REGULATIONS FROM THE EXECUTIVE IN NEED OF SCRUTINY ACT OF 2011

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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REGULATIONS FROM THE EXECUTIVE IN NEED OF SCRUTINY ACT OF 2011

TUESDAY, MARCH 8, 2011

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

The Subcommittee met, pursuant to notice, at 4 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, Gallegly, Franks, Reed, Ross, Cohen, Johnson, and Quigley.

Also Present: Representatives Conyers and Jackson Lee.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Ashley Lewis, Clerk; John Hilton, Counsel; and Allison Rose, Professional Staff Member.

Mr. COBLE. The Subcommittee will come to order.

As I stated in our January, 24, 2011, oversight hearing it is no secret that our economy is still soft. Unnecessary or unreasonable regulatory burdens will continue to drive business investments to other countries, and the result will continue to be too few American jobs and too little American prosperity. Perhaps more than anything else is Congress' excessive delegation of legislative decisions to Federal agencies that has produced a flood of Federal regulation that burdens our economy. When Congress makes the decisions, it is accountable to the voters for the results. When agencies make the decisions, they are not.

Not surprising, therefore, it is the unaccountable agencies that churn out regulation after regulation, year after year, whether needed or not. The cumulative weight of their regulations contributes heavily to the difficulty of our economic recovery. So does uncertainty over what regulations will come next, particularly what $100 million or $1 billion regulations are around the country.

The REINS Act is an important step, it seems to me, to turn this state of affairs around. It returns to Congress the decisions over whether the most costly regulations proposed by Federal agencies will become effective. And by returning these decisions to Congress, it ultimately will return the decisionmaking authority to the voters.

At our January, 2011, oversight hearing on the REINS Act, we considered at length the basic policy decision that the REINS Act presents. We also began a discussion about the constitutionality of the bill. At today's hearing, we will continue our consideration of

the REINS Act's constitutionality. It is my view that the discussion must begin from the premise that agencies have legislative rulemaking authority only because the Congress has delegated it to them. Therefore, when Congress seeks to reclaim some of its legislative authorities, that would seem to be inherently constitutional.

I am sure the witnesses will offer us their views on that and on ways in which we may be able to improve the REINS Act language. I look forward to hearing our witnesses' testimony, and reserve the balance of my time, and I am pleased to recognize the distinguished gentleman from Tennessee, the Ranking Member on this Subcommittee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

Welcome to the witnesses. I appreciate your coming before us.

Sometimes during a legislative hearing, a Committee will examine the particulars of a bill at issue, including the quality of its drafting, the need for additional provisions, or whether it can be improved or tweaked to make it more acceptable to the bill's opponents.

However, with respect to H.R. 10, the "Regulations From the Executive in Need of Scrutiny Act," or "REINS Act," I do not see the point of engaging in such a process because such a bill is simply an ill-conceived notion, particularly because the regulations—the title, Regulations From the Executive in Need of Scrutiny, implies directly that the Executive is in need of scrutiny. That Executive, of course, is the President of the United States; not the president of the Democratic Party, but the President of the United States, Barack Obama.

This act was not needed when George Bush was President, apparently. He did not need scrutiny, although, in retrospect, with the Nation coming close to falling into the Great Depression, the second Great Depression we would have had, he needed a lot of scrutiny. Putting us into a war where we didn't have weapons of mass destruction, and squandering a trillion dollars of our wealth and 4,500 people's lives and a whole lot of our reputation around the world, he didn't need scrutiny. Only when this man, this great man becomes President, is there a need for—let me see the title of this again—executive scrutiny. I think that is what it was. Executive in Need of Scrutiny Act. Well, in itself I think you can see that it is political and not a governmental decision.

In reviewing the written statements of the two majority witnesses, it is clear the real purpose of this hearing is to attack at its foundation the administrative system, particularly this President. In fact, both witnesses seem to take a strong issue with much of the 20th century. In fact, this antecedes the President, but certainly his policies embody much of the great policies of the last half of the 20th century which are under attack in this Congress, this modern government is.

