that you could support that would make this environment better?

We are here to learn from you.

Mr. GOLDSTON. Excuse me?

Mr. GOODLATTE. We are here to learn from you. This bill could conceivably be improved, if you could point us in the right direction of how to deal with what many of us perceive to be regulatory overkill in a way that makes more sense to you. I want to hear that.

Mr. GOLDSTON. So I would say we would start by saying that the approach shouldn't be to add as many new requirements as possible, particularly requirements whose only purpose seems to be to drag out——

Mr. GOODLATTE. Are you saying instead we should make it easier to get regulations out the door?

Mr. GOLDSTON. I think in some cases, with the help of both parties——

Mr. GOODLATTE. Let me just throw out a statistic here. In the past 10 years, final rules—in other words, you have completed the regulatory process—with the effect of law from administrative agencies have outnumbered laws passed by the Congress by 223 to 1. For every one law that this Congress passes, the massive Federal bureaucracy puts out 223 regulations.

This Congress is not shy about passing laws either. We usually produce 300 or so new laws each Congress. So you are talking 60,000 new regulations each 2-year cycle.

And we need to make it easier to produce those, so that businesses like Mr. Sells' have to confront more than 60,000 new regulations every 2 years?

Mr. GOLDSTON. Mr. Chairman, all those regulations are promulgated pursuant to Federal statutes enacted by the Congress. The agencies are not willy-nilly doing that.

If Congress doesn't——

Mr. GOODLATTE. That is why we are here today, because we think they have carried that ball way too far, and there needs to be a check on what they are doing to make sure they are more efficient and more effective and more cost-effective and more responsive to the people who have to carry these out and have to adjust their business models and have to cut back on employment when they can't afford to meet the regulations. That is why we are here.

Mr. GOLDSTON. Mr. Chairman, if I may, the way to handle that, if there are problems with the——

Mr. GOODLATTE. We have to pass 60,000 new laws curtailing the 60,000 regulations? I don't think so. I think we have to have a more pragmatic way to do that.

Mr. GOLDSTON. With all due respect, I don't think it requires 60,000 new laws. These are not being done each one by a different law.

If, for example, there are problems with the Clean Air Act in your view, then you should try to pass those changes. In reality, those changes don't tend to be passed through Congress because the public support isn't there to amend the Clean Air Act.

Mr. GOODLATTE. In reality, the Congress has ceded so much authority to the executive branch that it is an absolute impracticability to go through those one law by one law.

If I might, Mr. Chairman, if I could ask one more question of Mr. Levin, then I will not ask for anything more here.

Mr. Cass Sunstein, the former Obama administration OIRA administrator, and perhaps the single most prominent administrative law professor in the country, told the Commercial and Administrative Law Subcommittee in 2010 that the basic principles of the executive orders on rulemaking were important and should be a permanent part of the regulatory system.

Do you disagree with him?

Mr. LEVIN. Actually, I don't. I support the executive orders. What I am concerned about is——

Mr. GOODLATTE. Making them a permanent part of the regulatory system, which is what this legislation is to do.

Mr. LEVIN. With nonreviewability in the courts, as the orders provide, with a balanced list of factors to consider as the executive orders provide, but this bill would not, yes, I think those should remain. But I don't think they should be codified.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

Mr. Cohen, the Ranking Member, is recognized for 6 or 7 minutes.

Mr. COHEN. Thank you, sir. I probably will not take that.

Dr. Thomas, first, I would like to ask you, was your work on German beer, medieval beer, did that relate to regulations?

Ms. THOMAS. Yes, it did.

Mr. COHEN. How did regulations affect German medieval beer?

Ms. THOMAS. Well, most of the time, they regulated the space in which the beer could be sold, so geographically constrained it. And that was hindering to competition.

Mr. COHEN. Which is generally what happens, that legislation is passed that restricted, the regulations to benefit somebody.

But let me ask you, your statement was all about regressivity. The whole world is regressive. You understand that, don't you?

Ms. THOMAS. Yes.

Mr. COHEN. And I don't understand what you are saying, that all this is about high-income people's preferences and what they desire to the detriment of low-income folks, because it is regressive on them, and high-income people have these—it is almost sounds like some kind of socialist-type statement that you are making.

Should the whole world be taken down to the basic minimum quality?

Ms. THOMAS. What I am suggesting is that when regulation addresses low-probability risks, it represents the preferences of the wealthy. And in those cases——

Mr. COHEN. How do you know it represents the preferences of the wealthy?

Ms. THOMAS. Well, like I said in my testimony, households will address the highest probability risks before they address lower probability risks.

So just by the nature of things, low-income households don't have the resources to address low probability.

Mr. COHEN. Right, because they are poor, or lower income.

Ms. THOMAS. That is right.

Mr. COHEN. So let me ask you this, at the Mercatus group that you work with, Mercatus Institute, what have you all done in studies about regressivity in taxes, so that we can see to it that maybe people who are poor don't have to pay more burden of taxes, which is what this allows them, because they don't have that income, because it is a regressive tax system, to have those choices.

Do you have any papers that you all have done on regressive taxes?

Ms. THOMAS. I don't actually work for the Mercatus Center. I work for the university. I am just under contract with the Mercatus Center.

Mr. BACHUS. That is Dr. Hall.

Mr. COHEN. Have you done any work at all on regressive taxes?

Ms. THOMAS. No, I haven't.

Mr. COHEN. You haven't.

Ms. THOMAS. What my work shows is the regressive effects of regulation are to take money from the poor that they would be spending on high-probability risks that they could mitigate privately and reduces their income, essentially.

Mr. COHEN. Mr. Goldston, what do you think about this premise?

Mr. GOLDSTON. Well, a couple things. One, there are ways to address regressivity.

But I would say that, first of all, many of the things that poor people would do to address the high risks, such as stopping smoking, actually don't cost more money. My understanding of some psychological literature is that people don't necessarily start by addressing the higher risks.

But the main point is two things. One, low-income people are often actually the primary beneficiaries of important Federal regulations, such as the Clean Air Act, because low-income people actually often face higher rates of asthma and, therefore, regulations that reduce the chance of asthma attacks actually disproportionately probably benefit lower income people.

Mr. COHEN. And they are more likely to live in the inner city where the pollutants are more likely to occur.

Mr. GOLDSTON. Exactly.

So I question some of the assumptions about regressivity.

And it seems to me that if there are economic consequences to be dealt with, those should be dealt with separately after taking care of these broad health changes that the regulations can provide.

Mr. COHEN. Do you think that maybe a better way to address this problem of regressivity might be to pass a jobs bill and put people to work?

Mr. GOLDSTON. Well, I would agree that, looking at regressivity solely through the lens of regulation is a particularly distorted way to do it, given that there are tax consequences, budget consequences, in terms of regressivity. It would probably swamp anything in regulation, which, again, often benefits low-income people, and where there are other ways to take care of environmental justice issues.

Mr. COHEN. Mr. Sells, are you by chance the swimmer?

Mr. SELLS. Yes, sir.

Mr. COHEN. What do you think about swimming regulations, like regulations to say that you have to put the depth of the pool so you don't dive into a pool and it was 2-feet deep and hit your head? Do you think that is a good regulation?

Mr. SELLS. Yes, it is.

Mr. COHEN. And how about regulations that put fences around, so kids can't get into the swimming pools?

Mr. SELLS. That is a very good thing.

Mr. COHEN. Yes. And maybe the amount of chlorine that goes into the water, so when you are doing your butterfly or whatever it be, that you are safe?

Mr. SELLS. Yes, sir.

Mr. COHEN. So some regulations are good, and it just depends——

Mr. SELLS. Some regulations are good, and the ones you are pointing to are common sense. And that is what we are asking, as far as the business community is concerned, common sense and input from the business community, so that the impacts are appropriate for the business that we are trying to do.

Mr. COHEN. And when you swam at U.T., you beat Alabama swimmers, didn't you?

Mr. SELLS. Yes, sir, I did. We lost on one occasion also.

Mr. COHEN. Did you?

I yield back the balance of my time.

Mr. BACHUS. All right, thank you.

Mr. Holding?

Mr. HOLDING. Thank you, Mr. Chairman.

Mr. Rosen, you and other witnesses have discussed the Regulatory Accountability Act and the transparency provisions there to put businesses on notice what regulations are coming.

So I would like to get a little bit more specificity, so if you would tell us what kind of transparency reforms would be helpful to address the issue of this systemwide lack of transparency throughout the entire regulatory process.

So if you could address that with some specificity rather than just general terms.

Mr. ROSEN. Sure. I alluded in my written statement to the fact that sometimes one of the frustrating aspects of debates about regulation writ large, the regulatory process, is unavailability of some kinds of data. And that is because there isn't full transparency, even though, on the whole, the Federal Government is actually

pretty effective at collecting and publishing data in a lot of areas. But in the area of regulations, we are a little short.

So there are improvements that could be done to make the regulatory process, just in an information sense, more transparent.

You have, by executive order, twice a year OMB publishes a regulatory agenda. But the agenda could be much more robust in terms of what is disclosed in the agenda as to the various rules that have entered the pipeline, where they stand.

It could be more frequent. It could be more detailed in terms of covering more aspects. It could be broken out with greater specificity as to cost levels that are anticipated, the source of the authority, the timetables, and what stage it is at.

It could also, after rules are done, is where the government isn't so good at publishing aggregate data. And there are trade groups and nonprofits and others who try to collect that. But it is a difficult task to get it accurate as to what was done the prior year, how many rules of a different type. And there could be more transparency as to the cost-benefit studies that are done.

I think our academic colleagues in particular could probably profit from that, because the way it works now, the Agriculture Department does a cost-benefit study for a particular rule. It is in the docket for that rule. If the Transportation Department does one, it is in the docket for that rule.

But if you are trying to access the larger mass of how many were done last year and what is the quality of them, it is a fishing expedition. I mean, you have to learn a lot about how to master the various dockets and things.

So it could be made a lot more transparent by providing, in essence, a central repository and linkage to that.

There other kinds of information that aren't very transparent. Each agency has what is called a regulatory policy officer. Those could be identified to the public, as an example, as to who they are, so if you have an issue, you can go to them.

I could probably detail more than I have some of the specificity that you could get both out of the agenda and the annual——

Mr. HOLDING. Well, how about in respect to timing. It is a biannual requirement now. What about if we had monthly updates? You could post them on the Internet and keep a running monthly update.

Mr. ROSEN. That would be a big improvement.

Mr. HOLDING. Do you think it would be burdensome to do a monthly update? Or do you think they do them internally, anyway?

Mr. ROSEN. Exactly. If an agency is working on rules, it has to know it is working on them. Its leadership has to be able to track them. If they are not doing it, I would be surprised, because all the ones I am familiar with were.

But if they are not, it would be a good tool to make them to it.

And so I don't think it would be very burdensome, because it is being done, for the most part, already. It is just not made public, although some agencies do. DOT is a good example. They publish a monthly report. But most don't.

So making that a monthly update to the agenda, putting it on the Internet, a big improvement.

Mr. HOLDING. A final question: Do you think if the Regulatory Accountability Act had been in place since the late 1960's, early 1970's, when our modern regulatory authorities were fully starting to take shape, do you think we would be where we are now with the regulatory cost of $1.75 trillion per annum to comply with regulations?

Mr. ROSEN. I don't, and the reason I say that is I think there are rules out there that are inefficient, ineffective, and overly costly. And many of those would have been caught in a better process, like the Regulatory Accountability Act would establish.

Mr. HOLDING. Thank you.

Mr. Chairman, I yield back.

Mr. BACHUS. Thank you.

Ms. DelBene?

Ms. DELBENE. You are getting closer.

Mr. BACHUS. I have been practicing.

Ms. DELBENE. DelBene.

Mr. BACHUS. DelBene.

Ms. DELBENE. I was born in Alabama, too, so I appreciate it is hard to say. Closer.

Thank you, Mr. Chairman, and thanks to all of you for being here and taking time out of your day to be with us today. I really appreciate it.

Professor Levin, you talked about the additional complications that would come with this bill, and that it would require many rulemaking considerations that may not be relevant in the context of particular rules, and create a very labor-some process that isn't necessary.

So, given that, and that this bill kind of puts that in place, if you are going to set aside this legislation, and if the Subcommittee asked for your input on creating a more efficient regulatory system that provided additional safeguards for small businesses, how would you start? And would you make any changes to the APA? Or would you recommend any changes to the APA?

Mr. LEVIN. Well, on the matter of rulemaking considerations, I would refer you to the passage in the ABA comments, which I think potentially could have bipartisan support.

And what the section recommended was that Congress and the executive branch should get together to harmonize the conflicting mandates and impact analysis requirements and factors in a host of statutes, a host of orders. And agencies have trouble figuring out what they are supposed to do, because they are all going in different directions. If you put them into a common structure, it would make things clearer for agencies.

And what the section recommended was that it should be no more burdensome than we have now, or if possible, less burdensome. But if you harmonize them, you would make it a more efficient structure.

Ms. DELBENE. And when my colleagues are talking about the cost of the regulatory process, your testimony seems to indicate you think that the particular bill would make it even more costly for us to implement the recovery process.

Mr. LEVIN. Oh, absolutely. And in Democratic and Republican administrations alike.

Ms. DELBENE. Thank you.

Mr. Goldston, I guess Dr. Hall was talking about the impact on employment with respect to the regulatory environment. And you made a statement saying that you actually thought that regulations could have a positive impact on employment. I wondered if you would give kind of where that information comes from and what is your point of view compared to Dr. Hall's.

Mr. GOLDSTON. Sure. And what I was saying was that the literature has tended to show very little effect on employment. It could be slightly positive. I am going now, among other things, from a paper put out by the Wharton Center on Regulation, which definitely tries to look at both sides. And it summarizes the four major papers that have been done over the years looking at regulation and employment.

And the primary one that is most cited is Morgenstern, Pizer, and Shih, which is from Resources for the Future, that, again, basically found, looking across several industries, no overall effect on employment with slightly positive effect on a few industries, particularly petrochemicals. And most of the other studies have shown the same kind of minimal effect across the board.

Ms. DELBENE. So neutral is what you are saying the studies would show?

Mr. GOLDSTON. That regulation doesn't have a big effect on overall employment one way or another, and certainly isn't responsible for the recession, or our inability to quickly recover from a recession.

Ms. DELBENE. And in earlier comments, when you were talking about the rulemaking process with respect to implementing legislation that Congress has brought forward, do you feel like Congress could do a better job, in terms of how we provide legislation that would also——

Mr. GOLDSTON. Well, Congress could give more direction, obviously. I just think that these agencies are not acting by fiat. They are acting in response to statutes that direct them to put out regulations to protect the public. And if there are problems with those underlying statutes, then that is what should be addressed and debated. This kind of sweeping bill, which as Professor Levin mentioned, has super-mandates that single-handedly override statutes simply by the short phrase "notwithstanding any other provision of the law," that is not the way to do it.

I would also, if I might, say a comment or response to Mr. Holding's questions. We also would like to see, and this in some ways gets at one thing Chairman Goodlatte was asking about also, we would love to see more transparency in the way OIRA does it work.

That entity has become more and more powerful. It should be more transparent. And yet, OIRA is the one entity not required to be more transparent under this bill. It is able to provide guidelines that courts have to defer to. In the past, OIRA guidelines have been reviewed by the National Academy of Sciences. And the National Academy of Sciences said they should be withdrawn because they weren't properly done. OIRA is just as fallible as any other entity.

And while every other agency has to be transparent under this bill, the bill says OIRA, it is at the discretion of the director. So

a change that maybe we would all agree on is greater transparency for OIRA which this bill stands in the way of, actually.

Ms. DELBENE. Thank you.

Thank you, Mr. Chair.

Mr. BACHUS. We have allowed other people to go over, so if you have another question?

All right, thank you. I think the lady from Washington.

And now our newest Member of the Committee, the gentleman from Missouri, Mr. Jason Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Rosen, I think you would probably be a good one to ask, but back in my district, in fact, EPA has had a rule that was in effect for nearly 40 years that affected dairy farmers. And it required that they were compared under the same act as oil spills, and it would cost roughly some of them $10,000 a year.

Do you believe that if this act was in place, if that rule would never have been on the books?

Mr. ROSEN. If I understand the rule that you are talking about, I think it would have had a negative cost-benefit and that alone would have been a problem for it.

Mr. SMITH. I agree. Earlier, there was also some talk about the rulemaking on the peanut butter situation.

The time-consuming process allegedly demonstrated that formal regulatory hearings for proposed rules would be impractical. Are you familiar with the peanut butter example?

Mr. ROSEN. Yes. And it is one of the great myths that is thrown up as criticism of allowing hearings in rulemaking.

So I am glad you raised that, because the famous FDA peanut butter rulemaking that took 10 years, the part of it that involved a hearing was 30 days. And they did not even have the hearing until 5 years into the rulemaking, actually 6, over 6 years in. And then after they had the hearing, they delayed some more.

And so the problem of delay exists in all rulemaking. It has nothing to do with whether there are hearings or formal rulemaking or hybrid rulemaking. The peanut butter rulemaking actually stands for a different proposition, which is that agencies are often inefficient and slow. I can cite chapter and verse of notice and comment rulemakings that took 7, 10, 12 years.

When I got to the Department of Transportation in 2003, there were a half-dozen rules that were pending more than a dozen years, and none of them had hearings.

So it is a big myth and a distraction. There have been formal rulemakings conducted on the record that were done in roughly a year or just over a year, which is extremely fast for rulemaking.

The Agriculture Department during the Bush years did one on milk marketing orders. The Commerce Department did one extremely fast under the Marine Mammal Protection Act, involving I think they were beluga whales.

So these anecdotes that are used to criticize the bill, they just don't hold up. And when you have $1 billion at stake, the whole idea that you could make a law with no hearing, no notice, nothing, involving $1 billion and 30 days' notice, that is not what was intended when the APA was promulgated.

And so we are talking about a small subset to deal with factual issues where the premise, if it is mistaken, will produce a $1 billion error. It is not very much to ask that if someone has evidence that $1 billion error is about to be made, they get a chance to tell the agency so. That is not a big thing to ask.

Mr. SMITH. Thank you.

Professor, earlier, I believe that I wrote this down right, you said that if the Regulatory Accountability Act passed, that this would be more costly on the agencies. Is that correct?

Mr. LEVIN. Yes.

Mr. SMITH. So, would it be least costly on the small businesses if this were in place?

Mr. LEVIN. Would it lower costs on small businesses?

Mr. SMITH. With less regulations.

Mr. LEVIN. It would not directly affect them, but it would mean that either Republican or Democratic administrations could not get done what they need to do. A Republican administration or any Administration that wants to deregulate small business would have many more hoops to jump through also.

So I think what you are doing is stymieing the administrative process for good or for ill, in whatever direction. You should make the judgment of what your policies are going to be on substantive grounds, but not mess up the process of decision.

Mr. SMITH. So it would cost agencies more money and the small businesses not as much?

Mr. LEVIN. No, I was not testifying to that. I am saying that it would cost the agencies more money and, therefore, reduce their efficiency. And who knows what the effect would be on affected entities, because the effect of the bill would simply slow things down no matter what direction a conservative or liberal Administration wants to go.

Mr. SMITH. It would take longer for more regulations to be put on small businesses and family farmers, correct?

Mr. LEVIN. Yes, as well as regulations that would relieve their burdens.

Mr. SMITH. Thank you, Mr. Chairman. I yield my time.

Mr. BACHUS. Thank you.

There is some discussion, Mr. Goldston, you were talking about discussion of impact on the poor and my take was you were discounting Dr. Thomas' comments, what she described, inhalers, bronchial dilators.

And I think she in her testimony, whether she said this or not, but I do know, because there have been several articles that the new regulations, the effect of their discharge on the ozone. But it did quadruple the cost of most of those dilators.

Is that your understanding, that it tripled or quadrupled the cost?

Mr. GOLDSTON. Mr. Chairman, I would like to get back to you on that on the record, because we do have an expert who actually has written extensively on this issue.

My understanding, which I will double check, is that, first of all, most people have moved away from the ozone-based inhalers that the companies had many years to prepare, and then the concern is

obviously not just the use of the inhaler themselves, but the production, because it keeps CFCs in production and so forth.

But let me get back to you with a more extensive answer, because we do already have material on that that I am not fully familiar with.

Mr. BACHUS. I am aware that oral medications, there have been some substitutes——

Mr. GOLDSTON. As I understand it, they are more effective.

Mr. BACHUS. Or immunization. We have long-term, I guess you would say, a series of immunization.

But still, in several diseases, even degenerative diseases, particularly. And the cost has gone up.

And I do know that the agency did not consider that, that they at least said that was not part of their consideration. Do you think they should have considered that fact?

Mr. GOLDSTON. Again, I would have to look at what was actually done. Again, the industry was given a particularly long period of time in which to phase these out. So in that sense, the agency did take into account. It did not say tomorrow these kinds of inhalers are not available.

Mr. BACHUS. They are still dispensed in the hundreds of thousands every month, I think, and the cost has gone up. I mean, it has to drive up the cost.

Would you say the cost to those who need that medication, and most of them critically, can be the difference between being able to actually breathe or not? Do you think that ought to be considered?

Mr. GOLDSTON. I think the cost to consumers ought to be considered. I think it is.

But again, I would like to get back on the specific—my understanding is that actually a more effective medication was developed over that period for reasons beyond just the CFC concerns.

Mr. BACHUS. Okay.

Mr. GOLDSTON. On the larger issue, though, again, I think there are other ways to deal with regressivity and looking at regressivity just in terms of what is reduced by regulations——

Mr. BACHUS. Sure. I know you talked about smoking. And smoking obviously can result in and I guess aggregate emphysema and aggravate asthma. But people are usually born with asthma. They either have it or they don't.

Mr. GOLDSTON. Rates have been going up for reasons that are not completely understood. We do know what causes more asthma attacks, which includes dirty air.

Mr. BACHUS. Okay. And obviously, the pollution is aggravating source.

I know you are, Mr. Sells, in the concrete business. I was amazed, and again, anyone of you want to comment, when I had the EPA in my office and they were proposing some changes in arsenic levels and precipitants in the air that were indeed something we don't want in our air.

There was a chart that showed that the occureence of arsenic and some of those matters was heaviest on the West Coast and along the Gulf of Mexico, along the Texas border, the Mexico-Texas border, tremendous concentrations there, and along the Gulf Coast.

When I asked in a hearing, what is the source of this matter or material, it was Mexico and China. And yet, the regulation was directed at cement plants all over the country, including those in the East, where there is almost no arsenic in the air, even around the cement plants in my district, which is having to spend millions of dollars.

And I asked, well, what about China and Mexico? They said they couldn't consider it. They don't have any control over China and Mexico.

But they also, in that report, said that they would eliminate as much as a third of the production in the United States, but that it could be easily be replaced from Mexico.

And that is the type of thing that I think frustrates us.

Mr. GOLDSTON. Mr. Chairman, again, I will get back to you in greater deal in detail for the record. But my understanding is, first of all, that the regulations concerning arsenic are maximum achievable control technologies, so that is not concerned with the overall amount in the air, but actually what can be affordably achieved at a given——

Mr. BACHUS. No. Absolutely, let me say this, it absolutely can be achieved. But the cost was so prohibitive that even the EPA said it would shut a third of our production down. I mean, that was a part of their finding.

Mr. GOLDSTON. But my understanding, again, on these rules is actually the EPA concluded that there were not likely to be any plant closures from the rule, that there were some—and that, indeed, the rules have since been weakened to the point which, as Mr. Sells mentioned, some in the environmental community are actually suing, arguing that EPA weakened the rule——

Mr. BACHUS. They are. You are absolutely right. And I can tell you well aware.

But they were weakened as a result of people raising hell and saying, this is going to cost—we are going to lose jobs.

Mr. GOLDSTON. But if the argument is that the current system doesn't allow for any information to be given to an agency, doesn't allow for give-and-take, then whatever the pros and cons of the specific cement rule, it certainly shows a lot of process where there are already abilities for the company to have recourse.

Mr. BACHUS. Actually, the agency, it was only a tremendous outcry by people that said you didn't consider this. They said they couldn't. Only because, I think both President Bush and President Obama people said we can't do that.

Mr. Sells?

Mr. SELLS. If I may, Mr. Chairman, mercury is the big issue. And to your point, EPA's own data indicates that 85 percent of the mercury deposition in the United States comes from offshore sources.

For the cement industry, we have, currently, about 105 cement plants in this country. And over the next 3 or 4 years, with the implementation of the latest NESHAP, approximately 12 to 15 of those facilities will close in this country.

Now, when we were at our peak, our demand for cement in this country and construction at that time was 130 million tons. We only have capacity in this country for 105 million tons.

So in the same period of time, the last decade, where we have permitted three cement plants, which basically replaced most of the capacity in this country, the Chinese have gone from 1 billion tons, metric tons, of cement to 1.8 billion tons of cement.

So there is tremendous increase in what they have done. I always use the analogy that we have the Olympics in Atlanta and the sky was blue, and we didn't close any industries. When we went to China and Beijing, they closed industry within 100 miles, limited traffic, and they still couldn't get the skies clean.

Mr. BACHUS. I will tell you, Mr. Goldston, the Lehigh Cement Plant in Leeds, Alabama, they would have to spend, to comply with the regulations, some of which have been withdrawn on mercury and arsenic——

Mr. GOLDSTON. They really haven't been withdrawn, sir. They have been delayed.

Mr. BACHUS. Been delayed.

It would have cost them—they have made no profits in 4 years. I mean, they have lost money in 4 years. So it was not that they would have to take all their profit. They would have to take all their revenues for 3 years, which was an impossible task.

It is those types of things, when they tell us they can't consider that it will be replaced, it will come from Mexico and China——

Mr. GOLDSTON. Mr. Chairman, obviously, I can't speak to the specific plant that you are referring to. But for the industry as a whole, the industry is highly profitable.

That doesn't mean that costs ought not to be considered as allowed under the law, but I am not sure what the moral is of Mr. Sells' story.

It is true that China has horrible pollution because it doesn't regulate plants. Presumably, the answer to that isn't to create the same situation here.

Mr. BACHUS. Well, the moral is, is that we are going to shut down American jobs, American companies. It will be produced in Mexico and China. And it will increase mercury in our air in the United States.

Mr. GOLDSTON. Well, presumably the huge increase in Chinese cement plants is due to the extraordinary construction boom in China, not the——

Mr. BACHUS. Well, they are increasing their imports to us and Mexico. I mean, we are getting more for Mexico.

In fact, in Mexico, they made so much money, the Mexican cement plant, they started buying our cement companies with the profits they are making because they don't have the environmental——

Mr. GOLDSTON. Then they apparently didn't feel that it was too much of a burden to comply with American regulations when they were buying those plants.

Mr. BACHUS. Well, they are making so much money by not complying in Mexico.

But I am just saying it ought to be considered.

We did look at the chart, Mr. Levin. And what we are talking about here our jobs. And we couldn't find anywhere on the chart where it says that the agencies are required to assess job loss or job impacts.

Do you know where that is on the chart? Are you aware where they have to assess adverse job impact?

Mr. LEVIN. Well, as I mentioned, it's Public Citizens' chart, not mine. But I think you are correct, that there is no positive law requirement that they do that.

Mr. BACHUS. Yes, do you agree there should be?

Mr. LEVIN. I don't think it should be part of the law for every rule in every agency, because I do favor impact requirements with regard to major rules. But this would apply to every regulation that——

Mr. BACHUS. Well, what about—I mean it may not be every job in an every industry, but that is somebody's job.

Mr. LEVIN. What about rules——

Mr. BACHUS. For somebody, that is 100 percent of their pay.

Mr. LEVIN. What about rules on Medicare, rules on Indian tribes, rules on homeland security?

Mr. BACHUS. Again, I think job impacts ought to be considered along with anything else.

What do Republicans and Democrats agree on? Jobs, jobs, jobs. The President has used that term. John Boehner has used that term. Bob Goodlatte has used that term. Jobs, jobs, jobs.

That is what our economy needs. If we have more jobs, we will have better health. We will have better crime rates. We will lower that. It will make a safer country.

Mr. LEVIN. Mr. Chairman, I agree with that sentiment, and agree with that issue as one that is before the country. But I believe this isn't legislation that is well tailored to address that.

Mr. BACHUS. I see. Okay.

Let me say this, as the Chairman said, we would like to work with the American Bar Association and other groups, because some of these executive orders, we appreciate your willingness to work with us.

Mr. LEVIN. I just want to clarify again, I am not a spokesman today for the——

Mr. BACHUS. I understand that, but you are an expert on administrative law. You have written a leading casebook.

Mr. LEVIN. I would like it to be leading, yes.

Mr. BACHUS. It is a very good casebook. Thank you.

Mr. COHEN. Mr. Chairman, can I ask a question?

Mr. BACHUS. Mr. Cohen, you said you did not want to—no, you can ask as many questions as you want.

Mr. COHEN. You brought up a good point.

What if we just took this bill and made it into a bill that said that when you have these regulations, that they have to talk about jobs, and just synthesize it down to that. We might be able to pass it.

What about that?

And I think it is interesting that you mentioned that one job, that is one person's job, and I agree with you. But at the same time, Dr. Thomas' paper writes about how few lives would be saved, because of these rearview mirrors or rearview cameras in cars. And that life is somebody's life.

Mr. BACHUS. And I said esoterically one job. It is probably not one job. It is probably going to be thousands of jobs on every regulation.

Mr. COHEN. Right. But it is a balancing point.

Mr. BACHUS. But it is sort of like, if you are that 1 percent, it is 100 percent to you.

Mr. COHEN. Exactly. The same thing with your life.

Mr. GOLDSTON. Mr. Cohen, the other factor obviously is how good or bad the economic analysis is at this point in terms of being able to actually estimate jobs, even with cost, which is somewhat easier. Again, one RFF study showed that, in the vast majority of cases, initial cost estimates overestimate what the cost will be.

So I think I agree that the concerns with this bill is not that it mentions the word job, as Professor Levin mentioned. We are all concerned about jobs, but the fact that it turns it into a kind of requirement, and then adds all these other layers to that. We also need to be realistic about how good this estimating is before we place overreliance on it.

Mr. BACHUS. All right, Mr. Collins——

Mr. COHEN. I think Professor Levin, a student of Charles Burson's, I think, has a comment.

Mr. LEVIN. Yes, I am. A great Tennessean.

Mr. COHEN. A great Tennessean. And no controlling legal authority. All right.

Mr. LEVIN. I just wanted to follow up briefly on that discussion.

In the given rule, if somebody thinks that there will be an adverse affect on jobs, they can submit a comment to that effect to the agency, and the agency is required by the caselaw to respond.

So that is taken care of.

You also have rules where it is entirely speculative, what the effect on jobs will be, because it isn't economic regulation at all. And yet this bill would require them, and everybody else in the government that is promulgating a rule, to address this issue that may have very little relevance, and about which there is very little information. But they have to go out and research the information before they adopt the rule.

And I think that is wasteful because the system itself is self-correcting, where there is a controversy about jobs, it can be brought forward in the regular process.

Mr. BACHUS. I can tell you that with breathalyzers and with the cement industry, their way of addressing it was delaying it. But even during the delay, companies are having to make economic decisions on whether they want to modernize a plant or shut it down and locate that production overseas, or use a source overseas. And even a delay costs jobs.

Or in the case of the breathalyzers, people are paying more money every day. And most of them, if they are not poor, they are not healthy, and that is going to lead, as we all know, to at least a financial problem.

Mr. Collins?

Mr. Collins, the gentleman from Georgia, is recognized for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. BACHUS. Or six or 8 minutes.

Mr. COLLINS. I think one of the things that we have here, and I appreciate the Chairman, yielding, I think we just have a differing opinion of what regulations and how they affect on what they go by.

To me, regulations look about like you all sitting at that table, overcrowded and not sure which person is doing which, and which papers are whose, and that translates out to business, who has problems figuring out where they are in this process.

And the other thing I think, Mr. Goldston, you had said something just a second ago that struck me. And I think one of the things is that we are all concerned about jobs. And I will agree with you. Probably the first time you and I are going to agree on something today, but we will agree on this concern about jobs.

However, I think the concern that I think your job is, is more jobs in government. My concern is more jobs in private enterprise for enforcing regulations.

So I have a few questions for you, and I will follow up on Chairman Goodlatte's line of questioning.

Do you think the current body of regulation is sufficient, or do you truly believe that there needs to be new or even more regulations put forth by agencies?

Mr. GOLDSTON. First let me say, I was talking about private sector jobs.

Mr. COLLINS. The only thing that is growing much right now is government jobs in this area.

Mr. GOLDSTON. I am not sure that is accurate.

So in terms of your question, I think there are areas that need greater regulation. Not every area, but absolutely.

Mr. COLLINS. Can you give me an example of an unregulated industry right now?

Mr. GOLDSTON. I think food safety. I think——

Mr. COLLINS. That is unregulated?

Mr. GOLDSTON. Climate and the financial sector. I think those are all areas that actually do need further regulation.

Mr. COLLINS. So then I will follow up to that question. I apologize for interrupting. Those are where you think there needs to be new regulations.

Is there an unregulated industry that is dying to be regulated, in your opinion?

Mr. GOLDSTON. I don't know that there is an entire industry that is unregulated that is looking for regulation.

Mr. COLLINS. Is there another area you believe that needs to be regulated?

Mr. GOLDSTON. I am sorry, I——

Mr. COLLINS. Is there another area that needs to be regulated that is not being regulated right now?

Mr. GOLDSTON. I am not—how is that different from the question you asked me earlier?

Mr. COLLINS. You said I want to see if there are even more. I'm saying you're saying there needs to be more regulations. I am asking is there another industry that isn't being regulated right now that you think needs to be.

Mr. GOLDSTON. Off the top my head, I can't think of an entire industry that is unregulated now.

Mr. COLLINS. Okay. And I appreciate that. Thank you.

Do you believe that every regulation of the book serves the best interest of American families and small businesses?

Mr. GOLDSTON. I would not take a position on every regulation on the books, given the numbers Chairman Goodlatte cited. I would say that the regulatory system as a whole has repeatedly been shown by both Republican and Democratic administrations to have benefits that outweigh the costs significantly.

Mr. COLLINS. Okay. And again, like you said, we are going to disagree on a lot of this.

Do you believe it should be easier for basically agencies and unelected officials in these agencies to put forth regulations that financially impact small businesses?

Mr. GOLDSTON. I think there are some barriers to regulations, that there are a set of conditions under Regulate Paperwork Act, and so forth, that sometimes unnecessarily slow the process. That doesn't mean that there shouldn't be analysis of the regulations and that there shouldn't be transparency.

So again, not suggesting that the system is perfect, but there are cases where important regulations get held up for many years.

Mr. COLLINS. I have one final, and Mr. Rosen, I am coming to you, so that we are all effective here.

The question that I am seeing, especially in my area, and we are dealing with water runoff, storm runoff. We dealt with this a lot. We are getting to the point where many of the regulations are getting to the point where they are just unable to actually test for the levels that are prescribed.

At what point in time do you really just like, especially like phosphates and other things we are testing—and I used to work in this industry with stack monitoring and other things—that you really get to the point where you cannot with certainty actually test to the levels that are now being prescribed. Is there just at a certain point in time, you just say this is as good as we get?

Mr. GOLDSTON. Sure, there is a question all the time about how clean is clean. In the case, again, of phosphates and things like that, there are actual provable problems with water quality that result from water pollution runoff and so forth.

Again, the issue, though, is does this bill actually in a targeted way take care of the kinds of concerns you are talking about. Or, and this is sort of implicit in Mr. Smith's question, does it just slow down the system so, yes, fewer things will get out just because the system now will be so clogged up with process that isn't necessarily targeted to any of the problems that you were just referencing.

Mr. COLLINS. All right, thank you.

Mr. Rosen, if Regulatory Accountability Act had been in place in the late since the late 1960's, early 1970's, when our modern regulatory authorities began to take shape, do you think the cost to Federal regulation would be anywhere near the current estimate of $1.75 billion to $1.8 trillion?

Mr. ROSEN. I think it would be less than it is today.

Mr. COLLINS. Okay, explain how it would be less.

Mr. ROSEN. That the Regulatory Accountability Act creates mechanisms to ensure better factual accuracy of information that is being used in rulemaking, and better analytic evaluation of both

costs and benefits. Therefore, it would have screened out some bad rules that are on the books.

Mr. COLLINS. And I want to finish up, Mr. Chairman, and I will yield back, there are probably common ground even with Mr. Goldston and Mr. Levin, that we can find in this. I think the problem that we are getting into is the real concern that, and I heard it even in this Committee room on this Committee, saying, well, it doesn't have adverse effects on jobs. Well, I invite you, and I will pay your ticket to come down to the Ninth District, and I will take you to businesses that it does affect, that it is real world.

It isn't in the Beltway. The Beltway isn't real world. This is fantasyland. Go back out into the real world where people actually produce and do these things. This is where my concern is.

And Mr. Cohen and I can actually agree on something, that I agree, finding ways to actually put this in cost and fiscally responsible ways to do this.

When we look at that, then we regain the trust of American business in looking at the process of government. They don't look at it as intrusive.

These are the things that I appreciate this bill coming up, I appreciate that Chairman bringing forward, and our Chairman of the main Committee, Mr. Goodlatte, his input in this, and Chairman Bachus as well, and the Ranking Member.

We have to continue to look at this, because I believe it does matter. I believe this is what people are talking about around the kitchen tables, about their jobs. I believe this isn't the only, but it is one impact that is causing our economy to be in trouble right now, among all issues.

And I appreciate your answers, and I appreciate your being here today.

Mr. Chairman, I yield back.

Mr. BACHUS. Thank you.

Mr. ROSEN. Mr. Chairman, I was just going to observe

Mr. BACHUS. Yes, Mr. Rosen?

In fact, if we don't mind, we can give each panelist a minute just to make comments.

Would you object to that?

Mr. COHEN. A minute and 15.

Mr. BACHUS. A minute and 15, you know, minute, minute and a half.

But, Mr. Rosen, you can respond.

Mr. ROSEN. Yes, the comment that I was just trying to emphasize is, sometimes people think that this only about business. It is certainly business matters and is a key underpinning of our economy.

But regulation affects, as I said at the outset, it affects municipalities, it affects hospitals, universities, farmers, airports, all kinds of entities, some of which do employ people. Most of those do employ people.

It involves individuals subject to regulations.

So I reject the suggestion that I sometimes hear that this bill is about delay. I don't think this bill needs to produce any delay relative to the current system. Most of the delay that occurs in the regulatory process occurs for two reasons, working out policies

within an agency, and absence of good information and the need to either do some testing or gather some data or statistics or whatever. The part that involves complying with the analytic requirements and with the process through OIRA and the notice and comment, that is the tail on the dog.

And so the real thing is to get these rules right, and it's not just to create delay for business. That is nonsense. It is to get the rules right for everybody, for the businesses for sure. But as I say, the airports, the municipalities, the hospitals, the universities, and the individuals that are the American public.

Mr. BACHUS. Thank you.

And we will start with Mr. Sells, whom Mr. Cohen tells me was an All-American swimmer at the University of Tennessee.

Mr. SELLS. Yes, that was a few decades ago. And, believe me, a few pounds.

Thank you, Mr. Chairman, Mr. Cohen. Thank you for the opportunity to be here today.

I think it is extremely important, and I made this comment, and Mr. Rosen backed this up, we are looking for common sense and common-sense approaches here. We believe in this country, as the cement industry, that we actually have the cleanest cement plants literally in the world.

But we have to compete with those who don't comply in that arena, don't comply. And if our jobs are shipped overseas, they are lost forever. And it isn't just the cement industry. It is the steel industry. It is the lumber industry.

Those are the things that made our country great, agriculture, mining, manufacturing, industry. And we believe there is appropriate regulations, common sense, that can work.

As an example, one of the things that was mentioned, really, EPA has not weakened what they are asking our industry to do. There has been a slight delay, but it is because a lot of these things we are asking for were technically not achievable. And so the systems and the things that were asked for not even being used worldwide, hadn't even come out of the lab.

So thank you for the time, for the opportunity. And once again, thank you for your service in the United States Congress.

Mr. BACHUS. Thank you.

Let me comment on the one thing. The standards that we are talking about, you look at the EU. Our standards that they are proposing are much tighter than the European Union.

And that obviously calls into question—it ought to send a red flag up.

Mr. ROSEN. I think I had my turn, so I will let others speak here.

Mr. BACHUS. Let me just comment, I sued the railroads. I had a different attitude toward them, when I then started representing them. But you saw a different side.

