THE VIEWS OF THE ADMINISTRATION ON REGULATORY REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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SUBMITTED MATERIAL

THE VIEWS OF THE ADMINISTRATION ON REGULATORY REFORM

WEDNESDAY, JANUARY 26, 2011

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:02 a.m., in room 2123 of the Rayburn House Office Building, Hon. Cliff Stearns (chairman of the subcommittee) presiding.

Members present: Representatives Stearns, Terry, Sullivan, Murphy, Burgess, Blackburn, Myrick, Bilbray, Gingrey, Scalise, Gardner, Griffith, Barton, McKinley, Upton (ex officio), DeGette, Schakowsky, Weiner, Markey, Green, Gonzalez, Dingell, and Waxman (ex officio).

Staff present: Karen Christian, counsel; Stacy Cline, counsel; Todd Harrison, chief counsel; Sean Hayes, counsel; Alan Slobodin, deputy chief counsel; Sam Spector, counsel; Peter Spencer, professional staff member; Kristin Amerling, minority chief counsel; Karen Nelson, minority deputy committee staff director, health; Karen Lightfoot, minority communications director and senior policy advisor; Greg Dotson, minority chief counsel, energy and environment; Alexandra Teitz, minority senior counsel; Stacia Cardille, minority counsel; Tiffany Benjamin, minority counsel; Anne Tindall, minority counsel; Ali Neubauer, minority investigator; Brian Cohen, minority senior investigator and policy advisor; Jennifer Berenholz, minority chief clerk; Lindsay Vidal, minority deputy press secretary; and Mitchell Smiley, special assistant.

Mr. STEARNS. Good morning everybody, and let me welcome all of you to the Subcommittee on Oversight and Investigations. We appreciate your early attendance, and if possible, we would like to start promptly at 10:00. I would also like to point out that Chairman Upton has indicated that this will be a very active subcommittee. It is a very important subcommittee. I think most of us on both sides of the aisle realize that Congress, the House of Representatives, has a very important role in oversight of the Executive Branch. In this case, there are many areas that we can explore both in a way that is substantive and at the same time, I think, in a bipartisan way to have a better understanding of where there is error, where there is complement, and in the long run to give full oversight to the Executive Branch according to the Constitution. So I welcome this opportunity as chairman of this very important subcommittee, and I thank Mr. Upton, our chairman of the

Energy and Commerce Committee, for this distinct honor to be able to be chairman.

And of course, on the Democrat side, they have had some very illustrious people as Oversight and Investigations chairmen, including Mr. Dingell and Mr. Waxman and others, so I look forward to this opportunity for the next term and I welcome from both sides of the aisle any comments or feedback.

Let me open with a little bit of procedure. All members will have 5 days to make their opening statements part of the record by unanimous consent. Also, we have agreed under our procedures that there will be no opening statements except for the chairman and the ranking member, Ms. DeGette, and then she will allot 5 minutes to her members for another additional 5 and then I will do the same on this side. So again, I will do my 5 minutes, Ms. DeGette will do her 5 minutes, then I have 5 minutes that I have allocated to members on this side, and then you will have the same thing. With that, let me proceed to my opening statement.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

We convene this hearing of the Subcommittee on Oversight and Investigations today to gather information concerning the Administration's views and plans for regulatory reform. Now, we can all agree that this is a critically important topic, worthy of being the Energy and Commerce Committee's first hearing under the new Majority leadership.

Over the past 2 years, as the American public confronted the worst unemployment crisis in a generation, it simultaneously has faced an onslaught of federal regulations, with more yet to come. While the growth of the regulatory state has been a continuous concern over the past 2 decades, the pace in recent years has been breathtaking, given the Nation's dire economic situation.

According to the OMB data compiled by the Heritage Foundation, in fiscal year 2009, which spanned both the Bush and Obama Administrations, major rules added $13 billion in new costs to the economy. In fiscal year 2010 alone, federal agencies promulgated 43 major rules that imposed compliance costs estimated by the regulators themselves at almost $27 billion, the highest annual level since 1981. And we know agencies' estimates of costs may often be just the tip of the iceberg when it comes to the economic impact on jobs, competitiveness and innovation.

Now, along with all of these major rules come daunting levels of red tape, the costs of which cannot easily be counted. The Obama Administration's regulatory agenda released this past fall identifies 4,225 rules under development. The EPA alone has finalized 928 regulations since the start of this Administration, and it has also proposed a number of expensive and complex new rules affecting our energy system, our industrial and manufacturing infrastructure, and even the electric power we rely upon every day.

On top of this, new rules related to the expansive new health care law and the financial services reforms are certainly looming on the horizon, with regulatory impacts on many different aspects of our lives. From our health to our wealth to the freedom to live

our lives the way we want, the federal regulatory state continues to grow and intrude.

Of course, many regulations, derived from the laws Congress enacted, are essential to protect the public health and welfare and ensure free markets. While appropriate implementation of these laws is essential for these purposes, appropriate consideration of the economic and employment impacts of the regulations is essential for protecting the Nation's economic health and individual freedom. I am concerned that this balance has not properly been struck during the apparent rush to regulate over the past 2 years.

Against this backdrop, we consider today the President's new Executive order, initiatives relating to regulatory review and his stated focus on reducing the economic burdens of regulations and promoting job growth. Now, this focus is to be commended. We hope it will lead to meaningful results.

To this end, we seek to understand specifically how the Administration performs its regulatory reviews and what changes we can expect that will reduce the regulatory burden, especially in the areas of this Committee's jurisdiction. We will hear testimony and ask questions of a single witness today: Mr. Cass Sunstein, the current Administrator of the Office of Information and Regulatory Affairs, within OMB. Mr. Sunstein's office serves as the intersection of the Administration's rulemaking review process. In some respects, his office serves or can serve as a regulatory traffic cop, carefully reviewing significant rules to ensure that they are consistent with the law, the President's policies and priorities and that they receive appropriate review and analysis from other federal offices and agencies. He is especially qualified to explain the prospects and limits of the Administration's regulatory reform plans.

My colleagues, it is important that rhetoric is matched with measurable results and actions. For example, after the Bush Administration took office in 2001, it made little change to the existing regulatory guidance, but it made extensive use of the available tools to return rules, ask questions and prompt additional review. It took an active role, sending 19 so-called return letters in the first 2 years of the Administration. The present Administration has not even sent one return letter. We will gather information about this today.

We will also gather information to help us to understand the substance of the plans for retrospective regulatory review called for by the President. We should seek to understand the limits of the review ordered by the President. Rules issued by independent agencies like the FCC, the BCFP, CFTC, CPSC, FERC, FTC, SEC, FDIC, and the Federal Reserve and the NRC, among others, have apparently been placed beyond the purview of the President's review, and thus will not be affected by this initiative.

The information we gather today should help this committee's various oversight projects in the coming session of Congress. We have much ground to cover.

[The prepared statement of Mr. Stearns follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS

We convene this hearing of the Subcommittee on Oversight and Investigations today to gather information concerning the Administration's views and plans for

regulatory reform. We can all agree this is a critically important topic, worthy of being the Energy and Commerce Committee's first hearing under the new Majority leadership.

Over the past 2 years, as the American public confronted the worst unemployment crisis in a generation, it simultaneously has faced an onslaught of federal regulations, with more yet to come. While the growth of the regulatory state has been a continuous concern over the past 2 decades, the pace in recent years has been breathtaking, given the nation's dire economic situation.

According to the OMB data compiled by the Heritage Foundation, in fiscal year 2009, which spanned both the Bush and Obama Administrations, major rules added $13 billion in new costs to the economy. In fiscal year 2010 alone, federal agencies promulgated 43 major rules that imposed compliance costs estimated by the regulators themselves at almost $27 billion, the highest annual level since 1981. And we know agency estimates of costs may often be just the tip of the iceberg when it comes to the economic impact on jobs, competitiveness, and innovation.

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The EPA alone has finalized 928 regulations since the start of this Administration. And it has also proposed a number of expensive and complex new rules affecting our energy system, our industrial and manufacturing infrastructure, even the electric power we rely upon every day.

On top of this, new rules related to the expansive new health care law and the financial services reforms are looming on the horizon, with regulatory impacts on many different aspects of our lives. From our health to our wealth to the freedom to live our lives the way we want, the federal regulatory state continues to grow and intrude.

Of course, many regulations—derived from the laws Congress enacted—are essential to protect the public health and welfare and ensure free markets. While appropriate implementation of the laws is essential for these purposes, appropriate consideration of the economic and employment impacts of the regulations is essential for protecting the nation's economic health and individual freedom. I am concerned that this balance has not properly been struck during the apparent rush to regulate over the past 2 years.

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Mr. Sunstein's office serves at the intersection of the Administration's rulemaking review process. In some respects, his office serves or can serve as a regulatory traffic cop, carefully reviewing significant rules to ensure they are consistent with the law, the President's policies and priorities, and that they receive appropriate review and analysis from other federal offices and agencies. He is especially qualified to explain the prospects and limits of the Administration's regulatory reform plans.

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The information we gather today should help this Committee's various oversight projects in the coming Session of Congress. We have much ground to cover; so let me recognize, with pleasure, our new Ranking Member, Ms. DeGette.

Mr. STEARNS. It is my pleasure to recognize our new ranking member, Ms. DeGette.

OPENING STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Ms. DEGETTE. Thank you very much, Mr. Chairman. I am excited about the opportunity to serve in the 112th Congress as the ranking member of this esteemed committee. As you mentioned, Mr. Chairman, this is one of the most effective committees in the House, and in my 14 years on this subcommittee, it can also be one of the most bipartisan committees, and I look forward to working with you and my colleagues on both sides of the aisle both on new initiatives and also to follow up on some of the key investigations that we were working on in the last session of Congress. I also want to thank my chairman, Mr. Waxman, and my chairman emeritus, Mr. Dingell, for their fine investigative work on this subcommittee over the years.

Both Democrats and Republicans have supported laws to protect the health, environment, financial security, and safety of the American people. Today's hearing is about how to ensure that the regulatory system that implements these laws functions as effectively and efficiently as possible. This is a laudable goal that both sides of the aisle should support and which I personally support wholeheartedly. I was encouraged by the President's announcement last night in the State of the Union about his new initiative to streamline and modernize government, which is way overdue in many cases.

The President's new Executive order on improving regulation and regulatory review is an excellent starting point in this process. The order is based on such sound principles as the regulatory system must be based on the best available science, regulations protect public welfare while promoting economic growth and job creation should be retained, and the process must allow for public participation and open exchange of ideas, and the process must take into account both cost and benefits. Consistent with this directive, the Obama Administration has already identified several regulations that could be refined or cut, and I expect that we will hear from our witness today about additional areas where we can look at regulations.

I commend the Administration for this effort, and I hope that we can work together to support cost-effective implementation of the laws Congress has enacted to protect the American public's health, financial safety and security and their personal safety. These sensible safeguards are vitally important to the American people.

We must recognize, however, that regulations per se are not the problem. The mantra that all regulations are inherently bad and kill jobs is wrong and dangerous. Just 2-and-a-half years ago, for example, our financial system virtually collapsed following years of deregulatory efforts by Congress. The Securities and Exchange Commission and other federal financial regulators sat on the sidelines while flawed and unchecked financial practices robbed Americans of their retirement savings and caused our economy to nearly collapse. It wasn't regulations that caused the financial collapse

and the deepest economic recession since the Great Depression, it was unbridled deregulation.

For too long, big polluters have been allowed to dump toxic mercury into the air, resulting in birth defects and developmental problems for children in affected communities. Finally, after years of delay, the Administration is taking action to rein in this toxic contamination, and we should all support these efforts. Again, it is not regulations that caused these problems, it is the lack of regulations.

At the direction of the Supreme Court, the EPA has recently set standards to cut carbon pollution from cars and trucks. This regulation is a win-win. Not only does it cut pollution responsible for climate change, it saves 1.8 billion barrels of oil, making the Nation more energy-independent and secure and saving American families money at the pump.

Regulations to protect children from the health effects of tobacco and to prevent another salmonella outbreak in eggs or other threats to food safety are also important examples of where these problems have not been caused by an excess of regulations but rather a lack of regulations. So when you examine the details of these and other safeguards, you find that there is a real need for government action.

Now, I look forward to hearing from our witness today regarding the implementation of the Obama Administration's Executive order on improving regulations and the regulatory process. It is a commonsense plan to cut outdated regulations and promote transparency. I also look forward to working with all members of this subcommittee to examine regulatory reform in a sensible way. Thank you, Mr. Chairman.

[The prepared statement of Ms. DeGette follows:]

PREPARED STATEMENT OF HON. DIANA DEGETTE

Both Democrats and Republicans have supported laws to protect the health, environment, financial security, and safety of the American public. Today's hearing is about how to ensure that the regulatory system that implements these laws functions as efficiently and as effectively as possible.

This is a laudable goal that both sides of the aisle should support. The President's new Executive order on improving regulation and regulatory review is an excellent starting point. The order is based on sound principles such as:

- The regulatory system must be based on the best available science;
- Regulations protect public welfare while promoting economic growth and job creation;
- The process must allow for public participation and the open exchange of ideas; and
- The process must take into account both costs and benefits.

Consistent with this directive, the Obama Administration has already identified several regulations that could be refined or cut.

I commend the Administration for this effort. And I hope that we can work together to support cost-effective implementation of the laws Congress has enacted to protect the American people's health, financial security, and safety. These sensible safeguards are vitally important to the American people.

We must recognize, however, how important regulations are to our national welfare. The mantra that regulations are inherently bad and kill jobs is wrong and dangerous.

Just 2-and-a-half years ago, our financial system virtually collapsed. Following years of deregulatory efforts by Congress, the Securities and Exchange Commission and other federal financial regulators sat on the sidelines while flawed and unchecked financial practices robbed Americans of their retirement savings and caused the our economy to collapse.

It wasn't regulations that caused our financial collapse and the deepest economic recession since the Great Depression. It was unbridled deregulation.

For too long, big polluters have been allowed to dump toxic mercury into the air—resulting in birth defects and developmental problems for children in affected communities. Finally—after years of delay—the Administration is taking action to rein in this toxic contamination. We should all support these efforts.

At the direction of the Supreme Court, EPA has recently set standards to cut carbon pollution from cars and trucks. This regulation is a win-win. Not only does it cut pollution responsible for climate change, it saves 1.8 billion barrels of oil—making the nation more secure and saving American families at the pump.

Regulation to protect children from the health effects of tobacco and to prevent another salmonella outbreak in eggs or other threats to food safety are other important examples of where government is on schedule to act and must do so.

When you examine the details of these and other safeguards, you find that there is a real need for governmental action and that action will substantially benefit the public and the nation.

I look forward to hearing from our witness regarding implementation of the Obama Administration's Executive order on improving regulations and the regulatory process. This is a common sense plan to cut outdated regulations and promote transparency. In contrast, the Republican plan to eliminate safeguards vital to the welfare of Americans makes absolutely no sense at all.

Mr. STEARNS. I thank the gentlelady.

And now, according to our procedures, we have 5 minutes on this side, and they will be allocated to Mr. Upton, the chairman, at 1 minute, Mr. Barton, 2, Mr. Burgess, 1, and Mr. Gardner, 1. So the chairman, Mr. Upton, is recognized for 1 minute.

Mr. UPTON. Well, thank you, Mr. Chairman, and I would ask unanimous consent that my full statement be made part of the record.

Mr. STEARNS. By unanimous consent.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you for your very quick efforts to begin work in this 112th Congress. We have a lot to accomplish over the next 2 years, and this subcommittee will certainly play a key role.

Let me begin by welcoming our witness today, Mr. Cass Sunstein of the Office of Information and Regulatory Affairs. It is fitting that our first hearing is focused squarely on job creation and economic consequences of burdensome regulations that stifle investment and shift jobs overseas. Our Majority has made it clear that jobs are priority number one in this Congress. We can create a climate of job growth by cutting spending, by limiting the size and scope of government. I have asked our committee members to track down burdensome regulations that choke investment and destroy jobs, so we will identify these regulations, shine a light on them and then seek their repeal.

I welcome the President's announcement that his Administration plans to evaluate regulations to ensure that the benefits justify the costs and federal rules are tailored to impose the least burden on society, and I would ask again that the rest of my statement be made part of the record. I yield back.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON

Thank you, Mr. Chairman, and thank you for your quick efforts to begin the work of the 112th Congress. We have a lot to accomplish over the next 2 years, and this Subcommittee will play a key role.

Let me begin by welcoming today's witness, Mr. Cass Sunstein of the Office of Information and Regulatory Affairs. Mr. Sunstein is the Administration's point person on regulatory issues, which makes him the ideal witness for today's hearing on recent changes—announced last week by President Obama—to the Administration's regulatory stance.

It is fitting that our first hearing is focused squarely on job creation and the economic consequences of burdensome regulations that stifle investment and shift jobs overseas. Our majority has made it clear that jobs are priority number one for the 112th Congress. We can create a climate of job growth by cutting spending, and by limiting the size and scope of government. I have tasked our Committee Members to track down burdensome regulations that choke investment and destroy jobs. We will identify these regulations, shine a light on them, and then seek repeal.

I welcome the President's announcement that his administration plans to evaluate regulations to ensure the benefits justify the cost and federal rules are tailored to impose the least burden on society.

I also hope today's hearing will shed light on the many unanswered questions about the new Executive order. How does it differ from practices currently in place? How will the administration's regulatory approach change for the thousands of pages of forthcoming regulations as a result of legislation enacted last year?

Last year more than 6,000 pages of regulations were released to implement the health care law. Next month, the EPA will issue Boiler MACT rules, an earlier version of which were estimated by the agency itself to cost thousands of jobs.

We will also explore what this Executive order means for the litany of other regulatory policies in the pipeline, from greenhouse gas standards to government regulation of the internet. With 20 consecutive months of near double digit unemployment, the public expects, and demands, that we do better.

Thank you. I yield back.

Mr. STEARNS. The gentleman yields back.

The gentleman from Texas is recognized for 2 minutes.

Mr. BARTON. Mr. Chairman, do you want to go back and forth?

Mr. STEARNS. No, we are going to take our full 5 minutes on this side and then she is going to do her 5 minutes.

Mr. BARTON. OK. I ask unanimous consent that my entire statement be put in the record, Mr. Chairman.

Mr. STEARNS. Consent granted.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Let me congratulate you on being the chairman of this subcommittee. It is one of the important, if not the most important subcommittee of what I consider to be the best committee in the House. In a previous majority, I was subcommittee chairman of this subcommittee for 4 years and enjoyed it immensely. I have worked with numerous other subcommittee chairmen in Oversight.

The importance of congressional oversight cannot be overstated. In my opinion, the last 2 years under Mr. Waxman, Subcommittee Chairman Stupak was not aggressive in subjecting the Obama Administration to stringent oversight. I am sure you, Mr. Chairman, are going to correct that. As chairman emeritus of this committee, I stand with Chairman Upton and yourself in support of immediate and ongoing oversight of the Obama Administration and its practices and policies. Congressional oversight, if effective, leads to better functioning of government, one that protects the taxpayers by identifying excessive government spending, abusive regulatory re-

gimes, and discovering ways to decrease spending and stimulate the economy.

Today we are going to discuss the President's Executive order entitled "Improving Regulation and Regulatory Review." The order instructs federal agencies to develop plans to ensure that past, present and new regulations protect the public health, safety and welfare, and the environment while at the same time promoting economic growth. Who can be opposed to that, Mr. Chairman? However, having said that, in the last year alone, I have sent three letters calling attention to the lack of such analysis. I sent a letter to the White House concerning the impact of the Environmental Protection Agency's CO_2 endangerment finding. I sent another letter to the EPA regarding the proposed economic impact of proposed ozone standards, and this September I sent a letter to Chairman Waxman asking that he schedule a hearing on the Administration's decisionmaking and consideration of job impacts in connection with a major rulemaking and other regulatory initiatives that might adversely affect employment in the United States.

I see my time has expired, Mr. Chairman, so I am going to yield back and ask that the rest of my statement be put in the record.

[The prepared statement of Mr. Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON

Thank you Mr. Chairman for holding this important hearing, which marks the first oversight hearing of the 112th Congress. The importance of congressional oversight of the Executive branch cannot be overstated. For the past 2 years, the Obama Administration has not been subject to stringent oversight. As Chairman Emeritus, I stand with Chairman Upton and Subcommittee Chairman Sterns in support of immediate and ongoing oversight of the Obama Administration and its practices and policies.

Effective oversight leads to a better functioning government-one that protects taxpayers by identifying excessive government spending and abusive regulatory regimes and discovering ways to decrease spending and stimulate the economy.

Today we are here to discuss President Obama's Executive order entitled "Improving Regulation and Regulatory Review." The order instructs federal agencies to develop plans to ensure that past, present, and new regulations protect the public's health, welfare, safety, and environment while at the same time promoting economic growth and job creation. In theory I agree with the President's order. However, for the past two years the Obama Administration has pursued an aggressive agenda of regulatory expansion. Regulations were passed prior to the completion of a meaningful cost-benefit analysis that weighed the proposed benefit to the public against the actual cost to the economy.

Last year alone, I sent three letters calling attention to the lack of this analysis. In January, I sent a letter to the White House concerning the impact of the Environmental Protection Agency's CO_2 endangerment finding on American jobs. In June, I sent a letter to EPA regarding the economic and job impacts of proposed ozone standards. And, in September, I sent a letter to then Committee Chairman Waxman requesting the Majority schedule a hearing to examine Administration decisionmaking and consideration of job impacts in connection with major rule-making and other regulatory initiatives that may adversely affect employment in the United States. I am glad that the President is finally asking for some kind of cost-benefit review and I look forward to our discussion on how his Administration plans to do this today.

I want the public to know what I stand for. I support government regulations that equate to effective protection of the public's health and safety. I do not support those that suppress innovation and unnecessarily burden small businesses. I support government regulations that are based on sound science. I do not support those that are based on bureaucrats' opinions. And, as long as I serve the American public I will do my best to ensure that good governance prevails over lofty ideological goals.

Mr. STEARNS. By unanimous consent, will do. I thank the gentleman from Texas and recognize Dr. Burgess for 1 minute.

Dr. BURGESS. Thank you, Mr. Chairman, and I also want to welcome our witness here today. An important subject, improving the regulatory environment. In our country, in fact, the President himself penned an op-ed in the Wall Street Journal on January 18th. Quoting from the President, "Over the past 2 years the goal of my Administration has been to strike the right balance, and today I am signing an Executive order that makes clear this is the operating principle of our government." It is too bad that we didn't have that principle 2 weeks prior, because in another editorial in the Wall Street Journal on January 4th they talked about the EPA violating every tenet of administrative procedure to strip Texas of its authority to issue air permits that are necessary for large power and industrial plants. Going on, the best the EPA could offer up as a legal excuse for voiding Texas permitting authority last Thursday was that the EPA had erred in originally improving the State's implementation plan in 1992. The error that escaped the EPA's notice for 18 years was that the Texas plan did not address all pollutants. Back then, Texas hadn't complied with regulations that didn't exist and wouldn't exist for an additional 18 years.

I will yield back the balance of my time, Mr. Chairman.

I would ask that both of these be made part of the record, these reprints from the Wall Street Journal.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. I thank the gentleman, and I want to welcome two freshmen on the Oversight and Investigation Subcommittee: Morgan Griffith from Virginia and Cory Gardner from Colorado, and at this point allow Mr. Gardner 1 minute.

Ms. DEGETTE. First of all, would the gentleman yield?

Mr. STEARNS. I would be glad to yield.

Ms. DEGETTE. This is the first I can remember we have had two Coloradoans on this committee, and so I also want to welcome my neighbor to the north and also our other new freshman, but particularly Cory.

Mr. STEARNS. Good. Mr. Gardner, you have 1 minute.

Mr. GARDNER. Thank you, Mr. Chairman, and thank you, Congresswoman DeGette. Thank you very much for the time to be here. Thank you to the witness. And I ask unanimous consent that my statement be entered in its entirety in the record.

Mr. STEARNS. By unanimous consent.

OPENING STATEMENT OF HON. CORY GARDNER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. GARDNER. Thank you. Each day I am in town, my staff or I sit down with about five businesses from Colorado, and every business that we meet with talks about the concern that they have that this Administration is regulating them out of jobs and out of business, and those that aren't already being regulated out of business are fearful that the proposed rules will put them on that path. We exist in an environment where government regulation is the answer to all of our problems. Congress can't get both the House and the Senate to pass a bill so the Administration does it, and

they do it without having a process through Congress. The people speak through their representatives and then the Administration circumvents the people's representative. The process must be fixed and it must be fixed here.

The Executive order is the Administration's attempt to clean the regulatory house, so to speak. It is a directive to agencies that they must provide a cost-benefit analysis when justifying regulations and reduce the burdens on small businesses that are forced to comply. The question I have, though, is, how do you define benefits and what constitutes a burden? The last 2 years have shown that the Administration has a very different view of what benefits our economy and our working families.

So today is the first step that we have to go back to our hard-working constituents with the answers that are presented to every member here. We need to examine these sweeping federal rule changes that have the potential to cripple various sectors of our economy and negatively affect every business.

I thank you, and I hope we move away from "when all fails, regulate."

[The prepared statement of Mr. Gardner follows:]

PREPARED STATEMENT OF HON. CORY GARDNER

Mr. Chairman, I've been in office for about 3 weeks now. Each day I'm in town, I, or my staff, sit down with at least 5 businesses that operate in and out of Colorado. We have met with a cement production company, various municipalities trying to find ways to deal with water shortages, mining operations, manufacturing companies, and the list goes on.

Every business that talks to my office has the same complaint: the Administration is regulating them out of jobs and out of business. And those that aren't already being regulated out of business are fearful that proposed rules will put them on that path.

We exist in an environment where government regulation is the answer to all our problems. Congress can't get both the House and the Senate to pass a bill like cap and trade so the Administration does it—and they do it behind closed doors without having had an open and honest vetting process. What kind of democracy is that? The people speak through their representatives, and then the administration circumvents the people's will. The process must be fixed and it must be fixed here.

Executive Order 13563 is the Obama Administration's attempt to clean the regulatory house, so to speak. It's a directive to agencies that they must provide a cost-benefit analysis when justifying regulations, and reduce the burdens on small businesses that are forced to comply. The question I have is: how do you define benefits and what constitutes a burden? The last 2 years have shown that the administration has a very different view of what benefits our economy, our culture, and our working families. I define benefits by protecting the environment that has been given to us, providing affordable healthcare to those that want it, while at the same time keeping Americans at work, and allowing businesses to prosper. I define burden as something that will put so much pressure on industries that they must let go many of their employees, pay fines that put them way behind production, litigate until they can't afford it anymore, or worse—shut down entirely.

Today is the first step in addressing the concerns of my hard-working constituents and those of every member present. We need to examine sweeping federal rule changes that have the potential to cripple various sectors of our economy and negatively affect Colorado businesses.

I hope that this new Executive order is an indication that the administration believes the same thing, but I am skeptical that they are wed to the traditions of the past 2 years: when all else fails, regulate. This cannot continue and I look forward to hearing the witness's answers to many of our questions on how it will assess pending and future regulations.

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

Mr. STEARNS. I thank the gentleman, and I recognize Ms. DeGette.

Ms. DEGETTE. Mr. Chairman, I will recognize our ranking member of the full committee, Mr. Waxman, for our additional 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Mr. Chairman, I am a strong opponent of unnecessary regulations. In my years of service on this committee and on the Oversight and Government Reform Committee, I led numerous oversight and legislative efforts to promote government efficiency and eradicate wasteful spending and programs. In fact, in the 1990s, I served on the Advisory Committee for the corrections calendar set up by Speaker Newt Gingrich to identify outdated and pointless regulations so they could be quickly eliminated. I believe eliminating unnecessary government regulation is integral to ensuring effective government, but this is an area where it is easy to paint with too broad a brush. We need to remember that federal regulations also play a vital role in growing our economy and protecting our health and environment.

That is why I am concerned that much of the rhetoric we are hearing from the Republican side of the committee is a repeat of what happened the last time the Republicans took control of Congress. In 1995, the newly elected Republican majority conducted an all-out assault on regulations. They told alarming anecdotes about the impact of senseless government regulation. We were told that the Consumer Product Safety Commission required holes in the bottoms of buckets and that OSHA killed the tooth fairy by preventing parents from taking home their children's baby teeth from the dentist's office. These stories share two traits. They sounded compelling and they were simply not true. Now we are hearing repeated claims that regulations destroy jobs and stymie economic growth, and this is another myth.

Consider the collapse of the financial markets in 2008. This meltdown on Wall Street threw our economy into the deepest recession since the 1930s. Millions of Americans lost their jobs and it cost U.S. taxpayers billions of dollars to bail out AIG and Wall Street banks. The cause wasn't regulation. It was the absence of regulation. As Alan Greenspan testified before me and other members of the Oversight Committee, he said he made a mistake in promoting deregulation. He said he had found a flaw looking back over the situation in his free market ideology and was in a state of shock and disbelief.