Under H.R. 10, all major rules, that is, rules that have a positive or negative economic effect of a hundred million dollars or more, and there are increased prices for consumers, industries, and government entities, or have significant adverse economic impact must be approved by Congress before they can take effect. Congress must do so by passing a joint resolution of approval through both Chambers under expedited process.

I do not believe the REINS Act is necessary for the exercise of congressional control over the administrative system. Congress already has a number of means at its disposal to shape agency rulemaking. The most straightforward, of course, is its power to determine the nature and scope of its delegation of authority to an agency. If Congress deems the delegation of authority was too broad, it is always free to revisit that delegation and, if needed, retract or narrow the scope of the agency's authority, always keeping in mind that we have three separate and equal branches of government. And that should be reminded to us as well as we read the Constitution in the first week. And it talked about the three separate branches, Article 1 and 2, et cetera.

Additionally, as it was demonstrated vividly just a few weeks ago, Congress can use its power of the purse to stop implementation of specific regulations it objects to. For instance, no fewer than 19 out of the 67 amendments to H.R. 1, the "Full Year Continuing Appropriations Act 2011," or the attack on the last half of the 20th century were aimed at defunding the promulgation or implementation of existing and proposed regulations. Congress can also conduct oversight, whether through formal hearings or through less formal interactions between agencies and individual Members or Committees. Among the first phone calls that small business people and other constituents make when they have concerns about agency actions are to their Member of Congress, which in turn prompts Members to act.

Finally, Congress has enacted statutes to shape the administrative rulemaking process, including the Administrative Procedure Act and the Regulatory Flexibility Act. Moreover, through the reporting requirements through the Congressional Review Act, Congress has kept informed about agency rulemaking activity.

Congress is not shy about objecting to rules it finds objectionable, and has the means to impose its will regarding such matters. Moreover, each of these mechanisms ensures democratic accountability over agency rulemaking. The REINS Act, however, would force Congress to pass judgment on major rules without the opportunity to make a well-informed decision about their merits, leaving them wide open for special interests to stifle such rules in Congress.

Under the bill, Congress has only 70 legislative days to pass the joint resolution of approval through both Chambers, and is limited to a total of 2 hours of debate in each House; only 1 hour for each of those in favor and 1 for those opposed to the joint resolution; certainly not enough time for a well-informed and intellectual debate of the issues.

Committees of jurisdiction will only have 15 legislative or session days to consider the merits of major rules under their jurisdiction, after which a joint resolution of approval is automatically discharged.

Under such a short-circuited process, is Congress really in a position to second-guess the merits of rules that in many cases took many years of vetting to produce? Instead, Members would be bombarded with visits, phone calls, and talking points from industry lobbyists who would no doubt take advantage of this short-circuited process to shape Members' perspectives about the recalls.

The REINS Act forces Congress to move too quickly while pointlessly slowing down the agency rulemaking in a way that is not improvement. The REINS Act also threatens to undermine Congress' ability to consider other legislative business. For example, in calendar year 2010 alone, there were 94 major rules while there were only approximately 116 legislative days in the House during the same period. We are having less time on the floor, now that we have had a change in the 112th Congress in how we meet. Even under expedited procedures, Congress would be forced to delay important business, doing a further disservice to the American people.

This is not the first time the idea of requiring congressional approval has been proposed. It has been considered and rejected in the past. Chief Justice John Roberts criticized such legislation that was similar to the REINS Act in 1983. In a memorandum he objected that such legislation would "hobble agency rulemaking by requiring affirmative congressional consent to all major rules," and would "seem to impose excessive burdens on the regulatory agencies."

We ought not let the political passions at the moment produce such a radical change in how our government has worked and worked well for more than a hundred years, recognizing the three separate and equal branches of government.

The REINS Act is troubling for many reasons beyond the obvious political reins that it tries to project, and I urge my colleagues to oppose it.

I yield back the balance of my time.

[The prepared statement of Mr. Cohen follows:]

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

Sometimes during a legislative hearing, a committee will examine the particulars of the bill at issue, including the quality of its drafting, the need for additional provisions, or whether it can be improved or tweaked to make it more acceptable to the bill's opponents.