But I can remember when the Department of Transportation FRA director was testifying before us about the whistle rule. And he was explaining why they needed it, and my first response was, I said, well, you have been in a cabin, the cab of a diesel engine. I was going to kind of walk him through what goes on. And his response was, no, he never had.

But he was testifying about what the engineer and the conductor in the cab would do and what they saw. But here was the person who had never been in a cab.

And I was just stunned that that was actually, that he was—and I asked him did his agency if they had done that, and he was not aware that anyone had. And that to me—I mean, it is partly a blind spot. I mean, the engineer and the conductor in that cab can tell you more about that rule, and the effect of it, than anybody else.

Mr. Hall?

Mr. HALL. Sure. Let me say, I had a career of conducting economic impact studies, and I know a lot about labor markets.

Of course, regulatory agencies could conduct analysis of the employment impact of regulatory changes. And the evidence is very strong, in fact, there is unemployment created by repertory changes. The literature that people cite show this, as a matter fact. There is a great deal of misunderstanding of what that literature says, especially by noneconomists.

For example, the Morgenstern, Pizer, and Shih article, the economic impact on industry regulation on the labor market is not rocket science. Regulation can raise the cost in an industry. That is what Morgenstern, Pizer, and Shih found. It raised the cost on an industry. The industry has to spend more money to make the output.

Part of that cost is they have to hire extra people in compliance jobs. When the costs go up, prices go up, people buy less of the product. When people buy less of the product, they produce less and people in production jobs lose their jobs.

Morgenstern, Pizer, and Shih found that tens of thousands of people lost jobs, production jobs in the industries they looked at. What they also found was that the number of extra people hired to reduce productivity in compliance roughly was sometimes as much as the production jobs that were lost. Because the two net out doesn't mean production jobs are not lost. Those people lost their jobs. They are unemployed. They had to pay a huge amount personally from the unemployment to find new work, find less important work.

In addition, this work and other work only focus on the regulated industry. One of the most important impacts of regulatory change is outside the industry. When you raise prices, you raise prices for other industries that consume your product. It works like a tax. It is regressive like a tax, by the way.

When you raise prices, it creates higher prices than other industries. That has an employment effect, and people lose their jobs in those other industries.

For example, I looked at a 2011 study by the EPA on a regulation that was going to raise the price of electricity they estimated by 4 percent. By their own research, they found that 19 other industries would have reduced output because of the higher energy prices.

I carried their research one step further and for every job that would be lost in electrical generation industry, 11 jobs will be lost outside the regulated industry because of higher prices.

None of that was taken into account in the Morgenstern, Pizer, and Shih. But they did in fact find tens of thousands of people lost their jobs in that research. And this other research shows the same thing.

Mr. BACHUS. Thank you.

Dr. Thomas?

Ms. THOMAS. There are unintended consequences of regulation that go beyond the employment effects that have been discussed here today. There are real effects on low-income households. And the fact that there are other kinds of regressive effects, as Mr. Goldston points out, just reemphasizes the need for agencies to actually look at the effects of regulations on low-income households in all of their decisionmaking processes.

The consequences of many rules that apply to all of us that address specifically low risks or low-probability risks are harmful to the weakest members of our society, and we should all be concerned with those or about those.

We need to focus on the outcome of regulation, not just on intentions. Agencies should consider their regressive effects.

Mr. BACHUS. Mr. Goldston?

Mr. GOLDSTON. Thank you, Mr. Chairman.

And thank you for taking my testimony, despite coming from a Northeastern school.

I did go to Huntsville, Alabama, a couple times when I was overseeing NASA.

Mr. BACHUS. Well, Cornell is a very good school.

Mr. GOLDSTON. A couple things. Let me start with some general points. Let me start actually, as Dr. Hall rightly, of course, said, these studies don't find that there are no job losses. They are looking at macro losses across the industry. And again, as you said, at the polluting industries.

I think, if I remember correctly, the Morgenstern study, part of the rationale is not just additional hiring because of regulation, but that regulatory costs actually are very small percentage, especially manufacturing often, of overall costs to the industry.

The main point I would like to make a closing is that even if one shares your view, and the views expressed by others here in terms of skepticism about regulation, I think there is still reason to have deep concerns about this bill, because, again, it overrides other laws. It doesn't treat OIRA the way it treats other entities. It creates additional burdens that when they are imposed on everybody, on all agencies at once, such as the way the least-cost rule actually works, and the regulatory hearings, is not a targeted approach to take care of the kind of problems that have been mentioned here, but rather are a way to just kind of gum up the works. And they are ways that, when they have been tried in the past, have been shown only to have that effect.

So I don't think the issue here is whether there is anything that can be changed with the regulatory system, but whether this bill would make the system better or worse for the public at large. And our view is that, overall, this bill, regardless of what you think about the overall state of the regulatory system, would be damaging to the public at large because of the way in which it is not targeted and overreaches.

And I guess I would just add that, in my years on the Republican staff of the House, we were often confronted with this, where efforts to reform basically overreached and instead of actually trying to come up with targeted solutions, basically tried to shut down the system. And that actually put us in a position often where we just had to say no, rather than actually having a discussion of reform, because there was so much overreaching in the approach that was taken.

And I think with this bill, even more with the REINS Act, that is the case here, that it is not a targeted solution, even if one accepts everything that has been claimed about the failings of the regulatory system.

Thank you.

Mr. BACHUS. Professor Levin?

Mr. LEVIN. My sentiments are similar to those of Mr. Goldston, so I will just try to be brief.

We have heard a lot today about regulatory policy disputes, and I see those largely as questions to be worked out in the political sphere.

But I think that this act is not the right vehicle for having that debate. I think it is a misdirected approach to complicate the legislative process.

Mr. Rosen has made the case to you that there is no real threat of delay here. But I think the concerns about delay are very widespread in the administrative law community. I think he has a minority view, but the American Bar Association and the Administrative Conference have passed resolutions stating their view that the rulemaking process is already too complicated.

Scholars have looked at the Regulatory Accountability Act, and scores of them have signed letters of opposition. I know of none whatever in the legal-academic sphere who have endorsed the bill.

I was here a few months ago, testifying about the REINS Act, and there is a scholarly dispute about it. There is really argument on both sides among the academic community on that point.

But I think this bill has brought together scholars with regard to the Regulatory Accountability Act, because I have talked about it in various forums and can't find any other legal academic who endorses the bill.

So I think that the issue of jobs has been before you today. I think it is important for Congress to keep its eye on the ball in that regard. But I think this law is not the right vehicle for that.

And I think you should redirect your attention to matters that would speak more directly to the actual issue involved that would avoid crippling side effects and that have a good chance of passage. I don't think this bill meets any of those criteria.

I do thank you for the opportunity to testify, and I hope you will find it useful.

Thank you.

Mr. BACHUS. I thank you.

And this will conclude our hearing.

But before I do, at this time, customarily, we introduce, for the record, different letters of either support or opposition. And of those letters, I would like unanimous consent to introduce several letters.

Actually, Mr. Levin, one of these letters is the June 6, 2011, letter to the Judiciary Committee in support of this legislation, and I was looking at over three pages of people that signed this letter, associations, and you are correct in that I don't see the Bar Association on this list or any legal society listed in over three pages.

But what I do find is almost every other association that employs people in the United States is on this list. I mean, if you name one, it is on here. Medical, dental, repair shops, aeronautical, architects, bakers, boatbuilders, coatings, composites, concrete, engineering industry, feed industry, forest industry, foundry industry, you can just go on and on.

I don't know of one that is not on this list.

So there is a divide between——

Mr. GOLDSTON. Mr. Chairman, if I could just say, that is not particularly surprising. I think everybody pro and con agrees that this bill would hold up regulation.

And industry understandably would prefer to be unregulated. Our argument is that——

Mr. BACHUS. They all are regulated.

Mr. GOLDSTON [continuing]. Good and bad. Less regulated.

Mr. BACHUS. Yes, they are pretty heavily regulated.

Mr. GOLDSTON. Fair point. Less regulated.

Mr. BACHUS. It closes with the window industry. Windows are pretty important.

But anyway, I would like to introduce this, along with several other, credit unions, and several others. I would like to thank the NFIB for their statement and the Chamber of Commerce representing small business and other business.

So, without objection, I would like to introduce these in the record.

Mr. COHEN. I won't object if you will give me extra time to round up the usual suspects and put in letters against.

Mr. BACHUS. Sure You might actually want to read this list.

Even the flower industry. Flowers and flour.

Mr. COHEN. No objection.

[The information referred to follows:]

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B. Dan Berger
Executive Vice President
Government Affairs

July 8, 2013

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable Spencer Bachus
Chairman
Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law
United States House of Representatives
Washington, D.C. 20515

The Honorable Steve Cohen
Ranking Member
Judiciary Subcommittee on Regulatory Reform Commercial and Antitrust Law
United States House of Representatives
Washington, D.C. 20515

Re: NAFCU support for the Regulatory Accountability Act of 2013, H.R. 2122

Dear Chairman Goodlatte, Ranking Member Conyers, Chairman Bachus, and Ranking Member Cohen:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions, I write today in conjunction with tomorrow's subcommittee hearing on the Regulatory Accountability Act of 2013 (H.R. 2122). NAFCU supports this bipartisan legislation, introduced by Chairman Goodlatte and Chairman Bachus, as it would be one step toward providing our nation's credit unions with the kind of regulatory relief they so desperately need. NAFCU member credit unions are hopeful that tomorrow's hearing will pave the way for committee consideration and House passage of this important legislation.

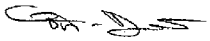
As you may know, credit unions are non-profit entities that exist to serve only their members. As a result, every new regulation imposed on credit unions by the CFPB, the National Credit Union Administration (NCUA), or the numerous other regulatory agencies results in increased loan rates and fees, decreased savings rates, and curtailed financial services provided to 96 million credit union members. Despite acknowledgement from members of Congress on both sides of the aisle that credit unions did not contribute to the financial crisis, the regulatory landscape for credit unions has been in constant flux in recent years. This includes subjecting the entire industry to the rulemaking authority of the Consumer Financial Protection Bureau (CFPB).

The Regulatory Accountability Act includes key provisions that would be helpful to member-owned credit unions as it would require regulators to consider their existing rules when writing new regulations; issue an advanced notice of proposed rulemaking (ANPR) prior to proposing a major rule; and, require regulators to avoid regulations that are inconsistent or incompatible with other regulations and draft regulations in simple and easy to understand language. In addition, the

provisions in the legislation calling for increased focus on cost-benefit analysis echo the concerns expressed in NAFCU's five-point plan on regulatory relief (attached), shared with you and your colleagues on February 12th of this year.

Again, thank you for holding a hearing on this important legislation and the general goal of reducing unnecessary regulation handed down from the federal government. The importance of regulatory relief for our nation's credit unions cannot be overstated. If we can answer any questions or provide additional information on this matter, please do not hesitate to contact me or NAFCU's Vice President of Legislative Affairs, Brad Thaler, at 703-842-2204 or bthaler@nafcu.org.

Sincerely,



B. Dan Berger
Executive Vice President, Government Affairs

cc: Members of the House Judiciary Committee

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Fred R. Becker, Jr.
President/CEO

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February 12, 2013

The Honorable Tim Johnson
Chairman
Senate Committee on Banking,
Housing and Urban Affairs
United States Senate
Washington, D.C. 20510

The Honorable Michael Crapo
Ranking Member
Senate Committee on Banking, Housing
and Urban Affairs
United States Senate
Washington, D.C. 20510

The Honorable Jeb Hensarling
Chairman
House Financial Services Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable Maxine Waters
Ranking Member
House Financial Services Committee
United States House of Representatives
Washington, D.C. 20515

Re: NAFCU Calls on Congress to Provide Regulatory Relief for Credit Unions

Dear Chairman Johnson, Chairman Hensarling, Ranking Member Crapo and Ranking Member Waters:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions, I write today to call for Congressional action during this session of the 113th Congress to enact broad-based regulatory relief that is essential to the credit union industry's ability to serve its 95 million members.

Our nation's credit unions are struggling under an ever-increasing regulatory burden that must be immediately addressed. A survey of NAFCU members late last year found that 94% have seen their regulatory burden increase since the passage of the *Dodd-Frank Act* in July 2010. The regulatory onslaught continues to compound as credit unions now have over 5,000 pages of rules from the Consumer Financial Protection Bureau (CFPB) that they must understand, interpret, and ultimately comply with – despite the fact that Congress has widely acknowledged that credit unions were not the cause of the financial crisis. Credit unions, many of which have very small compliance departments, and in some cases only one compliance officer, must comply with the same rules and regulations as our nation's largest financial institutions that employ armies of lawyers. The impact of the ever-increasing regulatory burden is even more sobering, as the number of credit unions continues to decline. There are nearly 700 fewer credit unions today than there were before the passage of the *Dodd-Frank Act*.

It is with this regulatory onslaught in mind that we call on Congress to enact meaningful regulatory reforms and provide much needed assistance to our nation's credit unions. Over the past year, we have been actively conversing with our member credit unions to identify those areas where regulatory relief is requisite.

Our ongoing discussions with our members have led us to draft a five point plan for credit union regulatory relief:

I. Administrative Improvements for the Powers of the NCUA

We believe there are changes that must be made to strengthen and enhance the National Credit Union Administration (NCUA).

First, the NCUA should have authority to grant parity to a federal credit union on a broader state rule, if such a shift would allow them to better serve their members and continue to protect the National Credit Union Share Insurance Fund.

Second, the NCUA should have the authority to delay the implementation of a CFPB rule that applies to credit unions, if complying with the proposed timeline would create an undue hardship. Furthermore, given the unique nature of credit unions, the NCUA should have authority to modify a CFPB rule for credit unions, provided that the objectives of the CFPB rule continue to be met.

Third, the NCUA and the CFPB should be required to conduct a look-back cost-benefit analysis on all new rules after three years. The regulators should be required to revisit and modify any rules for which the cost of complying was underestimated by 20% or more from the original estimate at the time of issuance.

Fourth, new examination fairness provisions should be enacted to help ensure timeliness, clear guidance and an independent appeal process free of examiner retaliation.

Finally, the Central Liquidity Facility (CLF) should be modernized with changes such as: (1) removing the subscription requirement for membership, and (2) permanently removing the CLF borrowing cap so that it may meet the current needs of the industry.

II. Capital Reforms for Credit Unions

NAFCU believes that capital standards for credit unions should be modernized to reflect the realities of the 21st century financial marketplace.

First, the NCUA should, with input from the industry, study and report to Congress on the problems with the current prompt corrective action (PCA) system and recommended changes.

Second, a risk-based capital system for credit unions that more accurately reflects a credit union's risk profile should be authorized by Congress.

Third, the NCUA should be given the authority to allow supplemental capital accounts for credit unions that meet certain standards.

Finally, given that very few new credit unions have been chartered over the past decade, and in order to encourage the chartering of new credit unions, the NCUA should be authorized to further establish special capital requirements for newly chartered federal credit unions that recognize the unique nature and challenges of starting a new credit union.

III. Structural Improvements for Credit Unions

NAFCU believes there should be improvements to the *Federal Credit Union Act* to help enhance the federal credit union charter.

First, Congress should direct the NCUA, with input from the industry, to study and report back to Congress suggested changes to outdated corporate governance provisions in the *Federal Credit Union Act*. Congress should then act upon those recommendations.

Second, a series of improvements should be made to the field of membership (FOM) restrictions that credit unions face expanding the criteria for defining "urban" and "rural"; and allowing voluntary mergers involving multiple common bond credit unions and allowing credit unions that convert to community charters to retain their current select employee groups (SEGs).

Finally, all credit unions, regardless of charter type, should be allowed to add underserved areas to their field of membership.

IV. Operational Improvements for Credit Unions

Credit unions stand willing and ready to assist in our nation's economic recovery. Our industry's ability to do so, however, is severely inhibited by antiquated legislative restrictions.

First, Congress should show America that they are serious about creating jobs by modifying the arbitrary and outdated credit union member business lending (MBL) cap. This can be done by raising the current 12.25% limit to 27.5% for credit unions that meet certain criteria or by raising the outdated "definition" of a MBL from last century's $50,000 to a new 21st century standard of $250,000, with indexing for inflation to prevent future erosion. Furthermore, MBLs made to non-profit religious organizations, businesses in "underserved areas", or small businesses with fewer than 20 employees should be given special exemptions for the arbitrary cap.

Second, requirements to mail redundant and unnecessary privacy notices on an annual basis should be removed, provided that the credit union's policy has not changed and additional sharing of information with outside entities has not been undertaken since the distribution of the previous notice.

Third, credit unions should be given greater authority and flexibility in choosing their investments.

Fourth, the NCUA should be given greater flexibility in how it handles credit union lending, such as the ability to establish longer maturities for certain loans.

Finally, Congress should clarify that Interest on Lawyers Trust Accounts (IOLTAs) at credit unions are fully insured and also that the NCUA should have practical requirements on how credit unions provide notice of their federally-insured status in any advertising.

V. 21st Century Data Security Standards

Credit unions are being adversely impacted by ongoing cyber-attacks against the United States and continued data breaches at numerous merchants. The cost of dealing with these issues hinders the ability of credit unions to serve their members. Congress needs to enact new 21st century data security standards that include: the payment of costs associated with a data breach by those entities that were breached; establishing national standards for the safekeeping of all financial information; require merchants to disclose their data security policies to their customers; requiring the timely disclosure of entities that have suffered a data breach; establishing enforcement standards for provisions prohibiting merchants from retaining financial data; requiring the timely notification of the account servicer if an account has been compromised by a data breach; and, requiring breached entities to prove a "lack-of-fault" if they have suffered from a data breach.

We have outlined a number of proposals that are necessary to providing the regulatory relief and assistance that credit unions urgently require. The number of credit unions continues to decline on a monthly basis and the ever-increasing regulatory burden the industry is facing is accelerating that decline as compliance costs become even more onerous. It is with that in mind that we call on Congress to act on any and all of these proposals, whether as a comprehensive package, or individually. Our nation's credit unions and their 95 million members desperately need this relief and we call on Congress to enact it.

Thank you for your attention to this important matter.

If you have any questions or would like further information about any of these issues, please do not hesitate to contact me or NAFCU's Executive Vice President of Government Affairs Dan Berger by telephone at (703) 842-2203 or by e-mail at dberger@nafcu.org.

Sincerely,

Fred R. Becker, Jr.
President and CEO

cc: Members of the Senate Banking Committee
Members of the House Financial Services Committee

June 21, 2013

The Honorable Bob Goodlatte
Chairman
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte:

On behalf of Associated Builders and Contractors (ABC), a national association with 72 chapters representing nearly 22,000 members from more than 19,000 construction and industry-related firms, I am writing in support of the Regulatory Accountability Act of 2013 (H.R. 2122). ABC supports this legislation, which would reform the Administrative Procedures Act and strengthen existing checks on federal agencies, allowing for more cost-effective regulations through a more transparent process.

As builders of our communities and infrastructure, ABC members understand the value of standards and regulations based on solid evidence, with appropriate consideration paid to implementation costs and input from affected businesses. ABC strongly supports comprehensive regulatory reform which includes across- the-board requirements for departments and agencies to appropriately evaluate risks, weigh costs and assess benefits of all regulations. H.R. 2122 is an excellent first step in regulatory reform because it ensures more accountability from federal agencies and greater stakeholder transparency.

Today, federal regulatory agencies wield incredible power through rulemaking. They have grown adept at using procedural loopholes in order to accomplish narrowly-focused goals. These agencies operate relatively unchecked and unsupervised, especially during the early stages of the regulatory process. They often disregard and circumvent the will of Congress and the American public by issuing regulations with poor or incomplete economic cost-benefit forecasting or other data analysis, instead of using the best and most accurate data that could have created more practical, sustainable rules and regulations.

As a result, some regulations result in crippling costs for companies affected by regulations that have limited or questionable benefit and no serious consideration for more practical alternatives. For the construction industry, these regulations routinely translate into higher costs and are passed along to the consumer. Ultimately, these costs impact our industry's recovery and our businesses' ability to expand and hire more workers. It is particularly alarming that small businesses, which comprise the vast majority of the industry, are disproportionately affected by this irresponsible approach to regulation.

We appreciate your attention to this important matter and urge immediate passage of the Regulatory Accountability Act of 2013.

Sincerely,

Geoffrey Burr
Vice President, Federal Affairs

4250 North Fairfax Drive, 9th Floor • Arlington, VA 22203 • 703.812.2000 • www.abc.org

June 6, 2013

TO THE MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES:

The undersigned groups strongly urge you to support H.R. 2122, the "Regulatory Accountability Act of 2013." We applaud sponsor Rep. Bob Goodlatte and cosponsors Reps. Collin Peterson, Lamar Smith, Bill Owens, Howard Coble, Kurt Schrader, and Spencer Bachus for their strong leadership on this important issue. This bipartisan legislation would enhance and improve the quality of the federal rulemaking process.

Our regulatory process has not been updated in more than six decades, and as a result we are seeing a rising number of massive, costly rules that breed uncertainty, drive up costs, and stifle hiring and investment. This legislation, which would modernize the 66-year old Administrative Procedure Act, would improve the process by which federal agencies promulgate regulations to improve accountability and the integrity of the rulemaking process.

Small and large businesses alike consistently cite growing regulatory burdens and the uncertainty that occurs when badly-written regulations must be corrected through years of litigation as the most significant obstacles to new hiring.

This bill would address these serious issues in a reasonable, measured way. The legislation would *not* prevent federal agencies from issuing regulations or accomplishing their objectives. Rather, the legislation would ensure that federal regulators base their regulatory decisions on solid information, ensure that the regulatory process is more transparent, and hold agencies more accountable to the public.

We strongly support the Regulatory Accountability Act and urge you to pass this important legislation.

Sincerely,

60 Plus Association
Academy of General Dentistry
Aeronautical Repair Station Association
American Architectural Manufacturers Association
American Bakers Association
American Boat Builders & Repairers Association
American Coatings Association
American Composites Manufacturers Association
American Concrete Pressure Pipe Association
American Council of Engineering Companies
American Feed Industry Association
American Forest & Paper Association
American Foundry Society

American Highway Users Alliance
American Hotel & Lodging Association
American Iron and Steel Institute
American Rental Association
American Supply Association
AMT – The Association for Manufacturing Technology
Associated Builders & Contractors, Inc.
Associated Builders & Contractors, Inc. – Pelican Chapter (LA)
Associated Equipment Distributors
Associated Oregon Industries
Associated Wire Rope Fabricators
Association of Equipment Manufacturers
Can Manufacturers Institute
Construction Industry Round Table
Consumer Electronics Association
Corn Refiners Association
CTIA – The Wireless Association
Edison Electric Institute
Electronic Security Association
Far West Equipment Dealers Association
Financial Services Roundtable
Flexible Packaging Association
Forging Industry Association
Heating, Air-conditioning & Refrigeration Distributors International
INDA – Association of the Nonwoven Fabrics Industry
Independent Electrical Contractors
Indiana Manufacturers Association
Industrial Energy Consumers of America
Industrial Fasteners Institute
Industrial Minerals Association – North America
International Sign Association
IPC – Association Connecting Electronics Industries
Irrigation Association
ISSA – The Worldwide Cleaning Industry Association
Marine Retailers Association of the Americas
Metal Service Center Institute
Motor & Equipment Manufacturers Association
National Association of Electrical Distributors
National Association of Federal Credit Unions
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Black Chamber of Commerce
National Club Association
National Council of Chain Restaurants
National Die Casting Association

National Electrical Manufacturers Association
National Federation of Independent Business
National Grain and Feed Association
National Industrial Sand Association
National Lumber and Building Material Dealers Association
National Mining Association
National Oilseed Processors Association
National Roofing Contractors Association
National Stone, Sand & Gravel Association
National Tooling and Machining Association
National Wooden Pallet and Container Association
Non-Ferrous Founders' Society
Petroleum Marketers Association of America
Portland Cement Association
Precision Machined Products Association
Precision Metalforming Association
Professional Landcare Network
Retail Industry Leaders Association
Secondary Materials and Recycled Textiles Association
Shipbuilders Council of America
Small Business & Entrepreneurship Council
Society of Chemical Manufacturers & Affiliates
South Carolina Timber Producers Association
SouthWestern Equipment Dealers Association
Textile Rental Services Association
U.S. Chamber of Commerce
Window & Door Manufacturers Association
Wisconsin Grocers Association
Wisconsin Manufacturers & Commerce

Statement of the U.S. Chamber of Commerce

FOR: SUBMISSION FOR THE RECORD ON HEARING CONCERNING H.R. 2122, THE "REGULATORY ACCOUNTABILITY ACT OF 2013"

TO: HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

BY: WILLIAM L. KOVACS,
SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS

DATE: JULY 9, 2013

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% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage 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 issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Written Statement for Hearing Record on H.R. 2122, the "Regulatory Accountability Act of 2013"

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

Written Statement of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

July 9, 2013

On behalf of the U.S. Chamber of Commerce, thank you for the opportunity to submit this written statement for the hearing record on H.R. 2122, the "Regulatory Accountability Act of 2013." My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. This bill addresses a major problem in our current regulatory process: the rushed, non-transparent process employed by federal agencies to issue new rules. This problem results in multimillion- and even billion-dollar rules being written that are poorly conceived, inadequately supported, poorly designed, and, from a legal standpoint, fatally flawed. The Chamber strongly supports the Regulatory Accountability Act and believes the reforms will help the regulatory system to function in the manner that Congress intended.

A. The Regulatory Accountability Act Modernizes the Badly Outdated Federal Rulemaking Process

Federal agencies very often fail to grasp the full impact that their new regulations – added to prior rules and those of ***other agencies*** – have on businesses, communities, and the economy as a whole. While agencies are currently required to undertake some consideration of the impacts their rules will have on regulated entities and the economy,[1] these reviews are limited and often conducted in a hurried, perfunctory fashion. Agencies increasingly have to take shortcuts to meet tight rulemaking deadlines, and very often fail to perform the full range of scientific and economic analyses necessary to know how best to design and develop a rule that regulated entities can comply with. As a result, rulemakings produce flawed, incoherent rules that become subject to lengthy court challenges, leaving regulated parties struggling to understand what exactly they have to do to comply with the law.

[1] *See, e.g.*, Executive Order 12,866 (1993)(requiring interagency economic review of "major rules" that are likely to have an annual effect on the U.S. economy of $100 million or more); Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* (requiring federal agencies to consider the impact their proposed rules will have on small businesses and small governments).

To address this problem, the Regulatory Accountability Act of 2013 has been introduced in both the House and the Senate,[2] with bipartisan support. The legislation would put balance and accountability back into the federal rulemaking process, without undercutting vital public safety and health protections. The bill focuses on the process of developing regulations. Better process will produce better substance, which results in better regulations. The Regulatory Accountability Act would achieve these important goals by:

- Defining "high-impact" rules as a way to distinguish the 5-7 rulemakings each year that would impose more than $1 billion a year in compliance costs.
- Giving the public an earlier opportunity to participate in shaping the most costly regulations before they are proposed. At least 90 days prior to the time the rule is proposed, the agency must provide the public with a written statement of the problem to be addressed, as well as the data and evidence that supports the regulatory action. The agency must accept public comments on the proposal.
- Requiring agencies (including independent agencies) to select the least costly regulatory alternative unless the agency can demonstrate that a more costly alternative is necessary to protect public health, safety, or welfare.
- Requiring agencies to consider the cumulative impacts of regulations and the collateral impacts their rules will have on businesses and job creation.
- Allowing stakeholders to hold agencies accountable for complying with the Information Quality Act,[3] which requires agencies to use data that is objective and reliable. The public would also have the opportunity to correct data that does not meet IQA standards.
- Providing for on-the-record administrative hearings for the very few most costly rules to verify that the proposed rule is well-conceived and well-supported by good scientific and economic data.
- Requiring agencies to be better-prepared before they propose a costly new rule. It requires agencies to justify the need for the rule and show that their proposal is actually the best alternative. Although agencies often resist undertaking this detailed degree of preparation, making them "do their homework" produces a better rule that is more likely to survive judicial challenge.
- Restricting agencies' use of "interim final" regulations, where the public has no opportunity to comment before a regulation takes effect.

The Act would require federal agencies do a better job of explaining the rationale for new rules and being more open and transparent when they write those rules. The Act simply requires additional process to ensure a better rulemaking product; it does ***not*** compel any particular rulemaking outcome. The Act will bring the Administrative Procedure Act of 1946 ("APA") into the modern era.

Today's regulatory landscape is far different from what it was in 1946. Only a handful of today's federal agencies existed 66 years ago. Many of today's most prolific rule-writing agencies were not created until the 1960s and 1970s (e.g., Department of Transportation (1966), Environmental Protection Agency (1970), Consumer Product Safety Commission (1972),

[2] S. 1029 was introduced on May 23, 2013, with original co-sponsors Senators Rob Portman, Mark Pryor, Susan Collins, Bill Nelson, Joe Manchin, Angus King, Kelly Ayotte, Mike Johanns, and John Cornyn.
[3] Public Law 106-554, Section 515 (2001); 67 Fed. Reg. 8,452 (Feb. 22. 2002).

Occupational Safety and Health Administration (1970), Department of Energy (1977), and Mine Safety and Health Administration (1977)). Each year, these and other agencies write some 30 "major rules," each of which has an annual effect on the economy of $100 million or more. Moreover, no less than seven of the rules agencies were poised to issue in 2011 had compliance price tags of $1 billion or more.[4] Rules of this magnitude were unheard of in 1946. A modernized APA is needed to restore the kinds of checks and balances on federal agency action that the 1946 APA was intended to provide the American people.

B. Examples of How the Regulatory Accountability Act Would Improve the Most Important Rulemakings

If the Regulatory Accountability Act becomes law, it would greatly improve the way that the most important rules are written. Just two recent examples illustrate how the Act would require agencies to conduct better rulemakings:

- **Cement MACT rule.** When EPA issued the final Maximum Achievable Control Technology (MACT) standard for the Portland cement industry in 2010, it was the most stringent air toxics standard ever written. In fact, the standard was overly stringent because incomplete emissions testing data for the industry was used to set the standard. EPA also specified monitoring methods in the standard that were technically unachievable. As written, the rule was estimated to cost at least $3.4 billion and result in the closure more than 20% of the cement plants in the U.S. This would have led to more cement having to be imported from overseas, and ***higher*** overall emissions and costs for the same amount of cement. If the Act had been law, stakeholders would have been able to present additional relevant emissions data to EPA in an on-the-record hearing. The agency would have learned why regulated plants could not meet the planned monitoring requirements. EPA would have had to consider the impact of the rule on the U.S. economy and related industries (such as concrete companies) that depend on cement for their business. As a result of the Act, EPA would have had the information it needed to select an achievable standard – based on adequate data – that would still significantly reduce air toxics. The agency would have avoided issuing a final rule that EPA itself subsequently acknowledged was so deficient that it had to be substantially revised. By getting the rule right in the first place, the agency would have had an effective Cement MACT rule in place—one that industry could comply with—years earlier than it actually did. EPA also perhaps could have avoided the time and effort of protracted litigation over the flawed standard.

- **Revised Ozone National Ambient Air Quality Standard.** In September 2011, EPA was on the brink of proposing a reconsidered, significantly tightened National

[4] The seven rules: EPA, Reconsideration of the 2008 Ozone NAAQS ($19-90 billion), EPA, Utility MACT ($10 billion), EPA, Boiler MACT ($3 billion), EPA, Coal Ash Rule ($0.6-1.2 billion), DOT, Federal Motor Vehicle Safety Standard – Rear-View Mirrors ($2 billion), DOT, Hours of Service On-Board Recorders/Recordkeeping ($2 billion), and DOT, Hours of Service (1 billion).

Ambient Air Quality Standard (NAAQS) for ozone. While the planned standard was withdrawn by the Administration on September 2, 2011, EPA is expected to propose a revised ozone NAAQS in late 2013 or early 2014. EPA itself had estimated that the 2011 revised ozone NAAQS would carry compliance costs of up to $90 billion per year. A stringent new ozone standard would have profound economic impacts on many areas of the country that fail to meet the new limit, including growth bans and other restrictions. If the Act were law, EPA would be required to issue an Advanced Notice of Proposed Rulemaking and provide stakeholders with detailed data on the need for a more stringent standard, its benefits, its costs, and its overall impact on the U.S. economy. Those stakeholders would have been able to challenge the agency's assumptions about the data supporting the rule and impact of the rule on communities and businesses.

C. The Regulatory Accountability Act Allows Better Public Involvement in the Rulemaking Process And Results In Better Rules

For the most costly rules, the opportunity for a hearing – with the ability to ask specific questions to the agency – gives stakeholders the best way to verify the underlying data an agency relies on, as well as the regulatory alternative the agency selected. In typical notice and comment rulemaking also known as "informal rulemaking," the agency is free to discount written comments and information with which it does not agree. Stakeholders have a very limited ability to inquire directly of the agency why various choices were made and get a response. Even if those stakeholders get contrary data or other information into the rulemaking docket, a reviewing court typically defer to the agency's determination of which data to rely on. Under H.R. 2122, however, interested parties in the most costly rulemakings would have an opportunity to probe the data and evidence an agency is using through an administrative hearing[5]. This hearing would be on-the-record, meaning that a transcript of the proceedings would become part of the docket for the rulemaking. This transcript would be available for any subsequent legal challenges to the rule.

In rulemakings involving the most costly regulations (***$1 billion or more*** per year in compliance costs), where there is concern about whether an agency has grounded its regulation on adequate, reliable data and whether the agency has fully considered reasonable alternatives, an on-the- record hearing is the most effective way to ensure that these critical issues are explored in a manner that is open and transparent. H.R. 2122 references current APA sections 556 and 557 to describe the hearing process, thereby creating a hybrid process for the relatively few (5-7 per year) high-impact rules. Under this hybrid process, notice and comment would come first, followed by a limited administrative hearing. The hearing would most likely be presided over by an Administrative Law Judge, who would hear the evidence and control the order of witnesses. At the conclusion of the hearing, the ALJ would submit the hearing record to the agency with or without recommendations. The agency would consider the comments received during the public comment period, as well as the evidence received during the hearing,

[5] In the case of major rules, a stakeholder could petition for the hearing. Stakeholders could also petition for a hearing on the quality of the data used by the agency, under guidelines pursuant to the Information Quality Act, Pub. L. No. 106-554 (2001).

and ***the agency*** (not the ALJ) would make the ultimate decision on issuing the final rule. Thus this limited hearing would not significantly delay or otherwise alter the agency's conduct of the rulemaking. Any court challenge to the rulemaking would occur after the rule is final; nothing that takes place in the hearing would prevent the issuance of the rule.

The Occupational Safety and Health Act (OSHA) currently provides for a similar type of hybrid hearing at the request of interested parties.[6] Experience with these hearings has shown that they have minimal impact on an agency's ability to issue rules in a timely fashion. Indeed, in what was perhaps the highest profile example—the ergonomics regulation proposed at the end of the Clinton administration—the agency published the proposal, held a hearing, and issued the final rule **within one year**, even though it was the most complicated and extensive regulation in the agency's history. Hearings on the record are commonplace for other types of administrative proceedings, even relatively routine ones. The U.S. Department of Agriculture, Agricultural Marketing Service, for example, uses on the record hearings as part of the process of issuing milk pricing regulations. This type of hearing is useful because it defines the facts that support or call into question the proposed regulation, it refines the facts under the force of truth testing, and it confines the facts upon which a rule may be issued to those within the hearing record.[7]

Some have pointed to formal rulemakings conducted during the 1960s and early 1970s to illustrate what they believe are inherent difficulties with on-the-record hearings during informal rulemakings. It must be remembered these awkward proceedings occurred during a very different era for federal agencies—one where extremely complex, billion-dollar regulations were unheard of. The contemporary experience with on-the-record hearings in OSHA and USDA rulemakings demonstrates that these hearings are entirely appropriate for the most costly and far-reaching new rules.[8] It is by no means asking too much of an agency to be willing to subject the facts and assumptions it relies on for a $1 billion-plus per year rule to this type of fact testing.

H.R. 2122 would require agencies to identify and adopt the least costly alternative that accomplishes the regulatory objective authorized by Congress. If the agency finds that one alternative meets the statutory objective and is less costly than other alternatives, the agency is required to adopt that alternative. If the agency does not believe that an alternative meets the relevant statutory objective, the agency is free to reject the alternative on that basis. Moreover, if the agency believes that a more costly alternative is needed the agency can select the more costly alternative with a showing that the more costly alternative is justified on the basis of public health, safety, or welfare. H.R. 2122 would not affect an agency's ability to determine what the

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[6] 29 U.S.C. § 655(b)(3). *See also* 29 C.F.R. §§ 1911.15-18. Other statutes require agencies to provide formal or "hybrid" rulemakings: 15 U.S.C. § 57a(c)(2)(B)(Federal Trade Commission); 21 U.S.C. § 371(e)(Food and Drug Administration); and 15 U.S.C. § 2603(b)(5)(EPA Toxic Substances Control Act).

[7] Hearings for the most costly rules conducted under H.R. 2122 would have many of the benefits of the Small Business Advocacy Review (SBAR) Panels required under the section 609 of the Regulatory Flexibility Act, as amended. 5 U.S.C.§ 609(b). Over the past 15 years, the Panel process has proven to be valuable by requiring face-to-face exchanges of information between agency personnel and representatives of small businesses a new rule would regulate. The opportunity to confront an agency concerning the design of its rule often results in a better-crafted, better-tailored rule.

[8] Statement for the Record of Benjamin F. Yale (October 25, 2011), submitted to the House Judiciary Committee for its Hearing on H.R. 3010, the Regulatory Accountability Act of 2011; see Hearing Record Serial No. 112-75 at 175 (available on House Judiciary Committee website for 112th Congress Hearings, October 25, 2011).

relevant congressional objective of a statute is. Where Congress has given an agency the discretion to interpret a broad congressional objective (e.g., "promote worker safety"), the agency has the discretion to interpret how to meet the congressional objective. The agency is free to determine (1) how to meet the objective, (2) which regulatory alternatives meet the objective, and (3) the costs and benefits of each alternative. H.R. 2122 would not affect any existing regulations, nor would it affect enforcement actions.

Pursuant to executive branch guidelines, federal agencies are currently already responsible for evaluating the costs and benefits of their proposed rules. Even in situations where agencies are not permitted to consider costs, such as when EPA sets air quality standards under the Clean Air Act, they still prepare a cost/benefit analysis. H.R. 2122 would simply require the agency to take the next step and select the lowest-cost alternative or show why a higher-cost alternative is justified. H.R. 2122's requirement to consider and adopt the lowest cost alternative is analogous to current requirements under section 205 of the Unfunded Mandates Reform Act (UMRA).[9] That law requires that federal agencies "shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost effective or least burdensome alternative that achieves the objectives of the rule."[10] Like H.R. 2122, UMRA also allows an agency to provide "an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted."[11] UMRA has been law since 1995, and the statutory mandate to adopt the lowest-cost alternative has not negatively impacted the rulemaking process or discernibly weakened regulatory protections for health, safety, and welfare.

For rules that impose the highest burden and costs, H.R. 2122 would require agencies to spend more time at the front-end of the process gathering data and preparing for a rulemaking, which allows agencies to spend less time trying to fix poorly-written rules at the end of the process. The process envisioned by H.R. 2122 is similar in concept to the process that now governs rules required to go through the Small Business Advocacy Review (SBAR) Panel process required under section 609 of the Regulatory Flexibility Act (RFA).[12] The Panel process is designed to force an agency to prepare detailed information about the planned rule, the data that supports it, and the cost of the rule – five to seven months ***before*** the proposed rule will be published in the *Federal Register*. Stakeholders have the opportunity to meet with the agency face-to-face and exchange information about the need for the rule, the data underlying the rule, and the cost to comply with the rule. This process results in the rule subsequently being tailored to better fit the regulated community. While the SBAR Panel process typically adds at least five months to the overall rulemaking process, the 50 or so significant EPA and OSHA rules that have gone through SBAR Panels since 1996—with more front-end preparation and stakeholder input—were typically finalized and implemented more smoothly than other rules.[13] And,

[9] 2 U.S.C. § 1535.
[10] 2 U.S.C. § 1535(a).
[11] 2 U.S.C. § 1535(b).
[12] 5 U.S.C. § 609(b); in fact, several provisions of the Regulatory Accountability Act are modeled after provisions of existing law. For example, the "lowest-cost alternative" language of the bill is based on language from section 205 of the Unfunded Mandates Reform Act, 2 U.S.C. § 1501 et seq.
[13] Examples of this type of positive rulemaking experience include the Line Industry Air Pollution rule (2004) the Non-road Diesel Engines rule (2004), the Mobile Source Air Toxics rule (2007) and the Non-road Spark-Ignition Engines/Equipment rule (2008).

because agencies benefitted from stakeholder input early in the process, these rules were more likely to be complied with immediately and less likely to be delayed with lengthy court challenges. With better front end preparation, high-impact rulemakings are much more likely to proceed smoothly on the back end of the process.