The Deepwater Horizon oil spill, which Chairman Stupak held hearings on in this subcommittee as well as on food safety as well as on automobile problems, that Deepwater Horizon oil spill wreaked havoc on the economies of the Gulf States. It was caused by too little oversight and regulation, not too much.

Members who were on this committee last Congress may remember our very first hearing. We brought in the CEOs from our Nation's leading manufacturing and energy companies to testify. What they told us is that they needed Congress to pass comprehensive

energy legislation so they could plan and invest for the future. Jim Rogers, CEO of Duke Energy, told us: "It is critical we know the rules of the road of climate change as soon as possible to make sure that we are making the right investments. Regulatory uncertainty is postponing investments and is postponing the creation of jobs from apprentices to engineers to Ph.Ds." Jeffrey Immelt, chairman and CEO of General Electric, who last week was asked by President Obama to lead the Council on Jobs and Competitiveness, told us: "Certainty in the investment world is critical to success and what we lack today is certainty. I am a capitalist pure, plain and simple, and I just want the system we have today not to be untenable over the long term insofar as the science is compelling on global warming." What these CEOs were telling us is that they needed more energy and carbon regulation, not less, so they would know the rules and plan and invest for the future.

Subcommittee Ranking Member DeGette and I circulated a memorandum to our Democratic members that provides more detail about these examples and others, and Mr. Chairman, I ask unanimous consent that this memorandum be included in the record to today's hearing.

Mr. STEARNS. Granted.

Mr. WAXMAN. Thank you.

As we commence this new Congress, let us put aside the false and hyperbolic claims about regulations killing jobs. By all means, let us prune unnecessary regulations where we find them but let us also not hesitate to regulate where needed to protect our economy and our children's future. There is no doubt that anybody would understand if you don't regulate to protect the environment, it is going to be at a disadvantage for a company to put in pollution control if their competitors don't do the same thing. Regulations can make the market work better for everybody while at the same time protecting the public interest. Yield back my time.

[The prepared statement of Mr. Waxman follows:]

PREPARED STATEMENT OF HON. HENRY A. WAXMAN

Mr. Chairman, I am a strong opponent of unnecessary regulations. In my many years of service on the Committee on Oversight and Government Reform, I led numerous oversight and legislative efforts to promote government efficiency and eradicate wasteful spending and programs.

In the 1990s, I also served on the Advisory Committee for the Corrections Calendar, an initiative established by Speaker Newt Gingrich to identify outdated and pointless regulation so it could be quickly eliminated.

I believe eliminating unnecessary government regulation is integral to ensuring effective government.

But this is an area where it is easy to paint with too broad a brush. We need to remember that federal regulations also play a vital role in growing our economy and protecting our health and environment.

That is why I am concerned that much of the rhetoric we are hearing from the Republican side of the Committee is a repeat of what happened the last time the Republicans took control of Congress.

In 1995, the newly elected Republican majority conducted an all-out assault on regulations. They told alarming anecdotes about the impact of senseless government regulation. We were told that the Consumer Product Safety Commission required holes in the bottom of buckets and that OSHA killed the tooth fairy by preventing parents from taking home their children's baby teeth from the dentist.

These stories shared two major traits: they sounded compelling, but they were simply not true.

Now we are hearing repeated claims that regulations destroy jobs and stymie economic growth. This is another myth.

Consider the collapse of the financial markets in 2008. This meltdown on Wall Street threw our economy into the deepest recession since the Great Depression. Millions of Americans lost their jobs and it cost U.S. taxpayers billions of dollars to bail out AIG and Wall Street banks.

The cause wasn't regulation; it was the absence of regulation. As Alan Greenspan testified before me and other members of the Oversight Committee, he had "made a mistake" in promoting deregulation. He said he had "found a flaw" in his free-market ideology and was in "a state of shocked disbelief."

The Deepwater Horizon oil spill wreaked havoc on the economies of Gulf states. It was caused by too little oversight and regulation—not too much.

Members who were on this committee last Congress may remember our first hearing. Like today's hearing, our focus two years ago was on how to build a strong economic future for our country. We invited nine CEOs from our nation's leading manufacturing and energy companies to testify.

And what they told us was that they needed Congress to pass comprehensive energy legislation so they could plan and invest for the future. The told us that sensible, market-based regulation of carbon emissions would spur billions of dollars in new investments.

Here is what Jim Rogers, the CEO of Duke Energy, told us: "It is critical we know the rules of the road of climate change as soon as possible to make sure that we are making the right investments. Regulatory uncertainty is postponing investments and [i]t's postponing the creation of jobs from apprentices to engineers to Ph.Ds."

Jeffrey Immelt, Chairman and CEO of General Electric, was asked last week to lead the President's Council on Jobs and Competitiveness. He told us the same thing: "Certainty in the investment world is critical to success. And what we lack today is certainty. I am a capitalist, pure, plain, and simple. And I just think the system we have today is untenable over the long term insofar as the science is so compelling on global warming."

What these CEOS were telling us is that they needed more energy and carbon regulation—not less—so they would know the rules and plan and invest for the future.

They understood what Alan Greenspan forgot: regulation is often needed to promote jobs and economic prosperity.

Subcommittee Ranking Member DeGette and I circulated a memorandum to our Democratic members that provides more detail about these examples and others. I ask unanimous consent that this memorandum be included in the record of today's hearing.

As we commence this new Congress, let's put aside the false and hyperbolic claims about regulations killing jobs. By all means, let's prune unnecessary regulations where we find them. But let's also not hesitate to regulate where needed to protect our economy and children's future.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

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SUPPLEMENTAL MEMORANDUM

January 26, 2010

To: Democratic Members of the Subcommittee on Oversight and Investigations

Fr: Henry A. Waxman, Ranking Member, and Diana DeGette, Subcommittee Ranking Member

Re: Supplemental Information on Regulations and Jobs

At today's hearing, one issue that may be discussed is the relationship between regulations and jobs and economic growth. The Republican Policy Conference has accused the Obama Administration of "unilaterally and arbitrarily writ[ing] job-killing regulations," claiming that the Administration "seems intent on fulfilling a radical environmental agenda, while destroying jobs."[1] Chairman Fred Upton has asserted that "burdensome regulations are stifling investment and chasing jobs overseas."[2]

Efforts to demonize the regulatory process are not new. Beginning in 1995, the last time Republicans took control of the House, their agenda included efforts to undermine important regulations to protect American families and the environment. At the time, Republicans claimed that a doctor was fined by the Department of Health and Human Services for changing a light bulb without proper certification and training; that the Consumer Product Safety Commission required buckets to have holes in them to prevent drowning; and that the Occupational Safety

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[1] Republican Policy Conference, *Obama Administration's EPA Assault on American Jobs* (Aug. 12, 2010) (online at www.gop.gov/policy-news/10/08/12/obama-administrations-epa-assault-on).

[2] House Committee on Energy and Commerce, Press Release, *In Wake of Executive Order, Energy and Commerce Subcommittee on Oversight and Investigations to Examine Administration's Regulatory Reforms WEDNESDAY* (Jan. 21, 2011) (online at www.energycommerce.house.gov/news/PRArticle.aspx?NewsID=8158).

and Health Administration "killed the tooth fairy" by requiring that baby teeth be treated as hazardous waste.[3] All of these claims – and many others – were subsequently shown to be false.

This year, Republicans are claiming that regulations destroy jobs. In fact, the opposite is often the case: the absence of responsible regulation can lead to job loss and significant economic costs. This supplemental memorandum describes three examples where the absence of regulations harmed or is harming our economy: (1) the financial collapse in 2008; (2) the Deepwater Horizon oil spill; and (3) the failure to establish comprehensive energy and climate regulations. The magnitude of the adverse economic impacts caused by the absence of regulation in these examples dwarfs any positive economic impacts that have been demonstrated from rolling back regulations.

Because much of the focus of the recent Republican rhetoric is aimed at the Environmental Protection Agency and, in particular, new regulations proposed under the Clean Air Act, this memorandum also includes a discussion of the economic benefits realized through clean air regulations.

I. The 2008 Wall Street Collapse

In the fall of 2008, the financial markets in the United States collapsed. This collapse cost U.S. taxpayers and investors billions of dollars and had a devastating effect on jobs and the economy.

The recession caused by the financial collapse resulted in a loss of over eight million jobs.[4] It caused the unemployment rate to increase from 4.4% in 2007 to 10.1% in 2009.[5] Hundreds of billions of taxpayer dollars were provided to AIG and Wall Street banks to save them from collapse.

The Committee on Oversight and Government Reform held a series of hearings in 2008 on the global financial crisis. These hearings and other investigations showed that the financial collapse – and the millions of jobs lost as a result – was due to the failure of regulators to protect the public and financial markets.

On October 23, 2008, Chairman Henry Waxman chaired a hearing entitled "The Financial Crisis and the Role of Federal Regulators."[6] Former Federal Reserve Chairman Alan

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[3] House Government Reform Committee, *Factsheet: False Republican Claims in the Small Business Paperwork Reduction Debate* (1995).

[4] Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Jan. 2008 – Feb. 2010).

[5] Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (online at data.bls.gov/pdq/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000).

[6] House Committee on Oversight and Government Reform, *The Financial Crisis and the Role of Federal Regulators*, 110th Cong. (Oct. 23, 2008) (110-209).

Greenspan, Chairman of the Securities and Exchange Commission Christopher Cox, and former Secretary of the Treasury John Snow provided testimony.[7] This hearing identified numerous areas where regulators could have intervened at early stages to prevent the financial practices that caused the economic meltdown. The Federal Reserve had the authority to stop the lending practices that fueled the subprime mortgage market, but Chairman Greenspan refused to regulate the industry. In 1994, Congress passed the Home Ownership Equity Protection Act. This law gave the Federal Reserve the authority to prohibit acts or practices "associated with abusive lending practices, or . . . otherwise not in the interest of the borrower."[8] Chairman Alan Greenspan never used this authority to regulate subprime loans.

The SEC relaxed its "net capital rule" in 2004 allowing investment banks to increase their leverage ratios to 33 to 1.[9] The Treasury Department opposed legislative efforts to require transparency and oversight in the market for derivatives.[10] The Offices of Thrift Supervision and the Comptroller of the Currency prevented states from protecting homebuyers from predatory lending.[11]

Allowing the market to regulate itself enabled the financial collapse. Former Chairman Greenspan admitted: "I made a mistake in presuming that the self-interest of organizations, specifically banks and others, were such is that they were best capable of protecting their own shareholders and their equity in the firms."[12]

Christopher Cox, Chairman of the Securities and Exchange Commission, echoed the need for more and better regulation of the financial industry, noting areas where new regulatory authority was needed:

> There are significant regulatory holes, significant regulatory gaps . . . . We have seen them, for example, with respect to the fact there is no statutory regulation whatsoever anywhere in the system for investment bank holding companies. We've seen it with respect to credit default swaps, a $58 trillion market with no regulator. There has been allusion made to the fact that in the mortgage brokerage market there is not adequate regulation. And certainly with respect to the multi-trillion dollar market in municipal securities, there is—the SEC and no one has any authority just to require disclosure to investors of what they're

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[7] *Id.*

[8] 15 U.S.C. § 1639.

[9] *Agency's '04 Rule Let Banks Pile Up New Debt*, New York Times (Oct. 3, 2008).

[10] Letter to Senator Michael Crapo and Senator Zell Miller from John Snow, Secretary, Department of Treasury, William Donaldson, Chairman, U.S. Securities and Exchange Commission, Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System, and James Newsome, Chairman, Commodity Futures Trading Commission (June 11, 2003).

[11] *See* 12 C.F.R. § 560.2 and 12 C.F.R. § 34.3.

[12] House Committee on Oversight and Government Reform, *The Financial Crisis and the Role of Federal Regulators*, 110th Cong. (Oct. 23, 2008) (110-209) at 45.

getting.[13]

Former Treasury Secretary John Snow was questioned about the anti-regulation sentiment that pervaded the Treasury Department during the Bush Administration. Mr. Snow indicated that his views on deregulation had changed following the financial meltdown. Mr. Snow stated: "We know we have to regulate financial markets. It's the matter of getting, I think as the chairman said, smart regulation, targeted, effective regulation."[14]

The TARP Congressional Oversight Panel summarized the regulatory failures that resulted in the 2008 financial crisis:

> After fifty years without a financial crisis – the longest such stretch in the nation's history – financial firms and policy makers began to see regulation as a barrier to efficient functioning of the capital markets rather than a necessary precondition for success. . . . The present regulatory system has failed to effectively manage risk, require sufficient transparency, and ensure fair dealings. . . . Had regulators given adequate attention to even one of the three key areas of risk management, transparency and fairness, we might have averted the worst aspects of the current crisis.[15]

II. The Deepwater Horizon Blowout and Oil Spill

On April 20, 2010, an explosion occurred on the Deepwater Horizon oil drilling rig at BP's Macondo well in the Gulf of Mexico. The rig was destroyed. Eleven people died and fifteen more were injured. More than four million barrels of oil gushed into the Gulf before the Macondo well was capped on July 15, 2010.

The economic and environmental impacts of this massive oil spill were catastrophic for the Gulf Coast states of Alabama, Florida, Louisiana, Mississippi, and Texas. The economy of the Gulf Coast depends heavily on the fishing and tourism industries, both of which were ravaged by the spill. Fisheries and oyster grounds in state and federal waters were closed. At the peak of the closures, 37% of the Gulf federal fishing zone was off-limits to all fishing.[16] The Gulf seafood industry suffered significant damage as a result of the public concern that Gulf seafood was not safe to eat.[17] Hotel, restaurant, and other tourism revenues also dropped.[18] In May 2010, the Federal Reserve Bank of Atlanta estimated that over 132,000 Gulf Coast jobs

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[13] *Id.* at 65.

[14] *Id.* at 92-3.

[15] Congressional Oversight Panel, *Special Report on Regulatory Reform* (Jan. 2009).

[16] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling* 140 (Jan. 2011).

[17] *Id.* at 185, 188.

[18] *Id.* at 185.

were at risk as a result of the oil spill, mostly in the accommodation and food services industry.[19] Over 125,000 Gulf Coast residents claimed economic losses, including lost jobs and property damage.[20] In June 2010, it was estimated that property value losses along the Gulf Coast could total $4.3 billion.[21] Moreover, a rich ecosystem was damaged by the unprecedented spill as wildlife died or was oiled, and marshes were polluted.[22] The long-term ecological consequences of the spill are currently unknown.

This economic and environmental devastation did not result from excessive government regulation. On the contrary, the lack of effective federal regulation and oversight was a primary cause of the oil spill.

In 2010, the Energy and Commerce Committee's Subcommittee on Oversight and Investigations held four hearings on the explosion and oil spill.[23] The Subcommittee found that significant regulatory gaps increased the risk of a disaster. For example, there was no federal requirement that a blowout preventer, the rig's failsafe device, have redundant techniques to seal the well pipe in case of a well blowout. There also was no requirement that oil companies test the emergency systems of their blowout preventers. If the blowout preventer at the Macondo well had functioned properly, the Gulf oil spill could have been avoided. But the commonsense regulations necessary to ensure that the blowout preventer would function when it was needed did not exist. BP used a risky well design and failed to perform critical tests of well safety – and was able to do because there were not adequate regulations in place to ensure safe drilling.

The Subcommittee's findings regarding weak regulation and oversight were echoed by the investigation and report of the bipartisan National Commission on the BP Deepwater Horizon Oil Spill. The Commission pointed to "the inherent risks of decades of inadequate

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[19] Federal Reserve Bank of Atlanta, Macroblog: Estimating the Oil Spill's Impact in the Gulf (May 10, 2010) (online at macroblog.typepad.com/macroblog/2010/05/estimating-the-oil-spills-impact-in-the-gulf.html).

[20] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling* 185 (Jan. 2011).

[21] *Oil Spill May Cost $4.3 Billion in Property Values,* Bloomberg (June 11, 2010).

[22] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling* 174 (Jan. 2011).

[23] House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Inquiry into the Gulf Coast Oil Spill* (May 12, 2010); House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Local Impact of the Deepwater Horizon Oil Spill* (June 7, 2010); House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *The Role of BP in the Deepwater Horizon Explosion and Oil Spill* (June 17, 2010); and House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *The Role of the Interior Department in the Deepwater Horizon Disaster* (July 20, 2010).

regulation" as a contributing factor in the Gulf oil spill.[24] It found that the increased risks associated with drilling in deeper waters "were not matched by greater, more sophisticated regulatory oversight" and that federal "regulations were inadequate to address the risks of deepwater drilling."[25] According to the Commission, "[m]any critical aspects of drilling operations were left to industry to decide without agency review."[26]

According to the Commission, "there was no requirement, let alone protocol, for a negative-pressure test [of the cement integrity], the misreading of which was a major contributor to the Macondo blowout. Nor were there detailed requirements related to the testing of the cement essential for well stability."[27] The Commission also found that "[t]he limited scope of the regulations is partly to blame" for the absence of a full assessment of the risks of BP's procedure for temporarily abandoning an exploratory well like the Macondo well before returning later to begin commercial production.[28] Furthermore, the federal agency that was supposed to regulate offshore drilling saw its resources diminish at the same time deepwater drilling operations began booming in the mid-1990s. The Commission explained: "Precisely when the need for regulatory oversight intensified, the government's capacity for oversight diminished."[29]

III. The Absence of Energy and Climate Regulations

A prominent Republican example of "job-killing" regulation is regulation to reduce carbon emissions and promote clean energy. In fact, however, the reverse is true. It is the absence of comprehensive energy and climate regulations – and the economic uncertainty that this creates – that is deterring billions of dollars in private sector investments.

At the first hearing held last Congress by the Energy and Commerce Committee, nine CEOs and senior executives from some of the nation's leading manufacturing and energy companies testified about the job-promoting effects that would result if Congress passed comprehensive energy legislation. Jim Rogers, Chairman, President and Chief Executive Officer of Duke Energy testified:

> And let me quickly say, for our company, we plan to invest $25 billion in infrastructure over the next 5 years. It is critical we know the rules of the road of climate change as soon as possible to make sure that we are making the right investments. Regulatory uncertainty is postponing investments and renewables in other green technologies. It's postponing the creation of jobs from apprentices to engineers to Ph.Ds. Our one fear –

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[24] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling* 56 (Jan. 2011).

[25] *Id.* at 56, 126.

[26] *Id.* at 126.

[27] *Id.* at 126.

[28] *Id.* at 127.

[29] *Id.* at 75.

> and I will leave this with you – is that many in Congress will look for reasons to postpone action on climate legislation this year.[30]

Jeffrey Immelt, Chairman and Chief Executive Officer of General Electric, was recently asked by President Obama to join the President's Economic Recovery Advisory Board. At the Energy and Commerce hearing last Congress, he testified:

> Certainty in the investment world is critical to success. And what we lack today is certainty in terms of what is going to happen and when it is going to happen. . . . [T]oday, we have almost the worst of all worlds. We have 17 States that are developing their own programs. We have RPS in some areas, not in others. The fact is that the last 40-plus coal plants haven't been permitted. You know, so we have an energy policy, it is just that nobody knows what it is. And it shows up in terms of those consequences. So, look, I am not – I say this with great respect to my colleagues – I didn't come to this as an environmentalist. I come to it as an industrialist. I am a capitalist, pure, plain and simple. And I just think the system we have today is untenable over the long term, insofar as, you know, the science is so compelling on global warming.[31]

David Crane, President and Chief Executive Officer of NRG Energy, told the Committee:

> If climate change legislation is passed . . . the first thing it will do is it will unleash additional investment by us in various technologies designed to prepare for the cap-and-trade system that is coming. So, you know, this may be counterintuitive, but I think quite the contrary, in the near term it will actually unleash investment and create jobs. And we and many of the companies that sit here, we have very substantial capital. I think my company and Jeff's are the two smallest at this panel. We sit with $1.5 billion in investment capital ready to invest, but we need to know in what direction.[32]

Steve Kline, vice president of corporate environmental and federal affairs for PG&E Corporation stated:

> We also see an incredible lost opportunity if we don't act now . . . there are these amazing, developing new technology centers across the United States, and we see those jobs going overseas and that technology superiority going overseas. And so, in terms of our service territory, where Silicon Valley is putting a lot of time and energy into these technologies, we are going to lose that if we don't act now.[33]

According to these corporate leaders, an energy policy that provides certain support for clean energy and regulatory obligations for global warming pollution would be a major

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[30] House Committee on Energy and Commerce, *The U.S. Climate Action Partnership*, 111th Cong. (Jan. 15, 2009).

[31] *Id.*

[32] *Id.*

[33] *Id.*

economic boost for the nation. It is the continued absence of clear rules and the uncertainty that is creates that is deterring energy sector investment.

IV. The Clean Air Act and Economic Growth

The Clean Air Act is widely recognized as one of the most successful environmental laws in American history. It was enacted in 1970, with strong bipartisan support, to protect public health from the ravages of air pollution. The Act was significantly strengthened in 1977 and 1990, again with strong bipartisan support. Over the past 40 years, the Clean Air Act has produced tremendous public health benefits, while supporting America's economic growth.

Since its adoption, the Clean Air Act has reduced key air pollutants by 60%, while at the same time the economy grew by over 200%.[34] From 1990 to 2008 alone, the Clean Air Act reduced key air pollutants by over 40%, as the economy grew by almost 65%.[35]

These pollution reductions save lives and improve public health, particularly among children and senior citizens. A peer-reviewed EPA analysis estimates that in 2010 alone, the Clean Air Act prevented over 160,000 premature deaths, 130,000 cases of heart disease, and 1.7 million asthma attacks, as well as 86,000 hospital admissions and millions of respiratory illnesses.[36] In 2010, the Clean Air Act also avoided over 3 million lost school days and 13 million lost work days, allowing our children to be better educated and making our workers more productive.[37]

The benefits of Clean Air Act programs outweigh the costs of clean-up, often by substantial margins, which means that our economy as a whole is strengthened by implementing these requirements. For example, the benefits of the acid rain program are estimated to outweigh the costs by 40:1.[38] The programs to clean up vehicles and fuels will produce an estimated $16 in benefits for every $1 in costs when fully implemented in 2030.[39] By 2020, the economic benefit of reducing air pollution is estimated at almost $2 trillion dollars.[40]

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[34] U.S. Environmental Protection Agency, *Air Quality Trends* (online at www.epa.gov/airtrends/images/comparison70.jpg) (updated Jan. 6, 2011).

[35] U.S. Environmental Protection Agency, *Our Nation's Air, Status and Trends through 2008* 7 (Feb. 2010) (online at www.epa.gov/airtrends/2010/report/airpollution.pdf).

[36] U.S. EPA, Office of Air and Radiation, *TheBenefits and Costs of the Clean Air Act: 1990 to 2020, Revised Draft Report*, 5-22 (Aug. 2010) (online at: http://www.epa.gov/oar/sect812/aug10/fullreport.pdf).

[37] *Id.*

[38] Lauraine G. Chestnut, David M. Mills, A Fresh Look at the Benefits and Costs of the US Acid Rain Program, 77 *Journal of Environmental Management* 252, 265 (2005).

[39] U.S. Environmental Protection Agency, *The Clean Air Act - Highlights of the 1990 Amendments*, (Sept. 14, 2010) (online at epa.gov/oar/caa/CAA_1990_amendments.pdf).

[40] U.S. Environmental Protection Agency, Office of Air and Radiation, *The Benefits and Costs of the Clean Air Act: 1990 to 2020, Revised Draft Report* 5-22 (Aug. 2010) (online at: www.epa.gov/oar/sect812/aug10/fullreport.pdf).

The Clean Air Act has also stimulated important sectors of the economy. The U.S. environmental technologies industry has grown dramatically with the implementation of the Clean Air Act and other environmental laws. In 2008, the industry generated approximately $300 billion in revenues and $44 billion in exports, and supported nearly 1.7 million jobs.[41] These include high-technology jobs in engineering and computer-aided design, as well as manufacturing and transportation. Installation of pollution controls produces construction jobs that cannot be outsourced. For example, Clean Air Act regulations mandating improved technology resulted in a 35% increase in U.S. boilermaker's sales between 1999 and 2001.[42] Implementation of just one Clean Air Act rule, the Clean Air Interstate Rule, has produced an estimated 200,000 jobs, according to the Institute for Clean Air Companies.[43]

The lesson of Clean Air Act regulations is that cleaner air, a healthier population, and technology improvements that result in a stronger economy go hand-in-hand.

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[41] U.S. Department of Commerce International Trade Administration, *Environmental Technologies Industries: FY2010 Industry Assessment* (online at http://web.ita.doc.gov/ete/eteinfo.nsf/068f3801d047f26e85256883006ffa54/4878b7e2fc08ac6d85256883006c452c/$FILE/Full%20Environmental%20Industries%20Assessment%202010.pdf).

[42] U.S. Environmental Protection Agency, *The Clean Air Act - Highlights of the 1990 Amendments*, (Sept. 14, 2010) (online at epa.gov/oar/caa/CAA_1990_amendments.pdf).

[43] Institute of Clean Air Companies, *Reply to Senator Thomas Carper* (Nov. 3, 2010) (online at www.icac.com/files/public/ICAC_Carper_Response_110310.pdf).

Mr. STEARNS. I thank the distinguished member.

I ask unanimous consent that the written opening statements of all members who so desire be introduced into the record. Without objection, the documents will be entered into the record.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL

Thank you, Mr. Chairman.

I thank you for holding today's hearing, and look forward to hearing from Administrator Sunstein.

Today's hearing topic is an important one. Executive departments and agencies serve a critical role in our governing process, promulgating rules and regulations as required in the laws written here by Members of Congress.

But our responsibilities as Members of Congress do not end when the President places his signature on a piece of legislation. I have long held that it is our responsibility as Members of Congress to ensure that the regulations and rules laid forward as a result of legislation allow for public comment, do not adversely impact our state and local governments and business community, provide a benefit to economic growth—not hinder it—and above all protect the public good.

I commend President Obama for calling on the departments and agencies to reform their regulatory process to increase transparency, efficiency, coordination and public participation, as well as to ensure that regulations and rules protect public health, welfare, safety and our environment, while also allowing for economic growth and job creation.

I also commend the President for taking into consideration the impact regulations have on our small businesses, who serve a vital role as engines of job creation in our communities. Allowing for regulatory flexibility for small employers, assures that small employers can comply with the letter of the law without endangering their business.

Of some concern to me, is the President's directive for a government-wide review of regulations and rules deemed to be outdated or ineffective. I agree that we must constantly review our programs to determine whether they are working effectively or efficiently and to determine where gaps, if any, exist, and I believe that this provision will further that goal.

However, we must ensure that the public participation mandate is heeded to when departments or agencies determine certain rules or regulations must be withdrawn or repealed.

George Santayana said something which I thought was very interesting. He said, "Those who cannot remember the past are condemned to repeat it."

We have seen what happens when careful consideration is not given to deregulation, most recently in the unholy alliance between Wall Street and Bush-era policies that resulted in the 2008 financial crisis.

Moving forward we must strive to ensure that there is a balance between our responsibilities as the federal government to regulate effectively, while also protecting the good of the public.

Thank you, and I look forward to hearing from Administrator Sunstein.

Greg Walden Opening Statement

Chairman Stearns, thank you for convening an oversight hearing on "Administration and Regulatory Reform", and allowing me to submit an opening statement to the record. As a member of the Energy and Commerce Committee and as a former Ranking Member on the Oversight and Investigations Subcommittee I look forward to working with you and value the important efforts the subcommittee will undertake in this new Congress.

I have briefly described below a few of the major administrative and regulatory rules that will have an impact on job creation and the rural economy in Oregon. Each of the issues reiterates the need to reform the regulatory process and bring accountability and transparency to the agencies that promulgate and implement these rules.

Despite the fact that some of these rules and regulations have yet to be finalized or are in legal limbo, they have already had a chilling impact on the growth of jobs in Oregon and reduced the ability for businesses to plan how to best invest in growing their business. Frustrating to many businesses and Oregonians with whom I've met is the fact that these agencies rarely take into consideration the economic impact that their rules and regulations will have once implemented, not to mention the cumulative impact of multiple costly rules on American businesses and manufacturers.

Thank you for considering these and their unique impact to Oregon's natural resource based economy as the subcommittee undertakes its important oversight responsibilities.

Boiler MACT Rules: In June 2010, the Environmental Protection Agency (EPA) announced a Maximum Achievable Control Technology (MACT) rule that would set unreasonably strict emissions limits and other requirements on industrial, commercial and institutional boilers, and process heaters that use fossil fuels and renewable biomass. The Boiler MACT rule has drawn criticism from bipartisan groups of lawmakers and from manufactures across the country including those in Oregon that utilize renewable biomass as a feedstock for their boilers. Impacting about 55,000 boilers nationwide, this EPA rule would require more than 99 percent of boilers to meet standards that only the top 12 percent of boilers can meet. According to industry reports, the cost to the forest products companies alone is estimated at around $7 billion, and the cost to the manufacturing economy would be between $20 billion and $50 billion. I've enclosed a letter from Members of Congress to EPA Administrator Lisa Jackson regarding concerns about this issue as well as numerous letters from forest products companies in Oregon that would be impacted by this rule.