H.R. 2122 would require independent agencies to comply with the procedural checks and balances contained in Executive Orders, Office of Management and Budget Circulars, and other directives. In addition to its other features, the bill would extend important procedural requirements to independent agencies such as the Federal Communications Commission. This will make the regulatory activities of independent agencies more open and transparent, and allow the public to have a greater voice in important agency decisionmaking.

Thank you for the opportunity to present this written statement.

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July 8, 2013

The Honorable Spencer T. Bachus, III
Chairman
Subcommittee on Regulatory Reform
& Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Stephen Cohen
Ranking Member
Subcommittee on Regulatory Reform
& Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Bachus and Ranking Member Cohen:

Re: H.R. 2122 – The Regulatory Accountability Act of 2013

Business Roundtable is pleased to have this opportunity to support H.R. 2122, the Regulatory Accountability Act of 2013.

Business Roundtable is an association of chief executive officers of leading U.S. companies with more than $7.3 trillion in annual revenues and nearly 16 million employees. Our member companies comprise nearly a third of the total value of the U.S. stock market and invest more than $150 billion annually in research and development – equal to 61 percent of U.S. private R&D spending. Our companies pay $182 billion in dividends to shareholders and generate nearly $500 billion in sales for small and medium-sized businesses annually.

Business Roundtable's members are subject to – and increasingly burdened by – a vast range of federal regulatory programs. As we explained in our report *Achieving Smarter Regulation*,[1] the solution is a smarter regulatory system that would engage regulated parties earlier in the process, improve the quality of information relied upon by federal agencies, and take better account of the cost of regulations.

[1] BRT, *Achieving Smarter Regulation* (Sept. 2011), available at http://businessroundtable.org/studies-and-reports/achieving-smarter-regulation/.

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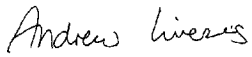
Page 2

The attached statement describes how H.R. 2122 (and its companion bill, S. 1029) would effectuate many of the elements of smarter regulation. The bill would help produce a regulatory system that promotes business investment, innovation, and job creation. We applaud this bipartisan legislation and urge the Subcommittee (and the full Committee) to act favorably on H.R. 2122 and for the House to pass it.

Sincerely,



Andrew N. Liveris
Chairman and CEO, The Dow Chemical Company
Chair, Select Committee on Smart Regulation, Business Roundtable

AL/lg
Attachment (1)

C: The Honorable Bob Goodlatte
The Honorable John Conyers, Jr.

Statement of Business Roundtable
Regarding
H.R. 2122, the Regulatory Accountability Act of 2013

Smart regulation is integral to protecting the economy and the American workforce. A smarter regulatory process would provide broad societal value, inspire business confidence and accelerate investment. At present, however, U.S. businesses, both small and large, are increasingly burdened by the cumulative impact of regulations issued under the current process. While each of these rules was well-intentioned, their collective effect has begun to hobble the U.S. economy:

- **Compliance costs money**. Federal agencies regularly issue rules costing hundreds of millions and even billions of dollars annually. These costs are added to businesses' ongoing compliance expenditures – expenditures that their foreign competitors may not have to make. It is crucial that regulatory requirements be justified, cost-effective and understandable.
- **Innovation is vital to our future.** American businesses are the world's most innovative, and that innovation maintains our competitive advantage and preserves our standard of living. Rules that require particular technologies or approaches, or that fail to keep up with technological evolution can jeopardize future innovation.
- **Investment requires certainty**. If companies are uncertain what regulators will require or how to comply with rules, they will be reluctant to commit capital to new or expanded productive investments. But this sort of investment is key to getting our economy going again for all Americans.

The solution is smarter regulation. As detailed in our report, *Achieving Smarter Regulation*,[1] a smarter regulatory system would encourage greater and earlier public participation, ensure that agencies use quality information, and promote more objective analysis of the benefits and costs of rules. It would contain accountability mechanisms to make sure that agencies actually follow regulatory requirements. It would treat independent regulatory boards and commissions the same as executive branch agencies.

H.R. 2122 would implement the key recommendations of *Achieving Smarter Regulation*.

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[1] BRT, *Achieving Smarter Regulation* (Sept. 2011), available at http://businessroundtable.org/studies-and-reports/achieving-smarter-regulation/.

Greater and Earlier Public Engagement

Notice and comment rulemaking has been described as "one of the greatest inventions of modern government,"[2] and represents the most important example of "crowd-sourcing" by the federal government, but it can be improved. Right now, the first inkling most citizens may get of an agency's thinking is when the agency publishes a Notice of Proposed Rulemaking in the Federal Register. Yet by then the agency has already invested substantial resources in the option or options that it is proposing, and it can be difficult for an agency to change course significantly.

The most important reform Congress can make in this connection is to require agencies to give the public earlier notice of the problem they are trying to solve, so that those with the greatest understanding of the issues and the potentially affected activities can provide agencies with the benefit of that knowledge when agencies can still readily make optimum use of it.

H.R. 2122 requires agencies to issue an Advance Notice of Proposed Rulemaking whenever they anticipate that a rule will impose costs of $100 million or more annually, have other major economic impacts, or involve novel legal or policy issues. Such a notice would give interested persons ample insight into the agency's intentions and adequate time to respond. The Senate version of the bill accomplishes this same goal via an alternative "notice of initiation" process.

The bill's provisions regarding interim rules also will guarantee that, even where agencies may properly dispense with notice and comment before finalizing a rule, they must seek and consider comments afterward, at least in cases where someone has an adverse comment.

Business Roundtable also supports minimum comment periods along the lines of those in H.R. 2122.

Better Quality Information

A regulation can only be as good as the information on which it is based. The notice and comment process recognizes that members of the public generally have the best information about topics on which agencies plan to regulate. The regulatory system should enable members of the public not only to provide information, but also to help gauge the quality of the information upon which agencies rely (or propose to rely) – to ensure that it is the best available and meets fundamental quality standards.

Most fundamentally, H.R. 2122 requires agencies to adopt rules only on the best reasonably obtainable information. It also calls upon the Office of Management and Budget (OMB) to issue guidelines applying the Information Quality Act (IQA) to rulemaking. This requirement would

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[2] Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE § 6:15, at 283 (Supp. 1970).

eliminate any doubt that IQA applies to rulemaking, and ensure that rules are based on quality information. A "mini-trial" process would enable IQA issues to be resolved early on in the rulemaking process rather than after the fact. Finally, H.R. 2122 would confirm that agency IQA decisions *outside* the rulemaking context are reviewable in court – a needed clarification.

More Objective Cost/Benefit Analysis

Cost/benefit analysis of economically significant rules issued by executive branch agencies, overseen by OMB, has been required by every administration, of both parties, for decades. Careful review of regulatory and non-regulatory alternatives is the only way to ensure that agencies only regulate when the benefits of regulation justify the costs, and that agencies adopt the least costly regulatory alternatives that meet the objectives of the underlying statute. Wherever possible, agencies should adopt performance-based rules and use economic incentives and publication of information in lieu of command-and-control approaches.

H.R. 2122 would codify these practices and standards. OMB would be required to issue guidelines regarding the assessment of costs, risks, and benefits, and agencies would be required to provide reasoned explanations of how they evaluated the guidelines and other considerations specified in the bill. H.R. 2122 would also backstop OMB's customary oversight role by authorizing courts also to take account of agency compliance by eliminating any deference to agencies that do not follow the guidelines.

Currently, rulemaking by independent regulatory boards and commissions is not subject to OMB oversight, even though both the Administrative Conference of the United States and the American Bar Association have supported such oversight.[3] H.R. 2122 would correct that inconsistency.

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[3] *See* Administrative Conference of the United States, Recommendation 88-9, "Presidential Review of Agency Rulemaking," 54 Fed. Reg. 5207 (Feb. 2, 1989), ¶ 2; American Bar Association, Recommendation 302 (Aug. 7-8, 1990).

Mr. BACHUS. This concludes today's hearing.

Thanks to all of our witnesses for attending, and this is a strikingly good panel. All Members I think have brought some tremendous points before us, and I thought it was well-balanced.

Without objection, all Members will have 5 legislative days to submit additional written questions to the witnesses or additional materials for the record.

This hearing is adjourned.

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

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

As Judiciary Committee Chairman Bob Goodlatte rightly pointed out just a few weeks ago during our markup of the FARRM Act, the Administrative Procedure Act is an "administrative Constitution" that attempts to strike a balance between the need for due process and fairness, on the one hand, and the need for agencies to be able effectively to carry out their policymaking responsibilities, on the other.

As with the Constitution itself, we must approach proposals that would make dramatic changes to the APA with caution, if not some considerable skepticism.

The proponents of H.R. 2122, the "Regulatory Accountability Act of 2013," have a high burden to meet in that regard.

Based on what I heard last Congress in our consideration of an almost identical bill and in the many regulatory debates we have held since then, the bill's proponents have not met that burden.

As an initial matter, whatever the merits of any of the individual proposals contained in H.R. 2122, I am concerned that the cumulative weight of all of the bill's changes to the APA would simply serve to stifle agency rulemaking, threatening to hamper the promulgation of important public health and safety rules.

As I said at last week's hearing on another bill, regulations are critical to protecting the American people from a vast array of harms, including dirty air and water, dangerous toys, reckless financial behavior, and unsafe workplaces.

This is not an abstract notion. On the question of workplace safety, for instance, the Bureau of Labor Statistics reports in its 2011 Census of Fatal Occupational Injuries that there were **4,693 workplace deaths** in 2011.

According to researchers from the National Institute for Occupational Safety and Health, the American Cancer Society, and Emory University's School of Public Health, there are an estimated **50,000 to 70,000** deaths from occupation-related diseases in the United States annually.

In addition concern about the cumulative weight of H.R. 2122, several provisions in particular raise concern. First, H.R. 2122's expanded use of formal rulemaking procedures for "high-impact" rules strikes me as an unnecessary procedural expansion that would not serve to improve the quality of rulemaking while at the same time adding major costs to the process and would effectively grind agency rulemaking to a halt.

Formal rulemaking fell out of favor more than a generation ago as its costs became more evident. A consensus developed that the notice-and-comment rulemaking procedures of Section 553 of the APA—which themselves are fairly heavily proceduralized, especially when combined with non-APA analytical requirements—struck a better balance between assuring a fair and accurate rulemaking process while maintaining agency effectiveness.

H.R. 2122's proponents offer no study or other data indicating that the use of cross-examination and other facets of the formal rulemaking process are the more effective tools for making scientific and policy judgments than the current process.

If anything, history suggests the opposite. In an infamous example, one formal rulemaking proceeding before the Food and Drug Administration took more than 10

years to determine whether the FDA should require that peanut butter contain at least 90% peanuts as opposed to 87% peanuts. A government witness was examined and cross-examined for an entire day about a survey of cookbook and patented peanut butter formulas, missing recipes, and his personal preferences in peanut butter.

While I make no judgments about how many peanuts should be in peanut butter, I do think that government could better spend its resources than devoting 10 years to decide that question. We ought to be wary of returning to those days.

Another concern with H.R. 2122 is its codification of overly burdensome cost-benefit analysis requirements.

I recognize that every president since Ronald Reagan has required that executive agencies conduct cost-benefit analyses, and that support for such requirements has been bipartisan.

Nonetheless, the particular agency determinations required under H.R. 2122, and the requirement that all of these determinations be made for *all* rules, would cause unnecessary delay and cost tremendous taxpayer resources.

I do not see the net benefit in expanding cost-benefit analysis requirements to non-major rules or to guidance documents, which do not have the force of law.

Moreover, we should be wary of overruling existing statutory provisions that prohibit agencies from considering costs when fashioning a rule. These provisions, like those in the Clean Air Act and the Occupational Health and Safety Act, represent carefully considered legislative judgments made by our predecessors.

Perhaps we should have a cost-benefit analysis done of H.R. 2122.

There are numerous other concerns that I will not delve into in these brief remarks, including the bill's provision establishing expanded and less deferential judicial review, under which judges could second-guess agencies' cost-benefit analyses and substitute their policy judgements for those of agency experts.

This bill does little to improve rulemaking and will only serve to stymie agencies from ensuring that the health, safety, and welfare of the American people are protected. I urge my colleagues to join me in opposition to this bill.

Supplemental Statement of Robert A. Sells, President,
Titan America Mid-Atlantic Business Division

Committee on the Judiciary, Subcommittee on Regulatory Reform,
Commercial and Antitrust Law

Detailed Statement of
Robert A. Sells, President, Titan America MABU
July 9, 2013

I am Robert A. Sells, President of the Mid-Atlantic Business Unit of Titan America, a heavy construction materials producer in 8 states, employing over 1,600 Americans. Titan America produces cement, concrete, concrete block, aggregates, sand and beneficiated coal ash. I have served in various roles with Titan America since 2001 and previously held positions with other major producers of building materials from California to Texas to the southeastern U.S. over the past 35 years. I have experienced first-hand the impacts, both good and bad, that regulations can have on business, whether it is trying to permit a new cement plant or quarry, implement safety or DOT regulations, address healthcare for employees, or develop markets for sustainable and resilient building materials.

In the wake of the Great Recession, various federal agencies have embarked on a series of rulemakings that would deliver uncertain public benefits while undermining economic recovery. Specific recent major regulatory actions impacting our industry include:

- EPA - Portland Cement National Emission Standards for Hazardous Air Pollutants (NESHAP)
- EPA - Portland Cement New Source Performance Standards (NSPS)
- EPA - Commercial and Solid Waste Incinerators (CISWI) Rule
- EPA - Non-Hazardous Secondary Materials (or "Solid Waste Definition") Rule
- EPA - Various revisions to the National Ambient Air Quality Standards (NAAQS)
- EPA - Proposed Rule for Coal Combustion Residuals
- EPA - Various regulations on stationary engines and light to heavy duty vehicles
- EPA and U.S. Army Corps of Engineers – Draft Guidance on Jurisdictional Waters
- MSHA – Various regulations on penalties, notification, reporting and recordkeeping.

- MSHA - Pattern of Violations
- MSHA - Proposed Respirable Crystalline Silica
- MSHA and OSHA – Interpretation on Guarding Regulations
- DOT - The Hours of Service (HOS) regulations
- Various regulations under the Family Medical Leave Act
- Various regulations under the Americans with Disability Act
- Various EEOC regulations and guidance
- Various NLRB regulations and guidance

And, let us not forget regulations that have or will come forth from the Patient Care and Affordability Act and the recent presidential Climate Policy.

The impact of regulation is very apparent in the U.S. cement industry. There are currently approximately 100 cement plants in the U.S. with a capacity of approximately 105 million metric tons. New regulations will cost the industry on the order of $2.4 billion and it is anticipated that 18 plants will close, several which already have. U.S. cement manufacturing capacity is expected to remain relatively static in the future with new capacity being off-set by plant closures. However, due to expansive population and economic growth as well as new demand for cement in the form of green building and energy needs, domestic cement demand by 2035 is expected to increase to over 180 million metric tons[1]. Between 2006 and 2012, U.S. cement manufacturing capacity increased from 101 million to 105 million metric tons, while cement manufacturing capacity increased by 750 million tons in China, 100 million tons in India, 48 million tons in Vietnam, 35 million tons in Iran, 15 million tons in Russia, and 12 million tons in Brazil[2].

We certainly do not seek the lack of regulations as may exist in developing countries, but with an energy-intensive industry, such as cement, there is tremendous environmental benefit to make that material in the U.S. under reasonable regulations. Furthermore, the ability to make up the

[1] Portland Cement Association Long-Term Cement Outlook, July 10, 2012.
[2] U.S. Geological Survey

expected shortfall between demand and domestic capacity with quality imported cement will be a challenge.

We support good regulation that is grounded in legal statute, clearly defines the scope and significance, addresses the risks and alternatives, has real measurable benefit, and addresses all costs, including direct and indirect, as well as evaluating jobs, economic growth, and competitiveness. Furthermore, while guidance from a regulatory agency can be useful and desired, guidance that goes too far as de facto regulation should be neither legally binding nor grounds for agency action. If such "guidance" is needed, it should go through rulemaking.

Below are additional details on examples that our company has experienced and that I believe represent the need for this legislation.

- As a company and with industry groups we have participated in comments on Advanced Notice of Proposed Rulemaking, Proposed Rules, and Draft Guidance, but there is often a disconnect when the Final Rule is issued and it becomes apparent that our comments were misunderstood or worse, ignored. Often the results are rules that are scientifically or technically flawed, with many provisions that are not implementable. This results in petitions for reconsideration, legal challenges, revised regulations and delays in implementation, all of which result in uncertainty for developing new or modified facilities.

- Presidential Executive Orders have addressed many aspects of HR 2122, but still leaves enforcement of those provisions up to the discretion of the White House and does not provide the regulated community with the ability to provide meaningful input to the assessment of some aspects, such as cost/benefit or the evaluation of co-benefits outside the statutory framework of the rule.
    - In 2006 the EPA did not set a limit for hydrochloric acid (HCl) in the Cement NESHAP because the emission levels were determined to be less than health

based standards. However, in 2010 the EPA included a very low limit for HCl claiming the benefit that reducing HCl would result in a reduction of SO_2.

- Concurrently, the 2010 Cement NSPS claimed that SO_2 controls had zero cost because the cost was already attributed to HCl cost under NESHAP. This simply is not the case.
- It often appears that co-benefits are counted multiple times over various rule makings to justify costs, such as SO_2 benefits counted towards NSPS or NESHAP rules also counting towards justifying National Ambient Air Quality Standards (NAAQS), which in themselves are not required to consider costs.

- We have had a relatively good working relationship with EPA the past year or so on the reconsideration of the Portland Cement NESHAP and to some extent CISWI and the "solid waste" definition rule, but much of this cooperation and coordination came after issuance of final rules and the on-set of petitions for review and legal challenges. Under the proposed HR 2122 legislation perhaps many of the issues with these rules could have been addressed during the rulemaking process thus avoiding on-going revisions and legal challenges, which continue with each of these rules today.
  - The 2010 Cement NESHAP had a particulate matter limit that was flawed in its development and significantly lower than what was proposed in 2009. The basis of the PM limit was also such that the current technology was not able to reliably measure emissions for compliance. Industry ultimately prevailed and the EPA revised the PM limit in 2013. Perhaps much of this could have been avoided if there were greater cooperation between EPA and industry between the proposed and final rules.

- Often regulatory or legal issues trump common sense in rules, and the rule making process does not allow the regulatory or legal basis to be challenged.
  - A cement kiln using traditional fuels under the Cement NESHAP and a cement kiln using a solid waste fuel under CISWI both operate in exactly the same manner with the same equipment and pollution controls, yet technical/engineering

operational constraints recognized under NESHAP are ignored under CISWI creating regulatory conditions that cannot be met technically. The CISWI particulate matter standards for a "waste burning" cement kiln are one-half to one-third that of a NESHAP cement kiln, but there is no physical or operational difference to justify the lower standards. Also, CISWI cement kilns have numerical emission limitations during startup and shutdown while NESHAP cement kilns have work practices. This is because in the NESHAP rule, the EPA recognized that it is impossible to measure numerical emission levels accurately for a cement kiln during startup and shutdown, but this reality in operations is not acknowledged under the CISWI rule.

- Under the Non-Hazardous Secondary Materials (or "solid waste definition") rule a tire from a collection program is a "non-waste fuel" while the exact same tire from a tire pile or landfill is "solid waste" triggering the much more onerous CISWI regulations. It may be argued that the "waste" tire can be processed into a "non-waste" fuel by shredding the tire and separating the rubber and metal, but cement kilns can use both the rubber as fuel and the metal as an ingredient, and the cement kilns can accommodate whole tires. Therefore, significant cost and energy would need to be wasted just to satisfy a definition.

- An underlying agenda often overshadows the scientific/technical or cost/benefit assessment of a rule. One needs to look no further than the EPA's proposed rule for regulating the disposal of coal ash for an example. While it is clear that past practices for coal ash disposal were under-regulated and undeniably created some significant problems at some sites, an objective assessment under this proposed regulation would have achieved a rational and protective rule that would have been in-place already. The EPA was able to adequately regulate municipal solid waste through the states. Why should this have been any different?

- Guidance as de facto rulemaking would also be reined in under the proposed HR2122 legislation. As a company we have seen many instances and attempts for agencies to

regulate via "guidance". Prime examples include the recent EPA/Corps of Engineers Jurisdictional Waters Draft Guidance, EPA guidance for various NAAQS implementation, MSHA and OSHA guidance or interpretation on guarding for machinery, EEOC guidance on background checks, and EEOC guidance on reasonable accommodation under the Americans with Disability Act.

- As an example, MSHA created a power point slide presentation last year to inform industry of their new interpretation of guarding standards for equipment and machinery. The slide show was 65 pages long with additional note pages. These new "interpretations" were developed and implemented with no input from the businesses regulated. In subsequent inspections citations (and fines) were issued on guards that had been in place for many years having passed many previous inspections by numerous inspectors. There were no opportunities to contest the citations prior to implementing corrections to the satisfaction of the MSHA inspector.

- DOT's Hours of Service (HOS) Rule recently went into effect and is extremely burdensome to the concrete ready mix businesses. This rule requires:
  - After 8 consecutive hours driver will take a mandatory 30 minute break.
  - Limits use of 34 hour restart provision to just once a week and covering at least two periods between 1 am and 5 am.

Ready mix drivers average trips are 15-30 miles from the plant site and they are only driving between 2 to 6 hours a day. In any other business these drivers would be classified as local short haul operators. The mandatory 30 minute breaks not only create burdensome paperwork to manage, but also takes a perishable product and restricts delivery and appropriate applications. Ready Mix business is partnered with construction. Due to the nature of construction work there are unavoidable delays caused by scheduling, weather and traffic. Construction may also be seasonal in many geographical areas, being very busy during the summer months. Therefore, the restart

provisions and mandated off duty periods under this rule will have no effect on the safety of our drivers, but will limit their hours and thereby lessening their working wages.

- MSHA's 2006 MINER Act has prevented due process once an inspector finds what he believes is a violation of the Act. Under the law operators are required to abate alleged violations to the satisfaction of the inspector and only then are they allowed to contest the citation, which in many instances is found to be erroneous.

- The recent MSHA Pattern of Violations (POV) Rule has several burdensome issues:
  1) Criteria to determine POV currently has specific benchmarks in each category and the new rule states that there will be periodic revisions. Will the 'revisions' (aka adjustments to formula) have public comment periods?
  2) Closure orders on mine sites will be issued <u>before</u> the operator has the opportunity to
     a) Discuss alleged pattern(s) with the agency
     b) Contest the validity of alleged citations used to identify a POV
     c) Verify the accuracy of agency data
     d) Obtain Judicial review of alleged violations/orders
  3) Several standards under this rule apply to very large category/areas. For a large operator (e.g., Cement Plant, Large Aggregates, etc) this will present a problem.
     a) 56.14100(b) can be a catch all for machinery, tools, and equipment. For a site with hundreds and perhaps thousands of opportunity (equipment, tools and machinery) and each citation could have different root cause.
     b) 56.20003 rule on housekeeping is extremely subjective, and could be an issue for a large site that could be issued multiple citations with different conditions.
  4) This rule would deny operators due process in contesting citations and penalties by permitting the use of contested alleged violations to impose POV mine closures.

- OSHA has implemented the Global Harmonization Standard in place of the long standing Hazard Communication Standard. The GHS is being implemented through training by

> the end of 2013 with complete implementation by June 2016. This rule will include an estimated 945,000 products in over 7 million OSHA regulated facilities. The implementation of this rule will be spread out over 3 years. The resources and costs for the training, replacement of signage/labels, and the replacing of all MSDS with SDS have not been fully realized by the agencies or business. However, OSHA estimates an annualized cost of 201 million dollars. Furthermore, MSHA has yet to adopt the change but has gone on record stating. "A mine operator who is compliant with the OSHA standard should generally be compliant with MSHA's standard." This comment leaves the door open to interpretation and leaves little to no guidance to the mining industry.

In closing, I would like to say that I agree that there are many protections and benefits provided by good regulations. However, often it seems that agencies are unwilling to fully consider the input from the regulated business community, to fully evaluate alternatives, or to strive to find the most cost-effective solution. We support HR 2122 – the Regulatory Accountability Act, which will require these agencies to follow a rational path to enacting regulations, and we encourage Congress to pass this legislation.

Supplemental Material submitted by Jeffrey A. Rosen, Partner, Kirkland & Ellis LLP

Exh. A

Business Roundtable™

Achieving Smarter Regulation

September 2011

Business Roundtable

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and invest more than $150 billion annually in research and development — nearly half of all private U.S. R&D spending. Our companies pay $163 billion in dividends to shareholders.

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Achieving Smarter Regulation

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Executive Summary

Federal regulation profoundly affects business in the United States. Unfortunately, while regulation can be essential, during this time of economic challenges it has become all too apparent that specific regulations are often counterproductive and far too costly, with a detrimental impact on employment and job creation. The challenge is to have only regulations that are necessary and cost-effective.

The driving idea behind this report is simple and timely: By improving the regulatory process, the resulting regulations will better meet the needs of the American people in a way that does not impose unnecessary costs. Accordingly, building upon prior Business Roundtable reports and analysis, *Achieving Smarter Regulation* reaffirms time-tested recommendations and focuses on particular proposals that are most relevant today.

This report first outlines the major challenges posed by federal regulatory policy. Too often, regulations are too expensive and too rigid, hurting both innovation and competitiveness. The overall regulatory environment, especially in light of many regulations' heavy compliance burdens, too often fails to produce the certainty that business needs to invest and create jobs.

Second, this report lists key principles that should guide a well-functioning regulatory process. For example, by encouraging early public engagement and ensuring that agencies use quality information and engage in objective, common sense analysis, a smarter regulatory process can maximize the efficacy of regulations and minimize their costs. Meaningful oversight by the Office of Management and Budget is essential.

Third, this report explains that the regulatory process is a shared responsibility among all branches of government and the public. To achieve essential reform, all stakeholders must work together to implement smarter regulatory policy.

Fourth, this report explains particular concerns about the current regulatory process. For instance, agencies do not always conduct or adhere to cost-

benefit analysis. Nor do they always use the best available data and scientific methodologies. Courts are sometimes overly deferential to agencies in certain contexts. And in recent years, problems with the federal permitting process have also come to the fore.

Finally, this report sets forth four specific reforms to meet those challenges including: stronger requirements for objective analysis, including for rules issued by "independent" agencies; more and earlier agency disclosure of the costs of proposed regulations; updates to the Administrative Procedure Act to require more rigor in the promulgation of the key subset of major rules that impose the greatest economic burden; and streamlining the permitting process.

By implementing these reforms in legislation and with a spirit of cooperation, the regulatory process can be made more cost-effective and of higher quality for the American people and can accomplish necessary objectives in a better, more transparent and more efficient way than some of the highly problematic regulations of recent years.

I. Introduction

Federal regulation of business has a profound impact on the public, on business investment and on U.S. competitiveness. Regulations on business impose costs that are like hidden taxes: not apparent but nevertheless significant in their impact on businesses, consumers and workers. Even a nonsignificant regulation adds to the growing cumulative burden of regulation, and this cumulative burden has a negative impact on jobs and the economy. The challenge is to have only regulations that are actually necessary and to design regulations to achieve worthwhile objectives at the lowest cost.

In 1994, Business Roundtable (BRT) issued *Toward Smarter Regulation*, which described problems with the regulatory process and recommended specific solutions, many of which were considered and debated in the chambers of Congress and the White House.[1] Although some progress was made, the underlying concerns remained. In the last few years, proposed and anticipated rulemakings at the federal level have alarmed the business community, shining a spotlight once again on the need for regulatory reform.

As BRT more recently explained in December 2010, "the success and profitability of U.S. companies — and their subsequent ability to invest in new jobs and new solutions — has been threatened by inflexible and cumbersome regulations in the financial services, environmental and health care sectors."[2] Consequently, BRT revisited *Toward Smarter Regulation*, and the result is this report — a reaffirmation of the earlier recommendations with a focus on a few specific proposals deemed to be most relevant and appropriate in today's economic and political climate.

This report (1) outlines the major challenges that federal regulation currently poses to U.S. businesses and domestic jobs; (2) proposes an optimal version of an improved regulatory process, referred to as "smarter regulation"; (3) describes the federal regulatory process as a shared responsibility among different branches of government and the public, including the business community; (4) presents a list of problems with the current regulatory system; and (5) recommends specific process reforms that, if implemented, can achieve "smarter regulation."

The title of this report — *Achieving Smarter Regulation* — is significant in that the underlying problems are more apparent and more acute today than they were 17 years ago, and many of the proposed solutions — such as cost-benefit analysis — have been proven to improve regulation. With the learning of the last two decades, and the major economic challenges currently facing our country, the time for debate is past; now is the time for adoption and implementation of smarter approaches to regulation.

II. The U.S. Economy Needs Smarter Regulation

Since *Toward Smarter Regulation* was issued in 1994, the U.S. economy has undergone significant changes, and it continues to face global challenges. During the last year, BRT has highlighted a number of specific planned regulations that would have a major adverse impact on the U.S. economy.[1] The interaction between federal government actions and the economy is even more important now than in the past. Federal regulation, in particular, poses four major challenges to U.S. businesses:

- **A cost challenge.** Regulations are expensive. Every year, federal agencies issue thousands of new regulations, imposing a cumulative cost of more than $1.7 trillion annually, according to a study sponsored by the Small Business Administration. Individual rules can impose costs of hundreds of millions of dollars — or even billions of dollars — on regulated parties. Moreover, while any individual regulation might be cost-effective, the cumulative impact of *all* regulations can be anything but.

  In addition, if U.S. companies face costs that foreign competitors do not, then it is harder for them to successfully sell products. Agencies, however, are often blind to the effect that regulations have on competitiveness. The best regulations/regulatory programs help provide certainty for business investment decisions while achieving the regulatory objective in a cost-effective and efficient manner and in a manner that achieves a high compliance rate.

- **An innovation challenge.** Business works when companies can experiment and try new things. Agencies, however, often impose rigid one-size-fits-all requirements that cut off promising opportunities, or they impose overly prescriptive rules that prevent better solutions. Likewise, resources spent complying with ill-designed regulations are by definition not spent on developing the products of tomorrow.

- **An investment challenge.** The regulatory process creates uncertainty that undermines investment, growth and job creation. If companies do not know what regulators will do, they understandably are reluctant to undertake

costly investment. Likewise, agencies often take too long to give permission for regulated parties to act — in part because they are focused on broad rulemaking objectives. The current regulatory system fosters uncertainty and so hampers growth and job creation.

- **A compliance challenge.** Regulating is easier than complying with regulations. Mandates are easy to promulgate but often difficult to achieve, particularly when they are confusing or poorly drafted. Some regulations are "technology forcing," meaning that they can be met only by solutions that do not yet exist. Moreover, the volume and complexity of regulations can make for a bureaucratic nightmare, especially as different agencies with overlapping jurisdiction all regulate the same subject matter. Extraordinary resources are spent annually ensuring that regulations are obeyed.

III. Smarter Regulation

Government intervention in the economy may sometimes be necessary to achieve desirable goals such as a cleaner environment, safer working conditions and safer products. In some instances, specific regulations have been well conceived and reasonably implemented. These efforts have produced substantial benefits for the country and the American people.

And yet, even with the best of intentions, government is simply not allocating limited resources in a cost-effective manner. Despite a dramatic increase in environmental, health and safety regulation, experience has taught us that often our nation's regulatory efforts have been more costly and less effective than they could have been. Moreover, the enormous costs of federal and state regulations exert a heavy drag on the economy. They depress wages, stifle productivity and economic growth, drive up prices, and impede innovation. They also burden federal, state and local governments. In our increasingly global economy, excessive regulation seriously undermines the competitiveness of U.S. businesses. Ultimately, the American public suffers.

As the country embarks on a massive new wave of regulations ... it is imperative that the regulatory process be improved to avoid problems of the past.

Beyond the problems caused by the rising costs of government regulation, the regulatory process itself has become unduly rigid, unresponsive, arbitrary and inconsistent. These problems have sparked increasing concern about the rationality of the regulatory process and a growing determination to do something about it. In April 2011, for example, BRT highlighted a number of individual current regulations that presented significant problems.[4]

As the country embarks on a massive new wave of regulations designed to address significant issues in health care and the financial sectors, as well as many new regulations involving the energy, transportation and labor sectors (among others), it is imperative that the regulatory process be improved to avoid problems of the past while ensuring that our limited resources are targeted prudently.

"Smarter regulation" equates to an improved quality control system for federal regulation. The following components do not guarantee good regulatory outcomes, but they increase the likelihood that a regulation will direct resources efficiently to achieve its objective.

Public Engagement

Information gathering is critical to the development of a regulation or a change in regulation, and therefore agency interaction with those in possession of relevant information is also critical. Early engagement by the agency with the affected regulatory community is to be encouraged.

There are many ways an agency can engage with stakeholders. One common mechanism is the public notice-and-comment process for so-called "informal rulemaking." However, even when that process is used, it would be desirable for an agency to seek earlier engagement with the business community and others prior to development of a proposed rule, especially when seeking a better understanding of the sector and when gathering information/data needed for regulatory development. Numerous methods are available to do that and ought to be employed more often. As the agency gathers information and receives public comment, the information and comments can be made publicly available in real time, thus fostering informed opinion.

For existing regulations, agencies should have mechanisms in place to receive information and feedback from the regulated community and to make improvements, as needed, to the underlying regulation.

Quality Information

Regulations should be based on the best available information, and the information should be of sufficient quality. Agencies should be held accountable for the quality of the information upon which regulations are based. The public ought to have a reasonable opportunity to identify when information is flawed and to obtain its correction. On scientific and technical matters, agencies should be required to use the best available scientific information and methodologies and, where appropriate, create incentives for the development and use of such information.[5]

Objective Analysis

When considering alternative approaches to regulation, an agency should rely on an objective analysis of benefits and costs along with a clear description of uncertainties in this analysis. Executive Order 12866 requires that certain covered agencies develop a cost-benefit analysis for each economically significant regulation, and agencies are free to develop such analysis for other types of regulation. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires analysis of impact for rules that affect a substantial number of small businesses. In these cases, it is imperative that impact analysis be objective and based on the best available information. Such an analysis is valuable both prospectively and retrospectively and when comparing/benchmarking U.S. regulations against those of other countries.

Methodologies should be continuously improved to assess the impact of significant regulations on productivity, wages and economic growth, as well as any adverse impact on jobs and international competitiveness in industries that bear the burden of regulation.[6]

Consideration of Costs and Benefits

An agency should promulgate a rule only when it has determined that the benefits justify the costs. This principle is part of Executive Order 12866, and there has been considerable experience with its application. Because not all benefits and costs can be quantified, there will be situations in which an agency will make this determination where the quantitative costs exceed the quantitative benefits. In such cases, the agency should at a minimum explain its reasoning as part of the rulemaking record. More generally, agencies should ensure that rules successfully address actual problems in a cost-justified manner and with the least costly alternative that will address the problem.

Expert Oversight

Congress often relies on the expertise of an agency to develop regulations. It is appropriate for such agency work, and the assumptions and data that underlie it, to be scrutinized by experts outside the agency to ensure its accuracy and objectivity. Under Executive Order 12866, the President has given the Office

of Management and Budget (OMB) responsibility for regulatory review and interagency coordination. It is critical that OMB devote sufficient resources (i.e., the quantity and quality of its staff) to implement this mandate effectively. Significant agency guidance documents and policies developed postregulation warrant special scrutiny, as they may be used as *de facto* regulation.

Another role of effective oversight is the need for coordination among agencies. Coordination should be improved to eliminate inconsistencies, duplication and unnecessary regulatory burden, as well as to coordinate the dates on which new rules take effect.[7]

Legislative Accountability

Congress plays a key role in the regulatory process and therefore is accountable in part for regulations that arise from legislation. Congress should take care when writing legislation that creates or modifies a regulatory program. For example, Congress should require that agency regulations be informed by considerations of direct and indirect costs and benefits. Congress should also clarify the conditions under which a regulatory program will begin and end, including the threshold for when regulation is appropriate. Congress should also make clear those aspects of administrative law that are judicially reviewable. In some instances, the authorizing statute and its subsequent regulations do not reflect current market conditions and circumstances. This is a particular concern in sectors where science/technology changes rapidly. Such outdated statutes and regulations should be modernized.

After an agency develops a regulation, it is appropriate for Congress to ensure that the agency is acting within its statutory authority. Any subsequent congressional action on an agency rule (approval or disapproval) should be constitutional, should not preclude judicial review by stakeholders, and should not create perverse incentives for agencies to work around the intent of Congress. It is certainly appropriate for Congress to consider ways to better exercise its oversight role for federal regulation by the agencies to whom Congress has delegated its own authority.

IV. Federal Regulation Is a Shared Responsibility

The President, Congress, the regulatory agencies, the courts, state and local governments, and the public — including the business community — have a shared responsibility in the development, implementation and overall effectiveness of, and compliance with, federal regulation.

- Congress provides the authority for federal agencies to regulate and defines the boundaries within which regulatory agencies must operate.
- The regulatory agencies use their expertise to develop specific regulations within their statutory authority and oversee implementation and compliance.
- The President manages the regulatory agencies and coordinates their regulatory efforts.
- The courts ensure that specific regulations are appropriate given the underlying statutory authority.
- State and local governments sometimes serve as partners with federal agencies in the development, oversight and enforcement of federal regulation. And sometimes state and local governments must comply with federal mandates, with or without commensurate federal funding.
- The public feels the impact of federal regulation of business in terms of its costs and benefits, which include effects on jobs and the economy. The public also provides critical information to agencies for the development and modification of regulations.

Because regulation is a shared responsibility among the different branches of government, it is seldom appropriate to attribute regulatory success or failure to just one part of the government. It follows logically that proposed regulatory reforms that focus on just one branch of government are not going to resolve all regulatory concerns by themselves.

V. Problems/Concerns with the Current Regulatory Process

A number of particular concerns plague the functioning of the rulemaking process in a wide variety of executive branch and "independent" agencies.

First, regulations sometimes are not based on sound science and/or quality data. A recent report from the National Academy of Sciences included harsh criticism of the Environmental Protection Agency (EPA) program to estimate chemical risk (i.e., the IRIS program). Though hundreds of billions of dollars can turn on what an agency does, major rules (having an annual impact on the economy of $100 million or more) sometimes provide little assurance that valid science and quality data were used. A recent EPA proposed rule to control hazardous air pollution from industrial boilers included standards based on nonrepresentative data, a fundamental mistake acknowledged by EPA (and remedied in the final rule).

Second, agencies do not always conduct/adhere to cost-benefit analysis. The Obama Administration has continued to use the longstanding Executive Order 12866, which requires that agencies "assess both the costs and the benefits of [an] 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."[8] Although once controversial, cost-benefit analysis is now considered a useful tool for saving lives and directing limited resources in the most effective manner.[9] Yet there continue to be examples that raise legitimate concerns about adherence to cost-benefit considerations. For example, the Department of Transportation (DOT) conceded that its Positive Train Control and Automobile Roof Strength rules had costs that exceeded their benefits by large amounts, and in the last few months of 2010, DOT proposed two more rules whose annual costs would exceed $1 billion per year despite producing benefits that would be less than half the costs.[10] EPA conducted no cost-benefit analysis at all for its Endangerment Rule for greenhouse gases, which is one of the most far-reaching and economically consequential regulatory actions in American history.[11] OMB recently reported that in 2010, agencies quantified both benefits and costs for only 27 percent of major rules.[12]

Third, regulated parties are not always given an opportunity to criticize agency record materials or file rebuttal comments. When the notice-and-comment process is followed, it often does not work as well as it could. One reason is that after an agency opens up a proposed action for public comment, it seldom gives regulated parties a chance to respond to comments filed by others. At least for major rules, there is sometimes too little process and concern for accuracy.

Fourth, when conducting judicial review, courts are highly deferential to agencies. Courts in some important instances have become overly deferential to agencies. For instance, agencies once used formal rulemaking when dealing with complex issues, but in *United States v. Florida East Coast Railway Co.*, the Supreme Court held that deciding when to use formal rulemaking is generally subject to agency discretion.[13] Likewise, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court held that courts must take a hands-off approach and defer to an agency's choice of procedure.[14] In a more general way, *Chevron*[15] and *Seminole Rock*[16] deferences to the agency's own interpretation of the law are powerful weapons in an agency's litigation arsenal. While it would not be desirable to make judges into discretionary policy administrators, the upshot from having too wide a range of deferential doctrines is that judicial review in some instances does not provide adequate assurance that an agency has objectively evaluated the premises and consequences of its rulemaking choices.

Fifth, the federal permitting process is unduly lengthy and time consuming, especially for new facilities/projects. Many job-creating projects, especially those involving manufacturing, energy and infrastructure, require federal permits and approvals (in addition to state and local permits). The requirements for submitting those permits are extensive and demand a significant commitment of resources at the outset. But once submitted, those permits are increasingly subject to delays both at the agencies and in the courts. Federal permits are in many instances not coordinated among agencies and often not subject to deadlines or prioritization. Even worse, even after issuance, they are sometimes subject to litigation that itself has no deadline, even when the litigation is lacking in merit. For example, the six-year statute of limitations under the National Environmental Policy Act means that project opponents can wait a significant time and then sue to delay work on a project.

VI. Recommendations for Improving the Regulatory Process

At this juncture, smarter regulation is not just desirable, but necessary. According to Andrew Liveris in *Make It in America: The Case for Reinventing the Economy*, "Regulations are beneficial only when they're clear, consistent and wise."[17] To make that sensible observation a reality, three key principles of smarter regulation should animate the reform process. Regulations should: (1) be made as objectively as possible; (2) be promulgated only to address a well-defined problem that represents a failure of markets or institutions that can reasonably be fixed by new rules; and (3) always be designed using the most efficient solution to achieve the defined objective.[18] In other words, agencies should always ask themselves whether a regulation is necessary as demonstrated by the data and, if so, whether there is a less burdensome way to accomplish that specific objective.

A robust and much-needed debate is under way about various approaches to reforming the regulatory process. Congress has held a number of important hearings on this topic this year, and several members have introduced reform proposals. Without speaking to each of these many proposals, some stand out as consistent with smarter regulation while providing benefits in both the short and the long run. These should be considered high priority for enactment/implementation:

The government should objectively analyze the costs and benefits of proposed and final major rules from all agencies, including "independent" regulatory commissions. Under Executive Order 12866, "covered" agencies must conduct a cost-benefit analysis for each economically significant rule (e.g., those imposing more than $100 million in annual costs or benefits) and provide this economic analysis to OMB for review. The executive order excludes certain "independent" agencies (e.g., the Securities and Exchange Commission, Federal Communications Commission, Consumer Product Safety Commission, Federal Energy Regulatory Commission, Federal Trade Commission, and others), even though such agencies are responsible for a large share (typically 20 percent) of the most costly rules. Cost-benefit analysis, along with OMB review, is needed for regulatory proposals coming from these agencies to better ensure that alternatives are identified and evaluated appropriately. It is imperative that estimates of costs and benefits be done *objectively*. Without an objective

(unbiased) estimate of both costs and benefits, regulatory analysis is meaningless. Furthermore, objective analysis is fundamental to many of the major regulatory reform proposals (regulatory budget, expanded analysis of regulatory impact on small business, congressional approval of major rules, unfunded mandates reform, etc.) being raised and debated today.

Agencies should publicly disclose the estimated costs of planned regulatory actions early in the regulatory process and with greater specificity.

One valuable way to ensure objective analysis is to have a credible, independent party perform the analysis rather than the regulatory agency itself. Where such an approach is not practical, another option is to have a credible, independent party review and critique the agency analysis. For example, the National Academy of Sciences has criticized EPA's process for assessing risk and recommended fundamental changes to the agency's program. EPA should not move forward with that program until it makes the recommended changes. The independent review should induce the agency to rely on objective data and analysis.[19]

Agencies should publicly disclose the estimated costs of planned regulatory actions early in the regulatory process and with greater specificity (e.g., less than $50 million, $100 million, $500 million, $1 billion, $5 billion, $10 billion, $50 billion, etc.). Today, almost all agencies disclose whether a planned action will be "major" (generally having an impact of $100 million or more on the economy). Although useful, this approach is outdated, having been imposed 30 years ago when there were few, if any, billion-dollar rules. Today, agencies are issuing rules that are estimated to impose costs in the tens of billions of dollars. Our old and simplistic system needs modernization. If the public does not know the magnitude of a proposed regulatory action, then it is difficult to focus public attention on the most significant rulemakings. Accordingly, such basic information should be provided earlier in the process and with greater specificity, as well as with an opportunity for regulated parties and the public to give agencies input as to the accuracy of their cost estimates.

Congress should consider changes to the Administrative Procedure Act (APA), particularly relating to the content of the rulemaking record and greater judicial scrutiny of that record. Major rules involving more than $100 million per year are a distinct subset of the overall flow of federal regulations — fewer than 1 percent of the rules issued annually — but they account for

a majority of the identified costs and sometimes involve billions or even tens of billions of dollars of impact on our economy. More careful development of a major rule before it becomes final (e.g., a hearing on the record) will make it more defensible and therefore lessen the resources spent on litigation and judicial review. Major rules should be subject to more administrative process to avoid agency error and unnecessary harm to our economy and jobs. This means restoring the original purpose of the APA to allow affected parties some form of a hearing when the consequences are great and enabling judicial review to provide a "check and balance" on the erroneous exercise of the authority delegated to agencies, as well as agencies' legal determinations about the scope of their own jurisdiction. For instance, some degree of formal rulemaking should be available for the most costly and significant regulations, as formal rulemaking "on the record" both requires and facilitates more careful judicial review. By allowing cross-examination of key agency assertions and reviewing these rules under a more searching standard of review, the accuracy of the facts and the quality of these rules will improve for those rules that **matter most to our economy and to job creation**.

The federal government should streamline the permitting process for siting and operating a new facility/project. A more certain and speedier process will enhance U.S. competitiveness and create jobs. One component toward achieving this recommendation is to create a federal office responsible for coordinating and expediting permit applications across the federal government.

* * * *

These recommended reforms should not — and are not intended to — make the regulatory process cumbersome and unduly lengthy, but they should — and are intended to — create quality rulemakings that improve the functioning of government and serve the public interest. Well-managed agencies can conduct rulemaking with better procedures in a timely manner.

Reforms, of course, should be tailored to the type of rulemaking. That is, the resources required to implement such reforms should be commensurate with the importance and/or impact of the rulemaking and the nature of the issues at stake. Major rulemakings, such as those involving more than $100 million of annual costs to our economy, certainly warrant improvements to the process to

ensure the accuracy and objectivity of the information used to promulgate them and the efficacy, efficiency and fairness of the rules that are issued. Everyone will benefit from smarter regulation.

VII. Conclusion

In the 17 years since BRT issued its call for regulatory reform, *Toward Smarter Regulation*, some points of contention have been resolved. For example, there is no longer a debate over whether regulatory agencies should conduct cost-benefit analysis for major rules because the technique has been widely accepted and has been credited with improving specific regulations.

By and large, however, the proposals contained in *Toward Smarter Regulation* have not been fully adopted, which is unfortunate because all of the recommendations remain applicable today, in some respects more than ever. The importance of regulation with regard to our national economy cannot be overlooked. The President and the Congress should seize the moment, enact the aforementioned reforms and achieve smarter regulation. The result will be positive for U.S. jobs and competitiveness. We can and must achieve our regulatory objectives at lower cost and with fewer adverse consequences for jobs, for innovation and for U.S. competitiveness.

Endnotes

[1] Business Roundtable, *Toward Smarter Regulation* (1994), available at http://businessroundtable.org.

[2] Business Roundtable, *Roadmap for Growth* (Dec. 8, 2010), available at http://businessroundtable.org.

[3] See, e.g., Business Roundtable, *Major Regulations/Issues of Concern* (April 12, 2011), available at http://businessroundtable.org.

[4] *Ibid.*

[5] *Toward Smarter Regulation* uses the term "sound science" to encompass the need to both use the best available information and objectively measure risk.

[6] See *Toward Smarter Regulation*, recommendation 6.

[7] See *Toward Smarter Regulation*, recommendation 7.

[8] Exec. Order No. 12866 (Sept. 30, 1993); see also Exec. Order No. 13497 (Jan. 30, 2009) (adopting Exec. Order No. 12866).

[9] John D. Graham, "Saving Lives through Administrative Law and Economics," 157 Univ. of Penn. Law Rev. 2 (2008).

[10] See 74 Fed. Reg. 22348, 22377–78 (May 12, 2009); 75 Fed. Reg. 2598 (Jan. 15, 2010); 75 Fed. Reg. 55852 (Sept. 14, 2010); 75 Fed. Reg. 76186 (Dec. 7, 2010).

[11] See 74 Fed. Reg. 66496 (Dec. 15, 2009).

[12] Office of Management and Budget, *2011 Report to Congress on the Benefits and Costs of Federal Regulations* (2011), p. 3.

[13] 410 U.S. 224 (1973).

[14] 435 U.S. 519 (1978).

[15] *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) (holding that agencies may receive deference when interpreting statutes that they administer).

[16] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency interpretation of its own regulation is "controlling ... unless it is plainly erroneous or inconsistent with the regulation").

[17] Andrew Liveris, *Make It in America: The Case for Reinventing the Economy*. Hoboken, NJ: John Wiley & Sons (2011).

[18] *Toward Smarter Regulation* recommended the use of market incentives and performance standards over more prescriptive regulation. Such standards provide more flexibility to regulated entities and therefore are less likely to impede innovation and cost-effective compliance.

[19] There are several other ways to promote objectivity, including developing standard methodologies to be used by all agencies when estimating benefits and costs and the uncertainties in these estimates, allowing other agencies to conduct the analysis jointly with the issuing agency, ensuring that OMB (and/or Congress) has the resources to evaluate the analysis, subjecting the preliminary analysis to public comment, requiring objective analysis in the underlying statute providing authority for the regulatory program, permitting evidentiary hearings about the data and assumptions used, and/or requiring the analysis to be part of the rulemaking record for a "more searching" judicial review process. These differing approaches, alone and in combination, also should be considered to determine the best way to ensure objectivity.

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Rein on federal regulations will only benefit economy

Jeffrey A. Rosen
GUEST COLUMN

With the nation's economy still in a slump, Sens. Rob Portman, R-Ohio, and Mark Pryor, D-Ark., are leading a bipartisan effort to create a smarter regulatory environment for American employers, workers, and consumers. Their recent proposal, the Regulatory Accountability Act, is a thoughtful solution to a problem. Sensible regulations can promote important public goods. But as President Obama recently acknowledged, excessive regulation can place "unreasonable burdens on business – burdens that have stifled innovation and have had a chilling effect on growth and jobs."

The Regulatory Accountability Act addresses this problem by building economic reality-checks into the process that regulators use to issue new red tape. The bill's primary focus is the "major rule" category – the 50 to 80 costliest regulations out of the nearly 4,000 federal rules issuing annually. Specifically, it would require agencies to evaluate the cost and benefits of new regulations, consider the potential impact on jobs and the economy, and choose the least burdensome approach. It would permit a judicial check on an agency's analysis of costs and benefits.

In response to this effort, University of Cincinnati law professor Joseph Tomain took to these pages to proclaim "four reasons (the) bipartisan accountability act will fail" (Nov. 1). The failures lie only in Prof. Tomain's analysis. Among several erroneous claims, the following four fallacies are worth highlighting:

■ First, Tomain asserts that "transparency goes out the window" with this bill. Just the opposite is true. The Portman-Pryor plan opens the regulatory process to greater sunlight at nearly every stage. It invites early public participation, requires agencies to reveal the data they use, and allows the White House's regulatory oversight office (called "OIRA") to place its views on new regulations directly in the agency's public record.

■ Second, Tomain takes issue with a recent estimate that federal regulations cost $1.75 trillion annually. He fails to mention that the source of the estimate is not the bill's sponsors, but a 2010 study commissioned by the Small Business Administration. Tomain refers to a lower White House cost estimate, but he omits the fact that it is based on a narrow sliver of all regulations – less than 5 percent of all regulations issued over a single 10-year period. Obama in August told Congress that seven of his planned new regulations will each cost more than $1 billion per year.

■ Third, Tomain argues that analysis of costs and benefits is a "weak tool" that hinders regulation. This criticism is at odds with the consistent use of a cost-benefit standard throughout 30 years of regulatory oversight by presidents of both parties. It is a valuable method to guide rational decision making. When we already have 290,000 federal employees at regulatory agencies, with a budget of $54.9 billion, is it really too much to ask that major new rules do more good than harm? Tomain offers no alternative other than to "let government govern" – a meaningless tautology that would grow only our government, not our economy.

■ Fourth, Tomain absurdly claims that this bill will "increas[e] the costs of regulations." Not so. The bill specifically tells federal agencies to tailor new regulations to impose the "least cost" possible to achieve the policy goals set out by Congress. New analytical requirements may require agencies to do more work on the front end to get new rules right. But the savings will be substantial and permanent. When a proposed new rule has more than a billion-dollar impact on our economy, isn't it important to get the facts right?

Sens. Portman and Pryor deserve high praise for working on a bipartisan basis to reform a regulatory system that too often imposes unnecessary costs on job creators and consumers. Their bill would be good for our economy, while still enabling sensible rules.

Jeffrey A. Rosen, an attorney in Washington, D.C., served as general counsel and senior policy adviser at the White House Office of Management and Budget.

Exh. B

Exh. C

November 2, 2011

The Honorable Lamar Smith, Chairman
The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3010, the Regulatory Accountability Act of 2011

Dear Mr. Chairman and Ranking Member Conyers:

The undersigned practitioners and scholars in the field of administrative law, and former regulatory officials in the White House, OMB and federal agencies, have reviewed the provisions of H.R. 3010, the Regulatory Accountability Act of 2011. H.R. 3010 would reform the Administrative Procedure Act's rulemaking provisions to enhance the quality of federal regulation, enhance democratic accountability and oversight for administrative policymaking, and improve policy outcomes for the American people. We strongly support the Committee's effort to enhance the analysis, justification, transparency of, and participation in, federal rulemaking, and we respectfully request that the Committee include this letter in the record.

In its current form, the Administrative Procedure Act (APA) does not adequately regulate the federal rulemaking process. It does not obligate agencies to rigorously define and characterize the need for regulation. It does not require agencies to identify the costs of regulations – including both compliance costs and impacts imposed on the economy and general welfare. It does not require agencies to carefully identify and assess the benefits to be achieved by new regulations, and does not compel agencies to choose the least burdensome, lowest-cost regulation that would achieve the statutory objectives. In short, the APA does not necessarily ensure that agencies justify their regulations in accordance with the highest standards the public deserves. H.R. 3010 would correct this.

H.R. 3010's critics argue that the bill would impose new burdens on agencies, by interposing additional analytic hurdles before agencies could adopt new regulations. First, it is important to understand that the bill's regulatory standards, and its analytic and justification requirements, are not fundamentally new – they have been previously developed and applied in Executive Orders issued by Presidents Reagan, Clinton and Obama. The bill would effectively codify existing principles and standards from these Executive Orders in law. Second, while

agencies would surely take the codified legal standards and requirements very seriously, and thus experience somewhat greater compliance burdens, that is not necessarily unreasonable or unwarranted. We believe the American public would view such additional safeguards as appropriate.

To be clear, we do not oppose environmental, health, safety or economic regulation. Nor do we believe that only a regulation's *costs* should be carefully tabulated and weighed. We agree that the *benefits* of many well-designed regulations can obviously be highly valuable to society, and we recognize that sound regulations can certainly reflect benefits that include intangible, non-quantifiable values (such as environmental, moral, ethical, aesthetic, social, human dignity, stewardship and other non-pecuniary or practical factors).

Taken together, we believe that *all* such costs and *all* such benefits must be rigorously analyzed, assessed, justified and scrutinized before significant new rules are imposed on the public, the economy, affected parties and regulated entities. Quite simply, that is "accountability."

The heads of regulatory agencies exercise extensive delegated policymaking authority, but are not directly accountable to the public through the democratic process. Accordingly, it is entirely reasonable, appropriate and, indeed, essential, for Congress to (i) specify in law more stringent criteria for rulemaking, (ii) facilitate substantial Presidential oversight of agency regulations (including those promulgated by "independent" agencies), (iii) enable more robust public participation in the rulemaking process, (iv) require regulations to be based on more reliable data and other relevant inputs, and (v) provide for more effective judicial scrutiny of the final regulations.

Of course, Congress often delegates its policymaking power to agencies, and it is incontrovertible that agencies' rulemaking can often be as highly consequential and important to the public as the congressionally enacted laws themselves. But for that very reason, regulation must not be undertaken without very careful consideration and observation of the most stringent procedures and analysis. The fact that the bill's requirements would embody existing regulatory review duties and obligations (based on numerous Executive Orders) in the APA itself is not objectionable. Before regulatory agencies impose new burdens on the public and the economy, the agencies should spend the time and make the effort to make sure they get the balance right for the overall benefit of society.

Accordingly, we view the Regulatory Accountability Act as serving the public well by mandating in statutory text that new regulations be thoroughly and meaningfully justified. Indeed, to the extent feasible, we would recommend that Congress avail itself of the same cost-benefit analysis prior to enacting regulatory legislation so as to avoid imposing unjustified regulatory mandates that agencies cannot fully resolve in the rulemaking process.

As noted above, far from imposing partisan or ideologically divisive requirements, H.R. 3010 embodies and implements a longstanding, bipartisan consensus on the proper principles of regulatory review and reform: Presidents Reagan, George H.W. Bush, Clinton, George W. Bush and—most recently and emphatically—President Obama, have all issued or implemented Executive Orders calling for rigorous justification of the need for regulation, careful cost-benefit analysis before imposing new regulatory requirements, reliance on sound science, and selection of the least burdensome regulatory alternatives that meet the relevant statutory objectives.[1]

H.R. 3010 would take those Executive Branch principles and codify them, thereby preserving in federal statutes the very values set forth in President Obama's recent Orders:

- Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.
- It must be based on the best available science.
- It must allow for public participation and an open exchange of ideas.
- It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.
- It must take into account benefits and costs, both quantitative and qualitative.
- each agency must, among other things:

[1] *See, e.g.*, Executive Order Nos. 12291 (Reagan), 12866 (Clinton), 13563 (Obama), 13579 (Obama).

- (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);
- (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
- (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

- Regulations shall be adopted through a process that involves public participation.
- each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process.
- each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.

- Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.
- each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.
- each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.
- Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation.
- Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking.
- To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).
- Executive Order 13563 of January 18, 2011, "Improving Regulation and Regulatory Review," directed to executive agencies, was meant to produce a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."
- Independent regulatory agencies, no less than executive agencies, should promote that goal.
- Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.

Indeed, the Regulatory Accountability Act would implement President Obama's recent call for "public participation and open exchange"[2] *before* a rule is proposed. Specifically, H.R. 3010 would create an Advance Notice of Proposed Rulemaking stage for major rules ($100M+). In this early notice, the agency would identify the problem it wishes to address through regulation and articulate the specific legal authority for doing so; disclose its preliminary views on the direction of the prospective regulation, and provide information concerning possible regulatory alternatives; and invite the public to submit written comments on these issues. While this adds a step in the regulatory process, it is one that allows interested parties a greater opportunity to help the agency reach a sound outcome.

The bill would also obligate agencies to rely on better scientific and technical data. While agencies must exercise their expert judgment, it is impossible to argue against the proposition that they should use the best data and other inputs available. Affected parties can invoke judicial and administrative remedies to ensure that agencies rely on scientific and technical evidence that meets the standards of the Information Quality Act. This is, of course, consistent with President Obama's call for regulating "based on the best available science."[3] This is unassailable. If agencies cannot disclose and defend the data they rely on as being the best available, they cannot possibly be confident enough in their regulatory analysis to impose new requirements on the basis of the data at their disposal.

The Committee may also wish to consider the possible application, or adaptation, of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, in the regulatory context. In *Daubert*, the Court empowered federal judges to reject irrelevant or unreliable scientific evidence, thus providing the judiciary a mandate to foster "good science" in the courtroom and to reject expert testimony not grounded in scientific methods and procedures. Some federal agencies have been criticized for lacking a commitment to sound science. Too often, federal courts have accorded great deference to uphold agency decisions that may have been based on faulty scientific evidence or unsupported assumptions and conclusions.

Daubert principles could be applied to the review of agency rulemaking under the APA because these principles are consistent with the APA requirement that agencies engage in reasoned decisionmaking, would assure better documentation

[2] Executive Order No. 13,563.

[3] Executive Order No. 13,563.

of agencies' scientific decisions, and would enhance the rigor and predictability of judicial review of agency action based on scientific evidence. This approach would be entirely congruent with the Regulatory Accountability Act's requirement that regulations be based on the best available science. Applying the Daubert principles in judicial review of agency action would allow courts to evaluate the scientific methods and procedures employed by agencies, but must not allow judges to substitute their own policy preferences or conclusions for those chosen by the agencies. The courts' review need not be heavy-handed; it can be both deferential and probing, ensuring that agencies formulate and comply with procedures tailored to producing the best results, while not dictating what those results must be in any given case.

Incorporating, or adapting, *Daubert* principles into administrative law would improve agency decisionmaking and enhance accountability. Agencies would be compelled to identify the most reliable and relevant scientific evidence for the issue at hand and disclose the default assumptions, policy choices, and factual uncertainties therein. Applying *Daubert* in the administrative context would refine judicial review of agency science, resulting in greater consistency and rigor.[4]

We also believe that it is reasonable that H.R. 3010 would expose more agency pronouncements, such as agency guidance documents, to more rigorous standards. Specifically, the bill would adopt the good-guidance practices issued by OMB in 2007 (under then-Director, and now Senator, Portman). Such agency guidance would be clearly noted as "non-binding," and would not be entitled to substantial judicial deference.

The heart of the bill is to build cost-benefit analysis principles into each step of the rulemaking process — proposed rule, final rule, and judicial review. As noted earlier, these principles are drawn from Executive Orders issued by Presidents Reagan and Clinton and emphatically reaffirmed by President Obama. The bill would make those principles permanent, enforceable and applicable to independent agencies. Compliance with these codified requirements would be subject to judicial review.

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[4] See Raul & Zampa, "'REGULATORY DAUBERT': A PROPOSAL TO ENHANCE JUDICIAL REVIEW OF AGENCY SCIENCE BY INCORPORATING DAUBERT PRINCIPLES INTO ADMINISTRATIVE LAW," available at http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+7+(Autumn+2003).

Significantly, the bill would require agencies to adopt the "least costly alternative that will achieve the objectives of the statute authorizing the rule." It permits agencies to adopt a more costly approach only if the agency demonstrates that the added costs justify the benefits and that the more costly rule is needed to address interests of public health, safety, and welfare that are clearly within the scope of the statute. This is consistent with the White House's recent instruction to federal agencies to "minimize regulatory costs"[5] and the President's directive to "tailor regulations to impose the least burden on society." (Exec. Order 13,563)

For high impact, billion-dollar rules, additional procedures would apply – which seems entirely reasonable given the resulting consequences for the public and the economy. Most importantly, affected parties will have access to a fair and open forum to question the accuracy of the views, evidence, and assumptions underlying the agency's proposal. The hearing would focus on (1) whether there is a lower-cost alternative that would achieve the policy goals set out by Congress (or a need that justifies an higher cost than otherwise necessary); (2) whether the agency's evidence is backed by sound scientific, technical and economic data, consistent with the Information Quality Act; (3) any issues that the agency believes would advance the process. Parties affected by major rules ($100M+) would also have access to hearings, unless the agency concludes that the hearing would not advance the process or would unreasonably delay the rulemaking.

Following the hearing prescribed in the bill, high-impact rules would be reviewed under a slightly higher standard in court — so-called "substantial evidence" review. While this standard is still highly deferential to the agency's judgments, it allows a court reviewing major rules to ensure that an agency's justifications are supported by "evidence that a reasonable mind could accept as adequate to support a conclusion based on the record as a whole."

We understand that these additional review and analysis requirements are not perfunctory and may not be easy for agencies to accomplish. However, we believe that because of the extensive delegation of essentially legislative authority from Congress and policymaking discretion that agencies exercise, and the substantial deference that agencies enjoy from the courts, the public deserves more analysis and justification before agencies acts. Moreover, we believe that the public also expects the President to influence and control rulemaking by all federal agencies, and thus we support greater centralized White House review of agency regulations

[5] Cass Sunstein, *Washington Is Eliminating Red Tape,* The Wall Street Journal (Aug. 23, 2011).

– including independent agencies – on behalf of the President by the Office of Information and Regulatory Affairs at OMB (in the Executive Office of the President). We believe the bill, which clearly applies its regulatory standards to independent agencies, should also make clear that the President is responsible for, and entitled to review, the rules issued by independent agencies such as the SEC, CFTC, FCC, FTC, CPSC, CFPB, etc.

The need for such Presidential authority is manifest. For example, in a recent case before the U.S. Court of Appeals for the D.C. Circuit, *In re Aiken County*, the presidentially controlled Department of Energy and the independent Nuclear Regulatory Commission did not actually agree on the merits of how to handle nuclear waste at Yucca Mountain. This prompted Circuit Judge Brett Kavanaugh to explain why the lack of presidential authority and control is constitutionally and politically dubious. Quoting both Alexander Hamilton in the Federalist Papers and the Supreme Court in *PCAOB*, he wrote that "the issue created by *Humphrey's Executor* is that the President's decision on the Yucca Mountain issue is not the final word in the Executive Branch. In other cases, the issue created by *Humphrey's Executor* is that it allows Presidents to avoid making important decisions or to avoid taking responsibility for decisions made by independent agencies. When independent agencies make such important decisions, no elected official can be held accountable and the people "cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"

President Obama has acknowledged the importance of Presidential review of independent agency rulemaking in recent, July 11, Executive Order. (Executive Order, 13,579) His Order requests (but does not command) that the independent agencies to submit the regulations they issue to the same principles applicable throughout the parts of the Executive Branch for which he is directly accountable. Specifically, independent agencies are now asked to scrutinize existing and future regulations in accordance with cost-benefit analysis. He also asks them to assure that regulatory policy is cost-effective and protective of innovation and job creation. Perhaps most importantly, independent agencies should also make sure that there is a real problem that needs to be solved before regulating, and then choose the least burdensome regulatory alternative that prevents or abates that harm. The bill currently before Congress should thus make clear – not only that independent agencies are subject to the salutary standards of cost-benefit analysis and rigorous policy justification – but also, that the President has the power and responsibility to review and control all such Executive Branch rulemaking.

While we endorse the bill's proposed codification of regulatory standards, analytic criteria, and accountability principles, we would also recommend that Congress consider incorporating the prospectively duplicative provisions of the Regulatory Flexibility Act (with regard to cost-benefit analysis for small business) and the Unfunded Mandates Reform Act (with regard to cost-benefit analysis and minimization of burdens on states, tribes and private sector; though UMRA does not currently apply to independent agencies). Moreover, as previously noted, we also believe the bill should specifically authorize the President to oversee rulemaking by independent agencies. The President's responsibility to oversee independent regulatory agencies, like the Consumer Financial Protection Board, for example, would ensure that the regulations adopted by such agencies are in the overall best interest of the American people.

Thank you for considering our views.

Respectfully submitted,

Alan Charles Raul
Former Vice Chairman,
White House Privacy and Civil Liberties Oversight Board
Former General Counsel, U.S. Department of Agriculture
Former General Counsel, Office of Management and Budget
Former Associate Counsel to the President

C. Boyden Gray
Boyden Gray & Associates
Former Ambassador to the European Union
Former Counsel to the President
Former Counsel to the Vice President

James C. Miller III
Former Director of the Office of
Management and Budget
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Jeffrey R. Holmstead
Former Assistant Administrator of the Environmental
Protection Agency for Air and Radiation
Former Associate Counsel to the President

Jeffrey Bossert Clark
Former Deputy Assistant Attorney General,
Environment & Natural Resources Division,
United States Department of Justice

David R. Hill
Former General Counsel,
U.S. Department of Energy

Exh. D

September 22, 2011

The Honorable Lamar Smith
United States House of Representatives
Washington, DC 20515

The Honorable Rob Portman
United States Senate
Washington, DC 20510

The Honorable Howard Coble
United States House of Representatives
Washington, DC 20515

The Honorable Susan Collins
United States Senate
Washington, DC 20510

The Honorable Collin Peterson
United States House of Representatives
Washington, DC 20515

The Honorable Mark Pryor
United States Senate
Washington, DC 20510

Dear Representatives Smith, Coble and Peterson, and Senators Portman, Collins and Pryor:

The undersigned groups strongly support your introduction of the Regulatory Accountability Act of 2011. Your bipartisan support for this bill makes clear that the need to update the 65 year old regulatory process transcends party affiliation.

Recognizing the precarious condition of America's economy and continued weakness in job creation, our members believe that regulations need to be narrowly tailored, supported by strong and credible data and evidence, impose the least burden possible, while still implementing Congressional intent. In addition, when agencies produce regulations that do not reflect these requirements, better mechanisms to hold them accountable are needed. The Regulatory Accountability Act of 2011 will restore these objectives to the regulatory process by:

- Increasing public participation in shaping the most costly regulations before they are proposed.
- Requiring that agencies must choose the least costly option unless they can demonstrate a need to protect public health, safety, or welfare.
- Giving interested parties the opportunity to hold agencies accountable for their compliance with the Information Quality Act.
- Providing for on-the-record administrative hearings for the most costly regulations to insure that agency data is well tested and reviewed.
- Restricting agencies' use of interim final regulations where no comments are taken before a regulation takes effect and providing for expedited judicial review of whether that approach is justified.
- Providing for a more rigorous test in legal challenges for those regulations that would have the most impact.

The Regulatory Accountability Act of 2011 builds on established principles of fair regulatory process and review that have been embodied in bipartisan executive orders dating to

at least the Clinton administration and will make the regulatory process more transparent, agencies more accountable, and regulations more cost effective. The Act will not affect any regulations that are already in effect.

We welcome the introduction of this bill and enthusiastically support it. We look forward to working with you on moving it forward.

Sincerely.

Alliance of Automobile Manufacturers
Aluminum Association
American Bakers Association
American Chemistry Council
American Farm Bureau Federation
American Forest & Paper Association
American Foundry Society
American Hotel and Lodging Association
American Machine Tool Distributors' Association
American Petroleum Institute
Associated Builders & Contractors, Illinois Chapter
Associated Builders & Contractors, Inc.
Associated Builders & Contractors, Rocky Mountain Chapter
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CTIA – The Wireless Association
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Industrial Energy Consumers of America
Industrial Supply Association
International Sign Association
International Warehouse Logistics Association
Irrigation Association
Marine Retailers Association of America
Metals Service Center Institute
National Association of Electrical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS®
National Association of Wholesaler-Distributors
National Black Chamber of Commerce
National Club Association

National Council of Chain Restaurants
National Electrical Contractors Association
National Federation of Independent Business
National Funeral Directors Association
National Marine Distributors Association
National Mining Association
National Newspaper Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand & Gravel Association
North American Association of Utility Distributors
North American Die Casting Association
North American Equipment Dealers Association
NPES—The Association for Suppliers of Printing, Publishing and Converting Technologies
Nuclear Energy Institute
Outdoor Power Equipment and Engine Service Association
Portland Cement Association
Property Casualty Insurers Association of America
Small Business & Entrepreneurship Council
SouthWestern Association (farm, industrial/construction and outdoor power equipment retailers)
SPI: The Plastics Industry Trade Association
U.S. Chamber of Commerce

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Fishing for a reason to regulate

By Jeff Rosen, former general counsel, White House Office of Management and Budget - 04/10/13 10:30 AM ET

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This Thursday, when the Senate holds its hearing on President Obama's nomination of Gina McCarthy for EPA administrator, attention is likely to be focused on the many costly rules that EPA has issued during the last four years, and the additional ones now planned. During the president's first term, the administration issued more than 200 economically significant new rules each involving more than $100 million in new annual costs — a record high for any president's first term — and EPA alone accounted for more than 25 new economically significant final rules, with annual costs in the billions of dollars by EPA's own estimates.

The administration has argued that those regulatory costs are justified, by asserting high "benefits" that exceed their costs. It is to the president's credit that he has continued to require cost-benefit analysis of major rules to ensure they do more good than harm, as presidents of both parties have required in the past. But with regard to EPA, what has been less noticed than the high cost of the agency's rules is that there is considerable reason to be skeptical about how EPA is assessing the benefits that it claims. Though environmental goals often deservedly command wide support, careful analysts have noted that EPA has overstated benefits and included things that ought not count at all. (See Dudley, 47 Business Economics 165, July 2012.) As one example, an ongoing action by EPA illustrates just how far agencies may go to find supposed "benefits" to justify new red tape.

In 2011, EPA proposed a new regulation governing the equipment that power plants and manufacturing facilities use to draw in water to prevent overheating. These water intake systems generally are not harmful to health or water quality, but EPA's staff expressed concerns primarily about their effect on larvae and forage fish — commonly known as "bait". To reduce losses of such fish, EPA wants to require installation of advanced screens at 1,260 facilities and dramatically more expensive technologies to be decided later on a site-by-site basis.

EPA initially estimated that its preferred approach would impose $466 million in annual costs on power plants and energy consumers, while producing only $16 million in quantified benefits. With one dollar in costs for every three cents in fish "benefits", this did not look like a cost-effective rule.

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But then EPA got creative. The agency mailed a "survey" to several thousand households, most of whom did not even respond. Through a series of purely hypothetical questions, EPA asked people to put a dollar value on how fishbait and other aquatic organisms make them feel. The 18-page survey asked how much per month they might imagine paying to save "0.6 billion fish." Two dollars a month? Three dollars? These sponsor-a-fish questions suggested that a couple bucks could save millions of tiny fish, with no benchmark to other environmental or economic priorities and no actual cost to the survey responders. Respondents were also asked how much they might imagine paying to improve the "condition of aquatic ecosystems" from "48 percent pristine" to "50 percent pristine" – for those who know what a 2 percent increase in pristine-ness looks like.

Perhaps EPA regulators found the results they were fishing for. Last summer, EPA published a notice showing that its "stated preference" survey supports increasing the estimate of fish "benefits" to $22.2 billion per year. That's about a 14,000% increase over the $16 million estimate it put out last year. If one takes this new method seriously, it suggests that for every $1 that Americans are willing to pay for fish on their dinner plate or on their hook, they are willing to pay another $140 to know the bait are swimming freely and comfortably somewhere.

This not a credible basis to justify new regulation. In the past, the Office of Management and Budget, charged with overseeing the rule-making process, and leading economists have insisted on safeguards against using surveys that pose purely hypothetical questions, rather than asking about real economic choices that people make. This approach also breaks with EPA's own prior limitation of assessing such intangible, "non-use values" only when looking at protections for endangered species like the humpback whale, but not for common and abundant wildlife like minows and bait.

The results of EPA's benefits "survey", if adopted when EPA finalizes its rule this year, could be misused to justify more than $2 billion per year in new regulatory costs under EPA's preferred option, and nearly $7.5 billion per year for an even more intrusive and costly option still under consideration. Energy businesses project that this could translate into up to $4.5 billion per year in costs passed on to consumers in the form of higher electric bills – the last thing families and employers need in an economy that has been stalled for too long already.

Perhaps Senators should be asking the EPA nominee whether this proposed new approach to evaluating regulatory benefits provides a worrying glimpse into what the administration's second-term regulatory game plan may look like, with dubious methods employed to expand the reach of regulation yet again. Hopefully not. Under EPA's latest maneuver, there would be few new burdens that regulators could not claim to justify on paper through bogus assertions of "benefits". Permitting this tactic would enable another substantial expansion of the regulatory state, at the continued expense of the private economy.

With our national economy unfortunately continuing to lag during the worst "recovery" in American history, the federal government should not be grasping for new excuses to impose higher regulatory costs. At a minimum, senators might ask the EPA nominee to commit the agency to using sound science, to use only valid measures of actual benefits, and to protect our environment in a reasonable way that avoids imposing unjustified costs on an economy that needs to get back to creating jobs and incomes rather than taking new regulatory actions that unnecessarily impede them.

Rosen is a lawyer in Washington, D.C., who previously served as general counsel at the White House Office of Management & Budget.

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Supplemental Material submitted by Ronald M. Levin, William R. Orthwein, Distinguished Professor of Law, Washington University in St. Louis

OCTOBER 24, 2011

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

SUMMARY

The Regulatory Accountability Act of 2011, H.R. 3010, would be a sweeping and consequential revision to the Administrative Procedure Act, particularly with regard to the process of rulemaking. The bill is unusually ambitious and crammed with details that are impossible to summarize. Among its provisions are many that the Section endorses, many it would modify, and many that it opposes.

With regard to the first category, we support provisions that would

- require agencies to maintain a rulemaking record,
- require agencies to disclose data, studies, and other information underlying a proposed rule,
- recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA),
- provide for agencies to consult OIRA when issuing major guidance, and
- extend these OIRA functions to the independent agencies.

With regard to the second category, we are sympathetic toward, but suggest modifications to, the bill's provisions that would

- add an Advance Notice of Proposed Rulemaking step to certain rulemakings,
- address the problem of agencies' issuance of "interim" rules that are never superseded by regularly adopted rules, and
- provide some centralized oversight of agency issuance of and reliance on guidance documents.

On the other hand, the Section has serious concerns about

- the bill's lengthy list of "rulemaking considerations" that agencies would be required to take into account at each stage of the rulemaking process,

- use of the long-discredited "formal rulemaking" for some rules,
- providing for judicial review of agencies' compliance with OIRA's guidelines, and
- effectively rewriting the substantive provisions regarding standard-setting in the enabling legislation of numerous agencies through a cost-focused "supermandate." (We take no position on the substantive question of the appropriate role of costs in setting standards; we only object to resolving that question in a single, across-the-board statute that would turn the APA into the "Administrative Substance Act.")

In general, we think many of the new steps the bill would require for rulemaking are, in numerous particular cases, valuable and appropriate. However, to impose these requirements automatically and across the board will, we fear, further ossify the rulemaking process with little offsetting benefits in the form of better rules.

The following comments track the organization of the bill itself. Readers interested only in specific provisions of the bill should consult the Table of Contents, which indicates the pages not only where particular topics, but also where specific statutory provisions, are discussed.

AMERICAN BAR ASSOCIATION SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

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* Citations in this table are to sections of the Administrative Procedure Act as it would be amended by the bill. All of these provisions are in § 3(b) of H.R. 3010, except where noted.

The Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA) respectfully submits these comments on H.R. 3010, the Regulatory Accountability Act of 2011.[1] The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.

The views expressed herein are being presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I. INTRODUCTION

The Administrative Procedure Act (APA)[2] has been in effect for some sixty-five years. Possible updates certainly deserve consideration. More particularly, the rulemaking process, which is a principal focus of H.R. 3010, has evolved in ways not anticipated in 1946. Important questions arise as to whether and how many of these changes should now be codified or refined.

The bill is an ambitious step in the development of APA revision legislation. As discussed below, we support some of its provisions and have suggestions for modifications in others. For example, we support codification of requirements that agencies maintain a rulemaking record and that they disclose data, studies, and other information underlying a proposed rule. We also support provisions that would recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA), provide for agencies to consult OIRA when issuing major guidance, and extend these OIRA functions to the independent agencies. Furthermore, the bill addresses some issue areas as to which we could potentially support legislation, although not the specific measures proposed in the bill. This category includes the bill's provisions regarding advance notices of proposed rulemaking and agencies' issuance of "interim" rules that are never superseded by regularly adopted rules. In addition, we have some proposals of our own that could usefully be incorporated into the bill.

On the other hand, the Section has serious concerns about the bill's lengthy list of "rulemaking considerations" that agencies would be required

1. H.R. 3010, 112th Cong. (2011) (as introduced in House of Representatives, Sept. 22, 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3010ih/pdf/BILLS-112hr3010ih.pdf.

2. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2006)).

to take into account during the rulemaking process. The ABA has long expressed concern that existing requirements for predicate findings already unduly impede agency rulemaking. The bill would aggravate this situation. That prospect should be troubling to both regulated persons and statutory beneficiaries, regardless of their location on the political spectrum. After all, the APA's rulemaking provisions apply to deregulation and to amendment or repeal of rules just as they do to adoption of new rules. Moreover, the case for prescribing new predicate findings in rulemaking is undercut by the recognized duty of agencies to respond to significant, relevant comments submitted during the public comment period. In this way, the rulemaking process is self-regulating.

A better approach to predicate findings would be for Congress to take on the project of refining and consolidating existing requirements for predicate findings and regulatory analysis into a single coherent and streamlined framework. Some of the considerations proposed in the bill might deserve to be included in such a framework, but a goal of this harmonization effort should be to ensure that the rulemaking process will be no more burdensome on agencies than it now is, and preferably less so.

Another area of concern is that the bill provides for regular use of the long-discredited "formal rulemaking" for high-impact rules and perhaps other major rules. This model has passed almost completely into disuse, because experience has shown that it leads to substantial delays and unproductive confrontation and because courtroom methods are not generally suited to resolution of legislative-type issues. We could support a carefully limited framework for oral proceedings where a need for cross-examination on specified narrow issues is affirmatively shown, but the bill goes far beyond that limited approach.

Finally, the bill would legislate in several areas that we believe Congress would more properly address in agencies' respective organic statutes than in the APA. These matters include evidentiary burdens and substantive decisional criteria that would override provisions in existing enabling legislation.

In connection with these and other provisions in the bill that our comments call into question, we hope that Congress will not overlook the virtues of caution and restraint. It should not undertake a sweeping revision such as this without a firm showing that there is a problem to be solved, and it should be wary of codifying minutiae in the Act. In our view, the strength of the APA derives in no small part from the fact that it confines itself to fundamentals. The general act must accommodate the government's need to tailor specific processes to the various tasks Congress assigns agencies. Solutions that work well in many or even most contexts may work poorly in others. The brevity of the APA has also permitted the

growth and modernization of the administrative process over time. That much of today's administrative law takes the form of case law, regulations, and executive orders is not necessarily a matter of regret, because those prescriptions offer useful on-the-ground flexibility and can be revised to meet changing needs more easily than can statutes.

Against this background, we turn to comments on specific provisions of the bill. Because § 3 of the bill comprises twenty-four of the bill's thirty-two pages, we will usually identify specific provisions by their proposed APA section or subsection numbers.

II. DEFINITIONS

Section 2 of the bill would amend § 551 of the APA by inserting additional definitions. In general, these are well-drafted and largely drawn from past legislation, executive orders, and case law. We have three suggestions.

First, "guidance" is (appropriately) defined in proposed § 551(17) to be identical to what the APA calls "interpretative rules [and] general statements of policy" in the current exemption from notice and comment in § 553(b)(A)[3]—yet the bill continues to use the older terminology in the exemption itself (proposed § 553(g)(1)). The bill should be revised to head off confusion over the use of two terms to mean the same thing, perhaps by eliminating the older terms altogether.

One other difficulty with the bill's definition of "guidance" is that it would apply to an agency statement "other than a regulatory action." That phrase was apparently drawn from President George W. Bush's regulatory review order,[4] but it appears nowhere in the APA, either now or under the proposed bill. This drafting error could be cured by an adaptation from the definition of "rule" in Executive Order 12,866. That definition refers to an agency statement "which the agency intends to have the force and effect of law."[5] Thus, the bill's definition of guidance could be reworded to apply to "an agency statement of general applicability that is not intended to have the force and effect of law but that sets forth a policy [etc. as in the current definition]."[6]

Second, Congress should take this opportunity to clarify the existing

---

3. 5 U.S.C. § 553(b)(A) (2006).

4. Exec. Order No. 13,422, § 3(g), 3 C.F.R. 191, 192 (2007).

5. Exec. Order No. 12,866, § 3(d), 3 C.F.R. 638, 641 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

6. The definitions of "rule" and "guidance document" in the recently adopted Model State Administrative Procedure Act draw a similar distinction. Under these definitions, the former "has the force of law" and the latter "lacks the force of law." *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT §§ 102(14), (30) (2010) (HeinOnline).

definition of "rule" in § 551(4) of the APA. This poorly drafted provision has been a target of criticism ever since the APA was first enacted. Briefly, the opening words of the definition—"the whole or a part of an agency statement of general or particular applicability and future effect"—are out of keeping with the manner in which administrative lawyers actually use the word "rule." The words "or particular" and "and future effect" should be deleted from the definition. The ABA has repeatedly called for the former change[7] and has also endorsed the latter in substance.[8] Thus, with minor drafting cleanup, we propose that the definition should read as follows:

> (4) "rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Third, a bill to modernize the APA provides an opportunity to update obsolete terminology. The bill already does this by replacing the phrase "interpretative rules" with the more compact term "interpretive rules," which virtually all administrative lawyers prefer. In a similar vein, the APA phrase "rule making" should be replaced by "rulemaking," the variant that virtually all administrative lawyers actually use.

III. RULEMAKING CONSIDERATIONS AND REQUIRED ANALYSES

Revised § 553(b) would codify a new set of "rulemaking considerations." These principles would require an agency to consider a large number of specified issues as a predicate for any new or amended rule. The considerations are summarized later in this section. The bill's requirements for the notice of proposed rulemaking (NPRM) in § 553(d) incorporate the

---

7. *E.g.*, 106 A.B.A. ANN. REP. 549 & 783, at 783 (1981) [hereinafter *1981 ABA Recommendation*] (citing 5 U.S.C. § 551(4) (2006)); 95 A.B.A. ANN. REP. 548 & 1025, at 1025, 1027 (1970).

8. *See* 117 A.B.A. ANN. REP. 35–36 (1992) ("Retroactive rules are and should be subject to the notice and comment requirements of [the APA]."). For a full discussion of the reasons supporting this proposal, see Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077 (2004). In this connection, we note that the bill's definition of "guidance" is appropriately limited to statements of "general applicability," but it is limited by its terms to statements of "future effect." This limitation would be ill-advised. Because interpretive rules theoretically clarify what the law has meant all along, courts routinely apply them to transactions that occurred prior to the issuance of the interpretation. *See, e.g.*, Reno v. Koray, 515 U.S. 50, 61 (1995); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). This is, in fact, one reason why the "future effect" language of 5 U.S.C. § 551(4) should be removed.

§ 553(b) "considerations" by reference. Section 553(d) goes on to require the agency to discuss other matters as well. Then § 553(f) sets forth requirements for the "notice of final rulemaking" (NFRM). They include not only "a concise general statement of the rule's basis and purpose"—the traditional APA requirement—but also "reasoned final determinations" regarding the matters tentatively addressed in the NPRM.

Up to a point, the Section agrees with the bill's premise that it could be useful to codify the requisite findings for a rule in statutory form. Three decades ago, in 1981, the ABA made a specific proposal along these lines. Its resolution urged Congress to require an agency to address the following matters in a notice of proposed rulemaking:

> (i) the terms or substance of the proposed rule;
>
> (ii) a description of its objectives;
>
> (iii) an analysis of alternatives to accomplish those objectives seriously considered by the agency;
>
> (iv) an invitation to submit proposals for alternative ways to accomplish the rule's objectives;
>
> (v) a description of reporting and recordkeeping requirements and an estimate of the time and cost necessary to comply; and
>
> (vi) to the extent practicable after reasonable inquiry, an identification of duplicating or conflicting or overlapping Federal laws or rules.[9]

Moreover, the resolution provided that a *final* rule should be accompanied by:

> (a) a statement of the reasons for the policy choices made in connection with the rule including a description of alternatives considered to accomplish the objectives of the rule, and a statement of the reasons for the selection of the alternative embodied in the rule and rejection of other alternatives;
>
> (b) factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file; and
>
> (c) a response to each significant issue raised in the comments on the proposed rule.[10]

Some of these requirements have direct counterparts in H.R. 3010. However, the bill's list is both lengthier and more adventurous in its scope, and it gives rise to serious concerns regarding both the collective impact of its requirements and the particular thrust of certain individual components. Turning first to the collective impact, we will explain our concerns about the bill's approach. Then we will discuss a variation on that approach that

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9. *1981 ABA Recommendation*, *supra* note 7, at 784.
10. *Id.* at 785.

we could, in principle, support.

A. Background Positions

For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress not to add unnecessary analytical requirements to the APA rulemaking process.

For example, in 1993 the Administrative Conference of the United States (ACUS) noted: "Informed observers generally agree that the rulemaking process has become both increasingly less effective and more time-consuming."[11] The Conference thus recommended, among other things, that "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues."[12] In a similar vein, the ABA, in a 1992 resolution sponsored by this Section, "urge[d] the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[13] The Section's report supporting this latter pronouncement warned:

> The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. . . . [The existence of multiple requirements] could have the effect of stymieing appropriate and necessary rulemaking.[14]

Since the early 1990s, when these statements were issued, the accumulation of new issues that an agency is required to address during rulemaking proceedings has actually increased, making the warnings of these two groups even timelier. The Section summed up the current picture in a 2008 report:

> Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory analysis. Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued

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11. ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4669, 4670 (Feb. 1, 1994).

12. *Id.* at 4673, ¶ II.C.

13. 117 A.B.A. ANN. REP. 32 & 469 (1992).

14. *Id.* at 470–71.

without public comment procedures but have real-world effects.[15]

Because of these concerns, the Section has long urged that the analytical requirements that agencies must observe during the rulemaking process be *simplified*. For example, the same 2008 Section report recommended that Congress and the President should "work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure."[16]

B. Predicate Analyses and Their Burdens

In light of these longstanding policy positions, we would be gravely concerned about a revision of § 553 that not only failed to consolidate existing analysis requirements, but greatly augmented the analysis burdens associated with completing a rulemaking proceeding. These incremental requirements would in all likelihood significantly hamper agencies' ability to respond to congressional mandates to issue rules, or to delegations of rulemaking authority. Moreover, they would likely augment the tendency of agencies to use "underground rules" (aka "regulation by guidance") or case-by-case adjudication to formulate policy without having to surmount the additional hurdles presented by § 553.

A number of items in the bill seem insufficiently attentive to the costs of investigation. For example, under § 553(b) the agency must consider "the degree and nature of risks the problem [addressed in the rule] poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction" as well as "the countervailing risks that may be posed by alternatives for new agency action."[17] It must also address "[w]hether existing rules have created or contributed to the problem the agency may address with a rule," and, if so, whether they should be changed.[18] In addition, the agency must address "[a]ny reasonable alternatives for a new rule or other response identified by the agency," including "potential regional, State, local, or tribal actions" and "potential

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15. ABA Section of Admin. Law & Regulatory Practice, *Improving the Administrative Process: A Report to the President-Elect of the United States*, 61 ADMIN. L. REV. 235, 239–40 (2009) [hereinafter *2008 Section Report to the President-Elect*].

16. *Id.* at 240. *See also* Letter from Warren Belmar, Chair, Section of Admin. Law & Regulatory Practice, to the Honorable Fred Thompson, Chairman, Senate Gov'tal Affairs Comm., Jan. 13, 1998, at 5 ("We urge Congress to review the collection of overlapping and potentially conflicting requirements embodied in these statutes and to consider replacing them with a single, clear set of obligations for agency rulemaking. . . . Such harmonization . . . would—in addition to simplifying the rulemaking process—enable the agencies to serve the public interest more efficiently and economically.").

17. H.R. 3010, 112th Cong. sec. 3(b) (2011) (proposed § 553(b)(3)).

18. *Id.* (proposed § 553(b)(4)).

responses that specify performance objectives [or] establish economic incentives to encourage desired behavior," "provide information upon which choices can be made by the public," or "other innovative alternatives."[19] Further, the agency must consider "the potential costs and benefits associated with [foregoing] potential alternative rules and other responses . . . including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness."[20] Some of the considerations in this list—which is not exhaustive—would be germane to a wide variety of rules; others would have very tenuous relevance or no relevance to many and perhaps most rulemaking proceedings.

The operative subsections of the bill cover much of the same territory. Section 553(d) requires that an NPRM must summarize information known to the agency regarding the foregoing considerations. The NPRM also must discuss the foregoing alternatives and make a reasoned preliminary determination that the benefits of the rule would justify the costs to be considered under § 553(b).[21] Likewise, the agency must thereafter discuss approximately the same considerations in its notice of final rulemaking.[22]

Collectively, these requirements would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders less able to plan effectively for the future. Not only new regulations, but also amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Thus, both affirmative regulation and deregulation may be impeded.

Of course, even great burdens may be worth bearing, if they produce great benefits. But these would not.[23] Although agencies frequently do and should consider many of these factors in significant rulemakings, many of these considerations are not relevant to most routine rulemaking. As the

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19. *Id.* (proposed § 553(b)(5)).

20. *Id.* (proposed § 553(b)(6)(A)).

21. *Id.* (proposed § 553(d)(1)(F) (cross-referencing § 553(b)(6))).

22. *Id.* (proposed § 553(f)(4)(C)–(E)).

23. As current OIRA Administrator Cass Sunstein, certainly a supporter of regulatory analysis, once pointed out: "[T]he costs of investigation and inquiry are never zero; to the contrary, they are often very high. We can readily imagine that agencies could spend all their time investigating ancillary risks and never do anything else—a disaster for regulatory policy." Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1552 (1996).

Section stated in the 2008 report mentioned above, when Congress and the President design regulatory analysis requirements, they

> should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process—some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.[24]

The current bill accepts this principle in part, imposing more demanding procedures for "major rules" and "high-impact" rules than for other rules. But the provisions in § 553(b) imposing analysis requirements ignore the need to tailor the process to the importance and impact of the rule.

The bill's blanket approach might be justified if it were the only way to ensure agencies gave consideration to critical factors in the subset of rulemakings where doing so is appropriate. But it is not. Two other mechanisms exist and are already working well. First, Congress can specify the factors that an agency should take into account when regulating pursuant to a specific provision. Enabling legislation does this all the time, and it allows for a more precise fit between the agency task and the factors to be considered.

Second, where particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process. As noted, agencies often consider issues of the kind just mentioned on their own initiative. If they do not, those issues are frequently raised in comments by interested members of the public. Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a recognized duty to respond to material and significant comments.[25] Thus, these issues will generally find their way into a rulemaking proceeding where they are directly implicated. It is excessive, however, to require agencies to touch all of these bases in

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24. *2008 Section Report to the President-Elect*, *supra* note 15, at 240.

25. *See* La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (quoting Am. Mining Cong. v. EPA, 907 F.2d 1179, 1188 (D.C. Cir. 1990)) (stating that an agency must articulate a response to comments "which, if true, . . . would require a change in [the] proposed rule"); City of Waukesha v. EPA, 320 F.3d 228, 257–58 (D.C. Cir. 2003) (quoting Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997)) (stating that an agency "need not address every comment [it receives], but it must respond in a reasoned manner to those that raise significant problems."); Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1151 (9th Cir. 2002) (quoting Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992)) (stating that an agency must respond to "significant" comments, meaning those which "raise relevant points, and which, if adopted, would require a change in the agency's proposed rule").

every rulemaking proceeding.[26] This is a fundamental point. The rulemaking process is to a large extent self-regulating. Commenters can be relied on to raise important issues. Knowing this, agencies anticipate the comments. And comments not anticipated must be grappled with.

It is true that, up to a point, the inquiries prescribed in proposed § 553(b) correspond to factors that have been codified in the initial sections of the executive orders on regulatory review issued or maintained by every President since Ronald Reagan.[27] Those provisions have served for many years as a means by which the presidents have communicated their respective regulatory philosophies to agencies that comprise arms of their administrations. Indeed, several of the considerations in § 553(b) appear to be modeled closely on the language of § 1 of Executive Order 12,866, the currently operative order. However, these executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases.[28] Moreover, compliance with the order is not judicially reviewable. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and OIRA, but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them. In contrast, under the bill, an agency's failure to discuss the prescribed matters to the satisfaction of a reviewing court would expose the agency to reversal for procedural error (subject to the court's judgment as to whether the error was prejudicial). The unpredictability of such appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion.[29] The burden on the

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26. A puzzling issue that the bill requires an agency to address is "whether a rule is required by statute." H.R. 3010, sec. 3 (proposed §§ 553(d)(1)(E)(ii), (f)(4)(B)); *see also* § 3(b) (proposed § 553(b)(1)). Why the bill specifically requires this determination is not apparent. If an agency concludes that its view of sound policy is at least consistent with the enabling statute, it should be able to proceed on that basis without addressing the purely hypothetical question of whether the statute would have required the same result had the agency desired otherwise.

27. Exec. Order No. 13,563, § 1, 76 Fed. Reg. 3821 (Jan. 21, 2011) (Obama); Exec. Order No. 13,422, *supra* note 4, § 1(a)(1) (G.W. Bush); Exec. Order No. 12,866, *supra* note 5, § 1 (Clinton); Exec. Order No. 12,291, § 2, 3 C.F.R. 127 (1981) (Reagan, retained by G.H.W. Bush).

28. Under Executive Order 12,866, an agency is required to provide to OIRA an "assessment of the potential costs and benefits of the regulatory action" and other factors only if the matter is identified as a "significant regulatory action." Exec. Order No. 12,866, *supra* note 5, § 6(a)(3)(B). Moreover, detailed assessments are required only for so-called "economically significant" rules, *see id.* § 6(a)(3)(C), a category similar to "major rules" as defined in § 551(15) of H.R. 3010.

29. Justice Rehnquist made a similar point effectively in the *Vermont Yankee* decision. Vt.

agencies and the resources demanded, therefore, would far exceed that of the corresponding language of the executive orders.[30] This would be particularly true under H.R. 3010, which, unlike its Senate counterpart, would make the sufficiency of an agency's compliance with these analytical obligations judicially reviewable for all rules, not just major rules and high-impact rules.[31]

These predictions are founded not only on our collective judgment as specialists in administrative procedure, but also on the lessons of experience at the state level. In 1947, California adopted APA provisions for rulemaking that were modeled on the federal APA. In 1979, however, the state adopted a much more detailed set of APA rulemaking provisions.[32] The statute calls for specialized findings and explanations and for numerous impact statements. These provisions require constant fine-tuning and have been amended on numerous occasions.

The intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences.[33] Specialized and experienced lawyers (rather than staff non-lawyers) must supervise every step of every rulemaking process. The state's APA generates a large amount of boilerplate findings, because agencies lack resources to perform all of the required studies. The process has become slow and cumbersome and consumes large quantities of staff resources. As a result, agencies can complete work on fewer regulations, particularly in a time of declining budgets like the present. This has adverse effects on public health and safety. The detailed provisions of the state's APA also provide many opportunities for lawyers to challenge rules on judicial review because of minor procedural infirmities. The California experience suggests that a

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Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 539–40 (1978).

30. Similarly, although the criteria in proposed § 553(b) appear to be based in part on similar prescriptions in the Unfunded Mandates Reform Act, 2 U.S.C. § 1532(a)(2)–(4) (2006), the analogy is weakened by the fact that, by statute, a court cannot set aside a rule on the basis of an agency's alleged failure to analyze a proposed rule according to the requirements of that Act or the inadequacy of the analysis it did provide. *See id.* § 1571(a)(3).

31. *See* S. 1606, 112th Cong. § 6 (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1606is/pdf/BILLS-112s1606is.pdf.

32. *See* CAL. GOV'T CODE §§ 11340–11342 (West 2005); MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW 29–40 (2002); Herbert F. Bolz & Michael McNamer, *Agency Rules and Rulemaking*, *in Cal. Public Agency Practice* ch. 20 (Gregory L. Ogden ed., 1996); Linda Stockdale Brewer & Michael McNamer, *Rulemaking Procedure*, *in California Public Agency Practice* ch. 21 (Gregory L. Ogden ed., 1996); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 48–51 (1992).

33. *See* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285–87 (1999); Marsha N. Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 260–62.

simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

C. A Suggested Alternative

As indicated above, the Section is by no means opposed to any and all codification of new rulemaking requirements in the APA. We believe the proper approach is the one we recommended in 1998 and 2008: that Congress and the President should "join forces to rationalize and streamline the rulemaking process."[34] As we have said before, the ability of agencies to perform required analyses "is compromised by the complexity of the set of instructions that agencies must follow—agencies (and others) must look to so many sources to ascertain the full set of actions required in a rulemaking that they may have difficulty framing the ultimate question for decision in a coherent manner."[35] The current bill does not subtract anything from the overlapping and potentially conflicting expectations prescribed not only in the APA, but also, for example, the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, Unfunded Mandates Reform Act, Paperwork Reduction Act, and National Environmental Policy Act, as well as agency authorizing statutes and presidential directives. Its trajectory is entirely in the direction of increases. The risk of excessive, sometimes conflicting, sometimes redundant cumulative burdens is compounded by the fact that there are many other related bills also now under consideration. In the circumstances, thoughtful harmonization and streamlining would be eminently desirable.[36]

We recommend, therefore, that Congress, working with the President, rework the overall corpus of findings and analysis requirements impinging on federal agencies, with an eye toward rationalizing these requirements while also maintaining effective political oversight and promoting sound regulatory outcomes. We would be happy to work with your subcommittee in such a re-examination. A number of the principles prescribed in § 553(b) of the present bill may well be found worthy of inclusion on such a revamped list, particularly insofar as experience with some of them under

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34. *2008 Section Report to the President-Elect*, *supra* note 15, at 239.

35. Letter from Warren Belmar, *supra* note 16, at 5.

36. We appreciate that congressional action to alter the requirements of executive orders would present obvious problems of interbranch relations. However, it seems reasonable to suppose that if, as we recommend here, the ultimate goal of the harmonization effort would be to produce a set of clear obligations that are no more burdensome, or less burdensome, than the status quo, the Executive Branch would be amenable to negotiations that could lead to agreed-on rescissions of presidential directives in the interest of facilitating the ability of agencies to accomplish their missions more effectively.

Executive Order 12,866, Unfunded Mandates Reform Act, etc., has been favorable. Insulation of consideration requirements from judicial review and confinement of such requirements to the most significant rulemaking proceedings would be important variables bearing on the acceptability of particular obligations. Conversely, some of the requirements that exist now, and some that we proposed in 1981, may be out of date. We note also that the Administrative Conference is currently engaged in a directly relevant project, the results of which should be known and may be the basis for an ACUS recommendation by the end of next year.

A baseline for this overall endeavor should be to produce *no net increase* in the collective burdens of required analyses and findings in rulemaking. Indeed, a net decrease would be even better, because it would respond to the overload problems that have served for too many years as impediments to the rulemaking process and incentives to agencies to rely on less transparent and participatory modes of policymaking.

D. Evidentiary Burdens

The requirement in the introductory clause of § 553(b) that a rulemaking agency "shall base its preliminary and final determinations on evidence" raises related concerns. The basic point is well-taken. The ABA proposal quoted above recognizes that a final rule should be accompanied by "factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file."[37] However, the § 553(b) version of this idea sweeps too broadly. Some rules do not purport to rest on factual assertions at all; they rest on law or pure policy determinations. At the very least, this provision should refer to "factual determinations." In addition, some factual assertions underlying a rule do not require evidentiary support, because they are legislative facts of an inherently predictive or judgmental type.[38] When Congress has

37. *See supra* note 10 and accompanying text.

38. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 518–21 (2009). The case law was usefully summarized in Chamber of Commerce of the U.S. v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005):

> [A]lthough we recognize that an agency acting upon the basis of empirical data may more readily be able to show it has satisfied its obligations under the APA, *see Nat'l Ass'n. of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984) (in informal rulemaking it is "desirable" that agency "independently amass [and] verify the accuracy of" data), we are acutely aware that an agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be "entitled to conduct . . . a general analysis based on informed conjecture." *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1124 (failure to conduct independent study

incautiously appeared to require "evidence" for such conclusions, the judiciary has managed to read an implied limitation into the statute.[39] It would be preferable, however, to avoid forcing the courts to solve a problem that Congress does not need to create in the first place.[40] After all, the courts have developed a substantial and relatively nuanced body of case law addressing whether agencies have, in various circumstances, supplied adequate factual support for their rules. A vaguely stated evidentiary requirement in § 553 is at best unnecessary and may be harmful.

Elsewhere, the bill provides 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."[41] We recognize that Executive Order 12,866 contains very similar language,[42] and that Congress has adopted comparable language in particular contexts, such as the requirement in the Endangered Species Act that a species designation be made on the basis of "the best scientific and commercial data available."[43] Where agency decisionmaking is required to rest on scientific determinations, the expectation that the science should be well-founded is certainly legitimate.[44]

Nevertheless, we question whether this notion belongs in the rulemaking language of the APA, where it could operate as an independent basis for

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not violative of APA because notice and comment procedures "permit parties to bring relevant information quickly to the agency's attention"); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813–14 (1978) (parallel citations omitted) (FCC, in making "judgmental or predictive" factual determinations, did not need "complete factual support" because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency")).

Notably, the court in *Chamber of Commerce* did overturn, on grounds of factual insufficiency, a different aspect of the SEC rule challenged in that case. *Id.* at 143–44. Our point, therefore, is not that an agency's evidentiary burdens should be lenient, but rather that the nature of those burdens is too elusive to capture in a brief statutory formula.

39. *See, e.g.*, Indus. Union Dep't v. Hodgson, 499 F.2d 467, 473–75 (D.C. Cir. 1974) (construing Occupational Safety and Health Act requirement of "substantial evidence" to support a rule).

40. Section 553(b) is also ambiguous as to whether the term "evidence" refers to any and all factual material that the agency might cite, or only a narrower class of material such as facts that would satisfy the rules of evidence in a trial-type proceeding.

41. H.R. 3010, sec. 3(b) (proposed § 553(f)(2)).

42. Exec. Order No. 12,866, *supra* note 5, § 1(b)(7); *see also* Exec. Order No. 13,563, *supra* note 27, § 1 ("Our regulatory system . . . must be based on the best available science.").

43. 16 U.S.C. § 1536(a)(2) (2006); *see also* Occupational Safety and Health Act § 6(b)(5), 29 U.S.C. § 655(b)(5) (2006) (requiring OSHA to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health").

44. *See generally* James W. Conrad, Jr., *The Reverse Science Charade*, 33 ENVTL. L. REP. 10306 (2003).

legal attacks apart from challenges to the substance of the agency decision. Whatever its appeal in science-dominated areas, it is inapt in relation to ordinary rulemaking, in which agencies frequently must act on the basis of general knowledge, informed opinion, and experience in the field. After all, in the age of the Internet, the range of "obtainable" information that might bear upon various agency rules is virtually boundless. A statutory obligation to seek out all information that a reviewing court might consider "reasonably obtainable" could prove unmanageable, resulting in a highly unpredictable legal regime for agencies and considerable additional litigation.[45] It may be better, therefore, for Congress to impose such obligations only in substantive statutes in which the nature of the agency's mission lends itself to such a mandate. Congress can customize the obligation to the particular nature of that mission. It has done this in, for example, the Safe Drinking Water Act, which specifies that "to the degree that an Agency action is based on science, the Administrator shall use (i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices."[46]

For generalized decisionmaking that may be far removed from scientific realms, however, the APA should not categorically rule out the possibility that information that appears reasonably reliable may suffice for purposes of a rule in which the stakes are small or the need for timely action is pressing, although the agency may not have engaged in a search to confirm that this information is the "best reasonably obtainable." Even in such contexts, after all, administrative law already imposes a duty to respond to material comments presented during the rulemaking proceeding—a duty that we believe should be codified in the APA.[47] Thus, if stakeholders actually provide information to an agency that casts serious doubt on its factual premises, the agency cannot ignore it.

E. Statutory Overrides

In addition to burdening the rulemaking process with analytical requirements that appear to be out of proportion to their likely payoffs, the bill's "rulemaking considerations" are troubling because of the way in which they would, in some cases, alter the substantive law. The APA would thus become, in several respects, an "Administrative Substance Act."

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45. *Cf.* Heartwood, Inc. v. U.S. Forest Serv., 380 F.3d 428, 436 (8th Cir. 2004) (construing the above-quoted language of the Endangered Species Act to mean that agencies are required "to seek out and consider all existing scientific evidence relevant to the decision at hand. They cannot ignore existing data." (internal citations omitted)); Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1194 (10th Cir. 2006) (following *Heartwood*).

46. 42 U.S.C. § 300g-1(b)(3)(A)(i) (2006).

47. *See infra* notes 120–121 and accompanying text.

For example, the requirement in the bill to consider, in connection with any proposed rule, the "potential costs and benefits associated with potential alternative rules . . . including direct, indirect, and cumulative costs and benefits," would apply "[n]otwithstanding any other provision of law."[48] This "supermandate" would apparently displace numerous provisions in which Congress has previously prescribed rulemaking premised on a different basis, such as use of the best available technology. It would, for example, apparently override rulemaking provisions in laws such as the Occupational Safety and Health Act and the Clean Air Act, which courts have authoritatively construed as not allowing decisions to be based on cost-benefit analysis.[49] Much, perhaps most, of the safety and health legislation now on the books would seemingly be displaced.[50]

Members of our Section have widely divergent views as to the utility of cost-benefit analysis and as to the range of circumstances in which it may be fruitfully deployed. Some strongly support the technique, and others are deeply skeptical. On the whole, the Section has been supportive of cost-benefit analysis but has stated that criticisms of it in the literature should be taken seriously along with more favorable appraisals.[51] The difficulty of quantifying certain types of benefits, and the inherently speculative nature of some of the costs, are only two of the substantial criticisms. We take no position on the general policy question here, but we believe that Congress should make judgments about the utility of cost-benefit analysis in the context of particular programs and the specific problems that those programs respectively address. A government-wide edict such as the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that § 553(b) omits certain qualifying language that the presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable. In a context in which the underlying statute does not permit actions to be based on cost-benefit comparisons, if Congress nevertheless wishes to require such an analysis (perhaps to inform itself and

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48. H.R. 3010, sec. 3(b) (proposed § 553(b)(6)(A)).

49. Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 471 (2001) (Clean Air Act); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510–12 (1981) (OSHA). The Court acknowledged these interpretations in Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 223 (2009). That case explained that the Clean Water Act contains a variety of statutory formulas for different rulemaking proceedings. The Court held that one section of that Act does permit cost-benefit analysis but recognized that other sections may not. *Id.* at 219–21, 223.

50. *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 32 (2003) (surveying 22 health, safety, and environmental laws and finding that only two contain a substantive cost-benefit mandate).

51. *2008 Section Report to the President-Elect*, *supra* note 15, at 240.

members of the public as to the consequences of its prior choice to make such considerations legally irrelevant), it should impose that requirement only in particular statutes in which it deems that purpose to be apposite.

The bill also imposes other inquiries "[n]otwithstanding any other provision of law," including consideration of means to increase "cost-effectiveness" and "incentives for innovation."[52] Those too are salutary objectives, but we do not believe that Congress should sweepingly displace all prior legislation in which earlier Congresses, carefully confronting social challenges on a much more specific level, have prescribed actions on the basis of criteria that do not include those objectives. Notably absent from § 553(b) is the disclaimer in Executive Order 12,866—and corresponding oversight orders issued by other Presidents—that the prescribed analyses apply only "to the extent permitted by law."[53]

Furthermore, the bill not only requires rulemaking agencies to consider matters that would not otherwise be relevant under their organic legislation, but also constrains them from acting except in compliance with additional criteria. To simplify a bit, § 553(f)(3) provides that an agency must choose the "least costly" rule that serves relevant statutory objectives unless a higher cost alternative would serve "interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule."

This would apparently be a substantial further departure from present law, although the extent of the departure is uncertain because of the vague and undefined terms of the operative criteria. The words "public health, safety, or welfare" are evidently meant to limit the range of acceptable rules in some way (otherwise they would be superfluous). Possibly they mean that factors such as distributional fairness, payment of society's moral debts (for example, to veterans), or avoidance of racial, ethnic, or gender disparities could be categorically excluded, at least if a rule that would further these intangible values would cost more (even slightly more) to implement than some alternative. Also, even if the phrase "public health, safety, or welfare" is interpreted broadly, the agency would have to demonstrate that those interests were "clearly" within the statute's scope. We do not understand why "clarity" should be required in this connection. Doubts about whether the statute authorizes an agency to rely on certain interests may be a prudential factor counseling against the commencement of a rulemaking that presupposes such reliance, because the litigation risks involved in such a venture might not justify the expenditure of agency

52. H.R. 3010, sec. 3(b) (proposed § 553(6)(B)–(C)).

53. *See, e.g.*, Exec. Order No. 12,866, *supra* note 5, § 1(b); *see also id.* § 9 ("Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.")

resources on it. However, this does not mean that the APA should require an agency to have "clear" authority for the interests on which it relies in adopting a final rule. It would be strange to empower a court to hold that, even though the interests on which an agency relies actually are within the scope of the enabling statute, the rule is invalid because such authority was uncertain prior to the court's decision.

Whatever meanings § 553(f)(3) might ultimately be held to contain, we question the proposition that cost considerations must always take priority unless the agency carries a burden of justifying a different priority. An Act that governs the entire range of federal agency rulemaking should allow greater flexibility regarding the manifold and diverse ways in which government can contribute to the general welfare. Indeed, the task of calculating or estimating *which* alternative is "least costly" could itself be difficult. Moreover, most of the laws that would be displaced were enacted after a deliberative legislative process in which affected individuals and interest groups had a meaningful opportunity to consult with Congress regarding the statute's tradeoffs among competing values. It is unlikely that these interested parties will have an equally meaningful opportunity to be heard regarding the abstract and diffuse nature of the mandates under discussion here.

Compounding the perplexities that § 553(f)(3) would generate would be the challenge of determining the "relevant statutory objectives" of a statutory scheme. The problem is that there may be no clear distinction between the "objectives" of a regulatory statute and the criteria that Congress selects to effectuate those objectives. For example, OSHA would presumably be able to rely on cost-benefit analysis if the "relevant objective" of the Occupational Safety and Health Act is interpreted as "worker safety," but not if it is interpreted as "worker safety to the extent feasible."[54]

The challenge of sorting out the ramifications of such a supermandate would be formidable and would result in substantial additional litigation. Federal judges would have much more opportunity to reshape regulatory policy according to their own judgment (and possibly their preferences). This would be especially true if Congress were to enact the bill's judicial review provision ordaining that, in the event of certain procedural omissions by the agency, a court "shall not defer" to an agency's "determination of the costs and benefits or other economic or risk assessment of the action."[55] That provision would place the courts into a

54. *Am. Textile Mfrs. Inst.*, 452 U.S. at 494, 540–541.

55. H.R. 3010, sec. 7 (proposed 5 U.S.C. § 706(b)(2)).

completely unprecedented, and constitutionally dubious,[56] position as super-regulators. However, even if that provision is not enacted, and traditional judicial review principles apply, courts would acquire broad power to ascribe meaning to phrases like "public health, safety and welfare" and "relevant statutory objectives."

Courts would also have to face questions as to how to reconcile the statutory override with the conflicting thrusts of much, or most, organic legislation. Presumably the APA override would be given *some* effect. "Notwithstanding any other provision of law" sends a strong message. Yet it is likely that courts would also pay heed to the traditional maxim that a general statute does not impliedly repeal an earlier, more specific statute.[57] Thus, the ultimate import of this legislation would not be determinable for some time.

IV. ADVANCE NOTICE OF PROPOSED RULEMAKING

Section 553(c) of the bill would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. The ANPRM would have to be issued at least 90 days prior to the NPRM, and at least a 60-day comment period would have to be provided. (The stated time periods are minimums. Presumably, a meaningful appraisal of the issues that could arise in a potential major or high-impact rulemaking, as well as of the public comments, would actually take longer.)

The Section agrees that the ANPRM and like devices can be useful tools in some rulemakings, especially those involving initial forays into a regulated area. We support explicit recognition of such procedures in the APA. Indeed, the ABA House of Delegates recommended in its 1981

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56. *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 274–78 (1933).

57. It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (internal citations omitted); *see also* Traynor v. Turnage, 485 U.S. 535, 547–48 (1988); United States v. Perry, 360 F.3d 519, 535 (6th Cir. 2004); California v. United States, 215 F.3d 1005, 1012–13 (9th Cir. 2000).

resolution that the use of consultative procedures prior to the notice of proposed rulemaking, including ANPRMs, should be encouraged. The report explained: "Lawyers in Government and private practice with experience in complicated rulemaking share the belief in extensive pre-notice exchanges of views and information to assist the agency in the development of a realistic and workable rulemaking proposal."[58]

In direct contrast to H.R. 3010, however, the ABA's 1981 resolution urged that "the decision to use or not to use [such] informal consultative procedures . . . should be within the *unreviewable discretion* of the agency."[59] The Section continues to believe that an amended APA should not make ANPRMs mandatory, even in proceedings to issue expensive rules.

The argument against such a requirement is straightforward: ANPRMs can significantly extend the time involved in rulemaking,[60] and often the costs of the delay will be greater than the benefits associated with an improved final regulation, which may be nil. For example, some rulemaking proceedings involve issues with which an agency is quite familiar because of prior proceedings or experience with the subject matter. In such situations, the agency may be able to propose a rule without any need for an ANPRM. In other proceedings, legal constraints limit the range of actions the agency may take. In such a case, the determination may be highly contested, but the relevant information, rationale, and conclusions can all be made sufficiently available for comment by the public in the notice of proposed rulemaking.

We can see no justification for the inflexible mandate of § 553(c).[61] Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs, and the fact that agencies do indeed use them even when not legally required confirms that they often deem them valuable. At the same time, an agency's exercise of discretion not to use an ANPRM in a given instance causes no prejudice to the rights or legitimate expectations of the public. As the 1981 ABA report pointed out, "Protection against abuse of this discretion lies in [judicially enforced]

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58. *1981 ABA Recommendation*, *supra* note 7, at 789–90.

59. *Id.* at 784, 790 (emphasis added).

60. This delay would be *in addition to* the 90 days allowed to OIRA for review of a proposed significant regulatory action prior to issuance of the NPRM. *See* Exec. Order No. 12,866, *supra* note 5, § 6(b)(2)(B).

61. Delays would not be the only costs involved. Under the proposed § 553(c), in addition to requesting the public's views of the agency's potential rulemaking initiative, the ANPRM published in the Federal Register would also have to identify "preliminary information available to the agency concerning the . . . considerations specified in subsection (b)." H.R. 3010, sec. 3 (proposed § 553(c)(1)(A)(iii)). This would likely be an extensive body of materials, and it should be noted that the Federal Register charges agencies hundreds of dollars per page for each Federal Register submission.

requirements for fairness in the rulemaking procedures subsequent to notice."[62] In other words, the traditional post-NPRM comment period provides an opportunity for members of the public to try to persuade the agency to revise its position or abandon the proposed rule altogether. If public comments indicate that the agency has made a real error or is headed down the wrong path, the agency will have to hold another round of notice-and-comment, which turns the original NPRM into a de facto ANPRM. In short, the current regime is effectively self-policing.

Particularly dubious is the bill's explicit requirement that an agency must issue an ANPRM even where it has already issued an interim rule without an NPRM after determining for good cause that compliance with APA rulemaking requirements would be impracticable or contrary to the public interest.[63] Since a rule would already be on the books, the agency should have the option of using that rule as the basis of any new rulemaking proceedings by proposing it in an NPRM, making the mandatory ANPRM superfluous.

A related provision, § 553(d)(2), states that if an agency decides not to go forward with a rulemaking proceeding, it must publish a "determination of other agency course."[64] It must also place in the rulemaking docket all information it considered in making this choice, "including but not limited to" all information that it would have been obliged to describe if it had proceeded with an NPRM.

An initial problem with this provision is that it is not limited to rulemaking proceedings in which the agency had issued an ANPRM. It hardly makes sense to require an agency to explain and document its reasons for not going forward with a venture that the public never had any reason to think would be forthcoming. Also, if the requirement to publish this determination (especially in a form that is expected to set the stage for judicial review, as the provision for docketing appears to imply) applies to situations in which the agency voluntarily utilized an ANPRM, that requirement would tend to discourage agencies from employing this useful consultative device. We assume, therefore, that § 553(d)(2) is intended to apply only to proceedings in which the agency issued an ANPRM as required by § 553(c), and the language should be narrowed accordingly.

Even with respect to those proceedings, we do not see why the APA should require publication of a "determination of alternate course"—a requirement that has no foundation in current law. Probably, the agency would publish some kind of explanation on its own, because a potential

62. *1981 ABA Recommendation*, *supra* note 7, at 790.
63. *See* H.R. 3010, sec. 3(b) (proposed § 553(g)(2)) (expressly referencing § 553(c)).
64. *Id.* (proposed § 553(d)(2)(A)).