Portland Cement MACT Rules: In September, the EPA finalized new national emission rules for Portland Cement manufacturing plants. Unfortunately, EPA did not utilize its authority to issue a subcategory under the rule to recognize the unique difference in manufacturing processes, raw material inputs, and associated emissions at various cement manufacturing facilities across the country. I, along with a number of state and local officials, have for over two years now explained to EPA the extensive efforts and investments undertaken by Ash Grove Cement Company to reduce the high levels of mercury emissions that are attributable to naturally

occurring mercury in the limestone quarries where Ash Grove's Durkee Cement Plant is located in eastern Oregon. Without the inclusion of a subcategory, this rule could lead to the closure of Ash Grove's Durkee, Oregon plant affecting 116 family-wage manufacturing jobs. Despite working closely with, and with approval from, the State of Oregon Department of Environmental Quality and local stakeholder groups to reduce mercury emissions levels by up to 90 percent through the installation of $20 million of the most advanced control technologies available, the Administration's unreasonable regulation insists that they reduce emissions by 95 percent. This standard could result in the closing of the plant and the loss of 116 jobs in rural Oregon. I've enclosed two letters that I have sent to EPA regarding this rule as well as a series of letters from local elected officials and the business community.

Particulate Matter Regulation: In July 2010, the EPA through its review of air quality standards for particulate matter laid the foundation for establishing the most stringent and unparalleled regulation of dust in our nation's history. EPA's draft policy assessment for particulate matter would disproportionately affect rural America and the ability of Oregon's farmers and ranchers to produce food and fiber for the world. Through these new standards, EPA has essentially proposed to reduce the particulate matter size to a point where everyday actions in rural America such as driving on gravel roads, harvesting grain or gathering cattle on the range would generate dust in violation of the standard. I have enclosed a letter from Members of Congress to the EPA regarding the agency's Second Draft Policy Assessment for particulate matter and its potential negative impacts.

Tailoring Rule: In May 2010, the EPA's final PSD Tailoring Rule failed to recognize the carbon cycle of biogenic sources, such as renewable biomass, despite long standing national and international policy to the opposite. Central Oregon has at least two major biomass power proposals underway—projects that are expected to bring in nearly 100 jobs in a region where unemployment is over 14 percent. Nationally, one expert estimated that implementing this rule would cause a loss of $18 billion in capital investment. After numerous Congressional efforts to explain the carbon neutrality of biogenic sources, EPA in early January decided to postpone for three years the pre-construction permitting requirements under the Tailoring Rule for biomass and other biogenic emissions until a more thorough internal evaluation can be conducted. Although this is a positive step, I am concerned that the ambiguities surrounding EPA's treatment of biomass will only lead to three more years of uncertainty about how they will treat biomass from federal and private forest lands as a renewable resource. I am deeply concerned that the delay in consideration of this misguided rule will have a chilling effect on potential biomass power projects during the interim period. I have enclosed two letters from a bipartisan group of Members of Congress as well as EPA's response where from January 12, 2011 where it announced the three-year deferral.

Pesticide Buffer Zones: Last spring, the EPA issued an ultimatum to implement the National Marine Fisheries Service (NMFS) 2008 biological opinion (BIOP) for the use of certain pesticides in Oregon, Washington, California, Idaho, and other states. EPA's guidance, which was based on a flawed NMFS BIOP that EPA itself said "lacks a level of transparency necessary for EPA to understand NMFS's rationale for it opinion that the use of any of the pesticides will jeopardize the continued existence", failed to take into consideration the latest science or input from

agriculture producers and will require producers in Oregon, Washington, California and Idaho to create 500-1,000 foot spray-free buffer zones around streams and rivers. This would have a devastating impact. In Oregon alone, 40 percent of agriculture lands would have to be taken out of production to comply with a 500-foot buffer zone requirement—up to 67 percent with 1,000 foot buffers. I've enclosed a letter I sent with other members of the northwest delegation to express concerns about the EPA's reliance on a flawed process to implement these job-destroying buffer zones.

Mr. STEARNS. Also, I ask unanimous consent that the contents of the document binder be introduced into the record. Without objection, the documents will be entered.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. Now, we get to our witness, and let me welcome the Administrator, Cass Sunstein, to our witness stand. I thought before we move forward I would give you a little brief background. I know oftentimes we have the witnesses and we don't know a lot about them, but I thought it would be very illustrative for all of us to hear a brief summary of his resumé. Before he became Administrator, Mr. Sunstein was the Felix Frankfurter Professor of Law at Harvard Law School. He graduated in 1975 from Harvard College and in 1978 from Harvard Law School. After graduation, he clerked for Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court and Justice Thurgood Marshall of the United States Supreme Court, and then he worked as an attorney advisor in the Office of Legal Counsel of the U.S. Department of Justice. He was a faculty member at the University of Chicago Law School from 1991 to 2008. A specialist in administrative law, regulatory policy and behavioral economics, he is the author of many articles and books. And so Mr. Sunstein, I welcome you to the subcommittee's hearing.

As you know, the testimony that you are about to give is subject to Title 18, section 1001 of the United States Code. When holding an investigative hearing, this committee has the practice of taking testimony under oath. Do you have any objection to testifying under oath?

Mr. SUNSTEIN. None at all, Mr. Chairman.

Mr. STEARNS. All right. The Chair then advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today?

Mr. SUNSTEIN. I do not.

Mr. STEARNS. In that case, if you would please rise and raise your right hand?

[Witness sworn.]

Mr. STEARNS. We welcome your 5-minute opening statement.

TESTIMONY OF CASS R. SUNSTEIN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS

Mr. SUNSTEIN. Thank you, Mr. Chairman. Thank you, other Mr. Chairman. There are several other Mr. Chairmen. Thanks to all of you. I am grateful and greatly honored to have the opportunity to appear today to discuss our new Executive order—it has a new number, 13563, on improving regulation and regulatory review—and also our new Memorandum from the President on small business and job creation, and I will have a few words to say about that memorandum in a moment.

The President has made clear that these documents are meant to create foundations for a regulatory system that protects public health and welfare while promoting economic growth, innovation—a key word in his State of the Union address—competitiveness and job creation as several of you have just emphasized. The Executive

order and the Presidential Memorandum require a number of concrete steps to achieve that overriding goal.

By way of background, let me briefly note that since 1993, the process of regulatory review has operated under Executive order under 12866 from President Clinton, which builds very directly on an Executive order issued by President Reagan in 1981 called Executive Order 12291. The Clinton Executive order sets out a number of principles and requirements that were in operation both under President Clinton and President Bush. Among other things, it calls for careful consideration of costs and benefits, for tailoring regulations to impose the least burden on society, and for selecting the approach that maximizes net benefits. It also calls for a process of interagency review coordinated by the Office of Information and Regulatory Affairs. That process has been in place for nearly 30 years.

The new Executive Order 13563 has six provisions that are designed to supplement and improve the process. First, it reaffirms the basic principles and structures of Executive Order 12866. In doing so, it emphasizes a point to which several of you have just pointed: the need for predictability and certainty. That is right out front in the new Executive order. It also emphasizes the importance of using the "least burdensome tools for achieving regulatory ends." That is a quotation. It emphasizes finally what hadn't been in his predecessor Executive orders, the need to "measure and seek to improve the actual results of regulatory requirements." That is the beginning.

Second, the new Executive order calls for public participation. It tries to bring rulemaking into the 21st century by requiring use of the Internet to promote an open exchange of ideas and perspectives. It also directs agencies to act before they commence rulemaking to seek the views who are likely to be affected, including those would be burdened by regulatory requirements. Public participation is front and center.

Third, and a point that has received considerable attention over the last several years, indeed decades, the new Executive order asks agencies to try to harmonize, simplify, and coordinate rules. It emphasizes that some sectors and industries face inconsistent, overlapping and redundant requirements. To reduce burdens and costs and to promote simplicity, it calls for greater coordination across the Federal Government. That is designed explicitly to promote innovation.

Fourth, the new Executive order asks agencies to consider flexible approaches that maintain freedom of choice for the public. Approaches that are choice preserving include, for example, provision of information rather than foreclosure of decisions through mandates and commands. This is more than a plea, a direction for flexibility.

Fifth, as noted, Executive Order 13563 calls for scientific integrity. It directs each agency to ensure the objectivity of information on which it relies.

Sixth and finally, what has been most publicized in the week since the Executive order was signed, it calls for retrospective analysis of existing rules. It is concerned about rules that may be outmoded, ineffective, or excessively burdensome. It directs agencies to

produce preliminary plans for periodic review of significant rules and to submit them to the Office of Information and Regulatory Affairs within 120 days, a pretty tight time frame. In this way, the Executive order is aimed at the stock of existing requirements as well as the flow of new requirements. Both are covered by the new Executive order.

The Presidential Memorandum on Small Business and Job Creation emphasizes the essential role that small businesses play in the American economy. With job creation in the title and economic growth in the body of the memorandum, the President has insisted as he wrote in the Wall Street Journal on federal agencies doing more to account for and reduce the burdens regulations may place on small businesses. To do that, he has emphasized of the Regulatory Flexibility Act and directed agencies specifically to explain themselves whenever in proposed rules or final rules they fail to provide flexibilities to small businesses in the form, for example, of partial or total exemptions, simplified reporting requirements or delayed compliance dates.

Taken as a whole, Executive Order 13563 and the new Memorandum on Small Business and Job Creation create strong foundations for improving regulation and regulatory review. I am looking forward to answering your questions.

[The prepared statement of Mr. Sunstein follows:]

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

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Testimony of

The Honorable Cass R. Sunstein

Administrator, Office of Information & Regulatory Affairs

Before the Committee on Energy and Commerce

Oversight and Investigations Subcommittee

U.S. House of Representatives

January 26, 2011

Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to appear before you today to discuss Executive Order 13563, "Improving Regulation and Regulatory Review," and the Presidential Memorandum, "Regulatory Flexibility, Small Business, and Job Creation."

As the President has made clear, these documents are meant to lay the foundations for a regulatory system that protects public health and welfare while promoting economic growth, innovation, competitiveness, and job creation. They require a number of concrete steps to achieve that overriding goal.

Let me begin with a few words by way of background. Since September 30, 1993, the process of regulatory review has operated under Executive Order 12866, issued by President Clinton, which builds in turn on the framework established by Executive Order 12291, issued by President Reagan on February 17, 1981. Executive Order 12866 sets out a number of principles and requirements. Among other things, it calls (to the extent permitted by law) for careful consideration of costs and benefits, for tailoring regulations to impose the least burden on

society, for selection of the approach that maximizes net benefits, for consideration of alternatives, and for a process of interagency review, coordinated by the Office of Information and Regulatory Affairs. Such a process has been in effect for nearly thirty years.

Executive Order 13563, issued on January 18, has six provisions designed to supplement and to improve that process. First, it reaffirms the principles, structures, and definitions established by Executive Order 12866. In doing so, it stresses the need for predictability and certainty and for using the "least burdensome tools for achieving regulatory ends." It emphasizes the need to "measure, and seek to improve, the actual results of regulatory requirements."

Second, Executive Order 13563 calls for public participation. It directs agencies to promote an open exchange with State, local, and tribal officials; experts in relevant disciplines; affected stakeholders; and the public in general. Attempting to bring rulemaking into the twenty-first century, it requires use of the Internet to promote such an exchange. It also directs agencies to act, even in advance of rulemaking, to seek the views of those who are likely to be affected.

Third, Executive Order 13563 directs agencies to take steps to harmonize, simplify, and coordinate rules. It emphasizes that some sectors and industries face redundant, inconsistent, or overlapping requirements. In order to reduce costs and to promote simplicity, it calls for greater coordination.

Fourth, Executive Order 13563 directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public. Such approaches may include, for example, public warnings or provision of information.

Fifth, Executive Order 13563 calls for scientific integrity. It asks each agency to ensure the objectivity of the information on which it relies to support its regulatory actions.

Sixth, and finally, Executive Order 13563 calls for retrospective analysis of existing rules. It asks for "periodic review" to identify "rules that may be outmoded, ineffective, insufficient, or excessively burdensome." It directs agencies to produce preliminary plans for periodic review of significant rules and to submit them to OIRA within 120 days. In this way, Executive Order 13563 is aimed at the "stock" of existing regulations as well as the "flow" of new requirements.

The Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation is focused especially on the "essential role" of small businesses in the American economy. It directs agencies to consider methods "to reduce regulatory burdens on small business." Under the Regulatory Flexibility Act (RFA), agencies may consider such flexibilities as extended compliance dates, simplified reporting and compliance requirements, and partial or total exemptions. The Memorandum specifically requires agencies to explain any failure to offer such flexibilities in proposed or final rules. As the President wrote in the Wall Street Journal, "today I

am directing federal agencies to do more to account for—and reduce—the burdens regulations may place on small businesses."

Taken as a whole, Executive Order 13563 and the Presidential Memorandum create strong foundations for improving regulation and regulatory review. I look forward to answering any questions that you may have.

Mr. STEARNS. I thank the witness.

Let me, before we start, perhaps set the tone here. You saw that Mr. Sunstein, we sort of changed the rules here to expedite things, and it is important, I think, to stress that the members' questions that they are going to ask get a direct answer from you. All of us have been in hearings where we just have 5 minutes and it is very difficult to get an answer, and I think that the questions that are going to be asked of you reflect that we are willing to do away with our opening statements so we can provide more time for testimony and questioning. Therefore, I just ask to make it as productive as possible if when you answer the questions you can answer yes or no. Some members will ask you these type of questions, and I know it is going to be difficult but we ask for your patience and forbearance that you would answer yes or no to these questions, and I thank you in advance for doing that. And with that in mind, let me be the first one to ask you questions.

The Obama Executive order was issued but the comments from organizations representing all the stakeholders and the job creators in this country, a lot are concerned with the Obama order: that there were a lot of independent regulatory agencies not part of the OIRA review. So my question for you, Mr. Sunstein, is, are the regulatory actions of the independent regulatory agencies such as the SEC, the FCC, the Federal Trade Commission, FERC and others, subject to OIRA regulatory review. Are they, yes or no?

Mr. SUNSTEIN. No.

Mr. STEARNS. I am also concerned about what appears to be a sort of amorphous type of standards that was articulated by the President. This is what is quoted in the Executive order: "Where appropriate and permitted by law, each agency may consider and discuss values that are difficult or impossible to quantify including equity, human dignity, fairness, and distributive impacts." Now, these are all subjective terms so you are going to make a decision on regulatory reform based upon human dignity, fairness, and distributive impacts, which I assume means distribution of income. Is my interpretation correct when you say distributive impacts, yes or no? Does that mean distribution of income?

Mr. SUNSTEIN. That wasn't our intent.

Mr. STEARNS. You are saying no. OK. But these standards, I mean, just looking at it, any rational cost-benefit analysis is going to be tossed out the window instead of saying does this economically make sense, what you can quantify. These agencies are going to be using these amorphous methods to determine the economic value of a regulation, and they are subjective. As you know, we are all inherently involved with either ideology or political correctness, so I guess the question is, won't these standards make it very difficult for any rational cost-benefit analysis to be implemented?

Mr. SUNSTEIN. That would be a no.

Mr. STEARNS. OK. By April 2010, the Administration had issued 190 economically significant regulations or regulations having an economic impact of $100 million or more. Is that correct?

Mr. SUNSTEIN. I want to double-check that number.

Mr. STEARNS. Sure. I appreciate that. And by December, that number was up to 224.

Mr. SUNSTEIN. I want to double-check that number as well.

Mr. STEARNS. So the number of regulations the Administration is issuing, in our humble opinion, is rising, not falling. That is just a comment.

Mr. SUNSTEIN. No, that is actually not true. The number of regulations issued in the last 2 years is about the same or slightly lower than the last 2 years of the——

Mr. STEARNS. OK. And if you could just follow up with the information to confirm what I asked you earlier, that would be helpful.

Mr. SUNSTEIN. Absolutely. That would be yes.

Mr. STEARNS. OK. Good for you. So in our opinion, these numbers represent a new amount of regulations including regulations into, I think, new areas such as the FCC regulation of the Internet for the first time. Will these regulations that have been issued in the last 2 years be subject to review under the President's new standard?

Mr. SUNSTEIN. Yes.

Mr. STEARNS. OK. And we expect to see more regulations issued by Health and Human Service to comply with the new health care law, new financial regulations to comply with the Dodd-Frank law, and new regulations from the EPA. Now, will these regulations be subject to review by OIRA?

Mr. SUNSTEIN. I believe you referred to non-independent agencies, and thus the answer is absolutely yes.

Mr. STEARNS. What we have seen from the Administration in the last 2 years is, in our opinion not a full exercise in responsibility to review these regulations. Are you aware that in the first 2 years of the Bush Administration, the agency issued 19 return letters to agencies, letters rejecting agencies' regulations while this Administration has issued zero return letters in the same period?

Mr. SUNSTEIN. I would say yes, I am aware of that. Would you like an elaboration?

Mr. STEARNS. We will keep going here. I think when the Democrats have a chance, they are going to give you a chance for elaboration.

Given that we have seen agencies respond to the Executive order by stating that they don't need to make any changes, I think this is what really concerns me and seems not to change anything in terms of how much control your office will really have. I think as a Congress we reach out to bureaucracies and lots of times we see these bureaucracies unable to act. Back in 2003, in your book Risk and Reason, you wrote, "All in all, President Clinton's Executive orders did not seem to have much impact. OIRA was largely passive and toothless, serving a coordinating function without trying to steer regulation in any particular direction." That is your quote in your book. The President's new policy reaffirms this very Executive order you have referred to as toothless and not performing, in our opinion. Would you think what you said in your book is applicable to what happened under the Obama Administration?

Mr. SUNSTEIN. Absolutely not.

Mr. STEARNS. OK. And let me just ask my last question here. Do you see that there in tab #3 in the binder before you is the President's Memorandum of January 30, 2009, on regulatory review? In it, he directs the director of OMB to produce within 100 days a set of recommendations for a new Executive order on federal regu-

latory review. The question I have for you is, were the set of recommendations produced within 100 days of the President's directive?

Mr. SUNSTEIN. Yes.

Mr. STEARNS. OK. That completes my time, and Ms. DeGette.

Mr. SUNSTEIN. Thank you for enabling me to be brief.

Mr. STEARNS. That completes my questions. Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman. Opening statement might have been a better description. Actually on the Minority side, we would like to hear some answers to some of these questions, so Mr. Sunstein, I have a series of questions I would like to ask you.

The first one is, OIRA was created in 1980 to oversee certain agencies, correct?

Mr. SUNSTEIN. That is correct.

Ms. DEGETTE. And——

Mr. SUNSTEIN. By the Paperwork Reduction Act.

Ms. DEGETTE. Yes, and it was created by Congress. Is that right?

Mr. SUNSTEIN. That is correct.

Ms. DEGETTE. So President Obama and the Administration could not in and of themselves change the jurisdiction of OIRA—only Congress could do that, right?

Mr. SUNSTEIN. That is correct.

Ms. DEGETTE. And all of these agencies that Mr. Stearns mentioned that are exempt from the President's Executive order are exempt from it because OIRA does not have congressional jurisdiction to oversee those agencies, correct?

Mr. SUNSTEIN. The basic answer is yes, but if I could elaborate slightly, if you would permit?

Ms. DEGETTE. Sure.

Mr. SUNSTEIN. Under the Paperwork Reduction Act, OIRA does oversee the independent agencies' information-gathering requests, and actually we have taken strong steps in the last months to try to reduce paperwork burdens on the American people, including from the independent agencies.

With respect to the applicability of the Executive order, what President Obama has done is followed the practice of President Reagan, who initiated the application of the Executive order to the executive agencies because of legal and political concerns about overreaching presidential authority. Both President Bushes went along with President Reagan on that issue.

Ms. DEGETTE. OK. Thank you.

Now, I want to talk for a few minutes about an issue that I think we are going to be hearing a lot about in this subcommittee, and that is the EPA regulations. The first target that I have heard about is large industrial boilers and the EPA proposed regulation to limit the emissions of toxic air pollution like mercury, lead, and dioxin. Are you familiar with that proposed rule, Mr. Sunstein?

Mr. SUNSTEIN. Yes.

Ms. DEGETTE. And are you aware that EPA's proposed rule would potentially save thousands of lives per year and protect children from neurotoxins because the benefits are projected to be about 14 times greater than the cost?

Mr. SUNSTEIN. I don't have the exact number before me but I am aware of numbers in that vicinity in the proposed rule.

Ms. DEGETTE. Did the Administration engage in an open regulatory process in working on promulgation of that rule?

Mr. SUNSTEIN. Absolutely, and it continues.

Ms. DEGETTE. Yes. In fact, the chairman of this committee has said that there were flawed regulatory tactics, so I want to talk for a minute about the EPA process that you just referred to. After proposing the rule last April, EPA received over 4,800 comments on the proposal from stakeholders including a large amount of data from industry on the capabilities and costs of various pollution-control options. Are you aware of that data that the EPA received?

Mr. SUNSTEIN. Yes, I am aware of the sheer volume of comments.

Ms. DEGETTE. OK. And are you aware, sir, that in September, Administrator Jackson of the EPA sent a letter to Congress indicating that the EPA was going to give more time to look at this because there were so many comments that were being received?

Mr. SUNSTEIN. Yes.

Ms. DEGETTE. And are you aware that on September 7th last year, EPA asked the court for an extension of time to continue the process but the extension given by the court was only very short?

Mr. SUNSTEIN. Yes, 30 days.

Ms. DEGETTE. Thirty days. And are you aware that the EPA has suggested that if all the comments cannot be addressed in the final rule, the parties may petition the EPA to reconsider the rule and the EPA has the authority to stay the rule pending the reconsideration? Is that correct?

Mr. SUNSTEIN. I remember something very close to that, and that may be precisely what the EPA said.

Ms. DEGETTE. OK. Now, do you think that the EPA's efforts to respond to the comments on the proposed boiler MACT are in line with this Executive order that is the subject of this hearing today?

Mr. SUNSTEIN. I would say very much that the EPA's careful consideration of public comments is in line with section 2 of the Executive order.

Ms. DEGETTE. Section 2. OK. Do you think that the EPA's request for an extension was in any way an admission of failure of the regulatory process?

Mr. SUNSTEIN. No.

Ms. DEGETTE. And can you explain why you believe that?

Mr. SUNSTEIN. Well, it is perfectly legitimate as some of the opening comments have suggested to try to take account of public concerns and comments to respond to stakeholder data or stakeholder perspectives and sometimes that takes a long time. There is a tradeoff between doing things and doing things right.

Ms. DEGETTE. And finally, do you think that criticizing the EPA's efforts on this rule is consistent with calls for greater process and transparency?

Mr. SUNSTEIN. What I would say is that greater transparency is exceedingly important and the EPA's effort to take account of public comment is admirable.

Ms. DEGETTE. Thank you. I yield back.

Mr. STEARNS. I thank the gentlelady.

The chairman of the full committee, Mr. Upton from Michigan, is recognized for 5 minutes.

Mr. UPTON. Well, thank you, Mr. Chairman, and again, I want to compliment you on the hearing. As I learned when I was chairman of the Oversight and Investigations Subcommittee, we are to identify problems and then come back with legislation to fix them. I think that what is happening is that we are finding a number of agencies that are exempt from OIRA's process, and this is something we ought to look into and we ought to come back with bipartisan legislation to fix that, give this Administration and any future Administration the ability to oversee all the regulations that are there. No agency should be exempt.

I want to compliment the President on his Wall Street Journal op-ed from this last week. I think many of us here would agree with some of the comments that he made when he wrote that we have to have the proper balance. Sometimes these rules have gotten out of balance, placing unreasonable burdens on business, which has had a chilling effect on growth and jobs. We need to promote economic growth. Sometimes regulations are not worth the cost, which is just plain dumb. I think a number of us welcomed that piece.

But I want to go back to the boiler MACT regulations here for a moment. EPA, as you know, estimated that the new rules would impose new capital costs of $12.6 billion, annual costs of over $3 billion. A study by the Council of Industrial Boiler Owners concluded that the true economic costs would in fact be $113.5 billion. The rules would place some 337,000 or more jobs at risk. So as you know, on January 21st, the court rejected EPA's request for a 15-month extension to finalize the boiler MACT rules and directed EPA to issue final rules by February 21st. My first question is, when OMB cleared the proposed rules last year, did OMB have concerns about the economic impacts given the state of the economy, particularly related to the numbers that I just cited?

Mr. SUNSTEIN. Any rule that imposes significant cost, we have significant concerns about.

Mr. UPTON. Is OMB now working with EPA to make changes to bring down the costs and ensure that the final rules will not create those risks?

Mr. SUNSTEIN. The EPA said in court filings that the rule would look significantly different, the final, and we are working closely with EPA to try to put it in the best form possible, and that work will be undertaken in line with the President's Executive order, which calls for careful attention to cost.

Mr. UPTON. So knowing all the comments that have been made, all the work that has been done, particularly over this last year, the admonition in essence by EPA in December that they need 15 more months: do you believe that you can do all that work in the next 3 weeks?

Mr. SUNSTEIN. It would be premature to say exactly how much can be achieved in the next 3 weeks.

Mr. UPTON. I used to work at OMB so I know how many people are there.

Mr. SUNSTEIN. I know you did. You know how hard people work. What I would say is that engagement with affected stakeholders,

with you, with members of your staff is most welcome in the period we have, that EPA, as the earlier line of questioning suggests, is completely alert to the concerns that have been expressed about cost. The Administrator has been clear on that. And we are going to do the best we can to get it right and to keep the costs down, to take account of objections and perspectives in the time that remains, and look forward to working with you on that.

Mr. UPTON. Knowing that you have got 3 weeks to go, would OMB welcome a congressional delay to give the agency more time to do its work on the rule that EPA in essence said will take it 15 more months? It is just hard to believe that EPA says that it needs 15 more months, the court says no, you are going to do it in 30 days, and now you say that we are going to get it done in 3 weeks even though your agency initially said it would take 15 months?

Mr. SUNSTEIN. Our focus, as your question suggests, is on implementing the law, taking account of costs and concerns, and complying with the court order. That is what we are focusing on. With respect to congressional responses, that is not exactly my lane. We are going to focus hard on implementation and try to get it right.

Mr. UPTON. Last question: would you like to have more time if given an opportunity?

Mr. SUNSTEIN. We agreed with the EPA that to get more time of the length that the EPA sought was a very reasonable request. So the EPA's request to the court, we supported.

Mr. UPTON. Yield back.

Mr. STEARNS. Thank you, distinguished Chairman.

I recognize Ms. DeGette.

Ms. DEGETTE. Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

Mr. Sunstein, I appreciate your answers. The question that was just being pursued was over the boilers under the Clean Air Act. Now, let us not forget the purpose of it. The purpose of the regulation is not to cost a lot of money to business which might lead them to reduce jobs. The purpose is to reduce mercury and lead damage which when it affects our children can lead to lack of brain development. Dioxin causes cancer. These industrial boilers are the second largest source of mercury emissions in our country. So when the EPA has proposed a rule, it has to be reviewed in terms of the costs and the benefits, and at the same time under your new procedures you are trying to fine-tube it to be sure it is the least costly way for business to comply. Isn't that correct?

Mr. SUNSTEIN. Exactly.

Mr. WAXMAN. Now, I know that no one here would support duplicative and pointless regulations, but I worry a lot of what we are going to hear the rest of this hearing are not those regulations, they are going to single out important regulations. Some Republicans are even saying that we shouldn't regulate the most abusive and risky Wall Street practices, even though those practices ended up nearly driving our economy over a cliff. Regulations don't just prevent harm, they can also help our economy. And the boiler one was to prevent harm.

But there are some regulations that really are important for business. One example of that is a carbon pollution standard for vehicles issued by the EPA and the National Highway Traffic Safe-

ty Administration April 2010. I understand that these standards improve national security by reducing our dependence on oil. They reduce carbon pollution and improve public health. They save consumers a lot of money, far more than manufacturers will spend building more efficient cars. I understand that these rules will save 1.8 billion barrels of oil. Is there any other action by this Administration or its predecessors that is even in this ballpark in terms of reducing our oil dependence?

Mr. SUNSTEIN. Offhand, I don't think there is an example that is as impressive.

Mr. WAXMAN. So this regulation is to reduce our dependence on oil, and in fact, as a result of it, for the first time America's oil consumption is flat. Right now even though the DOE regularly says that our consumption of oil was going to go up, it is not increasing. We are projected to use less oil in 2020 than in 2007. So if we are concerned about oil exports propping up unsavory governments around the world, which is certainly the case, then this rule is very good news.

Mr. Sunstein, I also understand this rule will reduce U.S. greenhouse gas emissions by 960 million metric tons, reducing overall greenhouse gas pollution from light-duty vehicles by about 20 percent by 2030. How does this compare with other actions this or other Administrations have taken to tackle the climate issue?

Mr. SUNSTEIN. I think this is the prize winner on that count as well.

Mr. WAXMAN. So these benefits don't cost the consumer a thing. In fact, they save consumers money. The majority of consumers will pay less overall for running their cars. On average, consumers will save $3,000 over the life of the vehicle. You are a nationally acclaimed expert on cost-benefit analysis. Are these estimates solid? Will people really be better off with these regulations in place?

Mr. SUNSTEIN. We don't have any serious question that this rule survives cost-benefit balancing.

Mr. WAXMAN. My understanding is that these cost savings are based on assumed gas prices ranging from $2.61 per gallon in 2012 to $3.60 per gallon in 2030, and we are seeing gas prices go up. In fact, if they go up, it will produce even greater net benefits of roughly $140 to $190 billion.

Now, we talked about the benefits to our national security and the environment but the rule also benefits the auto industry because it will harmonize State and federal standards across the country, and that is why the industry strongly supported these regulations. It provided certainty for them, clear paths for innovation, and it will make their job better as they try to innovate. EPA's contribution to these standards produced benefits 30 percent higher if we just had the NHTSA portion in place. Any effort to remove the EPA standard or its statutory authority would severely undermine the benefits of this rule. This is just one example. Overall, the benefits of the Clean Air Act vastly outweigh its costs by a ratio of 32 to 1. Rather than being a drag on the economy, these critical regulations improve our lives just as they are intended to do, and that is the whole point of having regulations in the first place.

Thank you very much, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

The gentleman from Texas is recognized for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. Timing is impeccable. I am supposed to be doing a live radio interview right now; we planned it very carefully that I can't do that.

There has been an explosion of regulation and regulations issued in the first years of the Obama Administration. Quite frankly, I don't see that your organization has done anything to slow that down. I don't see that you have done anything to actually do what the existing Executive order says. What gives us the confidence to think that this new Executive order is going to be any different? Does this Executive order require or will your office require agencies to determine the net job gain or loss of past, current, or new regulations?

Mr. SUNSTEIN. OK. If I may, can I discuss the idea of explosion? Actually——

Mr. BARTON. Well, discuss it very quickly because I have only got 3 minutes.

Mr. SUNSTEIN. I will be very fast. The number of regulations issued in the last 2 years is approximately the same as the number of regulations issued in the last 2 years of the Bush Administration. The total costs of regulation in the last fiscal year are lower than the total costs of regulations in the executive agencies in fiscal year 2007.

Mr. BARTON. Just the regulations issued under the new health care law are in the thousands.

Mr. SUNSTEIN. The numbers that have been issued in the last months are not in the thousands, so in terms of finalized economically significant rules, I don't think the data supports the claim.

Mr. BARTON. But what is the answer to the question? Is this new Executive order going to require a determination by your group, your agency of the net job gain or loss of past, current, and new regulations?

Mr. SUNSTEIN. We will be focusing very much on job loss as a result of regulations. The Executive order——

Mr. BARTON. So the answer is yes?

Mr. SUNSTEIN. Well, there are some technical reasons—that——

Mr. BARTON. So the answer is no?

Mr. SUNSTEIN. Well, I am afraid that the answer to this one uniquely thus far is neither yes or no.

Mr. BARTON. Well, that is a very evasive answer, and the President is going to give you an A plus for evading a straight question.

Mr. SUNSTEIN. Well, if I can explain——

Mr. BARTON. Let me go on because I have only got 2 minutes and 39 seconds.

You are aware, I am sure you are conversant with the endangerment finding that was issued the first 90 days by the EPA Administrator?

Mr. SUNSTEIN. I am aware of it.

Mr. BARTON. Are you aware of any cost-benefit analysis that went into that endangerment finding?

Mr. SUNSTEIN. A scientific finding is not a regulatory action so——

Mr. BARTON. So the answer is, there was none?

Mr. SUNSTEIN. There couldn't be at that time. The regulatory action that followed the scientific finding was full of cost-benefit analysis.

Mr. BARTON. Do you agree that that endangerment finding if actually implemented would cost millions of jobs to the U.S. economy and hundreds of billions of dollars?

Mr. SUNSTEIN. The endangerment finding by itself costs no money and no jobs. It is a scientific finding.

Mr. BARTON. That is not my question.

Mr. SUNSTEIN. If implemented, meaning if followed by regulatory action?

Mr. BARTON. Well, if implemented, if actually put into practice.

Mr. SUNSTEIN. Well——

Mr. BARTON. Every independent analysis has said it would cost millions of U.S. jobs and hundreds of billions of dollars——

Mr. SUNSTEIN. What I will tell you is——

Mr. BARTON [continuing]. Per year.

Mr. SUNSTEIN [continuing]. what we and the EPA are determined to do and with the new emphasis in the Executive order which I am grateful for your enthusiasm for is to try to minimize burdens and——

Mr. BARTON. I have 1 minute and 13 seconds. In Monday's Wall Street Journal, an EPA spokesman was quoted as saying that President Obama's new Executive order that you are here to testify on will not affect the EPA at all. Do you agree or disagree with the attestation of the spokesperson at the EPA?

Mr. SUNSTEIN. The Executive order will affect all agencies to which it applies, including the EPA.

Mr. BARTON. So you will send a letter to the EPA and inform them that they are going to be subject to this order?

Mr. SUNSTEIN. It is clear on the face of the Executive order that the EPA——

Mr. BARTON. So the EPA spokesperson just misspoke?

Mr. SUNSTEIN. I would like to see exactly what the EPA spokesperson said, but it is as clear as day——

Mr. BARTON. It is clear as day?

Mr. SUNSTEIN [continuing]. That the Executive order applies to the EPA.

Mr. BARTON. My last question. Would you support an amendment to the Clean Air Act that would require the EPA to do a true cost-benefit analysis of any proposed regulation it proposes to implement under that Act?

Mr. SUNSTEIN. We are in favor of cost-benefit analysis of any regulatory action, and that is already required by the Executive order.

Mr. BARTON. So the answer to that is yes?

Mr. SUNSTEIN. With respect to legislative action, that is not quite my lane. We are in the implementation business. So on the general idea of cost-benefit analysis for regulatory actions, absolutely.

Mr. BARTON. Thank you. I yield back.

Mr. STEARNS. I thank the gentleman.

The gentleman from Michigan, Mr. Dingell, is recognized for 5 minutes.

Mr. DINGELL. Thank you, Mr. Chairman.

I am interested in the last question just raised. Under the Clean Air Act, EPA is required to consider first, the health implications, and second, the best and the most economic way of accomplishing that purpose. Is that right?

Mr. SUNSTEIN. It depends on the——

Mr. DINGELL. Yes or no.

Mr. SUNSTEIN. Not quite, no.

Mr. DINGELL. Oh, yes, quite, because I helped write that law.

Mr. SUNSTEIN. No. If you need more than a yes or no answer, no, that's not correct.

Mr. DINGELL. What is wrong with it?

Mr. SUNSTEIN. Under the National Ambient Air Quality Standards, cost is not relevant. It is only a scientific interpretation.

Mr. DINGELL. Dearly beloved friend, I said that the first step taken is to comply with the law and address the health care questions. The second question that is addressed is to do it in the most efficient and economic way. Is that right?

Mr. SUNSTEIN. I don't think that is quite right either.

Mr. DINGELL. I would suggest strongly you go back and take a look at it because that is the way we wrote it.

Now, let me go into some matters here of concern. OIRA is required under the Executive order to submit a preliminary plan to review rules and regulations for the purposes of modifying, streamlining, expanding, and repealing. Do you believe that 120 days is sufficient time for the agencies to conduct such a review and to prepare an appropriate plan? Yes or no.

Mr. SUNSTEIN. Yes.

Mr. DINGELL. All right. Next question. Will these plans be subject to public notice and comment requirements of the Administrative Procedure Act?

Mr. SUNSTEIN. It is not a rule so no, but we do hope to have a high degree of public engagement.

Mr. DINGELL. Well, the Administrative Procedure Act requires these things to be subject to public notice and comment, does it not?

Mr. SUNSTEIN. No, it does not apply to preliminary plans.

Mr. DINGELL. All right. Now, will the agencies be required to have a public notice and comment period for any rules or regulations that are withdrawn or repealed? Yes or no.

Mr. SUNSTEIN. Yes.

Mr. DINGELL. Given the intent to reduce federal non-security spending in fiscal year 2008 levels, do you believe federal agencies will have the funding necessary to complete the required look-back of existing rules and regulations, yes or no?

Mr. SUNSTEIN. Yes.

Mr. DINGELL. Do you believe that the agencies have the personnel resources necessary to complete the look-back and do the other things that they must do? Yes or no.

Mr. SUNSTEIN. Yes.

Mr. DINGELL. Do you anticipate that the regulatory reviews, for example, by the Department of Health and Human Services will prevent the agency from completing the rulemakings required in and hinder the general implementation of the Affordable Care Act? Yes or no.

Mr. SUNSTEIN. No.

Mr. DINGELL. Similarly, will regulatory reviews prevent the Food and Drug Administration from completing the rulemakings required in and hinder general implementation of the Food Safety Modernization Act passed by the Congress in the last session? Yes or no.

Mr. SUNSTEIN. No.

Mr. DINGELL. Thank you, Mr. Chairman. I have stayed within my time.

Mr. STEARNS. I thank the gentleman from Michigan.

Mr. Sullivan is recognized for 5 minutes. We have a vote, and we are going to continue on, and then I urge everybody to come back. We need just a couple members. So we will adjourn after this vote and then come back. We don't have a series of votes until 3:00, I believe, so we should be able to get through the hearing. I recognize Mr. Sullivan.

Mr. SULLIVAN. Thank you, Mr. Chairman, and thank you, Mr. Sunstein, for being here today.

The EPA responded to the President's new Executive order last week by saying that they were confident it wouldn't need to alter a single current pending rule. EPA's statement went on to say that in fact EPA's rules consistently yield billions in cost savings that make them among the most cost-effective in government. Do you agree with the EPA's statement on this new Executive order review rule?

Mr. SUNSTEIN. The Executive order applies to the EPA. The retrospective analysis it requires is new so the EPA will have to do something new, and it welcomes that retrospective analysis, and the various provisions of the Executive order emphatically do apply to the EPA.

Mr. SULLIVAN. So it is yes?

Mr. SUNSTEIN. Well, anything involving greenhouse gases or air pollution or water pollution, and what I would want to emphasize is the provision calling for integration and harmonization. So sometimes sectors and industries are faced with overlapping and redundant requirements, and EPA I know welcomes the opportunity and direction to try to promote greater simplicity, reduce burdens, and promote greater certainty, a point which has had a lot of emphasis in this hearing.

Mr. SULLIVAN. Do you believe that all of the pending economically significant rules before the EPA as currently drafted will yield taxpayer savings?

Mr. SUNSTEIN. I would have to look at them all to make a judgment.

Mr. SULLIVAN. Are you involved in that process, though?

Mr. SUNSTEIN. We look at them when they come over typically to our office so the ones that are in the early stages of development where sometimes the EPA won't even decide to send the rule over because it needs to do more work. We don't typically engage with the agency before they have something that they are able to submit to us.

Mr. SULLIVAN. Do you believe that all of the pending rules before the EPA as currently drafted will create jobs which we need desperately in this country?

Mr. SUNSTEIN. It would be—I do not believe that every rule that any agency is considering is likely to create jobs.

Mr. SULLIVAN. So your answer is no?

Mr. SUNSTEIN. I do not believe that every rule that the EPA is considering is likely to create jobs.

Mr. SULLIVAN. Do you disagree with the EPA then, for example?

Mr. SUNSTEIN. I am reluctant to disagree with newspaper accounts of spokespeople, so I would need to see the quotation and I would need to see what its accuracy is. It is true that a number of EPA rules have benefits well in excess of costs.

Mr. SULLIVAN. And your boss seems to think that too.

Mr. SUNSTEIN. Seems to think a number of EPA rules have benefits well in excess of cost?

Mr. SULLIVAN. No, that he is concerned about our economy and that some of these regulations might hurt jobs.

Mr. SUNSTEIN. Oh, we very much—you are exactly right, Congressman. That is our focus. That is the focus of this Executive order, to make sure that regulations are helpful to economic growth.

Mr. SULLIVAN. I hope so.

The President's new Executive order says that agencies must consider equity, human dignity, fairness, and distributive impacts in determining cost-benefit of regulations. I have no idea what that actually means in bureaucratic language but say for example your cost-benefit test imposed $110 billion in hard costs to the economy but supposedly result in a $1 trillion increase in human dignity. What does this mean, and please explain this to me as I have several companies in my district. Mr. Gardner pointed that out. They're scared to death. They really are. They bring this up all the time—town hall meetings, meetings in my office, chemical companies, Oklahoma energy companies, trucking companies. And how do I explain all this gobbledy gook and stuff that you talk about? I mean, can you break it down on simple terms for me so I can go home to Oklahoma and talk about this?

Mr. SUNSTEIN. I am extremely grateful for that question because it is very important, and I understand the concerns to which it might give rise.

Mr. SULLIVAN. There are a lot of concerns.

Mr. SUNSTEIN. Let me explain if I may.

Mr. SULLIVAN. It is the most concerning thing to this economy and business right now.

Mr. SUNSTEIN. I think it ought not to be, and let me explain why. The sentence right before the one that refers to human dignity says "quantify in the most accurate way possible costs and benefits using the best available techniques." That is a firmer statement in favor of quantification than any American President has made.

With respect to equity, here is an example. We have a rule that has been proposed that involves children being run over—this is an immense tragedy—by their own parents because there isn't visibility, they can't see behind in the cars, and we had parents begging Congress to have a law that would save hundreds of children from being killed in those accidents. This rule, which is directly implementing a statute, it is about equity. It is about children typically. I have a son myself who is not quite 2. The children are typi-

cally around that age just learning to walk and getting hit. That is about 45 percent of those who are hurt in those accidents. That is equity. That plays a role.

With respect to human dignity, we do not mean this as an all-purpose qualifier of cost-benefit analysis, which is the foundation of the Executive order. We do mean it as a recognition that if you have a regulation or a law that is helping people who are wheelchair-bound—often they are veterans, by the way—to have access to bathrooms, there is a dignitary concern there. It is about human dignity, not just about——

Mr. SULLIVAN. I understand that, but someone keeping their job is dignity too.

Mr. SUNSTEIN. Absolutely, and that is why——

Mr. SULLIVAN. It is a dignified thing to do.

Mr. SUNSTEIN. That is why job creation is in the first sentence of the Executive order.

Mr. SULLIVAN. Thank you. I yield back.

Mr. STEARNS. I thank the gentleman. We will temporarily put the subcommittee into recess until 11:35, 11:40. Coming up on the Democrat side is Mr. Gonzalez and Mr. Green, and then on our side would be Burgess and Blackburn. So I urge everybody to return.

[Recess.]

Mr. STEARNS. The subcommittee will reconvene, and the chairman recognizes Ms. Schakowsky from Illinois for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

I wanted to thank you, Mr. Sunstein, for mentioning the requirement now to have some rearward visibility in cars. Along with Republican Peter King of New York, that was my legislation that would require some rulemaking, and I am very grateful for the lives that will be saved and injuries that will be prevented because of the regulation.

I am wondering, one way to judge, I suppose, how we are doing with regulation is just to count the numbers, but I think another way would be to look at what are the net benefits of those regulations, and I am wondering if you could describe that and perhaps even compare that to prior Administrations.

Mr. SUNSTEIN. Thank you for that question. In the first year of the Clinton Administration, the net benefits of final regulations were minus $400 million. In the first year of the Bush Administration, the net benefits of regulations were minus $300 million. In our first year, 2009, the net benefits of regulations were plus $3.1 billion, and it is going to look a lot better for 2010. So our net benefits are way ahead of our predecessor Administrations.

In terms of human realities behind the numbers, which your question points to, the rear visibility rule, which hasn't been finalized yet but it has been proposed, will save hundreds of lives or serious injuries, a plurality of which occur to children. We have a rule involving salmonella and eggs which will prevent 79,000 diseases, protect Americans a number of whom would die without the rule. We have rules involving stopping distance for trucks so they don't crash into people, so they stop more quickly. This will save hundreds of lives. So we are looking very carefully at the cost side, but as your question suggests, it is sometimes worth incurring a

cost if you can save significant lives, prevent injuries, prevent diseases and illnesses.

Ms. SCHAKOWSKY. I would also like you to describe the process. Clearly, OIRA doesn't always agree with regulations that are proposed, and again, there are a number of ways to measure that but I am wondering if you could describe your process and what the effect has been when you don't agree with regulations that have been proposed.

Mr. SUNSTEIN. Thank you for that question. The OIRA process which has been built up really since President Reagan and has had bipartisan approval involves agencies' submission of rules, proposed or final, to the Office of Information and Regulatory Affairs and then we coordinate a process of interagency analysis. So different parts of the government with different perspectives and expertise will weigh in on the proposed rule, and we have a period when the proposed rule is with the Office of Information and Regulatory Affairs when we are available to members of the public including stakeholders, including Congressional staffs, who can come over to us and frequently do to weigh in on rules.

There was a reference to the return letter and the absence of one from the Obama Administration thus far. That is a nuclear option, and if you look at the practice under the Bush Administration and the Clinton Administration and the Bush Administration before, the return letter is a very rarely used tool. I think the median number in the Bush Administration certainly in its last 5 or 6 years was one or two for thousands of rules. What more typically happens is a collaborative process by which the agency responds to the concerns expressed in the review process, and in our Administration, 75 percent of the time, three-quarters of the time the rule has been concluded on, meaning approved, consistent with change, meaning in the overwhelming majority of cases when the rule is concluded on, it has been altered, not necessarily by the Office of Information and Regulatory Affairs, but as a result of the process, typically by the agency itself which sees maybe there is a less burdensome way to do it, maybe we can cut costs this way, maybe this will have less of an adverse potential effect on jobs. Also, agencies not infrequently withdraw their rules when they conclude on the basis of what they have heard that it is not appropriate to go forward, and the withdrawal is a much more collaborative and constructive approach than the return letter, and I am sure previous OIRA administrators would agree with that. We have had at last count 99 rules that were submitted to the Office of Information and Regulatory Affairs withdrawn.

Ms. SCHAKOWSKY. So the record of this collaborative effect is to actually get rid of some potential rules and to significantly change a number of them?

Mr. SUNSTEIN. Absolutely.

Ms. SCHAKOWSKY. In the very few seconds I have left, let me just associate myself with the President's remarks yesterday that he would not hesitate to enforce commonsense safeguards to protect the American people. That is what we have done in this country for more then a century, and I think that is the way we should go forward. So I thank you very much.

Mr. STEARNS. I thank the gentlelady.

The gentlelady from Tennessee, Ms. Blackburn, is recognized.

Ms. BLACKBURN. Thank you, Mr. Chairman. I appreciate that, and I thank our witness for being here. I do have about three questions that I want to move through as quickly as possible.

We have discussed these orders that have been given, and one is entitled Regulatory Flexibility, Small Business, and Job Creation. In it, the President states that his Administration is, and I am quoting, "firmly committed to eliminating excessive and unjustified burdens on small businesses." Now, this is important to me because small business is our main employer in Tennessee. So as the President states in his memo, isn't it true that eliminating burdens on small business is the purpose of the Regulatory Flexibility Act?

Mr. SUNSTEIN. Absolutely correct.

Ms. BLACKBURN. OK. Under this Act, if any agency's proposed regulation will have a—quoting from the Act—"significant economic impact on a substantial number of small entities" an agency must conduct a regulatory flexibility analysis, correct?

Mr. SUNSTEIN. That is correct.

Ms. BLACKBURN. But isn't it true that in the vast majority of cases, the agency does not end up performing that analysis because it determines that its own regulation will not have a significant impact on small businesses?

Mr. SUNSTEIN. That is correct, with the qualification that the agency's determination to that effect is subject to a public and internal scrutiny including from the Office of Advocacy, which is an important partner in the regulatory process.

Ms. BLACKBURN. Well, I would point out to you also that a GAO report showed that 89 percent of its rules were certified as not having a significant impact. This is from the time period from 1994 to 1999. So the EPA was doing the analysis only 10 percent of the time. So do you have any current data on how often agencies are making this determination and therefore avoiding the requirement to fulfill that regulatory flexibility analysis?

Mr. SUNSTEIN. I don't have a number offhand but we can——

Ms. BLACKBURN. Would you submit for the record?

Mr. SUNSTEIN. Absolutely.

Ms. BLACKBURN. OK. Also in the memo regarding small business, it directs agencies to give, quoting, "serious consideration to reducing burdens on small businesses only in those cases where the agency is conducting a regulatory flexibility analysis," correct?

Mr. SUNSTEIN. That is correct.

Ms. BLACKBURN. But since these agencies rarely do it, it sounds like this memorandum won't really have much impact on small businesses. Do you agree with that?

Mr. SUNSTEIN. No, that I don't agree with, and you can just see in the last week two rules from the Occupational Safety and Health Administration have been withdrawn in order to engage with small business.

Ms. BLACKBURN. Do you make the determination that withdrawing those has a potential impact on small businesses' ability to conduct business?

Mr. SUNSTEIN. I don't personally make a determination that the withdrawal will have a positive impact but the Department of Labor——

Ms. BLACKBURN. But, sir, you are our witness today.

Second question that I'd like to go to with you. One of the protections for small business found in current law is the Small Business Regulatory Enforcement Act, and under that Act, EPA and OSHA must notify the SBA before publishing the regulatory flexibility analysis for a proposed rule so that an advocacy panel, which you just mentioned, can be convened to review it and provide feedback on its impact on small business. Recently, the new governor of Tennessee, Bill Haslam, issued a 45-day freeze on all new regulations and rules as part of a top-to-bottom review to fully understand new burdens being placed on businesses in our State. Regulatory reviews like the one that Tennessee is undergoing are important because States and small businesses are concerned that agencies are ignoring their feedback and the feedback that comes from the advocacy panel. I do think this is a problem that you all have and needs to be addressed. Here is an example. The EPA did not follow the recommendation of the advisory panel with respect to the boiler MACT rule, instead issuing a standard that many small businesses feel and have spoken out on that it is impossible to satisfy regardless of the cost. So who reviews the agency's decision with respect to how it considers the panel's advice? Does OIRA do that? What is the role here?

Mr. SUNSTEIN. We participate in that. There is a group, we participate in that, and you can be confident given the recent Presidential Memorandum and Executive order, and not just that, but concrete actions in the recent past that the concerns of small business will be very much taken into account.

Ms. BLACKBURN. Your consideration of it, do you consider it to be objective or subjective?

Mr. SUNSTEIN. Consideration of the significant impact on a substantial number?

Ms. BLACKBURN. Yes.

Mr. SUNSTEIN. To the best of our ability, that is an objective determination.

Ms. BLACKBURN. I have other questions. I will submit them to you in writing and ask for your timely response in writing.

Mr. SUNSTEIN. You will have that.

Ms. BLACKBURN. Thank you, sir. Yield back.

Mr. STEARNS. Mr. Green is next. Mr. Green, you are recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Sunstein, some of the regulations that raise the most ire of my Republican colleagues are regulations that are designed to implement the new health care reform law. In fact, you have to have regulations to implement a law typically. I am trying to think of an example that you don't. But Republicans have voted to repeal the entire law but a close look at these regulations shows that they will make insurance better and less expensive for patients for companies that provide workers with their insurance. On November 22, 2010, the Obama Administration issued a regulation implementing the medical loss ratio provision of the Affordable Care Act. This

regulation will make the insurance marketplace more transparent and make it easier for consumers to purchase plans that provide better value for their money. The guts of the regulation require that insurance companies provide more value for their premium dollar by actually spending your health insurance costs on health care. Such a novel issue for a health care company, I think, and to have a regulation that actually requires that, and not inflated administrative costs or excessive executive salaries. Mr. Sunstein, do you think that these rules would establish greater transparency and accountability for insurers, that they will guarantee Americans receive more value for their premium dollar and they will even give more Americans a rebate of some of their insurance premiums? Now, again, without the regulations that law would not be effective. Is that correct?

Mr. SUNSTEIN. That's correct.

Mr. GREEN. These all seem like they are good people who need health insurance. Isn't there a good example of regulations helping consumers, for example? Another regulation put in effect as a result of the health care reform law is the so-called grandfathering clause. This rule protects the ability of individuals and businesses to keep their current plan. It provides important consumer protections that give Americans rather than insurance companies control over their own health care. And it provides stability and flexibility to insurers and businesses that offer insurance coverage as the Nation transitions into a more competitive marketplace in 2014.

My question is, let me ask you about this rule. Isn't there a good example of regulations helping consumers and providing certainty for businesses?

Mr. SUNSTEIN. Absolutely that is a good example.

Mr. GREEN. Can you give us any insight here where there have been so many attacks on commonsense regulations that help consumers? Again, this is something that we have it in the law, and if the Administration didn't promulgate the regulations, I think you would not be doing your job.

Mr. SUNSTEIN. Well, we have a rule that has been issued that is going to help consumers make choices about tires by giving information—it is not a mandate, it is not very expensive—about safety, fuel economy and durability, and that is part of consumer protection providing information so that people can make their own choices.

Mr. GREEN. There are rules, and these are good examples of how regulations can actually help the American public and our constituents. They give Americans better value for their health insurance dollar and give businesses certainty about the insurance that they are paying for for their employees. It would seem like we should be cheering those kind of regulations instead of saying no, we want to abolish them. Now, we can take votes up here and you are not involved in that, but if you are not promulgating the regulations, again, the Administration would not be doing their job, and that is true whether it is President Obama, President Bush, President Clinton, or all the way back to President Reagan that promulgated regulations that was the intent of the law. Is that correct?

Mr. SUNSTEIN. Yes. Our first obligation is to respect the law.

Mr. GREEN. Thank you.

Mr. Chairman, I have no other questions but I would be glad to yield my 1 minute left to our ranking member.

Ms. DEGETTE. Thank you for yielding.

Let me just follow up on a couple of questions or maybe one. Mr. Sunstein, you were asked earlier about the direction in the Executive order to consider values that are difficult to quantify like human dignity. Can you elaborate for about 40 seconds on the intent of this direction?

Mr. SUNSTEIN. Yes. The idea is to recognize that under the law as the previous question suggested, human dignity is sometimes something that agencies are supposed to consider. Just this week, the Department of Justice issued a rule involving rape, and in the analysis of the rule the agency paid careful attention to monetizable costs and benefits. That is very important, but it recognized that the act of rape involves an assault to human dignity and it is not reducible just to numbers.

Ms. DEGETTE. Thank you.

Mr. STEARNS. Dr. Burgess is recognized for 5 minutes.

Dr. BURGESS. Thank you, Mr. Chairman.

Mr. Sunstein, we were all grateful when the President signed an extension of the sustainable growth rate law in December, but I think as we all recognize, access for our seniors to physicians of their choice is being adversely affected by what we know of as the sustainable growth rate formula, the formula by which Medicare pays physicians. Now, is it the President's intention to follow through on his promise that this formula abnormality be fixed in this 13-month time interval that we have given ourselves?

Mr. SUNSTEIN. I greatly appreciate the questions. It is a bit out of my domain as OIRA Administrator but——

Dr. BURGESS. You do work in Office of Management and Budget, correct?

Mr. SUNSTEIN. I do.

Dr. BURGESS. Is it likely to be in the President's budget request to Congress that there is some type of relief on the sustainable growth rate formula?

Mr. SUNSTEIN. I would have to defer to the director of the Office of Management and Budget lacking clarity on the right answer to that one.

Dr. BURGESS. Do you have a sense whether it is the President's commitment to follow through on this?

Mr. SUNSTEIN. My belief is that anything the President has made a commitment to, he is likely to follow through on.

Dr. BURGESS. Well, as you know, I mean, the price tag for this varies depending on who you talk to, but you get figures from $200 billion to nearly $400 billion over the 10-year budgetary cycle. Do you have an idea, a sense as to what programs the President is looking at cutting or replacing in order to come up with this figure?

Mr. SUNSTEIN. Actually on the budgetary side, there is an army of people who are working and that is not a side that the Office of Information and Regulatory Affairs works with at that level of detail. So in particular budgetary requests, we are respecting the workload of others.

Dr. BURGESS. Perhaps we can get that information from another source. But I do want you to understand that the Administration

has made a commitment on this and America's doctors are looking to the Administration to fulfill that commitment.