"major" or "high-impact" rule would by its nature be a matter of public interest. We would not object to requiring an agency that decides against going forward after an ANPRM to issue a brief notice to that effect, so that the public and potentially regulated entities will not remain in suspense indefinitely. But that does not mean the law should compel the agency to issue a formal notice with full documentation. Clearly, if someone *petitions* for a rule and the agency denies the petition, the agency must explain its denial, and the disappointed petitioner can seek judicial review.[65] The petition process—which is currently codified in § 553(e) of the APA[66] and would be retained without change in § 553(j) of the amended Act—directly protects private interests that might be harmed by a failure to commence rulemaking. The petition and the response frame issues effectively for judicial consideration. Given the availability of the petition route, we question the need for a formal notice in which an agency would have to explain why it declined to commence a proceeding that nobody sought in the first place, and that never progressed beyond a rudimentary stage of development.

V. NOTICE OF PROPOSED RULEMAKING

Proposed § 553(d) of the bill specifies the contents of the notice of proposed rulemaking (NPRM). This subsection contains several provisions that the Section strongly supports. For one thing, it provides that an NPRM must include "information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination to propose the rule."[67] In substance, this provision would codify the so-called *Portland Cement* doctrine,[68] a step that the ABA has favored for many years.[69] Disclosure of the factual basis for a proposed rule is essential to the effective use of the opportunity to comment and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts,[70] making codification highly desirable. We would suggest that the agency be further required to "provide an opportunity to respond to factual material which is critical to

65. Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007); Auer v. Robbins, 519 U.S. 452, 459 (1997).

66. 5 U.S.C. § 553 (2006).

67. H.R. 3010, sec. 3(b) (proposed § 553(d)(1)(D)(iii)).

68. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

69. *See 1981 ABA Recommendation*, *supra* note 7, at 785–86.

70. *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part); AARP v. EEOC, 489 F.3d 558, 567 (3d Cir. 2007).

the rule, which becomes available to the agency *after the period for comments has closed*, and on which the agency proposes to rely."[71]

Subsections 553(d)(1)(A)-(C) are almost identical to the requirements in the current APA and so do not raise difficult problems.[72] In addition, the ABA supports, in principle, a requirement that an NPRM must discuss alternatives to the proposed rule, although the Association's proposed language is narrower than that of the bill.[73]

The ABA has also long favored amendment of the APA to provide for the systematic development by the agency of a rulemaking file as a basis for agency factual determinations and a record for judicial review.[74] H.R. 3010 adopts the substance of this position in the concluding language of § 553(d)(1), read together with § 553(l). The necessity of maintaining a rulemaking record is firmly established in administrative practice, and codification would recognize this reality. We would also suggest that the bill explicitly provide that the record be available online. While that generally happens already, and is required in a qualified way by the E-Government Act, it would be worth making explicit. At present, the last sentence of § 553(d)(1) states that everything in the docket "shall be . . . made accessible to the public," but it does not say how, and the provision could be read to mean that simply having hard copies at agency headquarters suffices. We recommend that this provision, as well as § 553(l), be amended to expressly provide that the rulemaking docket be available online.[75]

In addition, § 553(d) provides that issuance of an NPRM must be

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71. *1981 ABA Recommendation*, *supra* note 7, at 785, 791 (emphasis added).

72. The current § 553(b)(3) differs slightly from the proposed § 553(d)(1)(C) in that the former allows an agency to include "the terms or substance of the proposed rule or a description of the subjects and issues involved," but the latter more restrictively requires the agency to provide "the terms of the proposed rule." We believe that it is generally good practice to provide the actual text of a proposed rule, but agencies sometimes omit that step, such as when they use an NPRM to solicit comment on a proposal made by a third party or invite comment on a few alternative proposals instead of proposing only one. Presumably, the effect of the revision would be to induce agencies to use an ANPRM for this purpose instead.

73. *See supra* note 9 and accompanying text.

74. *Id.*

75. We note in passing that the bill does not anywhere take account of electronic rulemaking. If the sponsors truly want to modernize the APA, they should consider updating the rulemaking process to reflect the impact of the Internet. The Section has been in the forefront of debates about the development of e-rulemaking. *See* ABA COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING (2008) (report of a blue-ribbon committee established under the auspices of the Section). We would be happy to engage in further dialogue on this topic with the committee.

preceded by consultation between the agency and OIRA. Information provided by OIRA during consultations with the agency shall, at the discretion of the President or the OIRA Administrator, be placed in the rulemaking docket. The same requirements apply to the notice accompanying adoption of a final rule (§ 553(f)(1) and the concluding sentence of § 553(f)(4)).

The main significance of the consultation requirement is that it would effectively extend a degree of OIRA oversight to rulemaking by independent agencies. To date, such agencies have always been exempted from the regulatory review provisions of the executive orders, but the APA definition of "agency" applies to executive branch and independent agencies alike. The ABA has long favored extension of the oversight orders to independent agency rulemaking,[76] and we strongly support this feature of the bill.

We do, however, have one suggestion and one objection regarding this section.

The suggestion concerns disclosure of materials received from OIRA. The ABA's position has been that a communication between a rulemaking agency and other officials in the federal government should be subject to required disclosure to the extent that it contains relevant factual material not previously placed in the rulemaking file or passes on a communication on the merits received from a source outside the federal government, but not otherwise.[77] We believe that the bill could be improved by incorporation of the affirmative aspects of that policy. Insofar as the bill contemplates broader disclosure of information than the ABA policy would require, we see no reason to object, because such disclosure would occur only at the option of the President or OIRA.

The objection is presaged by the discussion in Part III.B of these comments. For the reasons given there, we believe that a number of the predicate recitals prescribed in § 553(d) are excessive and should be reconsidered.[78]

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76. *See* 111 No. 1 A.B.A. ANN. REP. 8 (Feb. 1986); *id.* Rep. 100.

77. *1981 ABA Recommendation*, *supra* note 7, at 785, 791–92.

78. Subsections 553(d)(1)(E)–(F) require an agency to make a "reasoned preliminary determination" regarding the issues described there. We can agree that the notice of *final* rulemaking should be supported by a "reasoned final determination" of various predicates, as § 553(f) does require. *Cf.* ACUS Recommendation 93-4, *supra* note 11, ¶ IV.D, at 4674. However, although one would not want preliminary findings in the NPRM to be "unreasoned," a legal requirement in that regard seems superfluous, because the preliminary determinations will be revisited at the final rule stage before they have any operative effect. Indeed, one purpose of the comment period is to invite critiques of the agency's tentative reasoning. Moreover, this language could invite judicial invalidation of a final rule on the ground that the NPRM was inadequate because, while it put all stakeholders adequately on

VI. COMMENT PERIOD

Proposed § 553(d)(3) contains a minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule. It is not clear why such lengthy minimum periods are prescribed. Thirty years ago, the ABA proposed a 60-day minimum.[79] More recently, in a June 2011 recommendation, ACUS suggested that agencies should as a general matter allow comment periods of at least 60 days for "significant regulatory actions" (a category similar to "major rules" as defined in the current bill) and at least 30 days for all other rules.[80] President Obama's executive oversight order provides: "To the extent feasible and permitted by law," agencies should allow "a comment period that should generally be at least 60 days."[81] Clearly there is room for reasonable disagreement about the exact minimum period that should apply; but if the goal of the present bill is to codify "best practices," we believe that the figure(s) used in the bill should fall much closer to the range of possibilities suggested by the position statements just mentioned, so as to avoid unnecessarily aggravating the problem of excessive delays in the regulatory process.

In the recommendation just mentioned, ACUS went on to suggest that agencies may in appropriate circumstances set shorter comment periods but should provide an appropriate explanation when they do so. The ABA's 1981 recommendation contemplated analogous flexibility. It proposed that the APA "good cause" rulemaking exemption should be rewritten to allow an agency to comply "in part" with § 553 if it makes a written finding for good cause that "full compliance" would be "impracticable, unnecessary, or contrary to the public interest."[82] The sponsors of the bill should consider providing agencies with latitude to shorten the default statutory comment period in unusual circumstances.[83]

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notice, the agency's "preliminary determination" was insufficiently "reasoned." Perhaps courts would routinely find such errors harmless, but it would be safer just to eliminate this requirement.

79. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(a), at 785.

80. ACUS Recommendation 2011-2, Rulemaking Comments, ¶ 2, 76 Fed. Reg. 48,789, 48,791, ¶ 2 (Aug. 9, 2011).

81. Exec. Order No. 13,563, *supra* note 27, §§ 1–2, at 3821–22.

82. *1981 ABA Recommendation*, *supra* note 7, at 784, 789, 790. An earlier ACUS recommendation also advocated a "good cause" finding as a predicate for a short comment period. ACUS Recommendation 93-4, *supra* note 11, ¶ IV.B, at 4674.

83. *See* Fla. Power & Light Co. v. United States, 846 F.2d 765, 772 (D.C. Cir. 1988) (upholding fifteen-day comment period where agency was facing a statutory deadline for issuance of the rule).

VII. FORMAL RULEMAKING

Subsection 553(e) of the bill would confer broad rights upon private persons to force an agency to use so-called "formal rulemaking," pursuant to §§ 556–57 of the APA.[84] The scope of these rights is unclear, due to ambiguity in the opening language of § 553(e), but at a minimum the bill appears to allow parties to invoke a trial-type hearing on any proposed "high-impact rule" (roughly speaking, a rule with a $1 billion annual cost to the economy).[85] The hearing would encompass such core issues as whether the rule is cost-justified and whether a lower-cost alternative would achieve the relevant statutory objectives—plus any other issues sought by an interested person, unless the agency determines within thirty days of the request that the hearing would be unproductive or would unreasonably delay completion of the rulemaking. The latter petitioning process would also be available in proceedings to promulgate *major* rules (unless this is a drafting error).[86]

These provisions run directly contrary to a virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete. This broad agreement was summed up in 1993 in ACUS Recommendation 93-4: "Statutory 'on-the-record' and 'hybrid' rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination . . . can be unnecessarily burdensome or confusing and should be repealed."[87] Indeed, in the more than three decades since the Supreme Court severely curtailed the prevalence of formal and "hybrid" rulemaking procedures in a pair of leading opinions by Justice Rehnquist, *Florida East Coast*[88] and *Vermont Yankee*,[89] Congress itself has ceased to enact new formal rulemaking requirements and has rescinded some of the requirements that did exist.[90] The academic community has fully supported this

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84. 5 U.S.C. §§ 556–57 (2006).

85. Read literally, the opening language of § 553(e) could be interpreted as triggering formal rulemaking *either* "[f]ollowing notice of a proposed rule" *or* "before adoption of any high-impact rule." The caption of the subsection indicates, however, that the intent is to treat these conditions conjunctively, so that § 553(e) applies only to proceedings to promulgate high-impact rules. We discuss the subsection on that assumption, but the language should be revised for clarity.

86. H.R. 3010, sec. 5 (proposed § 556(g)).

87. ACUS Recommendation 93-4, *supra* note 11, at 4670, ¶ II.A.

88. United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

89. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524–25 (1978).

90. Food and Drug Administration Amendments Act, Pub. L. No. 110-85, sec. 901(d)(6), 121 Stat. 823, 942 (2007) (*codified as amended at* 21 U.S.C. § 352(n)) (2006 & Supp. II 2009) (prescription drug advertisements); Nutrition Labeling and Education Act, Pub. L. No. 101-535, sec. 8, 104 Stat. 2353, 2365 (1990) (*codified as amended at* 21 U.S.C. § 371(e)

development: We have not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.[91]

The collective repudiation of formal rulemaking reflects widespread recognition that trial-type methods are usually unsuitable in generalized rulemaking proceedings. Cross-examination can work well in the context of adjudicative proceedings, in which sharply framed issues of fact and witness demeanor frequently loom large. It is less appropriate to administrative policymaking, which, like congressional legislation, often turns on value judgments, "legislative facts," and policy perspectives that are inherently uncertain. Even in proceedings in which potentially expensive rules are under consideration, issues can be ventilated effectively through more limited variations on the standard model of notice-and-comment rulemaking.[92] Such proceedings allow for rigorous analysis, but the participants usually join issue over scores of interconnected questions through a continuing exchange of documents over a period of weeks or months. Live confrontation is largely beside the point in such proceedings.

This is not to say that live hearings can never shed light on the issues in rulemaking proceedings. *Vermont Yankee* recognized that agencies have discretion to resort to these procedures, and sometimes they do so. Indeed, § 553(b), as currently written, provides for public participation "with or without opportunity for oral presentation." In 1981, the ABA adopted a proposal for a "carefully limited" statutory structure for live hearings in rulemaking. It recommended that, in proceedings of unusual complexity or with a potential for significant economic impact, an agency should be required to conduct an oral proceeding with cross-examination "only to the extent that it appears, after consideration of other available procedures . . . that such cross-examination is essential to resolution by the

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(2006)) (FDA food standards).

91. In Exec. Order No. 13,422, *supra* note 4, at 193, § 5(a), President Bush stated that agencies "may . . . consider" the use of formal rulemaking for the resolution of "complex determinations." This brief reference to the formal rulemaking process was far from a strong endorsement. As construed by OIRA, it did not require agencies *even to consider* the use of formal rulemaking; it was simply a reminder about an existing option. Memorandum from Rob Portman, Office of Mgmt. & Budget, Exec. Office of the President, to Heads of Exec. Dep'ts & Agencies & Indep. Regulatory Agencies, M-07-13, at 13 (April 25, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-13.pdf. We know of no agency that availed itself of this option during the two years in which the order was in effect.

92. A summary of devices that amplify on simple notice and comment, but fall short of trial-type hearings, is found in ACUS Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654, ¶ 1 (July 19, 1976).

agency of issues of specific fact critical to the rule."[93] This criterion was similar to a guideline endorsed by ACUS several years earlier.[94]

However, H.R. 3010 goes far beyond the recommendations just described. The ABA and ACUS proposals did not contemplate any reliance on formal rulemaking pursuant to §§ 556–57. Moreover, they required that any need for cross-examination be *affirmatively* shown. In contrast, the proposed § 553(e) would confer a right to oral proceedings automatically as to some issues and would put the onus on the agency to justify omission of such proceedings as to other issues (and to do so within thirty days of the request, at a time when the future direction of the proceeding might be quite speculative).

Most importantly, the ABA and ACUS positions applied solely to issues of "specific fact."[95] ACUS asserted "emphatically" that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact,"[96] and the ABA's recommendation was consistent with that view by negative implication. Yet the issues listed in § 553(e) as *automatically* qualifying for consideration at a trial-type hearing in a high-impact rulemaking proceeding are quintessential examples of "questions of policy or of broad or general fact." They include, for example, whether the factual predicate of the rule is supported by evidence, whether any alternative to the proposed rule would achieve the statutory objectives at lower cost, and whether the proposed rule's benefits would justify a failure to adopt such a lower cost alternative.[97]

Any proposal to amend the APA in this regard must also take account of the heavy social costs that have resulted from legislation that requires agencies to use trial-type hearings to develop rules that turn on issues of "policy or broad or general fact." Studies conducted during the heyday of mandatory formal or "hybrid" rulemaking showed clearly that it slowed

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93. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(b)(ii), at 785.

94. ACUS Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 38 Fed. Reg. 19,792 (July 23, 1973). As explained by the Chairman of ACUS (Antonin Scalia), the term "issues of specific fact" referred to issues of fact that were "sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them." *See* Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1164 (D.C. Cir. 1979) (quoting Scalia).

95. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(b)(ii); ACUS Recommendation 72-5, *supra* note 94, ¶¶ 3, 5, at 19,792.

96. ACUS Recommendation 72-5, *supra* note 94, ¶ (c), ¶ 3, at 19,792.

97. H.R. 3010, sec. 3(b) (proposed § 553(e)(1)–(4)). They also include whether the information on which the rule is based meets the requirements of the IQA. *Id.* sec. 3(b) (proposed § 553(e)(5)). If Congress adopts proposed § 553(d)(4), which would provide a formal hearing on exactly that question early in the proceeding, a second go-round on the same issue would be unnecessary and simply a prescription for delay.

proceedings considerably and undermined agencies' ability to fulfill their mandates expeditiously. A leading study by Professor Hamilton found: "In practice . . . the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."[98] At the FDA, for example:

> The sixteen formal hearings that were held during the last decade vary from unnecessarily drawn out proceedings to virtual disasters. In not one instance did the agency complete a rulemaking proceeding involving a hearing in less than two years, and in two instances more than ten years elapsed between the first proposal and the final order. . . . The hearings themselves tended to be drawn out, repetitious and unproductive.[99]

Formal rulemaking also functioned in a number of instances as a bargaining chip with which regulated parties could extract concessions by threatening to insist on their right to trial-type proceedings, bogging down an agency in protracted proceedings.[100] These side effects are a large part of the reason why formal rulemaking was abandoned decades ago (except where already mandated by statute), and nothing that has occurred in the intervening years casts doubt on that judgment.

Over and above the broad policy questions they raise, the bill's formal rulemaking provisions present several difficulties involving their relationship to the rest of the APA. The bill provides that, in a formal rulemaking case triggered under the newly added provisions, the rulemaking record will consist of the trial-type hearing record *plus* the conventional § 553 rulemaking record generated through the notice-and-comment proceedings.[101] The latter record may contain memoranda, letters, emails, perhaps even tweets.[102] Yet *oral* contacts between rulemaking decisionmakers and members of the public would apparently be banned by virtue of APA § 557(d).[103] That prohibition would be difficult to justify, and it would be at odds with the sponsors' goal of transparency. The ban on

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98. Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1312–13 (1972).

99. *Id.* at 1287.

100. *Id.* at 1289 (FDA would "go to almost any length to avoid" formal hearings); *id.* at 1303 (Interior Department); *id.* at 1312 (Department of Labor). A study by Professor Stephen Williams (later a distinguished D.C. Circuit judge appointed by President Reagan) also highlighted the tactical advantages to private parties of the right to invoke formal hearings. Stephen F. Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 433–34 (1975).

101. *See* H.R. 3010, sec. 5 (proposed § 556(e)(2)).

102. *See* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011).

103. 5 U.S.C. § 557(d) (2006).

external oral contacts would apparently also extend to OIRA.[104] Indeed, formal rulemaking proceedings have always been exempt from OIRA review.[105] Yet exclusion of OIRA from consultation with the agency regarding the terms of a *major rule* would be unwise and difficult to reconcile with the emphasis elsewhere in the bill on expansion of OIRA's role.

Another APA requirement is that, after the hearing in a formal rulemaking case, the administrative law judge (ALJ) or another agency employee must write a "recommended, initial, or tentative decision" that makes findings and conclusions on "all the material issues of fact, law, or discretion presented on the record," unless the agency "finds on the record that due and timely execution of its functions imperatively and unavoidably . . . requires [omission of this procedure]."[106] It is unclear whether this preliminary decision would be based on the hearing record (as has been traditional) or the broader rulemaking record. Yet either of these alternatives would be problematic—the former because it would be based on a different body of information than the ultimate rule would; and the latter because it would apparently extend even to issues that the ALJ did not consider during the formal hearing phase of the proceeding. Either way, the writing of this decision would add another time-consuming step to the rulemaking process for high-impact rules.

In short, there may be a case for legislation that would institute a "carefully limited" place for trial-type methods in rulemaking, along the lines of the 1981 ABA resolution. The proposed § 553(e), however, would institute formal rulemaking with respect to issues that influential voices in the administrative law community have "emphatically" deemed unsuitable for such methods. It should be either fundamentally reappraised or omitted from the bill.[107]

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104. *Cf.* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1550 (9th Cir. 1993) (concluding that presidential staff are "interested persons" and "outside the agency" for purposes of § 557(d)).

105. Exec. Order No. 12,866, *supra* note 5, § 3(d)(1), at 641; Exec. Order No. 12,291, *supra* note 27, § 1(a)(1), at 127.

106. 5 U.S.C. § 557(b)–(c) (2006). Under the APA, in a formal rulemaking case, the preliminary decision need not be written by the employee who presided at the hearing. *Id.* § 557(b)(1). However, the hearing must be conducted by an ALJ, unless one or more agency heads preside personally (which would be an unlikely occurrence in a high-impact rulemaking proceeding). *Id.* § 556(b). Presumably, a rulemaking agency that does not otherwise employ ALJs would need to hire one or more of them for this purpose.

107. Section 556(f) of the bill states that an agency must consider the matters listed in § 553(b) and § 553(f) when it "conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rulemaking under section 553(c)." This may well be a drafting error, as the bill does not appear to provide for formal rulemaking "directly" after ANPRM proceedings.

VIII. INFORMATION QUALITY ACT

Proposed § 553(d)(4) of the bill would create a special procedure by which persons may challenge information upon which a proposed rule is expected to be based, if they allege that the information does not meet the requirements of the Information Quality Act (IQA). Initially, the challenger may submit a petition to exclude the information. If the petition is not immediately granted but nevertheless "presents a prima facie case," the agency must hold a trial-type hearing on the petition under § 556 of the APA, with cross-examination allowed. The hearing must be held within thirty days of the filing of the petition, and the agency must render a decision on the petition within sixty days of the initial filing, but judicial review of that decision is not available until the agency takes final action in the rulemaking proceeding.[108]

As an initial matter, the requirement to hold a trial-type hearing with cross-examination gives rise to some of the objections to formal rulemaking discussed above. It is not clear why cross-examination, which is most useful to determine the credibility of witnesses, would result in better decisions as to the reliability of specified data, an issue that frequently will turn on analysis of highly technical information. Moreover, the task of applying the open-ended terms of the IQA will not necessarily be a cut-and-dried matter. It may well implicate policy considerations and broad issues of legislative fact—the kind of issues that present the weakest case for the use of courtroom methods.

The sponsors of the bill have, to be sure, commendably sought to address potential concerns about delays by requiring any petition to be filed within 30 days of the NPRM and specifying that the hearing and decision must occur within two months of when the petition for correction is filed. However, even assuming that these deadlines hold up, the need to prepare for a live hearing will require a substantial investment of staff resources on a timetable that is not of the agency's choosing, particularly since it is easy to imagine there being multiple petitions from multiple members of the public. Suppose, as seems likely, the agency simply is unable to make a firm, final determination within the 60-day period. Then it will have two unappealing options. Either it will toss the challenged study or document, despite its possible usefulness, thus undercutting the solidity of the rulemaking record, or it will keep it in, despite its possible defects, thus potentially *also* undercutting the solidity of the rulemaking record and

108. On the other hand, the bill provides that an agency's decision to exclude information from a rulemaking proceeding, as requested in a petition, cannot be reviewed at any time. H.R. 3010, sec. 3(b) (proposed § 553(d)(4)(C)). No justification for this one-sided approach to judicial review under the IQA comes readily to mind.

running a risk of later problems on judicial review.

More fundamentally, it is not clear why the agency should be required to reach a decision on the merits of the petition immediately—within sixty days of when the petition is filed—as opposed to resolving the issue as part of the regular rulemaking process. Currently, if a member of the public believes that the information upon which the agency plans to rely is erroneous and violates the IQA, the person may so inform the agency during the comment period.[109] Under well-settled case law, the agency would need to consider those comments and rationally respond to them in the preamble to the final rule or risk judicial invalidation of the rule.

Section 553(d)(4) would entail new procedural complexity. One should not assume that this would always work to the advantage of those who favor reducing government regulation of private activity. Environmental and public interest groups have been frequent users of the Information Quality Act to oppose what they believe to be insufficient government regulation.[110] Thus, the new procedure may sometimes drive up the costs of promulgating rules that would make regulation stricter, but at other times it may have the same effect on rules that would relieve regulatory burdens.

Experience to date indicates that these burdens are unnecessary, for IQA questions are adequately—and perhaps best—dealt with through the rulemaking process. The Ninth Circuit essentially accepted the sufficiency of the existing approach in a case in which the plaintiff sought correction under the IQA of statements made by the Department of Health and Human Services regarding the efficacy of marijuana for medical purposes. The Ninth Circuit upheld the Department's refusal to act immediately on the petition, because the same issue was pending before the agency in its consideration of a rulemaking petition. The court agreed with the government that Office of Management & Budget (OMB) guidelines permitted the Department to "use existing processes that are in place to address correction requests from the public."[111] Of course, Congress can change the law to explicitly require a special procedure above and beyond the ordinary notice and comment process, but the onus should be on proponents of such legislation to explain why it is needed. Indeed, it may

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109. *See* Information Quality Guidelines: Principles and Model Language, *in* Memorandum for the President's Management Counsel from John D. Graham, Administrator, Office of Information & Regulatory Affairs (Sept. 5, 2002), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmcmemo.pdf.

110. *See, e.g.*, Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183 (10th Cir. 2006).

111. Ams. for Safe Access v. HHS, 399 Fed. Appx. 314, 315 (9th Cir. 2010). *See also* Prime Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010) (upholding OIRA guidelines insofar as they exempt adjudications from their coverage).

well make more sense to allow the agency to postpone its decision on a correction request tendered during a rulemaking proceeding until it adopts the final rule. At that time, the agency may have a much clearer idea about the materiality of the allegedly incorrect information, and the manner in which it will use that information, than it could have had within the sixty days immediately following the filing of the petition for correction. Under the bill, the challenger might be able to force the agency to hold a trial-type hearing and render a decision about a factual issue that will ultimately make little or no difference to the disposition of the final rule.

In addition, § 7(2) of the bill would amend § 706(2)(A) of the APA to provide that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "not in accordance with law . . . (*including the Information Quality Act*)."[112] We would be reluctant under any circumstances to see the broad language of § 706—a constitution-like statute that is invoked in thousands of court cases every year—amended to refer explicitly to an issue that has been, and probably would continue to be, litigated only rarely. More fundamentally, the chances that such an amendment would accomplish anything are, at best, highly uncertain. The weight of judicial authority indicates that the IQA creates no rights that are capable of being enforced in the first place. In *Salt Institute v. Thompson*,[113] the district court held: "Neither the IQA nor the OMB Guidelines provide judicially manageable standards that would allow meaningful judicial review to determine whether an agency properly exercised its discretion in deciding a request to correct a prior communication."[114] That ruling was upheld on appeal to the Fourth Circuit, which agreed that the IQA "does not create a legal right to access to information or to correctness."[115] Other courts have reached the same conclusion.[116] To be sure, there are also cases holding that the OMB guidelines are legally binding,[117] but those decisions did not take issue with the just-stated proposition in the *Salt Institute* cases.

This issue has not been definitively resolved. Indeed, in recent cases the Ninth and D.C. Circuits chose not to address it when they had the chance,

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112. H.R. 3010, sec. 7(2) (proposing to amend 5 U.S.C. § 706(2)(A) (2006)) (emphasis added).

113. 345 F. Supp. 2d 589 (E.D. Va. 2004).

114. *Id.* at 602.

115. Salt Inst. v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006).

116. Single Stick, Inc. v. Johanns, 601 F. Supp. 2d 307, 316 (D.D.C. 2009), *aff'd in pertinent part on other grounds sub nom.* Prime Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010); Ams. for Safe Access v. HHS, 2007 U.S. Dist. Lexis 89257 (N.D. Cal. 2007), *aff'd on other grounds*, 399 Fed. Appx. 314 (9th Cir. 2010); *In re* Operation of Mo. River Sys., 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004).

117. *Ams. for Safe Access*, 399 Fed. Appx. 314; *Prime Time Int'l Co.*, 599 F.3d 678.

demonstrating that the issue remains open at the appellate level outside the Fourth Circuit. Nevertheless, it would not make sense for Congress to ignore the case law that does exist. In brief, that case law indicates that the obstacle to judicial review of agency denials of requests for correction under the IQA is not (or not solely) found in the APA; it inheres in the IQA itself. Nothing in the bill purports to change the substantive law of that Act. At some point Congress may wish to review and perhaps revise the IQA to establish substantive standards, but proposed legislation that attempts to address this issue through amendment of the APA seems misdirected.

As is well known, Congress adopted the IQA as a rider to an appropriations bill, without hearings, committee review, or floor debate. That background lends further weight to the notion that, in order to resolve questions regarding judicial review under that Act, Congress should wait until it has had an opportunity to give the IQA the full airing that the statute never received at its inception.

IX. FINAL RULES

Section 553(f) of the bill sets forth requirements for final rules.[118] We have commented above on most of its provisions, including the new findings and determinations that an agency would need to make in order to issue a final rule, the requirement of consultation with OIRA, and the prescription of a rulemaking record.[119] We will not repeat that discussion here.

We note, however, that the list of predicate conditions in § 553(f)(5) omits one requirement that should be included. In line with ABA policy, that provision should be amended to require, in substance, that a notice of final rulemaking should include "a response to each significant issue raised in the comments on the proposed rule."[120] This obligation is well recognized in the case law[121] and is essential in order to make the comment process meaningful. Proposed § 553(f)(4)(G)(i) requires that an agency's notice accompanying any major rule or high-impact rule must include

> the agency's plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule,

118. A related provision, § 553(i), states that the "required publication or service" of a final rule should generally occur 30 days before it goes into effect. The "required service" language is a carryover from the current APA, which also refers to "personal service" in 5 U.S.C. § 553(b). However, since the latter language has been dropped from § 553(d) of the bill, the corresponding language of § 553(i) should also be removed.

119. *See supra* notes 9–33, 74–76 and accompanying text.

120. *See supra* note 10 and accompanying text; *see also* ACUS Recommendation 93-4, *supra* note 11, ¶ IV.D.

121. *See supra* note 25.

> whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.[122]

The ABA supports legislation providing for periodic review by agencies of their existing regulations. Its resolution, adopted in 1995, stated in part:

> Congress should require review programs and, in so doing, should: (a) ensure that agencies have adequate resources to conduct effective and meaningful reviews, and (b) avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies.[123]

At a general level, the proposed § 553(f)(4)(G)(i) is consistent with and would further the purposes of the ABA's policy. We also think that the substantive criteria listed in the subsection are stated with sufficient generality as to pose no conflict with the ABA's admonition against overly "detailed" requirements.

We are less convinced, however, that the agency should formulate a plan for reconsideration of a major rule when it promulgates the rule. At that time, the agency will by definition be unaware of future developments that would be relevant to such a plan, such as the manner in which the rule will have worked out in practice, whether it will prove basically successful or unsuccessful, and what other tasks the agency will be responsible for performing when the review occurs (perhaps a decade later). The "plans" for decennial review are likely to be empty boilerplate.

The usual approach to prescribing systematic reviews of existing regulations—as reflected in the ABA's resolution, a corresponding ACUS recommendation,[124] and presidential oversight orders[125]—is to ask agencies to create an *overall* plan for review of rules, separately from their promulgation of particular rules. We suggest that Congress follow this latter approach to mandating review of major rules (or a broader class of rules).

Moreover, a flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's

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122. The phrase "no less than every ten years" in § 553(f)(4)(G)(i) is ambiguous. It could refer to intervals that are "ten or more years apart," or "ten or fewer years apart." This language should be clarified.

123. 120 No. 2 A.B.A. ANN. REP. 48 & 341, at 48 (1995).

124. ACUS Recommendation 95-3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

125. Exec. Order No. 13,563, *supra* note 27, § 6; Exec. Order No. 12,866, *supra* note 5, § 5(a). President Obama's order called for an immediate, comprehensive review of *all* "significant" agency rules, but we view that directive as a one-time measure, not intended as long-term policy.

finite resources (not only budgetary, but also time and attention of key personnel). A study by the GAO indicates that, although reviews of existing rules can be useful, mandatory reviews are far more likely to lead to a conclusion that a rule needs no change than are reviews that an agency undertakes voluntarily.[126] Thus, a better system for reexamination of existing rules may be one that requires a serious review commitment but gives agencies more flexibility to determine the frequency with which particular rules will be reviewed.[127] The agencies' plans would, of course, be available for scrutiny and guidance from their respective oversight committees of Congress.

X. INTERIM RULES AND RULEMAKING EXEMPTIONS

A. Expiration Dates

Agencies frequently adopt regulations without prior notice and comment where they find for good cause that ordinary rulemaking procedures would be "impracticable, unnecessary, or contrary to the public interest."[128] However, they often designate such regulations to be "interim rules" and call for post-promulgation public comments. In theory, they will then consider the comments and revise the interim rule into final form. In some cases, however, such rules languish indefinitely in interim form. Section 553(g)(2) of the bill would require the post-promulgation process to be completed in 270 days for most rules and 18 months for major rules and high-impact rules. If the deadline is not met, the interim rule would have to be rescinded.

Agencies do sometimes abuse the flexibility afforded by the good cause exemption. Congress should, therefore, consider amending the APA to discourage or prevent agencies from leaving interim rules on the books indefinitely without ever undergoing the discipline of the notice-and-comment process. However, the specific remedy proposed in § 553(g)(2) gives rise to several concerns.

In the first place, the bill would repeal the existing exemption entirely. Thus, agencies would be required to utilize limited-term interim rules in all situations currently covered by the exemption. This is particularly ill-advised with respect to rules that fall within the "unnecessary" language of the current APA exemption. That language has been dropped entirely in

126. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 30–34 (2007).

127. *See* ACUS Recommendation 95-3, *supra* note 124 (discussing this idea in greater detail).

128. 5 U.S.C. § 553(b)(3)(B) (2006).

§ 553(g)(2), but that part of the exemption plays a vital role that should be preserved. Its purpose is to allow agencies to forgo notice and comment for technical corrections and other noncontroversial rules—not because there is any urgency about them, but rather because no one is likely to wish to contest them. Agencies make frequent use of this exemption, almost always without any controversy whatever.[129] When they invoke the "unnecessary" aspect of the good cause exemption, agencies customarily do not issue interim rules; they simply adopt the rule in final form immediately. There just is no reason to force them to seek post-promulgation comments, as ACUS has long recognized.[130] Judicial review is available to correct alleged misapplications of the "unnecessary" exemption, but if the exemption has been lawfully invoked, neither a post-promulgation comment period nor an expiration date is warranted.

With respect to rules adopted without prior notice and comment because of urgency, the deadlines written into the bill are more understandable, but we believe they are not a good idea, or, at the very least, are much too short. In its consideration of interim rules in 1995, ACUS did not recommend a uniform government-wide deadline date for finalizing the rules. We think this was the right decision.[131]

If an agency cannot meet the deadline for evaluating public comments and modifying the rule, it confronts the unpalatable choice of allowing its rule to lapse or rushing the process through to completion before the public comments have been properly analyzed and modifications to the rule have been carefully considered. Neither alternative is desirable, especially given that the rule was adopted to deal with an emergency situation.

An agency may be unable to meet the deadline for completing the post-promulgation modification process for many legitimate reasons. Often, a

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129. A scholar who examined every issue of the Federal Register published during a six-month period found that agencies expressly invoked the good cause exemption in twenty-five percent of the rules they issued (not counting many more in which they appeared to rely on it by implication). Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 338–39, 339 n.86 (1989). Of these, about twenty percent, or five percent of the overall total, invoked the "unnecessary" exemption alone. *Id.* at 351 n.124. He added that, although these figures may sound excessive, "an examination of the actual cases where the clause is invoked does not reveal general misuse." *Id.* at 339–40.

130. ACUS Recommendation 83-2, The "Good Cause" Exemption from APA Rulemaking Requirements, 48 Fed. Reg. 31,180 (July 7, 1983); *see also* ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110, 43,113 n.15 (Aug. 18, 1995).

131. *See* ACUS Recommendation 95-4, *supra* note 130, at 43,113, ¶ II.B.3 (recommending that agencies consider imposing deadlines on themselves in particular cases), discussed in relevant part in Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 736–40 (1999).

large set of complex interim rules are adopted at the same time to implement a new statute; these would all expire at the same time, creating a serious time crunch on limited agency staff resources. Or the agency may confront more urgent rulemaking or enforcement priorities, so staff is simply not available to deal with an expiring interim rule. Or the leadership of an agency may change just before the rule expires, and the new agency heads need to make their own decision about how to modify the interim rule.

In any event, if Congress decides to impose a deadline, we would suggest that it be at least three years, as in the case of tax regulations.[132] Consideration should also be given to allowing the agency to extend its time limit for a defined period upon showing good cause—a showing that presumably would be judicially reviewable (as the bill could specify).[133]

B. Judicial Review

Proposed § 553(g)(2)(C) goes on to provide that, in general, an interested party may seek immediate judicial review of an agency's decision to adopt an interim rule. Proposed § 704(b) essentially repeats this provision and adds that review shall be limited to whether the agency abused its discretion in adopting the interim rule without complying with ordinary rulemaking procedure. (Inconsistently, however, § 706(b)(3) provides that the court shall not defer to the agency's determinations during such review.)

One has to wonder why § 553(g)(2)(C) (and the repeated language in § 704(b)) is thought to be needed at all. Under existing law, interim rules are already reviewable immediately upon their issuance, if other prerequisites for judicial review are satisfied. Interim rules (also commonly called interim *final* rules) are not like an interlocutory order in an adjudicated case. They are legislative rules with the force of law and immediate operative effect. As such, they fall within the usual meaning of "final agency action" and are subject to judicial review under § 704.[134] Were there a body of case law that holds otherwise, one could make a case that Congress needs to clarify this principle, but we are aware of no such

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132. *See* I.R.C. § 7805(e)(2) (2006).

133. As written, the bill provides especially tight deadlines in the case of non-major rules, but that distinction is artificial. Whether a rule is major or non-major says little or nothing about the practical difficulties of meeting the deadline, the complexity of the regulatory problem, or the number of public comments that must be analyzed.

134. Ark. Dairy Coop. Ass'n v. USDA, 573 F.3d 815, 827 (D.C. Cir. 2009); Pub. Citizen v. DOT, 316 F.3d 1002, 1019 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004); Career Coll. Ass'n v. Riley, 74 F.3d 1265, 1268–69 (D.C. Cir. 1996); Beverly Enters. v. Herman, 50 F. Supp. 2d 7, 17 (D.D.C. 1999) (claim was time-barred because plaintiff *failed* to seek review of interim rule when it was promulgated).

cases.

A similar point can be made about the two inconsistent standards of review. We see no reason to choose between them, because neither is needed. An agency's decision to issue an interim rule, instead of complying with ordinary rulemaking procedures, is essentially a decision to invoke an exemption to the APA. Courts already decide issues of APA compliance, such as this one,[135] without appreciable deference to agencies, because no single agency administers that Act.[136]

C. *Other Exemptions*

The good cause provision is not the only rulemaking exemption that Congress should consider in connection with APA revision. It should take this opportunity to rescind the broad and anachronistic exemption for rules relating to "public property, loans, grants, benefits, or contracts."[137] ACUS has repeatedly called for repeal of this language, beginning in 1969,[138] and the ABA has concurred with a minor reservation relating to public property and contracts.[139] Similarly, the APA contains a sweeping exemption for matters involving "a military or foreign affairs function of the United States."[140] Both ACUS and the ABA have for decades been on record as urging that this exemption be narrowed, so that it would only apply (as does the corresponding exemption in the Freedom of Information Act) to matters that are specifically required by executive order to be kept secret in the interest of national defense or foreign policy.[141] A requirement that rules in the subject areas of both exemptions must be issued through the normal notice-and-comment process would harmonize well with the bill's overall emphasis on promoting public participation and agency

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135. Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003).

136. United States v. Fla. E. Coast Ry., 410 U.S. 224, 236 n.6 (1973); Collins v. NTSB, 351 F.3d 1246, 1252 (D.C. Cir. 2003); Am. Airlines, Inc. v. DOT, 202 F.3d 788, 796 (5th Cir. 2000).

137. 5 U.S.C. § 553(a)(2) (2006).

138. ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 38 Fed. Reg. 19,782, 19,784–85 (July 23, 1973).

139. *1981 ABA Recommendation*, *supra* note 7, at 783–84, 788. The reservation was that if rulemaking procedures are followed by an agency with overall responsibility for public property or contracts, including the Administrator for Federal Procurement Policy or the Administrator of General Services, the implementing agency should not have to repeat the process on its own; moreover, the APA should not displace any rulemaking procedures specified in the applicable organic statute. *Id.*

140. 5 U.S.C. § 553(a)(1) (2006).

141. *1981 ABA Recommendation*, *supra* note 7, at 784, 788–89; ACUS Recommendation 73-5, Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 39 Fed. Reg. 4847 (Feb. 7, 1974).

accountability in rulemaking.