On the issue of regulations, there was an entirely new federal agency that sprang up like mushrooms after a spring rain after the health care law was signed, and this was the Office of Consumer Information and Insurance Oversight. I talked to some of the people who were at the head of that agency in the fall and they could not identify for me where the authorization language existed in the Patient Protection Affordable Care Act for that new federal agency. I asked if there were not other areas of HHS that might do this same activity, and they said oh, no, this is an entirely new activity that we will be undertaking. Never before has the Federal Government regulated private insurance on a national level. That has always been left up to the States. So in this new climate of regulatory reform, is this a good idea to be going in this direction?

Mr. SUNSTEIN. As I say, the lane of the Office of Information and Regulatory Affairs is relatively narrow so issue of organization within HHS or DHS or others——

Dr. BURGESS. Let me interrupt you. Never mind that, because they actually have reorganized since we started asking questions and it is now in a different part of HHS, but just overall, if we are looking at a new climate of perhaps easing some of the regulatory burden, your words, not mine, is it a good idea to be instituting an entirely new federal agency that will perform this function?

Mr. SUNSTEIN. What I would say in the spirit of the Executive order just signed is that any decision with respect to regulation should be connected with the principles that the President has laid out, and that includes structural decisions.

Dr. BURGESS. Well, of course, it would have been helpful if we could have had those individuals in front of us for an oversight hearing during the fall. We were not permitted to do that. I suspect we will be now under Chairman Stearns' leadership. But again, in the interest of this new climate of regulatory reform, it seems like this is something where your office should take a direct interest. I mean, we are told, for example, that you can't sell insurance policies over State lines because that has always been a State regulated function and yet this individual is telling me that for the first time there is now going to be a national regulation of private insurance that has never existed in this country before. If that is OK, then maybe it is OK that we sell insurance across State lines, that that may be a logical follow-on that perhaps we should explore. But from the regulatory side, I do hope that your agency will take at least some passing interest and have some curiosity into this new agency that has been set up and now been absorbed into CMS but it is still there. The purpose is still there.

Mr. SUNSTEIN. I appreciate it.

Mr. STEARNS. I thank the gentleman.

Mr. Weiner from New York is recognized.

Mr. WEINER. Thank you. Let me begin by congratulating you, Mr. Chairman, on this hearing. You are showing you are running a very efficient, quick hearing, so quick in fact that it is uncontaminated by actual testimony from the witness in most cases.

We are learning a little bit about this Congress, which is that we have lurched so quickly into a very successful campaign by my Republican friends that all of the slogans are just being transplanted. We are having committee hearings and we are starting to see the slogans don't really hold up. For all this talk about excessive regulation, the first thing that Mr. Issa, a chairman of another committee, says is, hey, guys, tell us if there are any regulations you don't like because we don't know any. We hear my colleagues, particularly some of my freshmen colleagues, talk about how small businesses always tell me about regulations and how bad things are. Well, let us take a look at the record. The record is that the Dow Jones has had a better year than they have had any time in the last 12 years, that we have now businesses sitting on over $1 trillion of cash that they have done pretty well with, that we have now created more private-sector jobs in 2 years of Obama than 8 years of President Bush. So this whole idea of, my goodness, the crushing regulations, and then the first exchange between Chairman Stearns and Mr. Sunstein was interesting. He asked a question or postulated something. Mr. Sunstein rebutted it and then he returned and said well, let us assume I am right. Well, OK, we can do that, or we can actually listen to the evidence. There are no more regulations in these 2 years than there have been in the past 2 years.

But let me just ask, perhaps to put into context, this idea of regulation. No one likes bad regulations but regulation to try the price on it is kind of a hard thing to do. For example, when there was this big effort on the part of financial services companies to change the capital requirements to allow them to keep less capital, have more debt on their books, they said that this regulation was costing us an enormous amount of money. Well, I am curious. How do you calculate the cost of easing that regulation? Well, you have to count the TARP fund, 750-some-odd billion dollars, but how do you count the pain that it causes some person who did nothing wrong, whose home is not foreclosed, who is not underwater but lives on a block now with five foreclosed homes because capital requirements weren't lived up to? How do you count that? Let us assume each house is a $200,000 house. You can say well, there is the $200,000 home that is foreclosed on but how do you assess the value to the community that has lost the tax base? How do you assess the value of that homeowner who did nothing wrong, who took out no extra loans but now whose property value has plummeted 75 percent? How do you say to the rest of the economy that small business guy that because the bank has gone under because that requirement has been eased, now he can't get a loan?

The fact is, ladies and gentlemen, that these regulations are in place and they seem so onerous and burdensome sometimes but what they are intended to do is stop real damage to our economy. The very same Wall Street people who advocated for the lessening of the net capital rule are the ones who are now unemployed. They thought they were doing a great, smart thing, advocating to loosen that rule. We did it, and now their company, Bear Stearns, doesn't exist. Now, would you rather have a small regulation and have a beautiful company that is employing lots of people and giving loans or get rid of that burdensome, onerous regulation that requires this

silly thing like they keep enough money in their bank before they start giving loans? Would you rather have a regulation that says all hospitals have to have electronic recordkeeping so they can share information or do you want to try to figure out the cost that it is when someone is given the wrong drug and goes into seizure? Yes, it may cost a little bit more money to have these regulations in place, but if you are really going to do the mathematic calculation that Mr. Stearns alluded to and others have alluded to, how exactly do you do that? I think it would be helpful, Mr. Chairman, for us to have a hearing on exactly how it is you assess these costs. Let us see how much the cost is on having a lead in toys regulation. Let us see. How do you figure out the cost of brain cancer in a 6-year-old as opposed to a 3-year-old? Huh. Let us put that in a ledger and see how that works out. But the regulation is so burdensome and onerous. Well, to that family, that is the difference between their child having a lifetime illness and not, you know what? That regulation seems OK. Maybe it is not so bad for a toy company to have to not put lead in their toys.

So if we are really going to do the math, I think we should have a hearing here perhaps when Mr. Sunstein can come back. He clearly has a lot he wants to get off his chest, and I am not giving him much opportunity here either, but let us really see what that ledger looks like and let us be honest about it. Let us get past the campaign rhetoric.

Mr. STEARNS. Ms. Myrick is recognized for 5 minutes.

Mrs. MYRICK. Thank you, Mr. Chairman.

I wanted to go back to the NHTSA rulemaking, and I am going to ask you to submit some of this for the record because I have got another question and I will be out of time, so I appreciate it.

The proposed rulemaking that does say, rear visibility system and then cameras inside the car, etc., supposedly what I have been told is that the accidents that did happen were in large trucks and SUVs and vans, bigger vehicles, where the rule says it has to go in every car, and my question on the cost-benefit analysis again, believe me, I don't want children to lose their lives and there is nothing more unimaginable than losing a child, and if we can save millions of lives, I support saving millions of lives. But when you look at the change that the Administration says they want to do in the rulemaking and try and put cost-benefit analysis into it, the NHTSA's own modeling that they use says that it isn't cost beneficial to do it.

And then the other question is, if you do put this across the board to all the cars, does it raise the price of the cars to a point where people can't buy them and then you have still got accidents because they don't have availability? So for the sake of time, if you would be willing to answer that for me to submit for the record, and then also, did you have consultation with NHTSA before this happened, I mean, before the proposed rulemaking on the——

Mr. SUNSTEIN. Yes.

Mrs. MYRICK [continuing]. Cost benefit?

Mr. SUNSTEIN. Always with rules, we review the proposed rules before they go out.

Mrs. MYRICK. Thank you. My next question is on billion-dollar costs to the economy on rulemaking. I know you were asked by

Speaker Boehner and some other House members last year to tell them how many billion-dollar rules the Administration is preparing, and they didn't receive any answers to my knowledge, which has caused a lot of uncertainty in the business community. I know Mr. Weiner says everybody is doing wonderful but the reason they have got that cash setting aside is because they are afraid to invest it, not knowing what regulations are going to come down the pike. So, do you have an answer today? Can you tell us how many billion-dollar rules that you are planning?

Mr. SUNSTEIN. I can tell you how many billion dollars we have done, and it is a very small number. Planning, as our discussion suggests thus far, requires the process of interagency review, public review, cost reduction, so the number of rules that are planned in any strong sense that cost over $1 billion is very hard to specify. Often they are rules that are under discussion but they weren't really planned and they might come in like a lion and go out like a lamb.

Mrs. MYRICK. But perhaps we can get back with you on that later after a couple months or so.

Mr. SUNSTEIN. Yes.

Mrs. MYRICK. The other thing that I wanted to ask is, when you look back on the regulations that have been issued during the Administration, can you identify any in which it has been determined that the benefits have not justified the cost? Do you have that kind of analysis that you could share with us?

Mr. SUNSTEIN. Yes. There is only one big one that comes to mind. It is called Positive Train Control, and it is a statutory requirement, and the Department of Transportation had to issue it as a matter of law even though the monetizable benefits are lower than the monetizable costs. There aren't a lot like that.

Mrs. MYRICK. Would you be willing to submit again for the record?

Mr. SUNSTEIN. Unquestionably.

Mrs. MYRICK. I would appreciate a full answer and explanation on that particular situation.

With that, I yield back the rest of my time, Mr. Chairman.

Mr. STEARNS. I thank the gentlelady.

The gentleman from Massachusetts, Mr. Markey, is recognized.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

So we all know what the reality of this hearing is. The Republicans hope that they can use the Regulatory Flexibility Act to turn the United States into a health, environment, safety, and consumer protection regulation-free zone, and the presumption is that regulation is bad. But obviously that is not necessarily the case. For example, we have heard a lot about how EPA's efforts to regulate global warming pollution will lead to an economic catastrophe but this is just not borne out by the facts.

Before the Obama Administration's global warming regulations for cars and SUVs were announced in 2009, the auto industry in this country was literally in the tank before the regulations were in fact promulgated. More than 300,000 jobs lost, two American companies in bankruptcy and consumers no longer willing to buy the gas-guzzlers that the domestic automakers had bet the bank on. And what has happened since the regulations were announced?

Well, in 2010 auto sales went into overdrive and soared more than 11 percent, snapping the industry out of its 4-year decline. Companies were rehiring thousands of workers, and there has been a proliferation of new companies that plan to make and market electric vehicles and other advanced vehicles. So this Groundhog Day recitation of how regulations will destroy the economy and jobs has already been shown to be flat-out wrong.

So I have some questions about EPA's future global warming regulations that perhaps you could help me with, Mr. Sunstein. Will regulations that seek to limit global warming pollution from power plants or refineries also take into account the increase in jobs that could result from the development and installation of new clean energy technologies?

Mr. SUNSTEIN. Yes.

Mr. MARKEY. Yes. Isn't it true that regulations to curb dangerous air pollutants could result in quantifiable cost savings in the form of medical expenses that won't be incurred or environmental damages that won't need to be mitigated?

Mr. SUNSTEIN. Yes.

Mr. MARKEY. Installing pollution control technologies on power plants could also lead to increases in the efficiency of the facilities and significant cost savings for companies. Will you be quantifying these and other benefits as part of any regulatory analysis?

Mr. SUNSTEIN. These are not multiple-choice questions, and the answer is yes.

Mr. MARKEY. Thank you. The EPA recently announced that it would only issue its proposal to regulate global warming pollution from refineries and power plants after meeting with business leaders and other stakeholders to solicit their input. Is this consistent with the President's Executive order requiring agencies to seek the views of those who might be impacted by regulations before proposing them?

Mr. SUNSTEIN. Under section 2, absolutely.

Mr. MARKEY. EPA has also issued a rule that ensures that millions of smaller sources of global warming pollution are exempted from a requirement to obtain Clean Air Act permits and that the requirements for medium and larger emitters would be phased in over a period of several years. Is this consistent with the President's requirement that regulations take the special needs of small businesses into account?

Mr. SUNSTEIN. Yes.

Mr. MARKEY. Are EPA's actions also consistent with the President's Executive order requiring agencies to promulgate regulations that impose the least burden on society and maximizing the net benefits to society?

Mr. SUNSTEIN. That was the goal of the PSD tailoring rule.

Mr. MARKEY. Thank you. EPA recently proposed a rule to regulate air emissions from cement kilns. In its analysis, EPA found that the health benefits of the rule would yield between $17 and $18 for every $1 in cost. Do you think that this sort of return on a regulatory investment is a good one?

Mr. SUNSTEIN. It sounds like it would be a very good investment.

Mr. MARKEY. Historically speaking, have industries typically overestimated the costs of new regulations?

Mr. SUNSTEIN. That is frequently the case.

Mr. MARKEY. Now, for the cement kiln rule, EPA didn't even consider the benefits of reducing emissions of hazardous substances like lead, chromium or arsenic. Historically speaking, have agencies typically underestimated the benefits of new regulations?

Mr. SUNSTEIN. Often they have. We need to be very systematic and not answer the question typically.

Mr. MARKEY. I thank you for that precision in your answer, but I think the larger point is true, that our lives are longer and safer and better because of a regulatory scheme that began to be put in place in 1900. Average age of death in the United States in 1900 was 48 years of age. These regulations that have gone on the books from the Garden of Eden until 1900, 48 years of age, now it's 79 years of age, 31 bonus years. Something happened in the last 100 years and we exported it around the world that we got all those extra years, and a lot of it is protecting the health, the safety, the environment and ensuring that those regulations are there to protect everyone, not just the wealthy, which is what the first 5,000 years of humanity was really focused on.

I thank the gentleman.

Mr. STEARNS. I thank the gentleman. The gentleman is very active and interested in baseball, and in this case he has offered Mr. Sunstein a lot of softball questions.

Dr. Gingrey for 5 minutes.

Dr. GINGREY. Thank you, Mr. Chairman.

Mr. Sunstein, obviously it would appear on the Democratic side of the aisle that all regulations and regulatory regimes are good and they are suggesting that on our side of the aisle they are all bad when obviously it is somewhere in between, and really the purpose of this hearing and your testimony, we want to glean the truth because clearly some regulatory rules are bad, and in regard to the issue of human dignity and consumer protection, let me reference last year the Administration included an end-of-life Medicare payment rate for physician services in its final rule at literally the last minute without allowing for a period of public comment. Only after a large public outcry did the Administration own up to its actions and indeed reversed itself.

Section 1 of the President's recent Executive order states that our regulatory system, and I quote, "must allow for public participation and an open exchange of ideas." I want a yes or no answer. In your opinion, did the Administration allow for public participation in the crafting of this regulation as spelled out in section 1 of the Executive order? Yes or no.

Mr. SUNSTEIN. As the repeal of the original rule suggests, the judgment of HHS was that there had not been an adequate opportunity for public comment.

Dr. GINGREY. So the answer is no?

Mr. SUNSTEIN. Yes.

Dr. GINGREY. Thank you. Another yes or no question. Do you or OMB know who in the Administration made that decision to not allow public participation, instead slipped this regulation into the rule in the dark of night? Yes or no?

Mr. SUNSTEIN. I don't personally know.

Dr. GINGREY. OK. Another yes or no. Do you know which individuals within the Administration would have the authority to slip a regulation into a final rule in the dark of night without allowing for this public comment?

Mr. SUNSTEIN. I don't think anyone has that authority.

Dr. GINGREY. So the answer is?

Mr. SUNSTEIN. No, I don't know. There are people—the Secretary of HHS has considerable authority over her rules and she does not slip things in in the dark of night.

Dr. GINGREY. Well, it certainly does appear that the Administration purposely avoided obtaining Congressional approval for an unpopular regulation that they could not sell to the American people last Congress. So instead, the measure was inserted into this morass of regulations in the hope that no one would notice. Do you believe that the American people deserve to know why they were not allowed to publicly view this regulation before the Administration published it? Yes or no.

Mr. SUNSTEIN. I think the American people deserve to see the content of rules before they are finalized.

Dr. GINGREY. So the answer is yes. Thank you. Again, would this recent Executive Order 13563 prevent the Administration from enforcing a regulation without allowing public participation in the future?

Mr. SUNSTEIN. That is correct.

Dr. GINGREY. Can you assure us here today, Mr. Sunstein, that this Administration will not attempt such an illegal end run in the future? Yes or no.

Mr. SUNSTEIN. Yes.

Dr. GINGREY. Thank you. And finally—and I will yield back some time, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

Dr. GINGREY. If the witness would answer this last question? Would you agree this shows how regulations can make unpopular actions possible without Congress having to support political risky positions? Yes or no.

Mr. SUNSTEIN. Well, if I have to answer yes or no, I would answer yes to that one.

Dr. GINGREY. Thank you. You have been a great witness, and I will yield back to the chairman.

Mr. STEARNS. I thank the gentleman, and now we will move on to Mr. Scalise, who is recognized for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman, and Mr. Sunstein, I appreciate you coming before the committee.

I want to start asking about regulations regarding oil and gas drilling operations, and I think you touched on some of that but does OMB actually go and review the rules from the Department of the Interior concerning oil and gas regulations?

Mr. SUNSTEIN. If they are significant regulatory actions, yes. So it depends on their nature but some of them, the answer is yes.

Mr. SCALISE. OK, some of them. When the Department of the Interior came out with the moratorium on drilling, did you review that?

Mr. SUNSTEIN. No, that wasn't a regulatory action within the meaning of Executive Order 12866 so we did not review the moratorium.

Mr. SCALISE. At least that is your feeling that it wasn't?

Mr. SUNSTEIN. No, it is just, it doesn't fit easily within the definition of a significant regulatory action.

Mr. SCALISE. Why would you not think that would be significant, the President literally shutting down an entire industry?

Mr. SUNSTEIN. OK, I——

Mr. SCALISE. And which cost billions of dollars.

Mr. SUNSTEIN. I completely understand appreciate the question. The answer is somewhat technical, which is the foundation for authority is rules within the meaning of the Administrative Procedure Act. A moratorium isn't a rule within the meaning of the Administrative Procedure Act. We do extend review somewhat beyond that significant——

Mr. SCALISE. When you look at—I will just bring you back to President Clinton's Executive Order 12866, which is still in effect and part of your department's purview. If it has an annual effect on the economy of $100 million or more or more adversely affects in a material way, I mean, we are talking about a major policy decision that had an impact on well over $100 million and in fact is one of the reasons that we are seeing the price of oil approach $100 a barrel. Would you consider that first of all a major economic impact of $100 or more?

Mr. SUNSTEIN. Yes, though the "it" which is the reference is to regulatory actions, as I mentioned, and that is a term of art under the Executive order. The moratorium didn't quite fit under that.

Mr. SCALISE. And I would reference you to also go back and look at the federal judge's ruling, who felt that the Department did go outside of their purview——

Mr. SUNSTEIN. That is correct.

Mr. SCALISE [continuing]. In issuing that, and I would be curious to see what your relationship with those reviews was, and I would be surprised if you didn't feel that it was something that your department should have had review over. As it relates to the current regulatory scheme, are you in review of those rules?

Mr. SUNSTEIN. Yes. Anything that counts as a rule under the Administrative Procedure Act, absolutely, significant guidance documents and interpretative statements under March 2009 memorandum by the director of OMB, we review this also.

Mr. SCALISE. Is it true that the Department did not perform a regulatory flexibility analysis regarding its impact on small businesses?

Mr. SUNSTEIN. I don't recall the answer to that one. What are——

Mr. SCALISE. I will help you. This is from OMB. This is an OMB document that actually says that the oil and gas operations on the Outer Continental Shelf, the actions that they took did not require—according to your office, did not require—flexibility analysis.

Mr. SUNSTEIN. Are you referring to the moratorium or are you referring to a rule?

Mr. SCALISE. Their increased safety measures, as they referred to them.

Mr. SUNSTEIN. Oh, OK. Well, if it is a rule, then there has to be an analysis to that effect, and my recollection is that the small business impacts were not significant enough to require that analysis.

Mr. SCALISE. And who is that based on?

Mr. SUNSTEIN. That is based in the first instance under the Regulatory Flexibility Act on the judgment of the relevant department.

Mr. SCALISE. So you just take their word for it if they say it won't have $100 million impact? Clearly, and I will just run you off some numbers that the White House has actually confirmed. It has cost up to 12,000 jobs that our economy has lost because of that action. It has cost about 12 percent of our current U.S. oil production and about $70 billion of investment which there have been a number of private research that has been done to show that, $70 billion, so you just took their word that it wouldn't cost over $100 million?

Mr. SUNSTEIN. OK. If you are referring to the moratorium, as I say, that was not subject to our review under our Executive order. If you are referring to some rules that we have had——

Mr. SCALISE. The overall rules.

Mr. SUNSTEIN. Well, the moratorium is distinct from the rules. I don't believe, though I might be wrong on this, that the rules are anticipated to have significant adverse job impacts. One of them is——

Mr. SCALISE. Well, it already has. I mean, that has been documented by the White House, so when you come out with flexibility analysis, and you determine or you take their word that they don't need to do one under the law——

Mr. SUNSTEIN. No. I said in the first instance, which is a very important qualification, we do not take their word as authoritative and we engage with the Office of Advocacy and the Small Business Administration very carefully.

Mr. SCALISE. And I would like to get any kind of documentation, e-mails, correspondence that you had with them in relation to these rules and the determination not to do a flexibility analysis by your department because that was a ruling that your department——

Mr. SUNSTEIN. I believe you are referring, though I am not sure, to the moratorium, which, as I say, we didn't review. If you are referring to the rules, then we did review at least two——

Mr. SCALISE. And did you review——

Mr. SUNSTEIN [continuing]. With full analysis of costs and benefits.

Mr. SCALISE. Did you review the 30-day safety report that the President's own scientific commission—because one of your challenges or your tasks is to base this on science, and his scientists actually said it would reduce safety in the Gulf. The scientists said it would reduce safety in the Gulf to impose the moratorium. That was in the 30-day safety report that came out.

Mr. SUNSTEIN. The 30-day safety report isn't a regulatory action subject to formal OIRA review.

Mr. SCALISE. Right. But it was doctored by, from every report we have gotten from the climate czar, who is conveniently leaving, but that document was doctored to imply that the scientists said that the science backed it up when in fact the scientists said it actually

would reduce safety to impose that, and that is what the Department of the Interior used as the basis. So do you look at any underlying documents? If a department says we are going to make a rule and we are going to base it on underlying documents, do you look at those underlying documents?

Mr. SUNSTEIN. I was about to say I am very grateful that is not a yes or no question, but it ended up being a yes or no question. If it is not a regulatory action, then we don't have formal review though there may be some participation by some of OIRA's staff. Our lane is the lane of regulatory action with central feature being rules. Reports of that sort, we may have some informal——

Mr. SCALISE. And I know I am out of time, but the regulatory actions are costing jobs in the thousands right now.

Mr. SUNSTEIN. That is——

Mr. SCALISE. That is something we will have to follow up on.

Mr. SUNSTEIN. That is so appreciated, and at the core of the small business memorandum and the Executive order is insistent focus on job creation.

Mr. SCALISE. Thank you, Mr. Chairman. I yield back.

Mr. STEARNS. Mr. Scalise asked for some documents. I think you might provide him, at his request, with some of those documents.

Mr. Gardner is recognized for 5 minutes.

Mr. GARDNER. Thank you, Mr. Chairman, and thank you, Mr. Sunstein, again for your testimony before this committee.

I just want to talk a little bit about how something is reviewed under these Executive orders and hoping to have you help me understand what takes place. Could you explain briefly how your office would review a regulation under Executive Order 12866 and what are the key components of your review?

Mr. SUNSTEIN. OK. Thank you for that. What we would do first is explore with other agencies which are going to see the rule whether the requirement of consideration of alternatives has been met, whether the agency has done a careful analysis of costs and benefits, whether the agency has justified its reasoned determination that the benefits justify the cost, whether the agency has shown that there is a compelling reason for federal action, whether the agency has considered reliance on the market, reliance on State authority, as some of the earlier questions suggested——

Mr. GARDNER. So it is safe to say that there are basically three core components where you identify and assess available alternatives to direct regulation dealing with alternative forms of regulation and of course getting to impose the least burden on society including individuals and businesses?

Mr. SUNSTEIN. Yes, and we recently issued a checklist that basically puts in a page-and-a-half our essential inquiries.

Mr. GARDNER. So if you take a real-world example of the EPA and greenhouse gas regulations, how did your office use those requirements when carrying out that rule review?

Mr. SUNSTEIN. Well, the most costly of the greenhouse gas rules is the one that there is considerable enthusiasm for, which is the fuel economy rule, and what we did for that one was to investigate the costs of the rule, the benefits of the rule, to think of what alternatives there are in terms of stringency, to consider what kind of flexibilities might be provided for small business and others, to en-

sure that there was full public participation so that people could comment on the options, and to try to come up with the approach that maximizes net benefits.

Mr. GARDNER. And 12866 also says that the underlying analysis of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation identified by the agencies or the public, it goes on to say, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. Did the EPA provide and did you review an analysis of the reasonably feasible alternatives——

Mr. SUNSTEIN. Yes.

Mr. GARDNER [continuing]. For the endangerment finding and the subsequent greenhouse gas regulations?

Mr. SUNSTEIN. Yes. That is laid out in great detail in the regulatory impact analysis and it is also in the preamble to the rule.

Mr. GARDNER. And what alternatives then did the EPA provide to you?

Mr. SUNSTEIN. The EPA and NHTSA discussed different levels of stringency and explained that a more stringent approach would run into serious concerns about feasibility and cost.

Mr. GARDNER. And that was your evaluation of each as well?

Mr. SUNSTEIN. We concurred with the evaluation. We thought it was a very reasonable evaluation.

Mr. GARDNER. The testimony that we have heard today from members of the committee as well as our colleagues on the other side of the aisle seemed to, as the gentleman from Georgia stated, be an extreme left to the right. What am I supposed to tell my constituents when it comes to those who come to me and say these regulations are costing me jobs? I mean, are they wrong? Are they wrong that this is costing them jobs? Do they not know what they are talking about?

Mr. SUNSTEIN. Well, we need to know what regulation it is, but I think the first thing you should say to them, as reflected in your opening remarks, is that there are two sets of concerns. One is about fear of what is coming and the other is trouble caused by what is there. On fear of what is coming, you have a very strong signal from the President of the United States with respect to small business in particular, and that is a document——

Mr. GARDNER. So they are just fearful?

Mr. SUNSTEIN. Well, that is not all. I am using your words. And that is a legitimate fear that regulation can be harmful. So you asked what should you say to your constituents. I think you can say that both your subcommittee is on this issue and the President of the United States and the Administrator of the Office of Information and Regulatory Affairs share this concern, and with respect to fear of what is coming, we want to work directly with you to make sure things are going right rather than wrong.

Mr. GARDNER. So will you then make the commitment——

Mr. SUNSTEIN. Let me say with respect to the current regulations, I am very glad you introduced that because the president has called for a look-back at existing regulations that cause trouble, and you can find things in the very recent past where agencies actually have looked back, including the EPA——

Mr. GARDNER. Who triggers the look-back? Who does that?

Mr. SUNSTEIN. The look-back is a process that the Office of Information and Regulatory Affairs is helping to coordinate.

Mr. GARDNER. So you will request the look-back of the agency?

Mr. SUNSTEIN. Well, the President has requested the look-back.

Mr. GARDNER. But you will request to the regulatory agency what rule to review?

Mr. SUNSTEIN. They have to submit plans to us within 120 days, and we will work closely with them to figure out what the——

Mr. GARDNER. But looking back, you will request those rules that are already in effect?

Mr. SUNSTEIN. We will be participants in the process of figuring out what to look back on. I hope you will be a participant also.

Mr. GARDNER. Will you make a commitment today then during this time of economic crisis that you will use your power to make sure that the Administration doesn't put its stamp of approval on any regulation that costs American jobs?

Mr. SUNSTEIN. Well, what I would say if there is——

Mr. GARDNER. That can be a yes or no question pretty easily.

Mr. SUNSTEIN. A yes answer would be preposterous. If there is a regulation that is saving 10,000 lives and costing one job, it is worth it. But what I would make a commitment to do is to focus every day on job creation and the urgent need, as the President emphasized last night, to square everything we are doing with the overriding imperative of promoting competitiveness, economic growth, and helping people get good jobs.

Mr. GARDNER. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

I recognize Mr. Griffith.

Mr. GRIFFITH. Thank you, Mr. Chairman.

If I might follow up on that question and ask you, are you all taking a look at the—when you are looking at that job loss, are you taking a look at the benefit not only in this country but the cost of sending those jobs overseas? I mean, one of the things that we worry about in my district when people are talking about regulations, is this product is going to be made and sold in the United States, the question is whether or not it is made in the United States or whether or not it is made in China or some other country where they don't have these regulations, and so when you are looking at this, my question to you is, are you looking at what other nations are doing? Because if we having a small benefit but we are sending the job overseas and we are still going to get the product but now instead of having the jobs we have gotten a small benefit and no jobs, and do you all take that into account when you are looking at these regulations, and particularly the EPA?

Mr. SUNSTEIN. Yes. We had in our 2010 report to you all, our annual report to Congress, a detailed discussion of the risk of job loss from regulations that might send jobs overseas, and we continue to be very focused on that risk.

Mr. GRIFFITH. Well, I understand that, but are you marrying the two concepts? OK, we are worried about sending jobs overseas but are you also looking at what is the net benefit to the United States and then are we looking at what is the net benefit in the world environment? Because if the benefit is, is that we are going to clean up the air a little bit but we are sending all the jobs to China

where they won't even have the regulations we currently have, aren't we in effect, if we aren't marrying those two, so question number one of this would be, are we marrying them, and number two is, are we in effect making the environment of the world worse in many ways if we send these jobs offshore where they won't follow the same rules that we have?

Mr. SUNSTEIN. That is a great question. It is a fabulous question, and it has been raised in the context of some rules where it may be that the environment, the world environment is actually worse off as a result of what we do. Our basic source of what we should consider and lay out is legal requirements, so it may be that some of the environmental harms done elsewhere in the world aren't really legally relevant. They are not part of the statutory apparatus under which we are operating. And thank you for letting me elaborate a bit on this, but if you had asked me a yes or no question, I would have said with slight embarrassment because it is too simple, but I would have said yes.

Mr. GRIFFITH. And let me ask this because it has just been troubling me, and you have heard these questions before from some of the other members about the EPA. Its spokesman has said that they don't think that this will affect them, in essence, and you have made it very clear that yes, the President's Executive order does apply and that you all are looking at those regulations as well but clearly somehow they got the word they didn't. Do you know whether or not there was a private "get out of jail free" card or a wink and a nod that would say that they don't have to—we are going to come look but don't worry, everything is going to be OK?

Mr. SUNSTEIN. I am confident there was no wink or nod or side conversation.

Mr. GRIFFITH. All right. I yield the rest of my time back, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

Mr. Terry is recognized for 5 minutes.

Mr. TERRY. Thank you, Mr. Chairman, and I appreciate you being here today. It has been helpful.

First of all, I want to comment on a couple of things from three of my colleagues on the other side. Do you believe that this side of the aisle are regulatory anarchists and want toxic materials thrown into rivers and——

Mr. SUNSTEIN. If I may say, I think the questions—it is an honor to talk with any of you about these things, and the questions have been excellent and you deserve an answer, so I see no evidence of——

Mr. TERRY. And you have done well in that area. Let me follow up one question from Mr. Markey. Do you think banning all use of fossil fuels would yield positive health for human beings?

Mr. SUNSTEIN. All things considered, no.

Mr. TERRY. What do you mean by, all things considered? I mean, would it be healthier for our people if there were no fossil fuels used?

Mr. SUNSTEIN. On one dimension, it would be healthier because the pollution would go down but the economic hardship would be unhealthy.

Mr. TERRY. And balance is the issue here, so we can't deal in extremes is my point.

Mr. SUNSTEIN. That is right.

Mr. TERRY. Cost-benefit analysis is appropriate. And the President's Executive Order 13563 includes a cost-benefit analysis, correct?

Mr. SUNSTEIN. Yes.

Mr. TERRY. And you testified at the beginning that his Executive order does not apply to independent agencies?

Mr. SUNSTEIN. That is correct. Following President Reagan's lead, really——

Mr. TERRY. Well, yes, it doesn't. So the FCC—I am vice chairman of Communications and Technology, so my focus is with the FCC. So the Executive order does not apply to the FCC?

Mr. SUNSTEIN. It does not.

Mr. TERRY. And——

Mr. SUNSTEIN. In the small business memorandum, the President requests that the independent agencies comply with the——

Mr. TERRY. And has the FCC said they will comply to that order?

Mr. SUNSTEIN. We have not heard.

Mr. TERRY. OK. And in that regard, we have talked about, or you mentioned that the Executive order would help the Administration reach that cost-benefit analysis where you weigh both sides, so do you feel as you sit here today in your position, not as a law review author but in your capacity today that that would beneficial for the Administration if the Executive order would apply to the independent agencies?

Mr. SUNSTEIN. I believe that cost-benefit analysis is a helpful tool for any government actor, and in that sense, I believe that its use by the independent agencies would be informative.

Mr. TERRY. Would it be helpful to you in determining whether to give advice and counsel from OMB on behalf of the Administration through those agencies?

Mr. SUNSTEIN. We are very respectful of the independence of the Federal Reserve, the FCC, the FTC, which have independence as a matter of legal authority. It would be helpful to us, I will tell you in one domain that is exceedingly important though slightly technical. We provide annual reports to you all on the costs and benefits of regulation. You have asked us to provide information on the costs and benefits of regulations by the FCC, the FTC, all of the independents. More often than not, we don't have anything to tell you because there isn't a cost-benefit analysis, and——

Mr. TERRY. I would appreciate it. Is there a separate of powers or constitutional issue here in your view?

Mr. SUNSTEIN. There is certainly an issue in the sense that the President's legal authority over the independent agencies has occupied many less than fascinating pages of law reviews.

Mr. TERRY. But can that be resolved by congressional action or is there are still in your opinion——

Mr. SUNSTEIN. You could resolve it.

Mr. TERRY. I know you are not a Nebraska graduate so we have to question your academic history, but nonetheless, in your esteemed opinion.

Mr. SUNSTEIN. I think the professors at the University of Nebraska would agree that whether the independent agencies are subject to presidential control is ultimately up to Congress.

Mr. TERRY. So congressional authority would be necessary. Is that something that the President would request of us?

Mr. SUNSTEIN. I am not aware that the President has a view on that issue.

Mr. TERRY. And the independent agencies still have to provide regulatory plans?

Mr. SUNSTEIN. That is correct.

Mr. TERRY. Did the FCC provide you a regulatory plan that included net neutrality in 2010?

Mr. SUNSTEIN. I believe so. I know they provided a plan but I don't recall its exact ingredients.

Mr. TERRY. My time is—would you submit that for the record?

Mr. SUNSTEIN. I would be delighted.

Mr. TERRY. Thank you.

Mr. STEARNS. Mr. Terry's time has expired, and the gentleman from California, Mr. Bilbray, is recognized.

Mr. BILBRAY. Thank you.

Mr. Sunstein, last night the President proposed building a high-speed rail system in America that would cover 80 percent of the people and do it within 25 years. Do you believe under existing regulatory realities that that is possible?

Mr. SUNSTEIN. As I noted, the OIRA lane is narrow. We review existing regulations, so that is beyond my authority and my knowledge base.

Mr. BILBRAY. OK. Let me just say, as somebody who has built a rail system, I think that is where you need to—people like yourself need to be able to address that issue. When the President proposes something and it is not just money, is it legal to do it? And as somebody who has built a rail system, my opinion, of somebody who has actually done it, is that no, it is not legally possible under existing regulatory structure to build the system that the President proposed, which places all of us in the challenge of, do we not only talk about how much it spends but how much regulatory reform we need to make it possible? Do you have any experience in implementing projects such as transit, such as sanitation, such as building a factory? Do you have any experience in going through the regulatory process as a participant of that process?

Mr. SUNSTEIN. Any citizen has at least some experience in navigating the regulatory process, but my own experience with the regulatory process has been a participant over the last 2 years in making sure that the burdens to which you refer are as streamlined and navigable as possible, and the most important part of my experience in that domain, something that hasn't gotten much publicity—I hope it is an answer to your question—is that we quietly asked every agency of the Federal Government including the independent agencies for burden reduction——

Mr. BILBRAY. Whoa, whoa, whoa. See, you are asking about the process and you are doing it as a regulatory member. I am asking you, though, have you been the applicant, have you personally been through the gauntlet or have you observed it from an administrative point of view?

Mr. SUNSTEIN. Does my dad count? My dad had a small construction company.

Mr. BILBRAY. No, your dad doesn't count. We don't allow crime of blood or benefits of blood on this issue.

Mr. SUNSTEIN. My own career has not been navigating regulatory processes but I am trying to make them easier for people who do.

Mr. BILBRAY. As somebody who has been on both sides, this is where I see a real problem. If you haven't walked the mile, if you haven't gone through the frustration, if you haven't seen the obstructionism, you really don't understand how to correct the problem appropriately, and I think you and I would agree if the plumbing in your house was backed up, you would not call a doctor or a lawyer to address that issue, and the fact is—I would ask you a question. Let me back off and say this. Do you believe there are environmental laws on the books today that are hurting the environment with their enforcement?

Mr. SUNSTEIN. Well, I do believe there are environmental laws on the books today that can be significantly improved from both the economic and environmental standpoint.

Mr. BILBRAY. My question is, do you believe that there are environmental regs on the books today that their enforcement is actually hurting the environment rather than helping it?

Mr. SUNSTEIN. It would be most surprising if the answer weren't yes for at least some.

Mr. BILBRAY. OK. Then my question to you is, when we get into these review of assuming that the law's intention is actually being fulfilled, wouldn't you agree that that is a wrong assumption to make from the get-go, that laws' intentions are assumed to be effective rather than questioning are they effective so that there is a burden of proof of existence of those laws need to consistently be tested for their effectiveness and efficiency?

Mr. SUNSTEIN. Well, the President gave a clear yes answer in the Executive order which said we need to measure the actual results of regulations and the look-back is intended to do that.

Mr. BILBRAY. OK. Do you know what the reductions for vehicle was projected with the new environmental regs on auto manufacturers?

Mr. SUNSTEIN. The reduction per vehicle? I don't have the number. The reduction of emissions per vehicle?

Mr. BILBRAY. Yes. What was the goal with that reg? That is a pretty big reg. We ought to know what the number was.

Mr. SUNSTEIN. Per vehicle? I know that the number——

Mr. BILBRAY. OK. I will give you per vehicle or fleet reduction.

Mr. SUNSTEIN. Well, the emission reduction?

Mr. BILBRAY. Yes.

Mr. SUNSTEIN. I don't have the exact number.

Mr. BILBRAY. I am just asking for a percentage.

Mr. SUNSTEIN. The goal is about 36.5 miles per gallon.

Mr. BILBRAY. And what percentage is that a reduction they are looking at?

Mr. SUNSTEIN. We would have to do a little arithmetic to get it right.

Mr. BILBRAY. OK. What if I told you that scientists are already telling us that we can reduce emissions and auto emissions by 22.6

percent and Washington has done nothing to consider that cost-effectiveness program while it is putting burdens on the production of automobiles in this country?

Mr. SUNSTEIN. If I may ask, what is the cost-effective program you are——

Mr. BILBRAY. The cost-effective program is for us to go back and look at traffic control operated by government that is inappropriate.

Mr. SUNSTEIN. Oh, we are interested in any method that is cost-effective, cost-justified, to make this situation——

Mr. BILBRAY. Wouldn't that be the kind of savings that we need to do more of with our cost-effective analysis?

Mr. SUNSTEIN. It sounds like something very much worth investigating, yes.

Mr. STEARNS. I thank the gentleman, and I ask unanimous consent to let Mr. McKinley ask questions. He is on the full committee but he is not on the subcommittee. Without objection, so ordered.

Mr. McKinley, thank you for taking the time to come down. You are recognized for 5 minutes.

Mr. MCKINLEY. Thank you. Thank you, Mr. Chairman.

Thank you for being here. I have a series of questions more specific, and they deal with the Spruce Mine in West Virginia. You are familiar with that?

Mr. SUNSTEIN. That is not something——

Mr. MCKINLEY. Can you give me some volume, please?

Mr. SUNSTEIN. OK. Sorry. That is not something within our purview. We review regulations and regulatory actions. I believe what you are pointing to isn't something that is within the domain of the Office of Information and Regulatory Affairs.

Mr. MCKINLEY. But this was a retroactive veto. Are you aware of that?

Mr. SUNSTEIN. I have a recollection from newspaper accounts, but this isn't something within our authority. We do look at rules that have effects in this area but what you are referring to, I don't believe is a regulatory action under Executive Order 12866.

Mr. MCKINLEY. Were you aware of this veto prior to it happening?

Mr. SUNSTEIN. No.

Mr. MCKINLEY. You were not aware?

Mr. SUNSTEIN. No.

Mr. MCKINLEY. Do you have any idea why the EPA came to that decision?

Mr. SUNSTEIN. This is something which would be good to engage the people who made the decision for their explanation.

Mr. MCKINLEY. Were you aware that the EPA has made this determination to do it retroactive based on some new science?

Mr. SUNSTEIN. Because this wasn't regulatory action under 12866, if I am following, this wasn't something that we saw in advance in any way.

Mr. MCKINLEY. Do you think that it is something that they should have checked with you about before they embarked on something that was so draconian to West Virginia?

Mr. SUNSTEIN. Well, one thing I will say which is that in the regulatory domain, anything that is draconian for West Virginia or

anything else is of keen concern to us, but that thing had better be under the new Executive order as under the old a regulatory action within the meaning of both documents, and so I wouldn't want to comment on the decision or the process because my understanding is that this was not something that is subject to our review.

Mr. MCKINLEY. But you have enough awareness of it, so now—and the last question has more to do with, is it possible that if the regulatory bodies think that they can do this retroactively to a specific site in West Virginia, it is only in the Appalachian district they are doing this in the mines and they have applied it—the first application has been in the mines in West Virginia. If they feel they have the jurisdiction to be able to do that, could they not also do that in other markets like, for example, the chemical industry?

Mr. SUNSTEIN. What I would say in our domain is that rulemaking is not retroactive. Actually, the Supreme Court has said that rulemaking is presumed not to be legitimately retroactive and that under the President's new Executive order, not only are rules not retroactive but they also must be preceded by a period of public comment so stakeholders can see it. Not only that, the agency is supposed to engage stakeholders including those who would be adversely affected before they even propose a rule. So that is our policy with respect to rulemaking.

Mr. MCKINLEY. Do you think that this was a violation then if they made this retroactive?

Mr. SUNSTEIN. Well, as I say, this is not our lane or our area so I wouldn't want to speak to it absent authority or a full account.

Mr. MCKINLEY. Do you think if they—if rulemaking can occur like this in a retroactive fashion directed to the coal industry, would it not also apply to petroleum, chemical, other industries as well?

Mr. SUNSTEIN. The Supreme Court said in a decision a few years ago retroactivity is disfavored, and to answer that question, I want to know what exactly was the situation here and whether there was something unique to it that justified the action and whether——

Mr. MCKINLEY. From what I understand, sir, there was new science introduced but that new science was funded by the EPA. The study was funded by the EPA. I don't know whether that would—I am an engineer. I don't know that that would necessarily—if I fund something whether I am—that is new science. That is bolstering my cause.

Mr. SUNSTEIN. I greatly appreciate the question, and with your indulgence I would want to stay away from an area that I don't have authority over and that I haven't studied. I would say that with respect to the scientific issue generally, under section 5 of the new Executive order, there is strong emphasis on objective science and scientific integrity, and that is something in the rulemaking area which is our domain that we are taking exceedingly seriously.

Mr. MCKINLEY. Since you have heard of this now, are you going to look into it?

Mr. SUNSTEIN. If you would like me to, I would be——

Mr. MCKINLEY. I would love to have you look into it.

Mr. SUNSTEIN [continuing]. Delighted to have you put in contact with the people who have——

Mr. MCKINLEY. I would like to know more about what the repercussions of this are. Thank you very much.

Mr. SUNSTEIN. And thanks to you.

Mr. STEARNS. I thank the gentleman. We are going to go a second round of questions. I ask for your help here. It is just a few more and then——

Mr. SUNSTEIN. Are you asking me yes or no questions?

Mr. STEARNS. Say again?

Mr. SUNSTEIN. Are you going to ask me yes or no questions, Mr. Chairman?

Mr. STEARNS. I try. There is something here I want to ask you. It is a basic question. How many new government regulations have been enacted since your appointment?

Mr. SUNSTEIN. I believe the number of final regulations is going to be approximate.

Mr. STEARNS. No, I know.

Mr. SUNSTEIN. It is about 500.

Mr. STEARNS. Five hundred. OK. And do you perhaps have any idea how many new regulations will be necessary because of the new health care bill and because of the new financial service bill?

Mr. SUNSTEIN. I don't have that number. I would say that our number——

Mr. STEARNS. If you could venture a guess, that would be really fine.

Mr. SUNSTEIN. I wouldn't want to venture a guess because there is a fact of the matter, and one doesn't want to guess about things when the fact of the matter is not difficult to find.

Mr. STEARNS. I am just being a little humorous. I will give you a range. Over 5,000 for health care?

Mr. SUNSTEIN. It would surprise me if it is that high.

Mr. STEARNS. And over 5,000 for the financial bill?

Mr. SUNSTEIN. It would surprise me if it is that high.

Mr. STEARNS. OK. Earlier I asked you this question and you said yes. The director of OMB produced a set of recommendations for a new Executive order within 100 days of the President's January 30, 2009 directive. That means that the OMB recommendations were sent to the President around May 2009. I thought you said yes. Is that correct?

Mr. SUNSTEIN. Yes.

Mr. STEARNS. But the new Executive order wasn't issued until January 18, 2011—I had staff check that out—after the election. So your yes doesn't seem to comply with the facts.

Mr. SUNSTEIN. Ah, OK. No, what the President asked for in his memorandum to which you point, the early one, was not a new Executive order for issuance. It was recommendations for a new Executive order, and what we did was to run processes for a significant period under the Clinton Executive order under which President Bush also operated and acquired experience. We had a public comment period. We got a lot of comments from affected stakeholders, some from Members of Congress, there were informal and formal communications, and the process of acquiring information, learning from the agencies and from our own processes what works well and

what doesn't ran its course such that we were able to issue the Executive order last week.

Mr. STEARNS. In your testimony today, several times you mentioned that "retrospective" review will be done of regulations. It hasn't been defined in my mind: when does that begin? Does it include regulations issued during the Obama Administration or are you going back to the Bush Administration? Are you going back to the Clinton Administration? Maybe you might define what "retrospective" means.

Mr. SUNSTEIN. The Executive order says significant regulations that are on the books so everything is fair game.

Mr. STEARNS. How far does that go back, in your mind?

Mr. SUNSTEIN. It could go back to the 1920s if there is a regulation that is costly and not helping people.

Mr. STEARNS. It could go back to FDR?

Mr. SUNSTEIN. It certainly could go back to FDR. Everything is fair game. Needless to say, regulations that have been issued within the last weeks and months wouldn't be the first candidates for retrospective review because they were reviewed very recently, but we are eager to get ideas from you, Mr. Chairman, affected stakeholders, members of the public. We really need your help to identify regulations that should be revisited, and if they are doing harm but they are from 1945, then by all means let us revisit it as much as we would if they were doing harm in 1982.

Mr. STEARNS. I commend you. You are the first person from the Administration I have heard that said they were willing to go back and look at regulations from FDR, so that is quite a statement.

Now, will this review apply equally to all the agencies or just certain agencies that you are focusing on? I imagine that looking at all the agencies would be a mammoth job.

Mr. SUNSTEIN. As you said, the independent agencies following President Reagan's lead are not covered but all the executive agencies are covered.

Mr. STEARNS. You are promulgating vehicle fuel efficiency standards. Did the agency consider the cost of additional injuries and deaths stemming from the use of lighter vehicles?

Mr. SUNSTEIN. Yes, that was investigated with great care.

Mr. STEARNS. When you talk about this retrospective review, how are you proposing to bring in the public? The gentleman from West Virginia indicated that we had a company that got approval for a license and then retrospectively EPA revoked its license. Now the company is in jeopardy after investing millions of dollars, and employees will lose their jobs. Who would think that that could happen, especially after the government gave it a license? How are you getting the public to interface with you?

Mr. SUNSTEIN. It is a tremendous question, and we love your ideas. I will give you a few preliminary thoughts. One idea we have had is that the public has a lot more information than we do about what rules are actually doing on the ground.

Mr. STEARNS. I agree with that.

Mr. SUNSTEIN. So we need their help. It has happened already in this very early time that we have gotten a lot of communication from the public. The public has not been silent about rules that are causing trouble. I think you can expect in the relatively near future

one very important Cabinet agency going out to the public and asking for ideas about retrospective analysis, what rules are causing trouble. I think you can also expect a high degree of openness both with respect to asking for ideas about rules that no longer warrant public approval and also for ventilation of the plans, which are due, mind you, in 120 days. I would love it if some of those plans would beat that deadline and be out to the public before 120 days but my expectation is that the plans which will include candidates will be made public and there will be a period of comment, and as Chairman Dingell suggested, there is a full process of comment and review as rules get repealed, so that will also involve a high degree of public participation.

Mr. STEARNS. Thank you. My time has expired.

Dr. Burgess, second round.

Dr. BURGESS. Thank you, Mr. Chairman.

In reference to Dr. Gingrey's question about the regulation that went forward without a period of public comment, are you aware that there are in fact at least 10 such regulations under the health care law, the Patient Protection and Affordable Care Act, at least 10 such rules that were created without a period of public comment?

Mr. SUNSTEIN. Yes. What I am aware of is that some laws, and this is one of them, have for some rules time constraints that are so severe that the only option is to do what is called an interim final rule rather than go out for public comment, and that is a result of legal compulsion. What is noteworthy about interim final rules, and we have paid a great deal of attention to this, is they are interim rules.

Dr. BURGESS. Well, let me just—you offered just a moment ago that you would follow up with us. I actually look forward to you joining us again in about 3 months' time. If you would be willing to do that, maybe we could talk about some of the public comment that has come in on some of the interim final rules because it is important that this process be open and transparent and that people be able to communicate with the regulatory agencies and their government. I know I have heard from a lot of providers, hospitals, and patients that this is something that they would like to see.

Mr. SUNSTEIN. Absolutely. I spend a lot of my own time, sad but true, on regulations.gov where you can see those comments on interim final rules and I am quite aware that some rules have produced a lot of public interest.

Dr. BURGESS. I provided to you—I apologize that it wasn't in the briefing binder but something prepared by the Business Council, the Business Roundtable, policy burdens inhibiting economic growth. Did you have a chance to just glance at that while we were at the vote?

Mr. SUNSTEIN. I did glance at it.

Dr. BURGESS. And I appreciate you being willing to do that. Of course, our purpose here today is to talk about the regulatory burden and what we might do. This paper was prepared, interestingly enough, last June at the request of the Obama Administration, difficulty in this economic climate creating jobs, and the Obama Administration asked the private sector, provide us some guidance on what the Obama Administration might do to facilitate job creation.

So I think that was a good idea. The question I have is, why are we ignoring some of the more important things that were put forward in that monograph? We have, and I referenced this in my opening statement, the new source review aspect that was talked about in that paper was concerned about the fact that Texas does seem to be singled out for some special attention on taking its flexible permitting process and that other States that are using this were not subjected to the same constraints that Texas has been. Do you think this is helpful in creating a climate for job creation that Texas be singled out in this way?

Mr. SUNSTEIN. I should say that the document to which you point has a lot of concerns and that that has been reviewed carefully by relevant officials trying to make sure we do the best we can for the country. Singling out any State, in some ways Texas in particular, is not a good idea. Everyone should be treated similarly. What I would say about the particular example, I will give you my understanding, is that 49 States all complied with the EPA's permitting rule in the sense that——

Dr. BURGESS. My time is pretty limited. Let me just ask you a more specific question.

Mr. SUNSTEIN. This was an effort to help people in Texas get permits. In order to go forward, there had to be some permitting process, and the court approved it.

Dr. BURGESS. Well, that was under the greenhouse gas requirement, but did anyone at EPA consult with the Office of Management and Budget or the White House before moving forward with taking over the flexible permitting program under the Clean Air Act?

Mr. SUNSTEIN. That one was something that we were involved in, yes, and this was an effort, as I say, to permit people to get permits in Texas so they could go forward with construction, etc. That is my understanding.

Dr. BURGESS. And what is the status of that today?

Mr. SUNSTEIN. The court has approved it.

Dr. BURGESS. Let me ask you a question that is in a different direction. Do you think there should be any legislative effort to regulate broadcasting in the interest of democratic principles?

Mr. SUNSTEIN. What I would say is that as the Administrator of the Office of Information and Regulatory Affairs, I am focused on the Paperwork Reduction Act and on the recent Executive order and Small Business Memorandum. I think you might be referring to some academic writing that might have had my name attached to it but academic speculations by anyone including yours truly just aren't relevant to the current job.

Dr. BURGESS. But still, there is some talk about people who want to bring back the Fairness Doctrine and some people do see that as a restriction on free speech. Would that be something that would come through your regulatory agency if that occurred?

Mr. SUNSTEIN. No, we have no role, and I am on record as opposing the Fairness Doctrine.

Dr. BURGESS. Thank you, Mr. Chairman. I will yield back.

Mr. STEARNS. Mr. Griffith, you are recognized for 5 minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman.

If I could go back to some of Congressman McKinley's questions relating to the mine closure in West Virginia, and I know that what actually may have happened may not be under your watch, but wouldn't it be true under the Executive order that you would need to look at that? Because as I understood the President's comments last night in regard to the salmon, that one of the things that he wants to do is to make sure we don't have agencies having jurisdiction over what most people would think would be the same thing, and in that particular case, would you not agree with me that it didn't meet the circumstances? The facts didn't meet with what the President has said, even in section 1 of his Executive order because for that mine, it didn't promote predictability and reduce uncertainty, it created more uncertainty for everybody in central Appalachia because of that ruling. Would you not agree?

Mr. SUNSTEIN. I appreciate the question. I am reluctant to say anything critical of colleagues in any agency when I just don't know the underlying situation and it isn't something within our authority. I can say that EPA in the rulemaking domain has been extremely careful and scrupulous about ensuring that there is public comment before it goes forward with rules, and we had an earlier colloquy about the EPA's insistence that——

Mr. GRIFFITH. But wouldn't you agree with me that when the Army Corps of Engineers signs off on it and says everything is fine and then some 18 months to 2 years later the EPA comes in and yanks the licenses out, that that does not promote predictability and does promote uncertainty?

Mr. SUNSTEIN. I would need to know more about the particulars. I certainly agree with your emphasis on predictability and certainty, which are upfront in the new Executive order.

Mr. GRIFFITH. And wouldn't you agree that at least on the face of it that such action is not plain and easy to understand?

Mr. SUNSTEIN. Well, I am very concerned about clarity. The Plain Writing Act is something that is within our domain. We recently issued guidance on it. But I have learned from my period in Washington that things that are on the face a certain way sometimes aren't fully a certain way and so if you will forgive me, I like to be cautious before speaking on that.

Mr. GRIFFITH. Well, I understand being cautious but you can appreciate that the uncertainty that has now been created in the entire region about even attempting to invest money in opening up a new mine that has been caused by the actions that were taken, and isn't that something that under the Executive order that you all should be looking at?

Mr. SUNSTEIN. The Administration as a whole is committed to promoting certainty, so to look at something that is raising concerns along that front is completely appropriate.

Mr. GRIFFITH. All right. I thank the gentleman.

Mr. STEARNS. I thank the gentleman.

I now recognize the gentlelady, Ms. DeGette.

Ms. DEGETTE. Thank you very much, Mr. Chairman.

Mr. Sunstein, I really want to thank you for coming and testifying today. I found your testimony very illuminating and helpful, and I think this subcommittee is going to want to have ongoing conversations with you.

You know, we all agree that unnecessary regulations should be repealed and new regulations should not be overly burdensome on business or anybody else. I mean, that is a fundamental. Listening to the questioning on the other side of the aisle today, I kind of realize that there is this assumption that may have some vague historic basis but certainly with this new Administration and with my colleagues on the Democratic side of the aisle, we don't believe in overregulation and we don't believe that regulations should be burdensome, especially right now with unemployment still over 9 percent. We need to make sure that regulations are sensible, that they protect the public health and wellbeing and are not overly burdensome.

I was particularly interested—and I think, so there is some thinking since there is a Democratic Administration, we are just overregulating, but in fact, when you look at the actual facts and statistics, this is not the case. I was particularly interested in your comment earlier that the total number of rules in the first 2 years of the Obama Administration is comparable to the number of rules in the last 2 years of the Bush Administration, so about the same. And if you look at the number for the EPA specifically, which seems to be a great concern on the other side of the aisle, the comparison between the Administrations is very noteworthy. The EPA has finalized or proposed fewer Clean Air Act rules over the last 21 months than in the first 2 years of either President George W. Bush's Administration or President Clinton's Administration. President Bush finalized or proposed 146 Clean Air Act rules while president Clinton issued only 115, and President Obama has issued just 87, and frankly, some of the Obama Administration's rules, as you can attest, are trying to clean up the mess left by the previous Administration.

So let me give an example of that. A federal court threw out President Bush's rule to cut toxic mercury emissions from power plants in February 2008 because frankly, it was illegal under statute. So what it would have done would have been to let infants and children vulnerable to mercury pollution. So President Obama and his Administration were then forced to go back to the drawing board and repromulgate those rules because they were illegal the first time.

And so frankly, I think that, you know, Mr. Stearns and I are both eager to talk about regulations that might be burdensome and we are eager to work with you and the Administration to do that. We were just saying that we would welcome suggestions by members on both sides of the aisle and we would love to sit down and meet with you and your staff to propose anything that we think is overly burdensome because frankly, we are not facing a regulatory avalanche. These are safeguards for the American public, but I know that you and your staff intend to promulgate them in a way that is the least burdensome possible. So I just wanted to say that.