Finally, we note that § 553(g)(1) apparently seeks to carry forward without change the existing APA exemption for interpretive rules, policy statements, and procedural rules.[142] It does so imperfectly, however, because it would require an agency to take account of the § 553(b) considerations in issuing an interpretive rule or policy statement and also satisfy the requirements for final rules in § 553(f). These requirements would be excessive, not only for the reasons we have already mentioned regarding those subsections, but also because it would tend to deter agencies from issuing guidance at all. This would be detrimental to the interests of those citizens who rely on agency guidance for advice as to how they can best comply with their regulatory obligations.

XI. OIRA GUIDELINES

Section 553(k) would authorize OIRA to "establish guidelines" regarding multiple aspects of the rulemaking process. Of course, OIRA already does issue such guidelines. Insofar as the purpose of the subsection is simply to recognize and ratify this practice, we support the provision. Presumably, one consequence of codifying this authority would be to make OIRA guidelines applicable to independent agencies' rulemaking. As stated above, the ABA does support the extension of OIRA oversight to independent agencies.[143]

We assume that the "guidelines" authorized by the subsection would not be legally binding. At present, OIRA does have rulemaking authority in limited subject areas, such as the Paperwork Reduction Act and the Information Quality Act, but it has not claimed a general authority to regulate the rulemaking process. Indeed, the presidential oversight orders have all specifically disclaimed the intention to displace the authority granted by law to the respective agencies.[144] Our understanding is that the bill does not seek to alter that state of affairs. The sponsors should, however, reconsider certain language in the provision that may give rise to a contrary impression—e.g., that the guidelines would "ensure" that agencies use the best available techniques for cost-benefit analysis, "assure" that each agency avoids regulations that are inconsistent with those of other agencies, and "ensure" consistency in federal rulemaking.

Subsection 553(k) also authorizes OIRA to issue guidelines in subject matter areas that it has not heretofore addressed. The benefits of such

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142. *See* 5 U.S.C. § 553(b)(3)(A) (2006).

143. *See supra* note 76 and accompanying text.

144. *See, e.g.*, Exec. Order No. 13,563, *supra* note 27, § 7(b)(i); Exec. Order No. 12,866, *supra* note 5, § 9.

pronouncements may vary according to context. For example, the case for empowering OIRA to issue binding guidelines "to promote coordination, simplification, and harmonization of agency rules" is relatively strong, because problems of incompatible or duplicative regulations as between agencies are real, yet individual agencies cannot readily solve these problems on their own. The case for guidelines to ensure that rulemaking conducted outside the APA framework "conform to the fullest extent allowed by law with the procedures set forth in section 553" is less clear, because diverse approaches among the agencies may rest on legitimate differences in their respective missions and programs. In short, the direction in which § 553(k) appears to be headed may have merit, but its proponents will need to make a careful case for individual aspects of it.

In any event, we do not support the provision in § 706(b)(2) that would deny any judicial deference to agency cost–benefit determinations or risk assessments that fail to conform to OIRA guidelines—a purpose for which those guidelines clearly were not designed. We discuss this provision in Part XIII below.

XII. AGENCY GUIDANCE

Section 4 of the bill adds to the APA a new provision, § 553a, on the subject of agency guidance. It provides that, before issuing any *major* guidance, an agency must consider certain stated issues and consult with OIRA. It also states that any guidance must be explicitly labeled as nonbinding and that OIRA may issue guidelines to agencies as to how they should use guidance documents.

Most of these provisions have counterparts in existing practice and are supportable or at least not objectionable. The factors listed in § 553a(a)(1) as threshold considerations are mostly straightforward matters that one would normally expect the agency to consider, such as whether the guidance is understandable and supported by legal authority, and whether its benefits justify its costs.[145] (However, to the extent that this subsection incorporates by reference all of the cost factors listed in § 553(b), we would object for the same reasons discussed above in relation to the latter provision.) Moreover, OIRA already consults with executive agencies about significant guidance, and OMB has already published guidelines regarding the recommended use of guidance by agencies.[146] A consequence of codification in the APA would be that the application of these oversight functions would be extended to independent agencies, but

145. The reference in § 553a(a)(1)(B) to "the rule making" should say "a rule making."

146. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

such an extension would be consistent with ABA policy.[147]

The provision's general provision on guidance could benefit from refinement, however. First, the statement in subsection (b)(1) that agency guidance "may not be relied upon by an agency as legal grounds for agency action" could prove confusing, because interpretive rules certainly "may sometimes function as precedents."[148] Perhaps the quoted language should be rephrased as "may not be used to foreclose consideration of issues as to which the document reaches a conclusion,"[149] or should simply be deleted. Second, the requirement in subsection (b)(2) that any guidance must be labeled as not legally binding in a "plain, prominent and permanent manner" may be problematic. In the abstract, such labeling represents good administrative practice,[150] but conversion of this principle into a legal requirement may cause difficulties, particularly with respect to internal documents that technically meet the definition of "guidance" but are routine or casual statements, such as internal memoranda, that are prepared with little internal review.[151] Codification would also give rise to the question of what the consequences of breach would be. The ramifications of the principle of prejudicial error under § 706 could be difficult to sort out. Even OMB's Good Guidance Practices Bulletin treats the labeling practice as optional, although it suggests that agencies consider following it.[152] Thus, encouragement of labeling may be better left to advisory documents as opposed to the APA. Finally, subsection (b)(3), which identifies ways in which guidance shall be "made available," covers terrain that is already addressed in the Freedom of Information Act (FOIA), which is part of the APA.[153] It does not seem to add anything to what FOIA already requires, and it could create confusion. If the sponsors deem

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147. *See supra* note 76 and accompanying text.

148. United States v. Mead Corp., 533 U.S. 218, 232 (2001).

149. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT § 311(b) (2010) (HeinOnline) ("An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.").

150. *See* ACUS Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,103, ¶ II.A. (July 8, 1992).

151. *See* 118 No. 2 A.B.A. ANN. REP. 57, 58 (1993) (making recommendations on agency use of guidance, but with the caveat that the resolution "reaches only those agency documents respecting which public reliance or conformity is intended, reasonably to be expected, or derived from the conduct of agency officials and personnel;" as opposed to "enforcement manuals setting internal priorities or procedures rather than standards for conduct by the public").

152. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, *supra* note 146, at 3437.

153. 5 U.S.C. §§ 552(a)(1)(D), 552(a)(2)(B) (2006).

the current requirements for making guidance available inadequate, amending that requirement seems preferable to enacting a new provision on the same subject.

XIII. JUDICIAL REVIEW

We have already discussed the bill's provisions on judicial review as they relate to interim rules and the Information Quality Act, so the following comments relate to other provisions.

A. *Scope of Review*

Section 7 of the bill would add a new subsection (b) to the APA's scope of review provision, § 706, stating that a reviewing court "shall not defer" to various interpretations and determinations by an agency unless the agency followed certain specified procedures in relation to that determination.

The Section believes that this subsection is unwarranted. Judicial review of agency decisionmaking today is relatively stable, combining principles of restraint with the careful scrutiny that goes by the nickname "hard look review." Since the time of such landmark decisions as *Chevron*[154] and *State Farm*[155]—and, of course, for decades prior to their issuance—courts have striven to work out principles that are intended to calibrate the extent to which they will accept, or at least give weight to, decisions by federal administrative agencies. Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.

In any event, the principles proposed fall well outside the range of doctrines that can find support in the case law. For example, the bill provides in § 706(b)(2) that "the court shall not defer to" an agency's "determination of the costs and benefits of a rule or economic or risk assessment of the action" if the agency failed to conform to guidelines prescribed by OIRA. This provision is unwise.

Under standard judicial review principles, such shortcomings in reasoning normally result in a *remand for reconsideration*, so that the agency can (attempt to) provide an adequate basis for its position, or, perhaps, a proper regulatory analysis. It should not result in the court making its own findings on these issues. Such judicial overrides would defeat the purposes of the enabling legislation, because they would effectively mean that the court would make policy judgments that Congress has entrusted to the judgment of an administrative agency (subject to traditional political and

154. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
155. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

judicial oversight). This development would dramatically increase the policymaking power of federal judges who do not have experience in the relevant subject area and have no political accountability to Congress or the public. Moreover, scattered judicial interventions of this kind would inevitably tend to undermine the coherence of major regulatory programs.

We would add that the innovations introduced by § 706(b)(2) would also result in substantial burdens for the courts themselves. Appellate litigation would become more complicated (and expensive for litigants), because the courts would have to make complex threshold inquiries into whether or not the agency had complied with OIRA's guidelines. These questions would not necessarily have been resolved at the agency level, because the issue of judicial deference would not have been directly germane at that level. Of course, if the reviewing court were to resolve the threshold issue adversely to the agency, it would then face even more daunting challenges, as it would be required to become a de facto administrator charged with balancing costs and benefits of a rule, assessing risks, etc., for which the judges would likely have had no training. These new judicial tasks strike us as unwarranted—and all the more so at the present time, when many of the courts are facing "judicial emergencies" because of vacancies on the bench and the pressures of heavy caseloads in criminal, immigration, and other areas.

Another troubling provision is § 706(b)(1), which provides that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures in adopting the interpretation. Under those circumstances, however, the agency would actually be issuing a new regulation—it would not be interpreting the old one. Effectively, therefore, § 706(b)(1) would abolish all judicial deference to agencies' interpretations of their own rules. Yet many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it. A prohibition on such deference would be both unwise and unsupported by case law.[156]

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156. There is a serious debate in the cases and the law review literature as to whether an agency's interpretation of a regulation should receive *diminished* deference if the agency arrived at it without engaging in sufficient procedural formalities. *See generally* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 GEO. WASH. L. REV. 1449 (2011); Harold J. Krent, *Judicial Review of Nonstatutory Legal Issues*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 147, 151–58 (John F. Duffy & Michael Herz eds., 2005). That debate, however, has not generated substantial (if any) support for the proposition that such an interpretation should receive no judicial deference whatsoever, as § 706(b)(1) would provide.

Courts do, of course, play an indispensable role in overseeing agency action and correcting abuses. If Congress decides to reconsider the premises of that role, the Section would be very willing to work with it on proposals to refine the judicial review provisions of the APA. The principles of § 706(b), however, are in our judgment too far removed from current judicial review practice to offer a promising start in that direction.

B. Substantial Evidence

Section 8 of the bill would add a new definition of "substantial evidence" to the judicial review chapter of the APA. The definition itself is innocuous, as it is based directly on well-recognized case law.[157]

We are unconvinced, however, that the amendment is necessary or will accomplish what its sponsors expect. A press release by the sponsors indicates that the bill is intended to ensure that, "[a]s a consequence of the formal hearing [mandated by the APA as amended], high-impact rules would be reviewed under a slightly higher standard in court—substantial evidence review."[158] Apart from our objections to the formal hearings themselves, discussed above, we must question some of the premises of this statement.

As an initial matter, it is not at all clear that the bill as drafted would, indeed, subject high-impact rules to substantial evidence review. The APA provides that the substantial evidence test applies to "a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."[159] The first prong of this trigger may not apply because rulemakings that involved a formal hearing, i.e. were "subject to sections 556 and 557," will *also* have been "subject to" notice-and-comment under § 553. The second prong may not be satisfied because

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157. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). There the Court stated:

> We [have] said that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it . . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id. at 477 (internal citations and quotation marks omitted). Some cases quote only the middle of these three adjacent sentences for the meaning of "substantial evidence," and others the last one, but we know of no case that has suggested that those two formulations have different meanings.

158. Press Release, Rob Portman & Mark Pryor, U.S. Senators, and Lamar Smith & Collin Peterson, U.S. Representatives, Regulatory Accountability Act of 2011: Key Provisions (Sep. 22, 2011), *available at* http://portman.senate.gov/public/index.cfm/files/serve?File_id=472d1a09-93d5-4454-964a-54baf0d930cc.

159. 5 U.S.C. § 706(2)(E) (2006).

the bill expressly states that the record for review in a case of this nature would be the record of the formal hearing *plus* the ordinary § 553 record.[160] However, for purposes of the following discussion we will assume that the bill may be interpreted (or revised) to make the substantial evidence standard applicable.

The main problem with the apparent goal of the bill is that the case law has generally abandoned the assumption that substantial evidence review is a "slightly higher standard" than arbitrary–capricious review. The modern view, as stated in a leading D.C. Circuit opinion by then-Judge Scalia, is that "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter."[161] Other circuits have agreed.[162] With the advent of the "hard look" doctrine in arbitrary-and-capricious review, older conceptions of a disparity between the two standards of review have been seen as obsolete.[163]

If the sponsors were to rewrite the bill to make the substantial evidence test squarely applicable to review of high-impact rules, it would present the courts with a need for what Judge Scalia called a "fairly convoluted" inquiry:

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160. H.R. 3010, sec. 5 (proposed § 556(e)(2)).

161. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984). The court has repeatedly reaffirmed this view. *See, e.g.*, Butte Cnty. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010); Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417, 422 (D.C. Cir. 1986) (expressly relating this view to the "reasonable mind" definition of substantial evidence that the bill would codify).

162. Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005); Sevoian v. Ashcroft, 290 F.3d 166, 174 (3d Cir. 2002); Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1374–75 (9th Cir. 1995), *rev'd on other grounds*, 521 U.S. 457 (1997); Tex. World Serv. Co. v. NLRB, 928 F.2d 1426, 1430 n.3 (5th Cir. 1991); Cruz v. Brock, 778 F.2d 62, 63–64 (1st Cir. 1985). The Supreme Court has cited to the *Data Processing* reasoning and expressed no qualms about it. Dickinson v. Zurko, 527 U.S. 150, 158 (1999).

163. In *Data Processing*, Judge Scalia went on to say that the "distinctive function of paragraph (E) [substantial evidence]—what it achieves that paragraph (A) [arbitrary and capricious] does not—is to require substantial evidence to be found *within the record of closed-record proceedings* to which it exclusively applies." 745 F.2d at 684. Even this distinction would become less relevant under the amended APA, because the bill also creates a defined record for review of rules subject to arbitrary-capricious review.

> Suppose, for example, that Congress clearly intended to switch to a stricter test, but was also clearly operating on the mistaken belief that the existing test ("arbitrary or capricious") was more lenient than the "substantial evidence" standard. Should one give effect to the congressional intent to adopt a stricter standard, or rather to the congressional intent to adopt the "substantial evidence" standard (which is in fact, as we have discussed, no stricter)?[164]

The limited nature of the formal hearings contemplated by the bill could make the situation even more convoluted. Some, but not all, of the factual issues would have been litigated via the formal hearing process, for which substantial evidence review is designed. Does this mean that some factual determinations underlying a high-impact rule would be reviewed for substantiality of evidence, and others for arbitrariness? Drawing that distinction could prove confusing if not unmanageable. On the other hand, the bill may be construed to mean that the entire proceeding should be reviewed for substantiality of evidence. This reading would create what the D.C. Circuit has called an "anomalous combination" of features that gives rise to difficult questions as to "whether the determinations in [the case] are of the kind to which substantial evidence review can appropriately be applied," as well as "the adequacy of the record to permit meaningful performance of the required review."[165]

In short, we believe there is great doubt that legislation to impose a substantial evidence test for review of high-impact rules would accomplish what the sponsors intend for it, and every reason to think it would lead to confusion and complexity. As the Supreme Court has recognized, "case-specific factors, such as a finding's dependence upon agency expertise or the presence of internal agency review . . . will often prove more influential in respect to outcome than will the applicable standard of review."[166]

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Thank you in advance for your consideration of these comments. We hope they will be helpful, and we would be happy to work with the committee in its efforts to refine this bill further.

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164. *Id.* at 686.
165. Indus. Union Dep't v. Hodgson, 499 F.2d 467, 473–74 (D.C. Cir. 1974).
166. *Zurko*, 527 U.S. at 163.

Material submitted by C. Boyden Gray

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JUL 25 2013

July 17, 2013

Hon. Spencer T. Bachus, III, *Chairman*
Subcommittee on Regulatory Reform & Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Hon. Stephen Cohen, *Ranking Member*
Subcommittee on Regulatory Reform & Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 2122 — The Regulatory Accountability Act of 2013

Dear Chairman Bachus and Ranking Member Cohen,

I am pleased for this opportunity to support the Regulatory Accountability Act of 2013, H.R. 2122. As I explain in the enclosed statement, I twice testified before the full Judiciary Committee in support of the previous version of this Act. The reforms set forth in the bill, including the extension of cost-benefit review to "independent" agencies, is just as important today as it was in the last Congress.

In my career, I have been fortunate to observe the regulatory state from a variety of vantage points: in the Executive Branch, as White House Counsel and on President Reagan's original task force on regulatory reform; as Ambassador to the European Union, where regulatory friction between the United States and Europe was (and is) a critically important issue; as a private lawyer counseling clients who must bear the regulatory burdens imposed by federal agencies; and in my own civic work and public advocacy.

In all of those capacities, I have witnessed time and time again the harms that overburdensome regulation threatens to the free market, to economic growth, and to principles of good government. Regulation promotes the public interest when its benefits outweigh its costs, and to that end the Regulatory Accountability Act would protect the public interest.

Sincerely,

C. Boyden Gray

cc: Hon. Bob Goodlatte, Chairman, House Committee on the Judiciary
Hon. John Conyers, Jr., Ranking Member, House Committee on the Judiciary

Statement of C. Boyden Gray:

The Regulatory Accountability Act of 2013 (H.R. 2122)

July 16, 2013

In the last Congress, I twice testified before the full Judiciary Committee in support of the Regulatory Accountability Act of 2011. In October 2011, I testified in support of the Regulatory Accountability Act specifically. In September 2012, I returned to testify in support of the full suite of regulatory-reform bills that the Committee had passed, including the Regulatory Accountability Act and the REINS Act.

I enclose my prepared statements from those hearings, for inclusion in the record for last week's hearing on H.R. 2122, the Regulatory Accountability Act of 2013.[1] I stand by the specific points that I raised in those hearings, and I reiterate my support for the Act in general. As I said in 2011, "[b]y incorporating the provisions of the Regulatory Accountability Act . . . into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis." Furthermore, I continue to support the Act's effort to "strengthen[ ] judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements." The Act strikes the "delicate balance" of setting standards that are not burdensome, yet ensuring that those standards will be firmly enforced, and it will improve rulemaking at all agencies, "executive" and "independent" alike, as my prior statements explain.

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[1] My statements also remain available on the Committee's web site, at http://judiciary.house.gov/hearings/pdf/Gray%2010252011.pdf and http://judiciary.house.gov/hearings/Hearings 2012/Gray 09202012.pdf.

In the intervening months since the last hearing, we have witnessed only more evidence of the need to bring "independent" agencies into the framework for accountability and oversight established by Executive Orders 12291 and 12866. Let me offer two examples.

1. Consumer Financial Protection Bureau's Auto Loan "Bulletin"

The Dodd-Frank Act established the Consumer Financial Protection Bureau (CFPB), a new regulatory agency enjoying an unprecedented combination of independence and insulation from the executive, legislative, and judicial branches and an effectively open-ended statutory mandate. My constitutional objections to the CFPB's establishment are a matter of public record,[2] but the CFPB's execution of its broad powers raises substantial questions regarding cost-benefit analysis.

Dodd-Frank's Section 1022(b)(2) nominally requires the CFPB to conduct cost-benefit review of its rulemakings. But because the statute does not require the CFPB's analysis to be vetted by the experts at the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (*i.e.*, the experts that vet other agencies' regulations under Executive Order 12866), it inherently lacks the accountability added by outside review of its work by both OIRA and other stakeholder agencies, which the OIRA-review process currently requires for other agencies' rulemakings.[3]

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[2] *See, e.g.*, C. Boyden Gray & John Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?*, ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, vol. 11, no. 3 (2010), *available at* http://www.fed-soc.org/doclib/20101209_BoydenShuDoddFrankWP.pdf; C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank Is Unconstitutional*, WALL ST. J. (June 22, 2012).

[3] *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). Unfortunately, even OIRA's work can shows signs of pro-regulatory bias, including the inflation of a proposed rule's estimated costs. *See, e.g.*, Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 BUS. ECON. 165 (2012). And agencies have found tactics to "insulate" themselves from OIRA's review. *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

But even more worrisome is the fact that that statute limits the cost-benefit requirement to CFPB's *rulemakings*, thus allowing the CFPB to evade the rigors of cost-benefit review by imposing regulatory requirements and policies through "guidance" or other informal proceedings instead of actual rulemakings. For example, in March 2013 the CFPB announced a new policy of regulating auto loans. This was a controversial development, given that Dodd-Frank expressly limits the CFPB's jurisdiction over aspects of such loans,[4] but it was all the more controversial because it imposed this policy through a "bulletin" rather than through an actual rulemaking.[5]

The Regulatory Accountability Act doubly protects against these kinds of agency maneuvers. First, by reaching independent agencies, the Act would prevent the CFPB and other independent agencies from conducting such proceedings outside the scope of OIRA oversight. Second, the Act's Section 4 takes care to expressly reach not just rulemakings but also "guidance."

2. GAO's Study Of Agencies' Flawed Cost-Benefit Analyses

In December 2012, the Government Accountability Office (GAO) issued a study of several agencies' rulemakings promulgated pursuant to the Dodd-Frank Act.[6] The GAO's findings were troubling: independent agencies' evaluation of regulations' costs and benefits often omitted key elements of the OMB's best practices for regulatory review, and often did not seriously attempt either to fully quantify costs and benefits or to candidly discuss the strengths and weaknesses of their "qualitative" analyses.[7]

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[4] Dodd-Frank Act § 1029.

[5] CFPB Bulletin 2013-02 (Mar. 21, 2013), *available at* http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[6] *Dodd-Frank Act: Agencies' Efforts to Analyze and Coordinate Their Rules*, GAO-13-101 (2012), *available at* http://www.gao.gov/assets/660/650947.pdf.

[7] *See, e.g.*, *id.* at 18-19.

This is not the first time that the GAO has found independent agencies' analyses lacking,[8] and it follows the prominent criticisms published by the Inspectors General of the Securities and Exchange Commission and the Commodity Futures Trading Commission.[9] I fully expect that the independent agencies will continue to have such problems, and that reports detailing them will continue to issue, until Congress finally subjects independent agencies to truly meaningful oversight by OIRA and the courts.

* * *

Again, these examples reiterate and reconfirm the points I made in the Judiciary Committee's previous hearings; thus, I enclose my previous statements in support of the Regulatory Accountability Act, for inclusion in the record.

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[8] GAO, *Dodd-Frank Regulations: Implementation Could Benefit From Additional Analyses and Coordination*, GAO-12-151 (2011), *available at* http://www.gao.gov/assets/590/586210.pdf.

[9] CFTC, Office of the Inspector General, *A Review Of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act* (June 13, 2011), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf; SEC, Office of the Inspector General, Report of Review of Economic Analyses Conducted by the Securities and Exchange Commission in Connection With Dodd-Frank Act Rulemakings (June 13, 2011), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf.

Enclosure 1

Statement of Amb. C. Boyden Gray

October 25, 2011

Hearing Before the House Judiciary Committee:

H.R. 3010: The "Regulatory Accountability Act of 2011"

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

H.R. 3010: THE "REGULATORY ACCOUNTABILITY ACT OF 2011"

October 25, 2011

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the "Regulatory Accountability Act of 2011." I have previously testified before this committee on matters of administrative law, including the reauthorization of the Administrative Conference of the United States (ACUS).

At the ACUS hearing seven years ago, I testified that "the U.S. administrative law system, I believe, is the best in the world. It is the most transparent, the fairest and the most economically productive." I still believe that. But as I went on to say at that hearing, our administrative law system has retained its prized status only because of the government's commitment to maintaining and improving the system over time.

"The Administrative Procedure Act," I said then, "is unrecognizable in the sense of its original language. It has been largely rewritten, not in derogation of congressional intent, but to flesh out what the words mean." Or, to adapt Justice Holmes's famous words, the life of administrative law has been both logic and experience.

The bill before this committee, the "Regulatory Accountability Act of 2011," is a welcome next step in the continued improvement of administrative law. The Act applies the lessons of both logic and experience to solve some of the stark problems raised by the regulatory state's sudden, exponential new growth. On matters of public finance, energy and the environment, telecommunications, and health care, regulatory agencies are taking broadly worded statutory grants of power and applying them in ways that threaten to undermine America's competitive standing in the world, and American liberty at home.

Against that backdrop, the Act has many provisions that I welcome, including new formal-hearing requirements for major rules and high-impact rules, and an ongoing duty to revisit previously promulgated major rules and high-impact rules. But I would like to focus my testimony today on two subjects: First, and most importantly, the Act codifies cost-benefit requirements that have governed the Executive agencies for three decades, but which have not governed "independent" agencies, such as the Commodities Futures Trading Commission (CFTC). And second, the Act prudently reinforces the courts' important oversight role through judicial review.

Cost-Benefit Analysis and the Independent Agencies

Since President Reagan signed Executive Order 12291, and continuing through its successors, including Executive Order 12866, the President has required Executive agencies to subject newly proposed regulations to cost-benefit analysis, under the guidance of the Office of Information and Regulatory Affairs (OIRA).

That centralized review has substantially improved the regulatory process, promoting efficiency while simultaneously ensuring democratic accountability.

Those Executive Orders did not reach the "independent" agencies, however; instead, the Orders exempted those agencies from their coverage. But as those "independent" agencies—the CFTC, NLRB, and Federal Reserve, for example—have come to exert exponentially greater weight on the economy, their exemption has become utterly untenable.

Regardless of the extent to which "independent" agencies are subject to presidential control, Congress *clearly* controls them through its legislative power, and it may subject those agencies to procedural requirements—such as cost-benefit analysis and the opportunity for formal on-the-record hearings—and other forms of Administration oversight and judicial review.

And that is what the Committee proposes to do here. By incorporating the provisions of the Regulatory Accountability Act of 2011 into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis.

To illustrate the critical importance of this improved oversight, let me offer three recent examples of "independent" agency regulatory efforts that would be improved by OIRA oversight, cost-benefit analysis, and alternatives analysis.

1. Financial Regulation

The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed just last year, created an astonishing plethora of rulemaking requirements by a variety of agencies. According to the Davis Polk law firm's widely read legislative analysis, Dodd-Frank will require at least two hundred and forty-three rulemakings. The vast majority of those rules will be issued by "independent" agencies: the CFTC, SEC, and Federal Reserve, and the newly created Financial Stability Oversight Council and Consumer Financial Protection Bureau.

So far, the result has not been encouraging; in fact, it is cause for serious concern. The CFTC's Inspector General issued a report on April 15, 2011, detailing the flaws that have pervaded the CFTC's proposal of derivatives rules. Most significantly, the IG found that the CFTC's cost-benefit analysis for the new rules was directed not by economists, but by lawyers: "it is clear that the Commission staff viewed [cost-benefit analysis] to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of Chief Economist." The Regulatory Accountability Act, by contrast, would commit economic analysis to the economists. Better still, where the CFTC treated cost-benefit analysis as a "caboose," the Regulatory Accountability Act places it firmly near the front of the procedural train, in the required notice of proposed rulemaking.

The Federal Reserve's own regulatory work under Dodd-Frank raises similar red flags. Last month, JP Morgan Chase's CEO, Jamie Dimon, publicly

questioned Fed Chairman Bernanke whether the myriad Dodd-Frank regulatory initiatives would together do more harm than good. Chairman Bernanke answered, "nobody's looked at it in all detail," and that only after imposing these onerous new regulations would they "figure out where the cost exceeds the benefit and ... make the appropriate adjustments." Chairman Bernanke's reasoning puts the cart before the horse—or, to borrow the CFTC's terms, the caboose before the locomotive. Regulators should ascertain the costs and benefits of their regulations *before* deciding whether to impose those regulations on American people and industry, as the Regulatory Accountability Act's proposed framework recognizes.

Even more worrisome, in those same comments Chairman Bernanke disclaimed even the Fed's ability to calculate whether the cumulative effect of new regulations would have a positive or negative impact on credit: "You know, it's just too complicated. We don't really have quantitative tools to do that."

Those are unsatisfactory answers, especially when the apparent cost of new regulations—in terms of both compliance and substantive effect—may be so great. No one argues that cost-benefit questions can always be resolved to the nearest dollar, but in all cases the rigor of cost-benefit review must at least ascertain generally whether regulations do more harm than good. This is particularly important in cases of landmark regulatory reform, which overturns many long-settled arrangements and imposes new burdens on people and businesses. Our independent regulatory agencies can and must do better, and the reforms proposed in this Act will help to ensure that they do.

2. Telecommunications Policy

As the Nation's dependence upon communications technology and the Internet increases, so does the FCC's role in the Nation's economy. Most significantly, a majority of FCC commissioners have committed to establishing "net neutrality" rules governing current and future Internet infrastructure, culminating with the promulgation of net neutrality rules in December 2010. That policy is surrounded by uncertainty, both with respect to whether the policy is lawful (in light of the D.C. Circuit's decision last year in *Comcast v. FCC*), and with respect to whether those rules are justified as a matter of policy. While I would not currently offer conclusions on either of those points, I will note that the Commissioners are deeply divided on the question of whether the net neutrality policy's costs outweigh its benefits. The FCC's majority asserts that "the costs associated with these open Internet rules are likely small," but the dissenting commissioners urge that the policy will result in "less investment," "less innovation," "increased business costs," "increased prices for consumers," and "jobs lost." These are precisely the questions that should be—and, under the proposed Act, would be—resolved through rigorous cost-benefit analysis undertaken under OIRA oversight.

3. Energy and Environmental Policy

Let me end with one more brief example. The Nation's energy and environmental policies implicate not just one agency, but many. Spreading responsibility for these issues across many agencies is an invitation for substantial inefficiency, perhaps even cases of agencies working at cross-purposes. And so

inter-agency coordination is critically important. While the agencies with greatest influence over U.S. energy policy probably are the Department of Energy and the Environmental Protection Agency (EPA), three other important regulatory bodies—the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), and (because of its derivatives jurisdiction) the CFTC—are "independent" agencies, and thus exempt from the current OIRA review process. Going forward, the FERC's jurisdiction over natural gas pipelines will help to shape the Nation's development of newly abundant natural gas supplies; the NRC, meanwhile, largely controls the future of our electric power supply through its regulation of nuclear power generators, and the proposed Yucca Mountain site. The proposed Act would help to ensure that those agencies' rules promote the public interest in a coordinated procedure that includes the Energy Department and EPA.

Judicial Review

Let me note one other salutary feature of the Act: it strengthens judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements. Judicial review of agency action requires a delicate balance—the applicable standards of review are deferential, but those standards must be firmly enforced. The Act strikes that balance well.

And the courts are clearly able to maintain that balance of deference and critical scrutiny, as the D.C. Circuit demonstrated most recently deciding the case of *Business Roundtable v. SEC*. There, the court struck down the SEC's "proxy

access rule" upon narrow but firm review of the SEC's failure to satisfy an SEC-specific statute requiring the agency to consider costs and benefits. As the court explained in that case:

> We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

The SEC's failings in that case exemplify some of the regulatory failings that the Regulatory Accountability Act would work to prevent; the court's analysis exemplifies the well-tailored solution that courts would provide under the Act.

I would stress, however, that Congress must not dilute those generally applicable standards of judicial review by enacting separate statutes that tighten the scope of judicial review and thus effectively immunize certain agency decisions. The best recent example of this troubling trend is the Dodd-Frank Act, which prohibits the Supreme Court and other federal courts from considering, among other things, whether the Treasury Secretary's "resolution determination" (*i.e.*, forced liquidation) of a financial company was lawful; instead, the courts may only review whether his factual determinations and analysis was reasonable.

After I criticized Dodd-Frank's troubling features in a *Washington Post* op-ed last December, the Treasury Department's General Counsel replied in a letter to the editor, asserting that Dodd-Frank "explicitly provides for judicial review" of such draconian agency determinations, but neglecting to admit that judicial review

would be strictly limited in terms of both scope and time, thus nullifying the protections that judicial review ordinarily provides.

Congress should not insulate those types of agency actions from judicial review. The Regulatory Accountability Act is a welcome sign that this Committee values the courts' oversight role, and I hope that it signals Congress's continued commitment going forward.

* * *

The White House recently claimed that "the annual cost of regulations has not increased during the Obama administration"; that the last two years of President Bush's administration "imposed far higher regulatory costs than did the Obama administration in its first two years"; and that "there has been no increase in rulemaking in [the Obama] administration." Those are very broad—and, to put it gently, counterintuitive—claims. Only by requiring the federal agencies to calculate the costs and benefits of their regulations, and then subjecting those projections to the scrutiny of public comment, can we know with greater certainty whether new regulatory initiatives, especially landmark initiatives affecting economic growth and energy infrastructure development, do more good than harm.

Again, I am grateful for the opportunity to testify in favor of the Regulatory Accountability Act of 2011. It draws on, and improves upon, the foundation laid in the Administrative Procedure Act and the Executive Orders on regulatory review.

Enclosure 2

Statement of Amb. C. Boyden Gray

September 20, 2012

Hearing Before the House Judiciary Committee:

"Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery"

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

"REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY"

September 20, 2012

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the question of the current regulatory burden on the national economy. This is the single most pressing domestic policy matter of the day, and I am honored to contribute to the discussion.

As it is so often said, "history never repeats itself, but it rhymes." This seems to be one of those moments. Thirty years after President Reagan campaigned in large part on a platform of regulatory reform, and successfully reformed much of the administrative state, we find ourselves largely back where we began. Regulatory agencies once again rival the tax code and monetary policy in their ability to retard economic growth. And they are doing so at the worst possible opportunity—when we need economic growth more than ever.

Fortunately, while we have encountered these problems before, we also know from experience the best remedies: require regulatory agencies to subject their rules to the rigors of meaningful cost-benefit analysis; erect administrative law procedures that are transparent, predictable, and reliable; maximize the fruits of market-based solutions; and craft substantive statutes that give clear direction to—and place clear limits upon—the agencies that will administer them.

The solution is not just to "roll back some regulations, and call me in the morning," as President Obama glibly mischaracterized in his speech to the Democratic Party's convention earlier this month. Rather, the question is how we can best structure the administrative state to make its regulations both effective and efficient. It is not a question of deregulation; it is a question of *smart* regulation.

I. The Costs of Regulation and of Regulatory Uncertainty

I am a lawyer, not an economist, and so I defer largely to the economic analysis offered by my esteemed co-panelist, Professor John Taylor of Stanford and the Hoover Institution. That said, even a lawyer can recognize the basic facts of regulatory burden on the economy.

First, the Obama Administration's regulations impose immense costs on the economy. By their own estimate, their regulations have cost up to $32.1 billion—but that figure covers just forty-five so-called "major rules" issued in 2009, 2010, and 2011.[1] Of course, we should view the Administration's self-serving estimates of regulatory costs and benefits with a skeptical eye: as Susan Dudley, former Administrator of the White House Office of Information and Regulatory Affairs ("OIRA") and now Director of George Washington University's Regulatory Studies Center, noted recently in *Business Economics*,

> Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . A better baseball analogy might note that, as the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such

[1] See OIRA, "Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," at p. 19 (Mar. 2012), *at* http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

> enthusiasm about his team's score, one has to wonder who will ensure that the game is played fairly.[2]

In sharp contrast to the Administration's own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President's Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration's regulatory burden on the economy exceeds $450 billion.[3]

Second, regulators impose costs not just through the regulations that they directly impose, but also through the problem of regulatory uncertainty. While some assert that regulatory uncertainty is a "canard,"[4] a team of Stanford and Chicago economists recently demonstrated the impact of policy uncertainty, analyzing data that "foreshadows drops in private investment of 16 percent within 3 quarters, industrial production drops of 4 percent after 16 months, and aggregate employment reductions of 2.3 million within two years"—findings that "reinforce concerns that policy-related uncertainty played a role in the slow growth and fitful recovery of recent years[.]"[5]

Of course, the problem is not "regulatory uncertainty" in the abstract. Uncertainty beats certainty when the certainty in question is a massively costly regulation

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[2] Susan E. Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics* 47:3, at p. 175 (2012)

[3] *See* "President's Regulatory Record in the Courts" (Aug. 21, 2012), *at* http://americanactionforum.org/topic/president's-regulatory-record-courts.

[4] *See, e.g.*, Jonathan Cohn, "The GOP's Uncertainty Canard" (Oct. 4, 2011), *at* http://www.tnr.com/blog/jonathan-cohn/95748/republican-regulation-uncertainty-business-data-cantor-mishel-bartlett.

[5] Scott R. Baker, Nicholas Bloom, and Steven J. Davis, "Measuring Economic Policy Uncertainty" (June 4, 2012), *at* http://faculty.chicagobooth.edu/steven.davis/pdf/PolicyUncertainty.pdf.

with no benefits. Rather, the problem is costly, inefficient regulation, and the possibility of still more costly, inefficient regulation.

II. Regulatory Reform's Record

As I noted at the outset of this testimony, our present problems are challenging but not wholly unprecedented. The present economic malaise deservedly draws comparisons to the malaise of the 1970s, when heavy regulation combined with other headwinds to prevent economic growth. To the credit of economist Alfred Kahn, lawyer Stephen Breyer, and others, the Carter Administration and Congress began to wake up to those problems in the late 1970s. But Ronald Reagan truly understood the challenge, and he campaigned vigorously in 1980 on a platform of regulatory reform. Once elected, he put his mandate into effect by commissioning a serious reform effort.

I was privileged to participate in that process, which culminated with the landmark Executive Order 12291, creating the Office of Information and Regulatory Affairs and requiring executive branch agencies to subject regulations to meaningful cost-benefit analysis under OIRA's direction, among other things. President Reagan's Republican successors, Presidents George H.W. Bush and George W. Bush, continued to support and expand upon those reforms. And even Reagan's Democratic successor, President Clinton, largely maintained those reforms in Executive Order 12866.

To be clear, the Reagan reforms were not perfect. Most significantly, E.O. 12291 limited its requirements to *executive* agencies (the Environmental Protection Agency, Labor Department, and so on) but did not touch the so-called "independent" agencies—the Securities and Exchange Commission, National Labor Relations Board, and others. Even though the President has constitutional authority to impose such rules on the independent

agencies, the Reagan Administration stayed its own hand. It was a prudential decision: at that time, independent agencies' regulatory impact was much less than it is today.

The results were overwhelming, as seen in the economic growth that followed. But aside from the well-known statistical evidence, my favorite illustration of the success of Reagan's regulatory reforms is a personal anecdote. A couple of years after President Reagan promulgated his reforms, when the economy was in recovery, I encountered the wife of the C.E.O. of one of the Big Three U.S. auto companies. She said her husband attributed the recovery to the regulatory reform program—not just because of the revision of old regulations but because of the signal that new regulations would be efficient and transparent enough to enable the companies to focus less on Washington and more on cars and consumers.

III. Regulatory Reform Recedes

Unfortunately, in politics few victories are truly permanent, and regulatory reform is no exception. In recent years, the benefits of past reforms have been eroded by a number of developments.

First, and as I just noted, the so-called "independent" agencies have come to impose a much greater burden on the economy. The Securities and Exchange Commission, National Labor Relations Board, and other longstanding agencies wield immensely more power than they once did. Once-sleepy agencies such as the Commodity Futures Trading Commission were given vast new powers by the Dodd-Frank Act and other new laws. And Dodd-Frank created another new independent agency, the Bureau of Consumer Financial Protection ("CFPB"), which threatens economic costs of its own. While the Obama Administration has made much of the fact that it nominally asked independent agencies to

review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. Moreover, Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd-Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

Second, the executive branch's control of cost-benefit analysis increasingly lacks credibility, as Professor Dudley's aforementioned article demonstrates. The Administration's self-serving claims that its regulatory benefits far exceed the costs of unprecedented environmental regulations should be met with serious suspicion. One notorious case study is the Administration's proposed valuation methodology for power plants' "cooling water intake" facilities. To establish the value of fish harmed by those facilities, the EPA conducted a survey asking respondents how much they would be "willing to pay" to save certain species of fish. Of course such a study is wildly hypothetical, even ridiculous—few citizens are ever presented with a real-life situation in which they would pay real money to save real fish. And so the results, garnered from well-meaning respondents, were predictably skewed in favor of high values. That flimsy methodology might next be used to support costly regulations on the nation's energy producers.