And Mr. Chairman, I just wanted to ask the Majority a question, and maybe you know the answer but if not, maybe your staff or somebody else can tell me. The Republican have said several folks on your side of the aisle have said that an EPA spokesman said that the Executive order won't matter with respect to the EPA regulations, and I don't know who that—we are unaware of any state-

ment like that on this side of the aisle, and I am wondering if your staff or the members who said that could tell us who that spokesperson was so that we could set the Administration straight that the Executive order is going to apply to all regulations of agencies within the purview of Mr. Sunstein and his staff.

Mr. STEARNS. We would be glad to provide it for you. It is in The Hill, January 18.

Ms. DEGETTE. Thank you. And what is the name of the person?

Mr. STEARNS. Betsaida Alcantara, and the statement said that the agency has already been following many of the protocols formalized Tuesday, and so we would be glad to give The Hill article to you.

Mr. SUNSTEIN. May I——

Ms. DEGETTE. Wait a minute. This doesn't say that the Executive order doesn't apply to EPA regulations, and Mr. Chairman, I would ask unanimous consent to submit this article for the record.

Mr. STEARNS. I would be glad to, by unanimous consent.

Ms. DEGETTE. Thank you.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. But I think we have given you a name. It is your interpretation.

Ms. DEGETTE. Yes, you didn't, but it doesn't say anything about the Executive order and whether it applies.

Mr. STEARNS. That is your interpretation.

Mr. SUNSTEIN. May I make one brief addition to your excellent remarks?

Mr. STEARNS. Sure.

Mr. SUNSTEIN. Which is, if you look at the most expensive fiscal year of the last ones, it hasn't been 2010, it hasn't been 2009, it was 2007.

Mr. STEARNS. OK. The gentlelady's time has expired.

OK. Let me close. Mr. Sunstein, thank you for your patience and forbearance while we went and voted. Let me just ask you a question to clarify what Ms. DeGette was talking about. In the first 2 years of the Bush Administration, how many regulations were issued compared to the first 2 years of the Obama Administration?

Mr. SUNSTEIN. We will have to get that number.

Mr. STEARNS. OK. That is important because I think what she is alluding to—I think those facts are now apples and apples instead of apples and oranges.

Let me also point out that when Ms. DeGette talks about deregulation, on this committee we had a cap-and-trade bill we passed which the Senate didn't agree with. We had a health care bill pass. The Congress under the Democrats' majority had a financial bill. They also had bailouts. And so during that entire process, when you pass those four major pieces of legislation, you are going to have more regulation. And this is what I would like to conclude with. You had indicated that there should be a comment period for the citizens of this country to tell you and OMB that these regulations are killing them, and you are saying that you are willing to listen. So can I suggest that we sit down with you and we notify our members both on the Democrat and Republican side that you have made this very auspicious, generous offer to take seriously some of the problems? Now, the gentleman from West Virginia

pointed out that this company has lost its license after getting approved by EPA and that is a problem. That is losing jobs. That is exactly what I think the President is talking about. So can we have your agreement then today that you would sit down with this committee at a later date, not in a hearing but an opportunity where Ms. DeGette and I can present you with regulations that we think indeed are hurting this country and should be repealed?

Mr. SUNSTEIN. I would welcome that.

Mr. STEARNS. Well, I think you suggested the idea, so we just want to follow up on it.

Let me conclude by saying members have 10 days to submit questions for the record, and if there is no further comment, the subcommittee is adjourned, and thank you.

[Whereupon, at 1:19 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

THE WALL STREET JOURNAL.
WSJ.com

OPINION | JANUARY 18, 2011

Toward a 21st-Century Regulatory System

If the FDA deems saccharin safe enough for coffee, then the EPA should not treat it as hazardous waste.

By BARACK OBAMA

For two centuries, America's free market has not only been the source of dazzling ideas and path-breaking products, it has also been the greatest force for prosperity the world has ever known. That vibrant entrepreneurialism is the key to our continued global leadership and the success of our people.

But throughout our history, one of the reasons the free market has worked is that we have sought the proper balance. We have preserved freedom of commerce while applying those rules and regulations necessary to protect the public against threats to our health and safety and to safeguard people and businesses from abuse.

From child labor laws to the Clean Air Act to our most recent strictures against hidden fees and penalties by credit card companies, we have, from time to time, embraced common sense rules of the road that strengthen our country without unduly interfering with the pursuit of progress and the growth of our economy.

Sometimes, those rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs. At other times, we have failed to meet our basic responsibility to protect the public interest, leading to disastrous consequences. Such was the case in the run-up to the financial crisis from which we are still recovering. There, a lack of proper oversight and transparency nearly led to the collapse of the financial markets and a full-scale Depression.

Over the past two years, the goal of my administration has been to strike the right balance. And today, I am signing an executive order that makes clear that this is the operating principle of our government.

This order requires that federal agencies ensure that regulations protect our safety, health and environment while promoting economic growth. And it orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive. It's a review that will help bring order to regulations that have become a patchwork of overlapping rules, the result of tinkering by administrations and legislators of both parties and the influence of special interests in Washington over decades.


OPINION

Toward a 21st-Century Regulatory System

Where necessary, we won't shy away from addressing obvious gaps: new safety rules for infant formula; procedures to stop preventable infections in hospitals; efforts to target chronic violators of workplace safety laws. But we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.

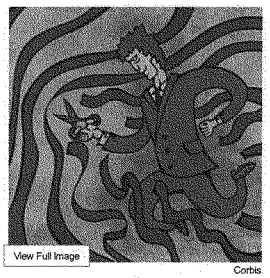
For instance, the FDA has long considered saccharin, the artificial sweetener, safe for people to consume. Yet for years, the EPA made companies treat saccharin like other dangerous

chemicals. Well, if it goes in your coffee, it is not hazardous waste. The EPA wisely eliminated this rule last month.

But creating a 21st-century regulatory system is about more than which rules to add and which rules to subtract. As the executive order I am signing makes clear, we are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses and ordinary citizens. It means using disclosure as a tool to inform consumers of their choices, rather than restricting those choices. And it means making sure the government does more of its work online, just like companies are doing.

We're also getting rid of absurd and unnecessary paperwork requirements that waste time and money. We're looking at the system as a whole to make sure we avoid excessive, inconsistent and redundant regulation. And finally, today I am directing federal agencies to do more to account for—and reduce—the burdens regulations may place on small businesses. Small firms drive growth and create most new jobs in this country. We need to make sure nothing stands in their way.

One important example of this overall approach is the fuel-economy standards for cars and trucks. When I took office, the country faced years of litigation and confusion because of conflicting rules set by Congress, federal regulators and states.



Corbis

The EPA and the Department of Transportation worked with auto makers, labor unions, states like California, and environmental advocates this past spring to turn a tangle of rules into one aggressive new standard. It was a victory for car companies that wanted regulatory certainty; for consumers who will pay less at the pump; for our security, as we save 1.8 billion barrels of oil; and for the environment as we reduce pollution. Another example: Tomorrow the FDA will lay out a new effort to improve the process for approving medical devices, to keep patients safer while getting innovative and life-saving products to market faster.

Despite a lot of heated rhetoric, our efforts over the past two years to modernize our regulations have led to smarter—and in some cases tougher—rules to protect our health, safety and environment. Yet according to current estimates of their economic impact, the benefits of these regulations exceed their costs by billions of dollars.

This is the lesson of our history: Our economy is not a zero-sum game. Regulations do have costs; often, as a country, we have to make tough decisions about whether those costs are necessary. But what is clear is that we can strike the right balance. We can make our economy stronger and more competitive, while meeting our fundamental responsibilities to one another.

Mr. Obama is president of the United States.

THE WALL STREET JOURNAL.
WSJ.com

REVIEW & OUTLOOK | JANUARY 4, 2011

The EPA's War on Texas

The agency punishes the state for challenging its anticarbon rules.

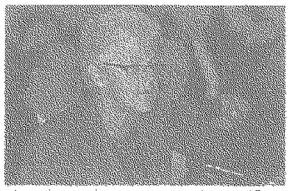
The Environmental Protection Agency's carbon regulation putsch continues, but apparently abusing the clean-air laws of the 1970s to achieve goals Congress rejected isn't enough. Late last week, the EPA made an unprecedented move to punish Texas for being the one state with the temerity to challenge its methods.

To wit, the EPA violated every tenet of administrative procedure to strip Texas of its authority to issue the air permits that are necessary for large power and industrial projects. This is the first time in the history of the Clean Air Act that the EPA has abrogated state control, and the decision will create gale-force headwinds for growth in a state that is the U.S. energy capital. Anyone who claims that carbon regulation is no big deal and that the EPA is merely following the law will need to defend this takeover.

Since December 2009, the EPA has issued four major greenhouse gas rule-makings, and 13 states have tried to resist the rush. The Clean Air Act stipulates that pollution control is "the primary responsibility of states and local government," and while the national office sets overall priorities, states have considerable leeway in their "implementation plans." When EPA's instructions change, states typically have three years to revise these plans before sending them to Washington for approval.

This summer, the 13 states requested the full three years for the costly and time-consuming revision process, until the EPA threatened economic retaliation with a de facto construction moratorium. If these states didn't immediately submit new implementation plans to specification, the agency warned, starting in 2011 projects "will be unable to receive a federally approved permit authorizing construction or modification." All states but Texas stood down, even as Texas continued to file lawsuits challenging the carbon power grab.

Two weeks ago, EPA air regulation chief Gina McCarthy sent the Texas environmental department a letter asserting that the agency had "no choice" but to seize control of permitting. She noted "statements in the media" by Texas officials and their "legal challenges to EPA's greenhouse gas rules," but she cited no legal basis.



Associated Press

Gina McCarthy

And no wonder. The best the EPA could offer up as a legal excuse for voiding Texas's permitting authority last Thursday was that EPA had erred in originally approving the state's implementation plan—*in 1992*, or three Presidents ago.

The error that escaped EPA's notice for 18 years was that the Texas plan did not address "all pollutants newly subject to regulation . . . among them GHGs [greenhouse gases]." In other words, back then Texas hadn't complied with regulations that *didn't exist and wouldn't be promulgated for another 18 years.*

The takeover was sufficiently egregious that the D.C. circuit court of appeals issued an emergency stay on Thursday

suspending the rules pending judicial review. One particular item in need of legal scrutiny is that the permitting takeover is an "interim final rule" that is not open to the normal—and Clean Air Act-mandated—process of public notice and comment. So much for transparency in government.

The EPA claims its takeover is a matter of great urgency, but Texas is being pre-emptively punished for not obeying rules that don't exist today because the EPA hasn't finalized them. "Now, at this early stage, there's no specifics to tell you about the rules in terms of what we're announcing today, other than they will be done and we'll move—take steps moving forward in 2011," Mrs. McCarthy told reporters on a conference call last week about the agency's "performance standards" for oil refineries, power plants, cement manufacturers and other such CO_2-heavy facilities.

"It's way too early in the game right now to be talking about what we think the standards are going to look like," she added helpfully. "Today's announcement is just the fact we're going to move to those standards."

This and other permitting uncertainties have brought major projects in the U.S. to a standstill. The Texas takeover in particular is pure political revenge and an effort to intimidate other states from joining the Texan lawsuits. The reason states are supposed to run the clean-air process is that local regulators have the staff, capacity and expertise that Washington lacks. When the carbon rules eventually are issued, that means the takeover will extend the current moratorium even longer in Texas.

The EPA concedes that some 167 current projects will be affected, and many more in the future. Our guess is that all of them will be delayed for years and many will simply die. This is precisely the goal of a politically driven bureaucracy that wants to impose by illegal diktat the anticarbon, anti-fossil fuel agenda that the Obama Administration has been unable to pass by democratic consent.

Printed in The Wall Street Journal, page 9

Subcommittee on Oversight and Investigations
The Views of the Administration on Regulatory Reform
January 26, 2011

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2.	President Bush's Executive Order 13422, *Further Amendment to Executive Order 12866 on Regulatory Planning and Review*.	January 18, 2007
3.	President Obama Memorandum, *Regulatory Review*.	January 30, 2009
4.	Office of Management and Budget, Request for Comment, *Federal Regulatory Review*.	February 26, 2009
5.	President Obama's Executive Order 13563, *Improving Regulation and Regulatory Review*.	January 18, 2011
6.	President Obama Memorandum, *Regulatory Compliance*.	January 18, 2011
7.	President Obama Memorandum, *Regulatory Flexibility, Small Business, and Job Creation*.	January 18, 2011
8.	The Wall Street Journal, *Toward a 21st-Century Regulatory System*.	January 18, 2011
9.	Congressional Research Service, *Comparison of Regulatory Executive Orders*.	January 22, 2011
10.	Independent Regulatory Agencies Whose Regulatory Actions Are Not Subject to OIRA Review.	

Federal Register
Vol. 58, No. 190
Monday, October 4, 1993

Presidential Documents

Title 3—

The President

Executive Order 12866 of September 30, 1993

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.*

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is

intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall 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.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. *Organization.* An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. *Definitions.* For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices

of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. *Planning Mechanism.* In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. *Existing Regulations.* In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not

duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. *Centralized Review of Regulations.* The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and (iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. *Resolution of Conflicts.* To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. *Publication.* Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a

regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. *Agency Authority.* Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. *Judicial Review.* Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. *Revocations.* Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.

William J. Clinton

THE WHITE HOUSE,
September 30, 1993.

[FR citation 58 FR 51735]

Federal Register
Vol. 72, No. 14
Tuesday, January 23, 2007

Presidential Documents

Title 3—

The President

Executive Order 13422 of January 18, 2007

Further Amendment to Executive Order 12866 on Regulatory Planning and Review

By the authority vested in me as President by the Constitution and laws of the United States of America, it is hereby ordered that Executive Order 12866 of September 30, 1993, as amended, is further amended as follows:

Section 1. Section 1 is amended as follows:

(a) Section 1(b)(1) is amended to read as follows:

"(1) Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted."

(b) by inserting in section 1(b)(7) after "regulation" the words "or guidance document".

(c) by inserting in section 1(b)(10) in both places after "regulations" the words "and guidance documents".

(d) by inserting in section 1(b)(11) after "its regulations" the words "and guidance documents".

(e) by inserting in section 1(b)(12) after "regulations" the words "and guidance documents".

Sec. 2. Section 2 is amended as follows:

(a) by inserting in section 2(a) in both places after "regulations" the words "and guidance documents".

(b) by inserting in section 2(b) in both places after "regulations" the words "and guidance documents".

Sec. 3. Section 3 is amended as follows:

(a) by striking in section 3(d) "or 'rule' " after " 'Regulation' ";

(b) by striking in section 3(d)(1) "or rules" after "Regulations";

(c) by striking in section 3(d)(2) "or rules" after "Regulations";

(d) by striking in section 3(d)(3) "or rules" after "Regulations";

(e) by striking in section 3(e) "rule or" from "final rule or regulation";

(f) by striking in section 3(f) "rule or" from "rule or regulation";

(g) by inserting after section 3(f) the following:

"(g) "Guidance document" 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.

(h) "Significant guidance document" —

(1) Means a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to:

(A) Lead to an annual effect of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
(B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or
(D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order; and (2) Does not include:
(A) Guidance documents on regulations issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;
(B) Guidance documents that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;
(C) Guidance documents on regulations that are limited to agency organization, management, or personnel matters; or
(D) Any other category of guidance documents exempted by the Administrator of OIRA."

Sec. 4. Section 4 is amended as follows:

(a) Section 4(a) is amended to read as follows: "The Director may convene a meeting of agency heads and other government personnel as appropriate to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year."

(b) The last sentence of section 4(c)(1) is amended to read as follows: "Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Office, and the Plan shall contain at a minimum:".

(c) Section 4(c)(1)(B) is amended by inserting "of each rule as well as the agency's best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities" after "of the anticipated costs and benefits".

(d) Section 4(c)(1)(C) is amended by inserting ", and specific citation to such statute, order, or other legal authority" after "court order".

Sec. 5. Section 6 is amended as follows:

(a) by inserting in section 6(a)(1) "In consultation with OIRA, each agency may also consider whether to utilize formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex determinations" after "comment period of not less than 60 days."

(b) by amending the first sentence of section 6(a)(2) to read as follows: "Within 60 days of the date of this Executive order, each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer, advise OMB of such designation, and annually update OMB on the status of this designation."

Sec. 6. Sections 9–11 are redesignated respectively as sections 10–12.

Sec. 7. After section 8, a new section 9 is inserted as follows:

"**Sec. 9.** *Significant Guidance Documents.* Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance documents. Each agency shall take such steps as are necessary for its Regulatory Policy Officer to ensure the agency's compliance with the requirements of this section. Upon the request of the Administrator, for each matter identified as, or determined by the Administrator to be, a significant guidance document, the issuing agency shall provide to

OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before the issuance of the significant guidance document."

Sec. 8. Newly designated section 10 is amended to read as follows:

"**Sec. 10.** *Preservation of Agency Authority.* Nothing in this order shall be construed to impair or otherwise affect the authority vested by law in an agency or the head thereof, including the authority of the Attorney General relating to litigation."

THE WHITE HOUSE,
January 18, 2007.

[FR Doc. 07-293
Filed 1-22-07; 8:45 am]
Billing code 3195-01-P

Federal Register
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Presidential Documents

Title 3—

The President

Memorandum of January 30, 2009

Regulatory Review

Memorandum for the Heads of Executive Departments and Agencies

For well over two decades, the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) has reviewed Federal regulations. The purposes of such review have been to ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical "second opinion" on agency actions. I strongly believe that regulations are critical to protecting public health, safety, our shared resources, and our economic opportunities and security. While recognizing the expertise and authority of executive branch departments and agencies, I also believe that, if properly conducted, centralized review is both legitimate and appropriate as a means of promoting regulatory goals.

The fundamental principles and structures governing contemporary regulatory review were set out in Executive Order 12866 of September 30, 1993. A great deal has been learned since that time. Far more is now known about regulation—not only about when it is justified, but also about what works and what does not. Far more is also known about the uses of a variety of regulatory tools such as warnings, disclosure requirements, public education, and economic incentives. Years of experience have also provided lessons about how to improve the process of regulatory review. In this time of fundamental transformation, that process—and the principles governing regulation in general—should be revisited.

I therefore direct the Director of OMB, in consultation with representatives of regulatory agencies, as appropriate, to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review. Among other things, the recommendations should offer suggestions for the relationship between OIRA and the agencies; provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost-benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process.

This memorandum 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of OMB is hereby authorized and directed to publish this memorandum in the *Federal Register.*

THE WHITE HOUSE,
Washington, January 30, 2009

[FR Doc. E9-2434
Filed 2-2-09; 11:15 am]
Billing code 3110-01-P

development and evolution of the digital library will be informed by the research communities that NSF supports, and it will serve as a living resource of multimedia materials that may be used to train current and future generations of scientists and engineers in the responsible and ethical conduct of research.

Invitation to Comment: The Foundation welcomes public comment on any aspect of the proposed Implementation Plan. Issues that responders may wish to address include, but are not limited to, the following:

- What challenges do institutions face in meeting the new RCR requirement?
- What role should Principal Investigators play in meeting NSF's RCR requirement?
- There are likely to be differences in the RCR plans that institutions develop to respond to this new requirement. What are the pros and cons of exploring a diversity of approaches?
- How might online resources be most effective in assisting with training students and postdocs in the responsible and ethical conduct of research?
- Discuss possible approaches to verifying that the requisite RCR training has been provided.

Comments: Comments regarding NSF's proposed implementation should be e-mailed to *RCRinput@nsf.gov* by March 31, 2009. Please include your comments in the body of the e-mail and in an attachment. Include your name, title, organization, postal address, telephone number, and e-mail address in your message.

FOR FURTHER INFORMATION CONTACT: For information on the NSF's implementation of the America COMPETES Act, contact Jean Feldman; Head, Policy Office, Division of Institution & Award Support; National Science Foundation; 4201 Wilson Blvd.; Arlington, VA 22230; e-mail: *jfeldman@nsf.gov*; telephone: (703) 292–8243; fax: (703) 292–9171.

Dated: February 23, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–4100 Filed 2–25–09; 8:45 am]

BILLING CODE 7555–01–P

OFFICE OF MANAGEMENT AND BUDGET

Federal Regulatory Review

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Request for comments.

SUMMARY: The Director of the Office of Management and Budget (OMB) is developing a set of recommendations to the President for a new Executive Order on Federal Regulatory Review, and invites public comments on how to improve the process and principles governing regulation.

DATES: Comments must be in writing and received by March 16, 2009.

ADDRESSES: Submit comments by one of the following methods:

- *E-mail: oira_submission@omb.eop.gov.*
- *Fax:* (202) 395–7245.
- *Mail:* Office of Information and Regulatory Affairs, Records Management Center, Office of Management and Budget, Attn: Mabel Echols, Room 10102, NEOB, 725 17th Street, NW.,Washington, DC 20503. We are still experiencing delays in the regular mail, including first class and express mail. To ensure that your comments are received on time, we recommend that comments be electronically submitted.

All comments submitted in response to this notice will be made available to the public on OMB's Web site. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an e-mail comment directly to OMB, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet.

FOR FURTHER INFORMATION CONTACT: Mabel Echols, Office of Information and Regulatory Affairs, Records Management Center, Office of Management and Budget, Room 10102, NEOB, 725 17th Street, NW., Washington, DC 20503. Telephone: (202) 395–6880.

SUPPLEMENTARY INFORMATION: For well over two decades, the Office of Information and Regulatory Affairs (OIRA) at OMB has reviewed Federal regulations. The purposes of such review have been to ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical "second opinion" on agency actions.

In a recent Memorandum for the Heads of Executive Departments and Agencies, published in the **Federal Register** [74 FR 5977], the President directed the Director of OMB to produce a set of recommendations for a new Executive Order on Federal regulatory review. Among other things, he stated that the recommendations should offer suggestions for the following:

- The relationship between OIRA and the agencies;
- Disclosure and transparency;
- Encouraging public participation in agency regulatory processes;
- The role of cost-benefit analysis;
- The role of distributional considerations, fairness, and concern for the interests of future generations;
- Methods of ensuring that regulatory review does not produce undue delay;
- The role of the behavioral sciences in formulating regulatory policy; and
- The best tools for achieving public goals through the regulatory process.

Executive Orders are not subject to notice and comment procedures, and as a general rule, public comment is not formally sought before they are issued. In this case, however, there has been an unusually high level of public interest, and because of the evident importance and fundamental nature of the relevant issues, the Director of OMB invites public comments on the principles and procedures governing regulatory review. These comments will be read and considered seriously even though no responses will be given.

This public process 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Kevin F. Neyland,

Acting Administrator, Office of Information and Regulatory Affairs.

[FR Doc. E9–4080 Filed 2–25–09; 8:45 am]

BILLING CODE 3110–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Meeting of the Industry Trade Advisory Committee on Small and Minority Business (ITAC–11)

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of a partially opened meeting.

SUMMARY: The Industry Trade Advisory Committee on Small and Minority Business (ITAC–11) will hold a meeting on Monday, March 23, 2009, from 9 a.m. to 3:30 p.m. The meeting will be closed to the public from 9 a.m. to 12:30 p.m. and opened to the public from 1 p.m. to 3:30 p.m.

DATES: The meeting is scheduled for March 23, 2009, unless otherwise notified.

Federal Register
Vol. 76, No. 14
Friday, January 21, 2011

Presidential Documents

Title 3—

The President

Executive Order 13563 of January 18, 2011

Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *General Principles of Regulation.* (a) 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 promote predictability and reduce uncertainty. 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. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (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.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. *Public Participation.* (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, 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. To 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 that should generally

be at least 60 days. To the extent feasible and permitted by law, 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. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) 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.

Sec. 3. *Integration and Innovation.* Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. *Flexible Approaches.* Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. *General Provisions.* (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 18, 2011.

[FR Doc. 2011-1385
Filed 1-20-11; 8:45 am]
Billing code 3195-W1-P

Federal Register / Vol. 76, No. 14 / Friday, January 21, 2011 / Presidential Documents 3827

Presidential Documents

Memorandum of January 18, 2011

Regulatory Flexibility, Small Business, and Job Creation

Memorandum for the Heads of Executive Departments and Agencies

Small businesses play an essential role in the American economy; they help to fuel productivity, economic growth, and job creation. More than half of all Americans working in the private sector either are employed by a small business or own one. During a recent 15-year period, small businesses created more than 60 percent of all new jobs in the Nation.

Although small businesses and new companies provide the foundations for economic growth and job creation, they have faced severe challenges as a result of the recession. One consequence has been the loss of significant numbers of jobs.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public. The RFA emphasizes the importance of recognizing "differences in the scale and resources of regulated entities" and of considering "alternative regulatory approaches . . . which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions." 5 U.S.C. 601 note.

To promote its central goals, the RFA imposes a series of requirements designed to ensure that agencies produce regulatory flexibility analyses that give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on small businesses. Among other things, the RFA requires that when an agency proposing a rule with such impact is required to provide notice of the proposed rule, it must also produce an initial regulatory flexibility analysis that includes discussion of significant alternatives. Significant alternatives include the use of performance rather than design standards; simplification of compliance and reporting requirements for small businesses; establishment of different timetables that take into account the resources of small businesses; and exemption from coverage for small businesses.

Consistent with the goal of open government, the RFA also encourages public participation in and transparency about the rulemaking process. Among other things, the statute requires agencies proposing rules with a significant economic impact on small businesses to provide an opportunity for public comment on any required initial regulatory flexibility analysis, and generally requires agencies promulgating final rules with such significant economic impact to respond, in a final regulatory flexibility analysis, to comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses. Executive Order 12866 of September 30, 1993, as amended, states, "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account,

among other things, and to the extent practicable, the costs of cumulative regulations."

In the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation.

Accordingly, I hereby direct executive departments and agencies and request independent agencies, when initiating rulemaking that will have a significant economic impact on a substantial number of small entities, to give serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens on small businesses, through increased flexibility. As the RFA recognizes, such flexibility may take many forms, including:

- extended compliance dates that take into account the resources available to small entities;
- performance standards rather than design standards;
- simplification of reporting and compliance requirements (as, for example, through streamlined forms and electronic filing options);
- different requirements for large and small firms; and
- partial or total exemptions.

I further direct that whenever an executive agency chooses, for reasons other than legal limitations, not to provide such flexibility in a proposed or final rule that is likely to have a significant economic impact on a substantial number of small entities, it should explicitly justify its decision not to do so in the explanation that accompanies that proposed or final rule.

Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action. With that understanding, agencies will be in a better position to protect the public while avoiding excessive costs and paperwork.

This memorandum 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this memorandum shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 18, 2011

[FR Doc. 2011–1387
Filed 1–20–11; 8:45 am]
Billing code 3110–01–P

Federal Register / Vol. 76, No. 14 / Friday, January 21, 2011 / Presidential Documents 3827

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The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register.*

THE WHITE HOUSE,
Washington, January 18, 2011

[FR Doc. 2011–1387
Filed 1–20–11; 8:45 am]
Billing code 3110–01–P

THE WALL STREET JOURNAL.
WSJ.com

OPINION | JANUARY 18, 2011

Toward a 21st-Century Regulatory System

If the FDA deems saccharin safe enough for coffee, then the EPA should not treat it as hazardous waste.

By BARACK OBAMA

For two centuries, America's free market has not only been the source of dazzling ideas and path-breaking products, it has also been the greatest force for prosperity the world has ever known. That vibrant entrepreneurialism is the key to our continued global leadership and the success of our people.

But throughout our history, one of the reasons the free market has worked is that we have sought the proper balance. We have preserved freedom of commerce while applying those rules and regulations necessary to protect the public against threats to our health and safety and to safeguard people and businesses from abuse.

From child labor laws to the Clean Air Act to our most recent strictures against hidden fees and penalties by credit card companies, we have, from time to time, embraced common sense rules of the road that strengthen our country without unduly interfering with the pursuit of progress and the growth of our economy.

Sometimes, those rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs. At other times, we have failed to meet our basic responsibility to protect the public interest, leading to disastrous consequences. Such was the case in the run-up to the financial crisis from which we are still recovering. There, a lack of proper oversight and transparency nearly led to the collapse of the financial markets and a full-scale Depression.

Over the past two years, the goal of my administration has been to strike the right balance. And today, I am signing an executive order that makes clear that this is the operating principle of our government.

This order requires that federal agencies ensure that regulations protect our safety, health and environment while promoting economic growth. And it orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive. It's a review that will help bring order to regulations that have become a patchwork of overlapping rules, the result of tinkering by administrations and legislators of both parties and the influence of special interests in Washington over decades.


OPINION

Toward a 21st-Century Regulatory System

Where necessary, we won't shy away from addressing obvious gaps: new safety rules for infant formula; procedures to stop preventable infections in hospitals; efforts to target chronic violators of workplace safety laws. But we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.

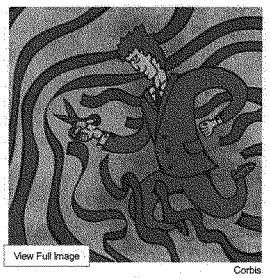
For instance, the FDA has long considered saccharin, the artificial sweetener, safe for people to consume. Yet for years, the EPA made companies treat saccharin like other dangerous

chemicals. Well, if it goes in your coffee, it is not hazardous waste. The EPA wisely eliminated this rule last month.

But creating a 21st-century regulatory system is about more than which rules to add and which rules to subtract. As the executive order I am signing makes clear, we are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses and ordinary citizens. It means using disclosure as a tool to inform consumers of their choices, rather than restricting those choices. And it means making sure the government does more of its work online, just like companies are doing.

We're also getting rid of absurd and unnecessary paperwork requirements that waste time and money. We're looking at the system as a whole to make sure we avoid excessive, inconsistent and redundant regulation. And finally, today I am directing federal agencies to do more to account for—and reduce—the burdens regulations may place on small businesses. Small firms drive growth and create most new jobs in this country. We need to make sure nothing stands in their way.

One important example of this overall approach is the fuel-economy standards for cars and trucks. When I took office, the country faced years of litigation and confusion because of conflicting rules set by Congress, federal regulators and states.



Corbis

The EPA and the Department of Transportation worked with auto makers, labor unions, states like California, and environmental advocates this past spring to turn a tangle of rules into one aggressive new standard. It was a victory for car companies that wanted regulatory certainty; for consumers who will pay less at the pump; for our security, as we save 1.8 billion barrels of oil; and for the environment as we reduce pollution. Another example: Tomorrow the FDA will lay out a new effort to improve the process for approving medical devices, to keep patients safer while getting innovative and life-saving products to market faster.

Despite a lot of heated rhetoric, our efforts over the past two years to modernize our regulations have led to smarter—and in some cases tougher—rules to protect our health, safety and environment. Yet according to current estimates of their economic impact, the benefits of these regulations exceed their costs by billions of dollars.

This is the lesson of our history: Our economy is not a zero-sum game. Regulations do have costs; often, as a country, we have to make tough decisions about whether those costs are necessary. But what is clear is that we can strike the right balance. We can make our economy stronger and more competitive, while meeting our fundamental responsibilities to one another.

Mr. Obama is president of the United States.

MEMORANDUM January 22, 2011

To: The Honorable Cliff Stearns, Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce
Attention: Peter Spencer

From: Curtis W. Copeland, Specialist in American National Government, (202) 707-0632

Subject: **Comparison of Regulatory Executive Orders**

This memorandum responds to your request that CRS compare the requirements in the executive order issued by President Barack Obama on January 18, 2011, on "Improving Regulation and Regulatory Review"[1] with the requirements in Executive Order 12866, "Regulatory Review and Planning," issued by President William Clinton on September 30, 1993.[2] **Table 1** below provides the requested information. The first column provides the complete text of each section of the new executive order (with some sections broken down into subsections or clauses to provide clearer points of comparison). The second column indicates whether there was a comparable requirement in Executive Order 12866, or in related documents (e.g., Circular A-4, which was last issued in 2003, and provides guidance to federal agencies on the development of regulatory analyses required under Executive Order 12866).[3]

As the table indicates, there are numerous similarities between the new executive order and Executive Order 12866. In fact, Section 1(b) of the new order specifically states that "This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993." There are a few differences between the two orders, although in some cases, other documents bridge those differences. For example:

- Section 1(c) of the new executive order states that, in applying the order's rulemaking principles, each agency is to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." Although there does not appear to be any directly comparable language in Executive Order 12866, Circular A-4 goes into great detail in describing what techniques should be used to quantify and monetize regulatory costs and benefits. Also, in November 2010, the Office of Management and Budget published a checklist for agencies to use in conducting regulatory impact analyses under Executive Order 12866 and Circular A-4.[4]

[1] To view a copy of this executive order, see http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

[2] The President, "Executive Order 12866: Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

[3] To view a copy of OMB Circular A-4, see http://www.whitehouse.gov/omb/circulars_a004_a-4/.

[4] To view a copy of this checklist, see http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf.

- Section 2(b) of the new executive order states that agencies should provide "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." Although there is no such requirement in Executive Order 12866 for online access to documents on regulations.gov (the regulations.gov website did not exist until 2003), the preamble to the 1993 executive order states that one of the executive order's objectives is "to make the [rulemaking] process more accessible and open to the public." Also, many of the transparency requirements in Executive Order 12866 are intended to provide more openness and accessibility.
- Section 6(a) of the new executive order requires agencies to release the results of their retrospective analyses of existing rules, including supporting data, "online whenever possible." Although Section 5 of Executive Order 12866 states that retrospective reviews are needed, and requires agencies to develop a program under which the agency will periodically review its existing significant regulations, there is no requirement for the release of the reviews to the public, online or otherwise.

I trust that this information is helpful. Please do not hesitate to call if I can provide any other information.

Table 1. Comparison of the New Executive Order on "Improving Regulation and Regulatory Review" with Executive Order 12866

New Executive Order	Executive Order 12866
Section 1. General Principles of Regulation. (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.	The preamble to Executive Order 12866 says (in part) that "The American people deserve... a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society...."
It must be based on the best available science.	Section 1(b)(7) states that "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."
It must allow for public participation and an open exchange of ideas.	Section 6(a)(1) states that "Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process."
It must promote predictability and reduce uncertainty.	Section 1(b)(12) states that "Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."
It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.	Section 6(a)(2) states that each agency's regulatory policy officer "shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order."
It must take into account benefits and costs, both quantitative and qualitative.	Section 1(a) states that "Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."

New Executive Order	Executive Order 12866
It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand.	As noted above, Section 1(b)(12) states that "Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."
It must measure, and seek to improve, the actual results of regulatory requirements.	Section 1(b)(8) states that "Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt."
(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (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);	Section 1(b)(6) states that "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."
(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;	Section 1(b)(11) states that "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."
(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);	Section 1(a) states that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."
(4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and	Section 1(b)(7) states that "Each agency...shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt."
(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.	Section 1(b)(3) states that "Each agency shall 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."
(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.	No direct counterpart in E.O. 12866. However, OMB Circular A-4 goes into great detail describing the methods that agencies should use to quantify and monetize current and future benefits and costs.

New Executive Order	Executive Order 12866
Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.	Section 1(a) states that costs and benefits shall be understood to include "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." The section goes on to say that, unless a statute requires otherwise, agencies should select approaches that maximize net benefits, "including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity." Also, OMB Circular A-4 goes into great detail in describing how to treat costs and benefits that are difficult to quantify or monetize.
Sec. 2. Public Participation. (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.	Section 1(9)(b) states that "Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions."
(b) To promote that open exchange, 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. To 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 that should generally be at least 60 days.	Although there is no mention of using the Internet, Section 6(a)(1) states that "Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."

New Executive Order	Executive Order 12866
To the extent feasible and permitted by law, 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. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.	No direct counterpart in E.O. 12866 (in part because the online rulemaking docket in regulations.gov did not exist until 2003). However, the preamble states that one of the executive order's objectives is "to make the [rulemaking] process more accessible and open to the public." Also, many of the transparency requirements in the executive order are intended to provide more openness and accessibility. For example, Section 6(a)(3)(E) states that each agency is to "(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C) [i.e., the text of the regulatory action and any cost-benefit analysis); (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and (iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." Also, Section 6(b)(4)(C) requires OIRA to "maintain a publicly available log that shall contain" (among other things) (1) "The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications;" and (2) "all documents exchanged between OIRA and the agency during the review by OIRA."
(c) 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.	As noted previously, Section 6(a)(1) of E.O. 12866 states that "before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials)."
Sec. 3. Integration and Innovation. Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.	As stated in the preamble, one of the objectives of the executive order is "to enhance planning and coordination with respect to both new and existing regulations." Section 2(b) states that "Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency." That section designates OMB to oversee that coordination. One of the stated purposes of the "Planning Mechanisms" in Section 4 is "to provide for coordination of regulations." Also, the Regulatory Working Group established in Section 4(d) is to serve as a forum for (among other things) "the development of innovative regulatory techniques."

New Executive Order	Executive Order 12866
Sec. 4. Flexible Approaches. Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.	Section 1(b)(5) states that, in designing its regulations, "each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity." Also, Section 1(b)(11) states that "Each agency shall tailor its regulations to impose the least burden on society...." In addition, Circular A-4 recommends that agencies consider alternative regulatory approaches, including providing information to the public, market-oriented approaches, and performance standards that "give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way."
Sec. 5. Science. Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.	As noted previously, Section 1(b)(7) states that "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation." The March 9, 2009, memorandum mentioned in the new executive order states, in part, that "When scientific or technological information is considered in policy decisions, the information should be subject to well-established scientific processes, including peer review where appropriate, and each agency should appropriately and accurately reflect that information in complying with and applying relevant statutory standards."
Sec. 6. Retrospective Analyses of Existing Rules. (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.	Section 5 states that a review of existing regulations is needed "to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations." However, there is no mention in E.O. 12866 regarding the release of the reviews online or otherwise to the public.
(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.	Section 5(a) states that "Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order."
Sec. 7. General Provisions. (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.	Section 3(b) of Executive Order 12866 defines an "agency" as "any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10)."

New Executive Order	Executive Order 12866
(b) Nothing in this order shall be construed to impair or otherwise affect: (i) authority granted by law to a department or agency, or the head thereof; or (ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.	Section 9 states that "Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law."
(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.	In six different places (e.g., in the principles of regulation in Section 1(b)), Executive Order 12866 says that the requirements are to be implemented "to the extent permitted by law." However, there is no mention of appropriations.
(d) 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person.	Section 10 states that "Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."

Source: CRS.

Independent Agencies Not Subject to OIRA Regulatory Review

1. Board of Governors, Federal Reserve System
2. Bureau of Consumer Financial Protection
3. Commodity Futures Trading Commission
4. Consumer Product Safety Commission
5. Federal Communications Commission
6. Federal Deposit Insurance Corporation
7. Federal Energy Regulatory Commission
8. Federal Housing Finance Board
9. Federal Maritime Commission
10. Federal Trade Commission
11. Mine Enforcement Safety and Health Review Commission
12. National Labor Relations Board
13. Nuclear Regulatory Commission
14. Occupational Safety and Health Review Commission
15. Postal Rate Commission
16. Securities and Exchange Commission

THE HILL

E² Wire
THE HILL'S Energy & Environment Blog

EPA 'confident' Obama reg policy won't affect new climate rules

By Andrew Restuccia - 01/18/11 06:05 PM ET

The Environmental Protection Agency (EPA) is "confident" it will not have to alter current or pending environmental regulations, including upcoming climate rules, as part of the new regulatory review framework President Obama outlined Tuesday.

"EPA is confident that our recent and upcoming steps to address GHG emissions under the Clean Air Act comfortably pass muster under the sensible standards the president has laid out," an EPA official told The Hill in a statement Tuesday.

The official said this includes EPA's current rules, including tighter fuel economy standards, as well as upcoming greenhouse gas standards for power plants and refineries. Both the current and pending regulations "have all been characterized by broad public participation, extensive transparency and thorough analysis," the official said.

Under the new framework, announced by Obama on Tuesday, federal agencies must review current regulations and ensure upcoming regulations meet new standards regarding transparency, science and economic impact.

Industry and business groups cited the new framework Tuesday in calling on Obama to overturn or alter a number of the administration's regulations. The National Association of Manufacturers said Tuesday that the administration should **halt upcoming climate regulations** under the regulatory policy.

A senior administration official said earlier Tuesday that EPA's climate rules would be **subject to additional analysis**, including cost-benefit analysis and efforts to reduce the burden on affected industries.

President Obama, in a *Wall Street Journal* op-ed Tuesday previewing his framework, argued that the benefits of the administration's environmental regulations **outweigh the costs**.

EPA spokeswoman Betsaida Alcantara, in a statement, said the agency has already been following many of the protocols formalized Tuesday in Obama's framework.

"OMB's announcement formalizes what we at EPA have been doing under this new administration: using common sense and transparency to review regulations while rooting them in science, the law and the mission to protect Americans' health," Alcantara said. "In fact, EPA's rules consistently yield billions in cost savings that make them among the most cost-effective in the government."

Source:
http://thehill.com/blogs/e2-wire/677-e2-wire/138627-epa-confident-new-obama-reg-policy-wont-alter-climate-rules

U.S. House of Representatives Energy and Commerce Committee
Subcommittee on Oversight and Investigations
Questions for the Record from Cass R. Sunstein
Administrator, Office of Information and Regulatory Affairs

Chairman Stearns:

1. Isn't it true that the Obama Administration had issued 190 economically significant regulations as of April 2010?

Between January 20, 2009 and April 30, 2010, OIRA completed review of 72 economically significant final and interim final rules.[1] Counting all regulatory actions, including proposed rules, OIRA concluded review of a total of 156 economically significant regulatory actions during that time period.[2]

2. Isn't it true that this number had grown to 224 in December 2010?

Between January 20, 2009 and December 31, 2010, OIRA completed review of 120 economically significant final and interim final rules.[3] Counting all regulatory actions, including proposed rules, OIRA concluded review of a total of 253 economically significant regulatory actions during that time period.

3. How many regulations were issued in the first two years of the Bush Administration, 2001-2002?

Between January 20, 2001 and December 31, 2002, OIRA completed review of 547 significant final and interim final rules.[4] Counting all regulatory actions, including proposed rules, OIRA concluded review of a total of 1,268 significant regulatory actions during that time period.

4. How many regulations were issued in the first two years of the Obama Administration?

Between January 20, 2009 and December 31, 2010, OIRA completed review of 555 significant (economically significant and other significant) final and interim final rules.[5] Counting all regulatory actions, including proposed rules, OIRA concluded review of a total of 1,243 significant regulatory actions.

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[1] This count excludes 10 rules that agencies withdrew from OMB review. The search function for OMB regulatory review can be found at:
http://www.reginfo.gov/public/do/eoAdvancedSearchMain
Selecting "Concluded" under "Review Status" allows a search of concluded rules based on rule characteristics such as stage of rulemaking and economic significance.

[2] Counts of OMB regulatory review can be found at:
http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init

[3] This count excludes 12 rules that agencies withdrew from OMB review.

[4] This count excludes 85 rules that agencies withdrew from OMB review, 7 rules that OMB returned for reconsideration, and one rule that was improperly submitted.

[5] This count excludes 42 rules that agencies withdrew from OMB review.

Rep. Blackburn:

1. Please submit for the record current data on how often federal agencies made a determination that a proposed regulation would not have a significant impact on small businesses, and therefore avoided having to carry out an analysis under the Regulatory Flexibility Act.

The semiannual Unified Agenda includes information on determinations by federal agencies of whether an analysis under the Regulatory Flexibility Act is required for a proposed regulation. In the Fall 2010 Unified Agenda, which includes the most recent prospective data, agencies reported that a Regulatory Flexibility Analysis was not required for 1,056 proposed rules, including "routine" and "non-substantive" rules, and that the analysis requirement was "undetermined" for 245 proposed rules, again including "routine" and "non-substantive" rules.[6] OIRA reviewed a subset of those rules; agencies reported in the Unified Agenda that a Regulatory Flexibility Analysis was not required for 317 proposed significant rules for which OIRA concluded review between January 20, 2009 and February 7, 2011.[7] During the same time period, OIRA also concluded review of an additional 62 proposed rules where the agencies indicated in the Unified Agenda that a Regulatory Flexibility analysis requirement was "undetermined."

Rep. Burgess:

1. Is it the President's intention to follow through on his promise to fix the Medicare sustainable growth rate abnormality in this 13-month time interval since the extension of the sustainable growth rate law in December 2010?

Please see next question.

[6] The advanced search function for the Unified Agenda can be found at:
http://www.reginfo.gov/public/do/eAgendaAdvancedSearch

[7] The search function for OMB regulatory review can be found at:
http://www.reginfo.gov/public/do/eoAdvancedSearchMain
Selecting "Concluded" under "Review Status" allows a search of concluded rules based on characteristics such as "Regulatory Flexibility Analysis Required."

2. Will the President's 2012 budget request to Congress likely include relief on the sustainable growth rate formula?

OIRA was not involved in policy discussions about the budget and has no jurisdiction over it;[8] I do not work on these issues, or have any personal knowledge of them. That said, my office has communicated with colleagues at OMB about this issue in response to your question.

The President's budget for FY 2012, released on February 14, 2011, proposes to continue current physician levels of payment and offset the increase above current law for the next two years with specific health savings. I am informed that looking beyond that, the Administration is determined to work with Congress to put in place a long-term plan to reform physician payment rates in a fiscally responsible way and to craft a reformed reimbursement system that gives physicians incentives to improve quality and efficiency while providing them with predictable payments for the care they furnish to Medicare beneficiaries.

3. Depending on who you talk to, the price tag for this program ranges from $200 billion to nearly $400 billion over the 10-year budgetary cycle. What federal programs does the President plan on cutting or replacing in order to come up with the money to pay for this? If you are unable to answer this question, please direct it to someone who can answer.

OIRA was not involved in policy discussions about the budget and has no jurisdiction over it;[9] hence I do not work on these issues. My colleagues at OMB inform me that the President's budget includes $62 billion over 10 years in specific savings proposals that offset the cost of two years of a physician payment freeze, which costs approximately $54 billion. Program integrity proposals account for $32 billion; proposals to reduce the cost of drugs and durable medical equipment and improve efficiency account for $28 billion; and a proposal to streamline pharmacy benefit contracting in the Federal Employees Health Benefits (FEHB) program saves $1.8 billion.

Looking beyond 2013, the Administration is determined to work with Congress to put in place a long-term plan to reform physician payment rates in a fiscally responsible way. The Administration will work with Members to identify offsets for the remainder of the cost, consistent with recent Congressional action on this issue.

[8] An exception is that the Statistical and Science Policy staff of OIRA work closely with the budget-side of OMB to coordinate the budgets of Federal statistical agencies, as required by the Paperwork Reduction Act.
[9] As already mentioned, an exception is that the Statistical and Science Policy staff of OIRA work closely with the budget-side of OMB to coordinate the budgets of Federal statistical agencies, as required by the Paperwork Reduction Act.

Rep. Myrick

1. In regard to the National Highway Traffic Safety Administration's (NHTSA) proposed rule to require rear visibility systems in cars, isn't it true that NHTSA's own modeling says it is not cost-beneficial to do it?

As NHTSA's Notice of Proposed Rulemaking indicates, the statute limits NHTSA's ability to consider options that could have reduced net costs. The proposal seeks comment on how to reduce the costs while still complying with the statutory mandate, and the rule may change before it is finalized. The proposed rule states that the annual monetized benefits are approximately $600 million, and that the annual monetized costs are approximately $2 billion. It also states: "Some of the benefits of the proposed rule are hard to quantify, but are nonetheless real and significant. One such benefit is that of not being the direct cause of the death or injury of a person and particularly a small child at one's place of residence. In some of these cases, parents are responsible for the deaths of their own children; avoiding that horrible outcome is a significant benefit."

2. If you apply this rule across the board to all cars, does it not raise the price of cars to the point where sales of new cars decline, and you still have accidents because you don't have availability?

According to NHTSA's regulatory impact analysis (RIA), applying this rule to all cars will cost consumers between $58 and $203 per vehicle. However, NHTSA did not estimate the effect of the rule on new vehicle sales. Consistent with Executive Order 13563, and in particular its emphasis on public participation and accurate quantification, all of the analysis is subject to public comment and to revision.

3. How many $1 billion rules is the Obama Administration currently planning?

In FY 2010, the Administration issued two final rules with an annual cost of $1 billion or more. As of now, nine rules have been proposed by federal agencies with annual estimated costs of $1 billion or more. (These rules may change substantially in response to public comment and further analysis prior to becoming final.)

We do not have final estimates of the costs of rules that are in preliminary stages; the contents of such rules, and the corresponding estimates of their costs and benefits, are not yet settled.

A number of rules may be proposed in the future, as indicated by the Unified Agenda. But these rules are in an early stage, and it would be premature to describe the potential costs or benefits.

4. When you look back on the regulations that have been issued during the Obama Administration, can you identify any in which it has been determined that the benefits did not justify the costs? Please provide more information on each of these, including the positive train control regulations which you cited at the hearing.

Four rules fall into this category.

1. The first rule, the Federal Aviation Administration (FAA) ADS-B Equipage rule, is a first component of NextGen, a system that will transform today's radar-based aviation system to handle increased aviation demand, leading to further benefits in the future. In the FAA's analysis, the bulk of the costs of the ADS-B Out rule are incurred between 2010 and 2020 (the rule's analysis period), while most of the benefits from air traffic control efficiencies are expected to occur after the mandated compliance date of 2020. As a result, the cost/benefit ratio in the analysis does not reflect the overall benefits that are ultimately expected to accrue to society as a result of the issuance of this rule.

2. The second rule is the Environmental Protection Agency (EPA) Water Quality Standards (Numeric Nutrient Criteria) for Florida's Lakes and Flowing Waters rule. This rule was developed pursuant to a consent decree that required the EPA to develop numeric limits for nitrogen and phosphorus for Florida's fresh waters. Note that this rule may have additional water quality benefits that could not be quantified.

3. The third rule is the Department of Transportation Positive Train Control regulations. While the costs were higher than the benefits for this rule, the Department was statutorily obligated to promulgate this rule and had no statutory discretion to ensure that the monetized benefits justify the monetized costs.

4. The last rule is the National Highway Traffic Safety Administration Roof Crush regulation. The goal of this rule was to provide greater passenger protection in rollover crashes of cars and light trucks in which the vehicle roofs are crushed. A rule was statutorily mandated.

Rep. Scalise

1. Isn't it true that the Department of the Interior did not perform a regulatory flexibility analysis regarding the impact on small businesses of the moratorium on oil and gas exploration on the outer continental shelf?

The Department of the Interior (DOI) determined that the moratorium did not require a Regulatory Flexibility Act analysis. OIRA did not review the moratorium because the moratorium was not a "regulatory action" as defined by Executive Order 12866. As a result, OIRA also did not review DOI's application of the Regulatory Flexibility Act to the moratorium.

2. Isn't it true that OIRA concluded that the actions taken by the Department of the Interior regarding oil and gas operations on the outer continental shelf did not require a regulatory flexibility analysis?

In October, 2010, OIRA concluded review of two DOI Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) rules associated with oil and gas operations on the outer continental shelf: a final rule requiring that each operator develop, maintain, and operate a Safety and Environmental Management System (SEMS) program; and an interim final rule requiring increased safety measures.

DOI concluded that the SEMS final rule did not have a significant impact on a substantial number of small entities, and provided an analysis of the basis of that decision.

With regard to the safety measures interim final rule, although DOI did provide an estimate of the rule's impacts on small entities, the Regulatory Flexibility Act section of the preamble of the rule states the following: "Given the emergency nature of these rules, BOEMRE has not yet prepared a detailed Initial Regulatory Flexibility Analysis for this rule; however, BOEMRE intends to publish a supplemental Initial Regulatory Flexibility Analysis in the near future which will examine the impact of this regulation on small entities in greater detail than provided below. BOEMRE continues to be interested in all potential impacts of the interim final rule on small entities and welcomes comments on issues related to such impacts. These comments will assist BOEMRE in conducting further analysis than provided below regarding the economic impact of these regulations on small entities, as well as an opportunity to examine regulatory alternatives that can accomplish BOEMRE's safety goals at a lower cost to small entities." DOI published this supplemental Initial Regulatory Flexibility Analysis on December 23, 2010.

3. Please provide all documentation, emails and correspondence between OIRA and the Office of Advocacy in the Small Business Administration related to these rules in making the determination not to do a regulatory flexibility analysis.

The attached letter, written to BOEMRE by the Office of Advocacy in the Small Business Administration, communicates the general content of the exchanges between OIRA and the Office of Advocacy.

Rep. Terry

1. Did the Federal Communications Commission provide OIRA with a regulatory plan that included net neutrality in 2010?

The net neutrality rule, *Preserving the Open Internet; Broadband Industry Practices*, was not included in the Federal Communications Commission (FCC) Fall 2010 Unified Agenda. The FCC does not submit a Regulatory Plan to OIRA.

Rep. McKinley

1. Please advise us as to who will be looking into the repercussions of the EPA decision to apply a retroactive veto with regard to the Spruce Mine in West Virginia. What steps have you taken, if any, to investigate this issue?

As I mentioned at the hearing, OIRA does not review individual permitting decisions. That said, I have asked my staff to do some more research into this issue, and we will communicate your concerns to the EPA.

Office of Advocacy
www.sba.gov/advo

Advocacy: the voice of small business in government

November 22, 2010

Via Electronic Submission

Department of the Interior
Bureau of Ocean Energy Management, Regulation and Enforcement
Attention: Regulations and Standards Branch
381 Elden Street, MS-4024
Herndon, Virginia 20170-4817

Re: Oil and Gas and Sulphur Operations in the Outer Continental Shelf-Increased Safety Measures for Energy Development on the Outer Continental Shelf, RIN 1010-AD68[1]

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration submits these comments to the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) regarding its interim final rule which establishes certain drilling regulations relating to well control on the Outer Continental Shelf. Advocacy recognizes the importance of improving the safety of offshore oil and gas drilling operations in Federal waters, and encourages BOEMRE to continue examining ways to accomplish that goal while limiting disproportionate impacts on small businesses. Advocacy commends BOEMRE for committing to publishing a supplemental Initial Regulatory Flexibility Analysis (IRFA) for its interim final rule, and is providing these comments in order to assist BOEMRE in complying with its obligations under the Regulatory Flexibility Act.[2]

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.[4]

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[1] *Oil and Gas and Sulphur Operations in the Outer Continental Shelf-Increased Safety measures for Energy Development on the Outer Continental Shelf; Interim Final Rule*, 75 Fed. Reg. 63346 (October 14, 2010).
[2] 5 U.S.C. §601 et. seq.
[3] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.) (SBREFA).
[4] *Id.*

Background

As a result of the Deepwater Horizon explosion and subsequent oil spill , the Department of Interior developed certain recommendations regarding safety measures for deepwater drilling which were released in the report entitled "Increased Safety Measures for Energy Development on the Outer Continental Shelf" (the Report). The Report recommended that certain measures be implemented to ensure sufficient redundancy in blowout preventers, promote well integrity and enhance well control. On June 8, 2010, BOEMRE issued a Notice to Lessees and Operators (NTL) that immediately implemented certain recommendations in the Report. The interim final rule codifies the requirements listed in the NTL as well as other recommendations identified in the Report as suitable for implementation through emergency rulemaking. The interim rule includes a limited discussion of the impact of the rule on small businesses and BOEMRE has committed to publishing a supplemental IRFA with a more detailed analysis.

Comments

Advocacy appreciates BOEMRE's decision to publish a supplemental IRFA. In its notice, BOEMRE included certain information regarding the composition of the oil and gas industry and the small business entities - lessees, operators, and drilling contractors - that will be most affected by this interim rule. BOEMRE estimates that $29 million dollars or 15.8% of the interim final rule's total cost of $183 million will be borne by small businesses. This cost would comprise about 0.36% of these small businesses' fiscal year 2009 revenue.

However, BOEMRE does not discuss how these costs would be distributed among small businesses. Advocacy is concerned that these costs will impact certain small businesses more heavily than others. Advocacy encourages BOEMRE to include additional information regarding how the industry functions and which small entities are most likely to incur increased costs as a result of this interim final rule. Advocacy also recommends that BOEMRE include a more detailed discussion of the distribution of costs among the small entities identified in the IRFA in order to accurately determine whether some small entities will incur disproportionate impacts as a result of this rule.

The RFA requires agencies to include in their IRFA a description of any significant alternatives to the proposed rule that minimize significant economic impacts on small entities while still accomplishing the agency's objectives.[5] While BOEMRE did note a few alternatives in the interim rule, Advocacy recommends that BOEMRE include a more detailed discussion of the alternatives and their effects on small business and the reasons for or against adopting those alternatives. Advocacy further recommends that BOEMRE continue to conduct outreach with small entities affected by this rule and any future safety rules to develop alternatives that minimize disproportionate impacts on small entities.

[5] 5 U.S.C. §603(c).

Conclusion

Advocacy is pleased that BOEMRE recognizes its dual obligations to insure the safety and soundness of offshore drilling practices and to comply with the RFA. Advocacy requests that full consideration be given to the comments listed herein and would be happy to further assist BOEMRE in preparing its IRFA. Please contact me or Kia Dennis at 202-205-6936 should you have any questions.

Best regards,

//signed//

Winslow L. Sargeant, Ph.D.
Chief Counsel for Advocacy

//signed//

Kia Dennis
Assistant Chief Counsel for Advocacy

Cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

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