Furthermore, too much of the current Administration's regulations are driven not by transparent notice-and-comment rulemakings, but through backroom deals. Perhaps the most notorious example of this is the Administration's "bailout" of the auto industry. Seizing upon the industry's 2008-2009 crisis, the White House and EPA coerced auto companies into agreeing to accept overwhelmingly burdensome greenhouse gas regulations before a single word of the proposal was ever drafted—a disturbing incident recounted

forcefully in the House Oversight and Government Reform Committee's new report.[6] To the extent that the Administration forced this deal upon private industry, it was a serious abuse of power; to the extent that some inside the industry welcomed the arrangement, to the detriment of other auto companies and the economy at large, it was a textbook case of the "crony capitalism," backroom deals, and logrolling inherent in a regulatory process that lacks true transparency. As regulations proliferate, so do the opportunities for secret deals.

IV. Regulatory Reforms To Solve Our Modern Problems

Given those and other problems, the basic solutions clearly present themselves. Regulatory cost-benefit analysis requirements must be extended to independent agencies. And the framework for such review can no longer be designed and executed exclusively by the executive branch, without outside oversight.

In the last two years, Congress has seen many legislative reforms incorporating these solutions. In fact, the bills considered and passed by this Committee, described below, constitute a comprehensive set of reforms that would solve many or all of the problems at hand.

First, the Regulatory Accountability Act (H.R. 3010) takes the cost-benefit analysis currently required of agencies pursuant to executive orders and applies it to *all* agencies, executive and "independent" alike, as a matter of federal statutory law. By requiring agencies to analyze costs and benefits on the record, it gives the public an opportunity to comment upon the estimates of those costs and benefits, ultimately improving the final calculations by increasing the amount and quality of information in the

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[6] "A Dismissal of Safety, Choice, and Cost: The Obama Administration's New Auto Regulations" (Aug. 10, 2012), *at* http://oversight.house.gov/wp-content/uploads/2012/08/CAFE-Report-8-10-12-FINAL.pdf

administrative record. Furthermore, the Act would generally require agencies to choose the lowest-cost rulemaking alternative that meets the objectives of the underlying substantive statute—it would not supersede the requirements of, *e.g.*, the Clean Air Act, but rather it would simply require regulators to select the regulatory framework that achieves those requirements at the lowest possible cost. And the Act preserves agency discretion to choose a higher-cost alternative if necessary to protect the public health, safety, and welfare, so long as the additional benefits justify the additional cost.

The Regulatory Accountability Act would also require agencies to consider market-based alternatives to command-and-control rulemaking. This is a particularly laudable proposal. During my time in the Reagan and Bush Administrations, some of the government's greatest legislative successes promoted market-based solutions. The Clean Air Act, for example, fostered a system of emissions trading that allowed the free market to solve some of the most vexing regulatory challenges presented by air pollution. (That genuine cap-and-trade system stands in marked contrast to the phony "market-based" cap-and-tax solution promoted more recently by climate-change activists.) Unfortunately, recent legislation has trended in the other direction—for example, much of the regulatory mandates imposed by Dodd-Frank, to end the problem of "Too Big To Fail" banks, are counterproductive and destined to fail, whereas simple capital requirements would allow the market to solve the problem itself. The Regulatory Accountability Act will help to correct this trend, by restoring market-based solutions to a central place in regulatory policymaking.

By requiring — not merely inviting — the White House to impose cost-benefit analysis requirements on "independent" agencies, and then subjecting that review to deferential-yet-meaningful judicial review, the Act would ensure that the President and

OIRA will take responsibility for independent agencies, with the further oversight provided by judicial review of the agency's eventual output.

The Regulatory Flexibility Improvements Act (H.R. 527) targets the problems that regulatory agencies currently create for small businesses. By requiring agencies to account for the total impact of regulations—their cumulative direct and indirect impacts—and by requiring the agencies to open the door to small businesses to advise on the real-world effects of regulation, the Act would create a process to prevent regulators from placing heavy regulations on the nation's job creators without first exercising due care and prudence. True to its name, this bill improves the existing Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, to finally achieve those laws' original aims.

The "REINS" Act (H.R. 10) would restore Congress's constitutional responsibility as the nation's sole repository of legislative power, by requiring Congress to vote for major regulations before they go into effect. For the past century, Congress has delegated more and more power to regulators, raising serious constitutional concerns. Even if such delegations will not be remedied in the courts under the old "Nondelegation Doctrine," they *certainly* can be remedied by Congress itself. The REINS Act is a laudable attempt by Congress to prevent itself from abdicating its constitutional responsibilities, refocusing accountability on legislators who—unlike federal bureaucrats—are directly accountable to the People.

The Regulatory Freeze for Jobs Act (H.R. 4078, Title I) recognizes that the current economic malaise calls for immediate action. To that end, the Act would freeze regulations costing more than $100 million until the unemployment rate finally reaches 6

percent. The Act, which includes exceptions necessary to protect national security and public health, safety, and welfare, would create the "breathing room" necessary to repair the economic injuries exacerbated by over-burdensome regulations. We need to grow the economy, not the *Federal Register*.

The Sunshine for Regulatory Decrees and Settlements Act (H.R. 4078, Title III) would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham ("sue and settle") litigation and resultant "consent decrees" to constrict or prevent true transparency in the regulatory process. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General's office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that "public interest" litigation truly promotes, not impairs, the public interest.

Finally, the "RAPID" Act (H.R. 4078, Title V) recognizes that the burdens of regulation are not limited to the rulemaking process. Countless federal statutes require companies to apply for permits before undertaking job-creating projects. And too often, regulators, aided by activist groups, now seem to think that the goal of the permitting process is not to get safe, sound projects approved, but to block projects for political, ideological, or even fundraising reasons. The RAPID Act would streamline the permitting process, directing agencies to work together in a single, coherent process that promotes efficiency and accountability, including meaningful deadlines for the completion of administrative reviews and for the filing of suits challenging permit approvals.

Some have argued that those legislative reforms are too heavy-handed, placing too much power in the hands of federal judges to micromanage regulatory or economic decisions better left to experts. I disagree. These reforms do not prescribe any

substantive outcomes; they do not nullify substantive statutes governing finance or the environment; rather, they merely erect procedures that will require the White House and agencies to seriously consider costs, benefits, and alternatives. This is a light burden and, given the burdens that agencies place on persons and businesses, an entirely proportionate one.

The best example of how these reforms would work in practice is the D.C. Circuit's recent decision in *Business Roundtable v. SEC*,[7] an appeal of the S.E.C.'s "proxy access rule." A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments. Because the agency clearly had failed to satisfy those minimal requirements, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

Some have argued that these statutes would make regulators' work too difficult. Last autumn, when this committee convened a hearing on the Regulatory Accountability Act (H.R. 3010), a group of law professors wrote that "the procedural and analytical requirements added by" the Act "would be enormously burdensome."[8] I could

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[7] 647 F.3d 1144 (D.C. Cir. 2011).

[8] *See* https://www.law.upenn.edu/blogs/regblog/Letter%20to%20House%20Judiciary%20Committee%20on%20HR%203010.pdf

not myself devise a better parody of the myopic, regulator-centric view of the regulatory state. Administrative agencies place enormous burdens on American companies every day; those burdens, not procedural requirements placed on bureaucrats, are the problem that cries out for immediate alleviation.

And again, reforms of the kind reflected in *Business Roundtable v. SEC* do not impose unreasonable burdens on either regulators or the courts. Indeed, the caseload of the D.C. Circuit, which is the principal reviewing court, appears to be declining, not growing.[9] And within that shrinking caseload, the court's regulatory docket is declining even faster.[10]

* * *

In closing, let me note that the Reagan Administration's successes are not the only examples worth considering. In the 1990s and early 2000s, the "sick man of Europe" was Germany—perhaps a difficult fact to recall, considering that Germany is today the engine of European economic growth and the continent's best hope for economic stability. Germany saved itself first and foremost through regulatory reform in 2003-2005, especially with respect to labor law restrictions, and the reforms worked very quickly to turn Germany's recovery around.

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[9] *See, e.g.*, "Judicial Business of the United States Courts," 2011 Annual Report of the Director of the Administrative Office of the U.S. Courts, at p. 59 (http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf).

[10] *See, e.g.*, Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J. L. & PUB. POL'Y 1, 2 (2012) ("The number of cases filed in the D.C. Circuit has declined more or less continuously over the last twenty-five years. More surprising, the number of administrative law cases filed in our court also has declined over that period, again consistently, and the percentage of administrative law cases on our docket is lower now than it has been in all but two of the last twenty-five years.").

Germany's resurgence has shaped much of the modern political-economic debate, not just on questions of European bailouts but also on the issue of the proposed U.S.-E.U. free trade agreement—a treaty that could dramatically reduce transatlantic over-regulatory friction.

But amidst all of that, we must not neglect the lessons relevant to the issues before this committee today. Germany's Chancellor Merkel is urging Europe to recognize that structural reform is needed to rescue the continent from economic disaster. We should heed her warnings as well, and begin by reforming the structure of the administrative state.

Statement of Administration Policy on H.R. 3010

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 29, 2011
(House Rules)

STATEMENT OF ADMINISTRATION POLICY

H.R. 3010 – Regulatory Accountability Act of 2011
(Rep. Lamar Smith, R-Texas, and 36 cosponsors)

The Administration is committed to ensuring that regulations are smart and effective, that they are tailored to advance statutory goals in the most cost-effective and efficient manner, and that they minimize uncertainty. Accordingly, the Administration strongly opposes House passage of H.R. 3010, the Regulatory Accountability Act. The Regulatory Accountability Act would impose unprecedented procedural requirements on agencies that would prevent them from performing their statutory responsibilities. It would also create needless regulatory and legal uncertainty and increase costs for businesses, as well as state, tribal, and local governments, and further impede the implementation of commonsense protections for the American public.

The Regulatory Accountability Act would impose unnecessary new procedures on agencies and invite frivolous litigation. When a Federal agency promulgates a regulation, it must already adhere to the requirements of the statute that it is implementing. In many cases, the Congress has mandated that the agency issue the particular rule or regulation, and it often prescribes the process the agency must follow. Agencies must also adhere to the robust and well understood procedural requirements of the Administrative Procedure Act, and major rules are subject to the requirements of other Federal statutes such as the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act. In addition, for decades, agency rulemaking has been governed by Executive Orders issued and followed by administrations of both political parties. These require regulatory agencies to promulgate regulations only upon a reasoned determination that the benefits of the regulations justify the costs, to consider regulatory alternatives, and to promote regulatory flexibility. Lastly, final regulations are subject to review by the Federal courts to ensure that agencies satisfy the substantive and procedural requirements of all applicable statutes and consider input from the relevant stakeholders.

Passage of H.R. 3010 would replace this time-honored framework with layers of additional procedural requirements that would seriously undermine the ability of agencies to execute their statutory mandates. It would require cumbersome "formal" rulemaking for a new category of rules, for which agencies would have to conduct quasi-adjudicatory proceedings. It would impose unnecessary new evidentiary standards as a condition of rulemaking. It would subject the regulatory process to unneeded rounds of litigation. Finally, the Regulatory Accountability Act would undermine the Executive Branch's ability to adapt regulatory review to changing circumstances.

In these ways and others, the Regulatory Accountability Act would impede the ability of agencies to provide the public with basic protections, and create needless confusion and delay that would prove disruptive for businesses, as well as for state, tribal and local governments.

If the President were presented with the Regulatory Accountability Act, his senior advisors would recommend that he veto the bill.

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Letter of Opposition to H.R. 3010

October 24, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3010, the Regulatory Accountability Act of 2011.

For inclusion into the record of the Committee's hearing, to be held on Tuesday, October 25, 2011.

Dear Mr. Chairmen and Members of the Committee:

We, the undersigned 42 teachers and practitioners in the field of administrative law, regulation, and public administration, have reviewed the provisions of H.R. 3010, the Regulatory Accountability Act of 2011—a proposed revision of the Administrative Procedure Act's informal rulemaking provisions. We strenuously urge your rejection of this proposal.

The bill would substitute for the current APA Section 553 a new version that is approximately ten times longer. It would add over 60 new procedural and analytical requirements to the agency rulemaking process—many of which would apply to all non-exempt rulemaking, however ordinary and however far removed from the major health, environmental and safety regulations that we sense animate current concerns. Most of these requirements apply in repeated fashion—during enlarged obligations of advance notice of rulemaking, at the rule proposal stage, and at the stage of final adoption. The bill greatly extends the time periods necessary to complete lawful consideration of a proposed rule. It introduces formalities inviting obstructionist tactics that agencies would be unable to defend against, tactics available to regulated entities and "public interest" participants alike. It also changes long-standing judicial review doctrines applicable to the review of agency rules.

We seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted. Instead it would likely lead to rulemaking avoidance by agencies—increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount the additional hurdles presented by the new Section 553. Executive officials would find it practically impossible to use rulemaking either to create new regulations or to undo old regulations.

We therefore oppose the bill in its current form and, more importantly, oppose its basic approach. While we share many of the views expressed in the comprehensive comments of the ABA Section on Administrative Law and Regulatory Practice, we wish here to emphasize our conviction that the positive aspects of the bill identified by the Section are greatly outweighed by the damage this bill would cause to administrative agencies and the public welfare they promote if it were enacted.

The APA has served for 65 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life. For that reason, it has been rarely, and only in a minor way, amended in all

those years. Its provisions for "notice-and-comment rulemaking," in particular, have proved a foundational part of our Administrative Law and of our modern democracy—a government technique that we are justly proud of and that we proselytize about around the world. Uncoordinated procedural and analytical requirements added by Congress, presidents, and the courts over the past few decades, although meritorious in many instances, have already made it more complex, costly and slow ("ossified") in the major rulemakings to which they generally apply. It has been widely noticed that the sheer weight of their combination has not only become an increasing drag on the process, but also has led agencies to substitute other less participatory procedures, such as adjudication, guidance instruments or interim-final rules, for ordinary rulemaking. H.R. 3010 would enormously exacerbate this problem. More than an amendment, it would make ordinary rulemaking so expensive and cumbersome as, essentially, to bring it to a halt.

Therefore, rather than try to add to the ABA Section's exhaustive analysis of the bill, we highlight and re-emphasize key objections to the bill that the Section has identified. We find them highly persuasive.

- For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress to rationalize them with attention to their costs, benefits, and likely impact on agency procedural choices. *This bill goes in the exact opposite direction*, adding complex and duplicative new requirements for essentially all notice-and-comment rulemaking, that will discourage any use of the process.

- Collectively, the procedural and analytical requirements added by this bill would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders (including businesses large and small) less able to plan effectively for the future. Not only new regulations, but amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Enforcement of these requirements on judicial review is available to regulatory proponents and regulatory opponents alike, adding to the burden of defensive lawyering agencies must carry. Thus, both affirmative regulation and deregulation may be impeded.

- A similar approach involving the intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences, as reported in Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285-87 (1999). The California experience suggests that a simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

- Although the Section has been generally supportive of cost-benefit analysis, the bill's proposal to add a government-wide edict to the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that the bill's codification omits certain qualifying language that the

presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable.

- We can see no justification for the bill's inflexible mandate that would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs.

- The bill's proposed minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule, is too long.

- The bill's conferral of broad rights upon private persons to force an agency to use so-called "formal rulemaking" runs directly contrary to the consensus of the administrative law community that the APA formal rulemaking procedure is unworkable and obsolete.

- The bill's attempts to address the reform of the hastily enacted Information Quality Act through amendment of the APA is misdirected.

- The bill's flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's finite resources, and will likely lead to cursory reviews.

- The bill's repeal of the good cause exemption for when notice and comment is "unnecessary" is a mistake because agencies make frequent use of this exemption, almost always without any controversy whatever.

- The bill's provision that would deny any judicial deference to various interpretations and determinations by an agency unless the agency followed certain specified procedures in relation to that determination is unwarranted, falls well outside the range of doctrines that can find support in the case law and would also result in substantial burdens for the courts themselves.

For these reasons, we are united in opposing this proposal.

[Please note that the names are in alphabetical order and the affiliations are given for identification purposes only.]

Respectfully submitted,

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Response to Questions for the Record from David Goldston, Director of Government Affairs, Natural Resources Defense Council

**Questions for the Record
from Ranking Member Steve Cohen for
the Hearing on H.R. 2122, the "Regulatory Accountability Act of 2013"**

July 9, 2013

Questions for David Goldston

1. What is wrong will having agencies conduct formal rulemaking based on a trial-like procedure with evidence and testimony?

   ANSWER: There is no need to guess what the impact of formal hearings would be: the procedure was discontinued because it was found to be extraordinarily time consuming and labor intensive without providing added value to the regulatory process. The current process already requires agencies to hear and consider a range of views and to explain their reasoning, and it is backed up by the courts. Trial-like hearings would add further delays to the already extended rulemaking process without producing better rules. It is ironic that this procedure is being pushed by some who dislike judicial review of rulemaking, which necessarily occurs in the form of a trial.

2. Asbestos has long been proven to be a carcinogen. Why hasn't its use been banned in the U.S.?

   ANSWER: The U.S. Court of Appeals for the Fifth Circuit ruled against the Environmental Protection Agency's (EPA) efforts to ban asbestos in 1991 in *Corrosion Proof Fittings v. EPA*. The court cited, among other things, the Toxic Substances Control Act's (TSCA) requirement that EPA promulgate the "least burdensome" regulation in throwing out the asbestos ban. The court said the provision meant that EPA had to do a cost-benefit analysis of alternatives to a ban. The ruling is widely considered to have made TSCA a dead letter because of the high hurdle EPA has to clear to regulate a chemical, even one with toxic effects as established as those of asbestos. Indeed, the bipartisan TSCA reform bill recently introduced by Senators Lautenberg and Vitter would remove the "least burdensome" language from TSCA.

   H.R. 2122, by contrast, includes alternatives analysis requirements and a mandate that a regulation be the "least costly" option that are more explicit and even more burdensome than the language that has been so destructive in TSCA. H.R. 2122 requires agencies to conduct an extensive cost-benefit analysis on "*any* reasonable alternatives for a new rule or other response identified by the agency or *interested persons*." (Sec. 3(b), emphasis added) Agencies could be hung up for years evaluating a wide, almost unbounded range of theoretical alternatives, with opponents of action further gumming up the works by proposing additional approaches of questionable value that would have to be analyzed.

3. Mr. Rosen says that he is concerned because the Administration's regulatory agenda shows 4,062 new regulations making their way toward adoption, with 224 of them being economically significant. He also notes with concern that the Obama Administration

averaged 54 economically significant rules during its first term, which was more than the average for other administrations going back to the Reagan Administration.

Do you share Mr. Rosen's concern about these numbers?

ANSWER: No. Statistics like these obscure at least as much as they inform. First, the raw data on numbers of rules tell one nothing about what the regulatory system is or is not accomplishing. Studies under both Democratic and Republican administrations have concluded that the benefits of federal regulations have far outweighed their costs. The benefit to cost ratio may be as high as 10:1.

Second, the numbers tell one nothing about the impetus for the rules. Many rules are required by statute or by judicial rulings based on statute. OMB Watch (now the Center for Effective Government) found in its September 2012 report, "The Regulatory Tsunami that Wasn't," that almost half (97 of 200) of the economically significant rules issued in the first 42 months of the Obama Administration were mandated by statutory or judicially imposed deadlines.

Third, the numbers themselves are misleading. The Unified Agenda of Federal Regulatory and Deregulatory Actions is a poor metric of regulatory activity as it includes a wide range of rules, including entries that have been pending for years and entries that may not come to a conclusion for years, if ever. In addition, the dollar threshold for a "major" or "economically significant rule" – an impact of $100 million or more on the economy – has not changed since 1996 even as inflation and economic growth have changed the import of that number.

Fourth, averages hide spikes in the number of rules issued that may occur because of deadlines, particular problems that may arise, the need to address backlogs from previous Administrations or from policies that slowed regulation at particular times. According to a report by the conservative Regulatory Studies Center at the George Washington University (citing information from RegInfo.gov), the Bush Administration issued 73 economically significant regulations in its final year, more than in any year of the Obama Administration.

In short, there is no indication that there has been a fundamental shift in regulatory policy under President Obama. Rather, there is an indication that the Administration has been somewhat more attentive to the need to promulgate regulations to address real problems, as well as facing more deadlines. Moreover, the Obama Administration has hardly rushed through regulations. According to the May 2013 Congressional Research Service (CRS) report "Counting Regulations," the Office of Information and Regulatory Affairs (OIRA) took an average of 69 days to review economically significant regulations in 2012, the highest number in the years covered by the CRS review.

4. Please respond to Ms. Thomas's thesis that federal regulations reflect the preferences of the wealthy at the expense of the poor.

If wealthy people are better able to mitigate a broader range of risks, doesn't that mean that the poor actually benefit from regulation given that regulation would mitigate risks for the poor that they themselves could not afford to mitigate?

ANSWER: The fundamental fallacy in Ms. Thomas's testimony is perhaps clearest in her conclusion: "The best way to avoid forcing low-income households to pay for the preferences of high-income households is to allow them to make their own choices when it comes to the mitigation of risks they experience." What exactly would this mean? It seems to confuse risks that can be addressed privately (e.g., diet – although even such private choices can be aided by governmental requirements, such as food labeling) and those that can only be addressed through government action (e.g., air pollution). How is a low-income household supposed to express its choice to reduce the number of asthma attacks its children experience due to living in a highly polluted area? Or to deal with the increased mortality from breathing in fine particulates? By moving to a more expensive area? Low-income households are often more likely to be the victims of environmental degradation and to have fewer means to mitigate the consequences. That may be one reason that when they express their choices at the ballot box, they tend to support candidates who, among other things, favor regulation.

This is not to say that regulations can never be economically regressive. The way to handle that is not to ignore real problems or to allow private parties to impose the costs of their activities (i.e., externalities) on the public, including (and sometimes especially) the poor. Economics offers plenty of tools to compensate if a regulation poses disproportionate costs on low-income households (which may be the case even if the regulation also benefits low-income households disproportionately). To look at the impact of federal policy on low-income families solely through the lens of the cost of regulation is perverse, but politically expedient for those advocating a conservative agenda.

5. Although he cites little empirical data establishing a link between regulation and unemployment, Mr. Hall testifies that regulations must have an employment impact because "regulatory change that raises the cost of production in an industry is basic economics."

What is your response?

ANSWER: Economic studies on the impact of regulation on overall employment have generally found that regulation has a neutral to slightly positive impact. These studies were summarized in a March 2013 Issue Brief "Regulation and Employment" from the University of Pennsylvania's Wharton School, drawing on the results of a conference held by the Penn Program on Regulation in September 2012. Moreover in Bureau of Labor Statistics surveys, even business leaders cite government regulation as a reason for layoffs in only a small minority of cases (and they inherently have nothing to say about the overall level of employment).

One of Dr. Hall's contentions was that regulations indirectly lead to employment reductions throughout the economy by imposing increased costs on those who buy products from regulated industries. There appear to be few if any studies on this, but the argument assumes that any cost increases from regulation are significant enough to downstream users to have a noticeable effect. This is not necessarily the case. For example, the energy sector is highly regulated, but for most companies, energy accounts for less than 2 percent of their costs. Even if there were a significant price increase in energy (which is not being proposed), the total cost increase to most downstream industries would be just a fraction of a percent of their overall costs.

Dr. Hall also ignores the many ways regulation can have a positive effect on the overall economy. The Great Recession was caused, at least in part, by lax regulation of the financial sector, which had a far more negative impact on overall employment than any individual regulation ever could. And regulations pushing the U.S. auto industry to make cars that are safer and have greater fuel economy have bolstered that industry.

6. What are some ways that the APA and the rulemaking process can be improved?

ANSWER: Congress should be cautious about amending fundamental statutes like the APA. One problem with the current regulatory system is the extent to which additional requirements have been added to the process through laws like the Paperwork Reduction Act and the Regulatory Flexibility Act as well as Executive Orders. (H.R. 2122, of course, would take this process of accretion to, if not beyond, its logical extreme, making it difficult for any regulation to move forward.) Congress should start by examining the current process to see which requirements are actually leading to better, more appropriate regulation (that is, allowing for needed regulation and nothing more) and which are just making it more difficult to protect the public. As the American Bar Association's Section on Administrative Law and Regulatory Practice said of the current requirements in a 2008 report, "Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate."

Also, the role of the Office of Information and Regulatory Affairs (OIRA) has been steadily increasing for decades, with OIRA now effectively assuming authorities that statute gives to agencies and holding up regulations for extended periods of time. Clarifying and limiting the role of OIRA and making its actions more transparent would improve the regulatory process. H.R. 2122 goes in the opposite direction, codifying an expansive role for OIRA while leaving to OIRA the decision on how transparent to be.

7. If you would like to respond to any statements by your fellow witnesses and have not otherwise had an opportunity to do so, please do so here.

ANSWER: During the hearing Chairman Bachus cited inhalers for asthma sufferers as an example of regulation run amok, and I said I would respond more fully for the record. Asthma inhalers that use ozone-destroying chlorofluorocarbons (CFCs) were banned effective December 31, 2011 after a long phase-out period, but one manufacturer of such inhalers has been seeking legislative permission to sell its existing stock. The leading

medical groups that represent physicians who treat asthma, however, do not support that move because they believe the medication in those inhalers is neither safe nor particularly effective. Groups opposing the move include the American Thoracic Society, the American Academy of Allergy Asthma and Immunology and the American Association of Respiratory Care, among others. Safer medications are now available both by prescription and over the counter. While these medications cost more per dose, the overall cost to the patient may be lower because the newer medicines are more effective and provide relief for a longer period of time.

But aside from the strong rationale for keeping CFC-based inhalers off the market, there is a larger point relevant to the discussion of H.R. 2122. CFC-based products were banned by statute, Title VI of the Clean Air Act. Whatever one thinks of the ban, it cannot be seen as a case of agencies abusing their authority. The Act does give the Food and Drug Administration the ability to waive the ban but only if there are no "safe and effective" alternatives – demonstrably not the situation with asthma inhalers. It's hard to see how H.R. 2122 would have any impact at all in this case. But the otherwise irrelevant example of asthma inhalers does underscore one point: If Congress has concerns about the regulatory system, it should look at the underlying substantive statutes rather than inveighing against agencies and trying to hamper their ability to carry out their statutory responsibilities with layers of problematic requirements. But as I noted at the hearing, Congress has been reluctant to do that because those statutes tend to have broad public support.

There was also discussion at the hearing about EPA rules to limit toxic pollution from cement plants. Under the Clean Air Act, such rules were required to be in place in 1997. EPA finally issued rules this year, which are so weak that environmental groups are challenging them in court. The drawn-out story of EPA's efforts to limit the emission of mercury and other toxics from cement kilns is hardly a tale of an agency on a regulatory tear. The requirement to issues limits is in statute. The process has not exactly rocketed along, denying industry a say or forgoing economic analysis. Courts have weighed in at several points along the way, including requiring EPA to carry out the law when it tried to avoid doing so. As with inhalers, if Congress has concerns about the regulation of cement kilns – beyond concern about exposing the public to toxic pollutants – then it should try to amend the law (as the House has indeed tried to do over environmental group objections), not to add layers of process in an effort to make the law impossible to carry out.

Finally, let me once again draw attention to the one way H.R. 2122 would fundamentally alter underlying statutes rather than just adding procedural hurdles. The phrase "Notwithstanding any other provision of law" in the new subsection (b)(6) created by Section 3(b) of the bill would sweep away all statutory provisions that limit the consideration of cost in setting standards. For example, the Clean Air Act's effective requirement that certain air standards be based solely on the health effects of pollutants would be null and void. (The Act allows costs to be taken into account in determining how to meet the standard.) This is a fundamental, substantive policy shift affecting

numerous statutes that should not be simply slipped into a bill that purports to be about general regulatory procedures.

Response to Questions for the Record from Ronald M. Levin, William R. Orthwein, Distinguished Professor of Law, Washington University in St. Louis

Questions for the Record
from Ranking Member Steve Cohen for
the Hearing on H.R. 2122, the "Regulatory Accountability Act of 2013"

July 9, 2013

Questions for Ronald Levin

1. H.R. 2122 would substantially increase the need for formal rulemaking, yet this process is rarely used currently. Why formal rulemaking so rarely used?

The issues in a rulemaking proceeding ordinarily do not turn on witness demeanor. Instead, they turn on disputes over legal and policy analysis and "legislative facts." Courtroom methods are generally not necessary or appropriate for the resolution of such disputes. Furthermore, the public expects modern rulemaking to be broadly participatory. That expectation cannot be honored if, as in formal rulemaking, an agency must confine its decisionmaking to a closed trial record. In addition, preparation for a trial-type hearing requires far more staff time than the simple notice-and-comment procedure of § 553 of the current APA, and there is no clear justification for requiring agencies to devote so many of their finite resources to this formal process.

2. Are you aware of a single empirical study that shows regulations depress job creation?

No, and any such study would be an outlier. Following a conference on this precise issue sponsored by the Penn Program on Regulation, Professor Adam Finkel reported: "The consensus of empirical research and theoretical principles, which was generally supported by conference participants, is that regulation usually does not have a significant effect on overall employment levels."[1]

In his testimony at this hearing, Mr. Rosen relied at length on findings by the Regulatory Studies Center at George Washington University. But here is what two researchers at that center said last year about this specific issue:

> What we are currently hearing from politicians and the media is that regulation is the enemy of job creation, an argument that may be more driven by rhetorical salience than evidence. On this subject, a recent article in the *Washington Post* reports, "Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job creation." ....
>
> When we discuss prospects for regulatory reform, the conversation should not be centered on how regulations destroy jobs. While that may be a politically convenient way to frame the discussion, our study indicates that the evidence simply does not provide much support for that

[1] Alisa Melekhina, *Penn Conference Dissects the Impact of Regulation on Jobs*, REGBLOG, Oct. 15, 2012, https://www.law.upenn.edu/blogs/regblog/2012/10/15-melekhina-ppr-conference-jobs.html.

argument, as least on a macroeconomic scale. As the aforementioned Washington Post article points out, regulations oftentimes create new jobs. Whether those jobs are as productive as others is another subject for debate, but regardless, the use of "jobs" as a measure of regulatory burden is simply misguided.[2]

3. Committee Chairman Bob Goodlatte said at a markup for an unrelated bill last month cited the APA's "critical protections . . . against errors and excesses in agency rulemakings."

Would you concur with Chairman Goodlatte's statement?

In your view, is Chairman Goodlatte's past statement inconsistent with his justifications for H.R. 2122?

As I interpret Chairman Goodlatte's comment, he was saying that the APA already contains safeguards that serve to deter agencies from making errors and excesses during the rulemaking process. I concur with that comment, rather than with the Chairman's assertion in his prepared statement for this hearing that the APA "places only a handful of light restrictions on the federal rulemaking process."

Specifically, the APA has long been construed to require an agency to respond to significant issues raised by stakeholders during the rulemaking comment period, including questions as to its factual premises and alternative solutions to the problem the agency is addressing. If it does not respond rigorously to these issues, it invites reversal under the judicial "hard look" doctrine. In short, although the statutory text of the APA is brief, the way it is actually implemented imposes a high degree of discipline on the rulemaking process.

Much of the Chairman's rationale for H.R. 2122 comes down the argument that agencies have adopted regulations that impose too many unjustified burdens on businesses. To my mind, however, that objection does not show that existing *procedures* are inadequate. Rather, it reflects substantive policy disagreements that Congress can and should address through other exercises of its legislative and oversight responsibilities. The proposed amendments to the APA are an inapt vehicle for resolving these disagreements, especially because they would in the long run interfere with the ability of both Republican and Democratic administrations to govern effectively, and because numerous administrative rules have nothing whatsoever to do with government regulation of business and other economic activities.

4. You note that the bill would override other laws, such as the Clean Air Act, Clean Water Act, OSHA, and the Food and Drug Act, among others.

Why is this "supermandate" problematic?

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[2] Tara M. Sinclair & Kathryn Vesey, *Regulation, Jobs, and Economic Growth: An Empirical Analysis* 2, 28 (2012), http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/032212_sinclair_vesey_reg_jobs_growth.pdf (quoting Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Minimal*, WASH. POST, Nov. 13, 2011).

Administrative rulemaking occurs in a wide variety of contexts. Rules may protect public health and safety, facilitate business development, bestow monetary benefits through mass justice programs, or resolve sensitive social controversies. Congress has spent decades devising nuanced decisional criteria to govern these many areas of controversy. Some of the mandates governing these programs provide for a comparison of costs and benefits; others do not, because their subject matter does not lend itself to quantification. Some allow for consideration of incentives for innovation; others do not, because that criterion is completely irrelevant to the mission of the agency in question.

The supermandates in H.R. 2122 are problematic because they would impose a one-size-fits-all template on all of these diverse programs, displacing countless well-considered solutions with a few short statutory formulas. They greatly oversimplify complex problems of regulatory policy. If Congress believes that some of these enabling statutes are misdirected, it should proceed as past Congresses have – by examining and revising particular statutes on an individualized basis.

5. What are the ramifications of the more extensive opportunities for judicial review under the Act?

The Act would provide that, in a variety of circumstances, a reviewing court "shall not defer" to the decisions of the rulemaking agency. This development, a complete departure from existing case law, would be unwise. As the ABA Administrative Law Section's comments on H.R. 3010 explained two years ago:

> Such judicial overrides would defeat the purposes of the enabling legislation, because they would effectively mean that the court would make policy judgments that Congress has entrusted to the judgment of an administrative agency (subject to traditional political and judicial oversight). This development would dramatically increase the policymaking power of federal judges who do not have experience in the relevant subject area and have no political accountability to Congress or the public. Moreover, scattered judicial interventions of this kind would inevitably tend to undermine the coherence of major regulatory programs.[3]

6. Mr. Rosen says that he is concerned because the Administration's regulatory agenda shows 4,062 new regulations making their way toward adoption, with 224 of them being economically significant. He also notes with concern that the Obama Administration averaged 54 economically significant rules during its first term, which was more than the average for other administrations going back to the Reagan Administration.

Do you share Mr. Rosen's concern about these numbers?

[3] ABA Sect. of Admin. L. & Reg. Practice, *Comments on H.R. 3010, the Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 667-68 (2012).

The wide variety of administrative regulations, which I discussed above, makes it difficult to draw helpful generalizations on the basis of the raw number of rules that are issued or under consideration during a given period of time. For example, many rules are mandated by Congress or by judicial decree. Many rules deregulate. Many rules implement programs that confer government benefits on citizens instead of imposing burdens. Many rules are housekeeping measures. And many rules are eagerly sought by individuals and businesses that need to know how they can comply with legislation that they know will regulate their conduct in some fashion. Because the category of agency rules lumps together such a mixed bag of administrative actions, I do not believe that a mere numerical count can shed meaningful light on the issue of whether or not agencies are using their powers properly. In order to make such a judgment, one would need to know a great deal more about both the costs and the benefits that are expected to flow from any given regulation.

7. H.R. 2122 requires that agencies adopt the "least costly rule . . . that meets relevant statutory objectives."

What are some potential concerns with this requirement?

The "least costly rule" criterion reflects a worthy policy objective, but I do not think it can work as a legal standard. It raises serious vagueness problems. "Least costly" to whom? To the particular plaintiff who challenges a given regulation? To regulated persons in the aggregate? To society? To the agency? Does it mean only dollar costs, and if so, why? If intangible costs are included, how are they to be measured? The sponsors probably are focused on the "costs" that rules may impose on businesses, but in other contexts this requirement could have perverse consequences. For example, the "least costly" way to write a rule on eminent domain might provide the lowest possible compensation to property owners, and the "least costly" tax exemption rule might minimize the Treasury's refunds to taxpayers.

Even if one had in mind a clear definition of what "least costly" means, the provision could prove unmanageable and invite unlimited litigation. Just about any rule could potentially be tweaked in some manner that would make it at least a little cheaper. Moreover, a particular rule might be costlier for one segment of the public than some alternative rule, but the alternative rule might be costlier for a different group. The "least costly rule" criterion would apparently require the agency to quantify and compare the aggregate costs to all affected persons for each alternative rule it considers (in isolation from their respective benefits, as far as this paragraph is concerned). Indeed, the Act expressly provides that this quantification must include "direct, indirect, and cumulative costs."[4] If the agency gets that comparison wrong, in the reviewing court's view, it has presumptively violated the APA.

The Act goes on to provide that an agency need not select the "least costly" rule "if the additional benefits of the more costly rule justify its additional costs and … if the agency explains its reasons for doing so…." Apparently, a reviewing court would be free to substitute its own view of whether the benefits justify the costs for the view of the rulemaking agency. At

[4] H.R. 2122, § 553(f)(3)(A), incorporating by reference § 553(b)(6)(A).

least, nothing in the language of the provision indicates otherwise. Thus, the provision gives rise to many of the same risks of judicial interference and overreaching that I discussed in question 5.

8. H.R. 2122 sets forth extensive requirements for the preparation of "advanced" notices of proposed rulemaking for high-impact and major rules and for those that raise "novel legal or policy issues."

What are some potential concerns with this requirement?

The advance notice of proposed rulemaking required by the bill would extend the length of the proceeding by a minimum of ninety days. (In practice, it would probably be more than that, because the agency would need more than thirty days to evaluate comments following the required sixty-day comment period.) By definition, this requirement would prolong the public's uncertainty as to what rule the agency will ultimately adopt, and it would delay the government's ability to begin alleviating the problem that led it to seek a rule in the first place. In many instances, this mandatory delay would serve no purpose in helping the agency decide what rule to propose – e.g., where the agency is already familiar with the issues involved, or where legal constraints limit the range of actions the agency may take.

Supposedly, the purpose of this requirement is to enable the public to exert influence at an earlier stage in the development of a rule. However, the premise that the agency will be more receptive to public input if it has to hold two rounds of notice and comment rather than one is sheer speculation. What is certain, however, is the increase in government sluggishness that the provision would bring about.

9. What are some potential concerns with H.R. 2122's expansion of the ability for members of the public to challenge agency compliance with the Information Quality Act?

First, the bill requires the agency to hold a trial-type hearing, with cross-examination allowed, in order to consider an Information Quality Act (IQA) challenge. This is an unnecessarily cumbersome decisionmaking model, because the IQA question would probably turn on highly technical issues – not on witness credibility, which cross-examination is designed to illuminate.

Second, the agency would have to hold this hearing early in the proceeding, at a time when it may not even be clear what issues will prove material to the proceeding. The result could be that the agency would be forced to conduct hearings on issues that would make no difference to its ultimate decision. The better approach, which exists under current law, is to allow the agency to consider IQA issues as part of the regular notice-and-comment process.

Third, the bill would create an express right to go to court to assert claims under the IQA. The courts have held, however, that the IQA and its implementing regulations do not create a legal right to access to information or to its correctness. According to these cases, the IQA contains no judicially manageable standards by which such rights could be determined. This is, I

emphasize, not the *majority* view in the case law; it is the *only* view in the case law.[5] Thus, even if the APA were amended to liberalize *access* to the courts, the IQA itself, as currently interpreted, provides no rights that could be enforced there.

10. What are some ways that the APA and the rulemaking process can be improved?

I support § 553(d)(1)(D)(iv) of the present bill, which would require an agency to disclose data and studies on which it intends to rely during the rulemaking. I also support certain provisions of the currently pending Senate version of the Regulatory Accountability Act, S. 1029, including provisions that would expressly require a rulemaking agency to respond to significant issues raised in comments submitted during the comment period, § 553(f)(2)(E), and that would facilitate an incoming presidential administration's ability to review "midnight rules" adopted by its predecessor, § 553(f)(5).

In addition, Congress should implement some of the longstanding recommendations of the American Bar Association and the Administrative Conference. Specifically, it should narrow the exemptions from rulemaking procedure for rules relating to military or foreign affairs and rules relating to public property, loans, grants, benefits, or contracts."[6] It should also repair the APA's flawed definition of "rule," which has been criticized as misdrafted ever since the APA was adopted in 1946.[7]

Finally, I favor extension of OIRA review to rulemaking by independent agencies, as proposed in a pending Senate bill, S. 1173. I do not, however, favor codification of specific criteria for cost-benefit analysis and other substantive regulatory principles, as that bill currently provides. Rather, I believe that each president should be able to specify his or her own preferred criteria for regulatory analysis and OIRA review thereof.

11. If you would like to respond to any statements by your fellow witnesses and have not otherwise had an opportunity to do so, please do so here.

I believe that my testimony and the above responses provide a sufficient statement of my positions, but I would be happy to respond to any other specific questions that members of the subcommittee may have.

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[5] *ABA Section Comments*, *supra*, at 657-58.
[6] *Id.* at 663-64.
[7] *Id.* at 627-28.

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