With respect to H.R. 10, the "Regulations From the Executive in Need of Scrutiny Act" or "REINS Act," however, I do not see the point of engaging in such a process because the bill is, simply put, an ill-conceived idea.

In reviewing the written statements of the two Majority witnesses, it is also clear that the real purpose of this hearing is to attack at its foundation the administrative system. In fact, both witnesses seem to take strong issue with much of the 20th Century, at least with respect to the development of modern government.

Under H.R. 10, all major rules—that is, rules that have a positive or negative economic effect of $100 million or more, increase prices for consumers, industries, and government entities, or have a significant adverse economic impact—must be approved by Congress before they can take effect. Congress must do so by passing a joint resolution of approval through both chambers under expedited procedures.

I do not believe the REINS Act is necessary for exercising Congressional control over the administrative system. Congress already has a number of means at its disposal to shape agency rulemaking.

The most straightforward, of course, is its power to determine the nature and scope of its delegation of authority to an agency. If Congress deems that its delegation of authority was too broad, it is always free to revisit that delegation and, if needed, retract or narrow the scope of the agency's authority.

Additionally, as was demonstrated vividly just a few weeks ago, Congress can use its power of the purse to stop implementation of specific regulations that it objects to. For instance, no fewer than 19 out of the 67 amendments to H.R. 1, the "Full-Year Continuing Appropriations Act of 2011," were aimed at de-funding the promulgation or implementation of existing and proposed regulations.

Congress also can conduct oversight, whether through formal hearings or through less formal interactions between agencies and individual Members or Committees. Among the first phone calls that small businesspeople and other constituents make when they have concerns about agency action is to their Member of Congress, which, in turn, prompts Members to act.

Finally, Congress has enacted statutes that shape the administrative rulemaking process, including the Administrative Procedure Act and the Regulatory Flexibility Act. Moreover, through the reporting requirements of the Congressional Review Act, Congress is kept informed about agency rulemaking activity.

Congress is not shy about objecting to rules that it finds objectionable and has the means to impose its will regarding such matters. Moreover, each of these mechanisms ensures democratic accountability over agency rulemaking.

The REINS Act, however, would force Congress to pass judgment on major rules without the opportunity to make a well-informed decision about their merits, leaving the door wide open for special interests to stifle such rules in Congress.

Under the bill, Congress has only 70 legislative days to pass a joint resolution of approval through both chambers and is limited to a total of 2 hours of debate in each House—only 1 hour each for those in favor and for those opposed to the joint resolution. Committees of jurisdiction would have only 15 legislative or session days to consider the merits of major rules under their jurisdiction, after which a joint resolution of approval is automatically discharged.

Under such a short-circuited process, is Congress really in a position to second-guess the merits of rules that, in many cases, took years of vetting to produce?

Instead, Members would be bombarded with visits, phone calls, and talking points from industry lobbyists, who would no doubt take advantage of this short-circuited process to shape Member views about the rule.

The REINS Act forces Congress to move too quickly while pointlessly slowing down the agency rulemaking process in a way that does not improve it.

The REINS Act also threatens to undermine Congress's ability to consider other legislative business. For example, in calendar year 2010 alone, there were 94 major rules, while there were only approximately 116 legislative days in the House during that same time period. Even under expedited procedures, Congress would be forced to ignore other important business, doing a further disservice to the American people.

This is not the first time that the idea of requiring Congressional approval of agency rules has been proposed. Such a proposal had been considered and rejected by Congress in the past.

Interestingly, Chief Justice John Roberts criticized legislation that was very similar to the REINS Act back in 1983. In a memorandum, he objected that such legislation would "hobbl[e] agency rulemaking by requiring affirmative Congressional assent to all major rules" and would "seem to impose excessive burdens on the regulatory agencies. . . ."

We ought not let the political passions of the moment produce such a radical change in how our government has worked—and worked well—for more than 100 years. The REINS Act is troubling for many reasons, and I urge my colleagues to oppose it.

Mr. COBLE. I thank the gentleman from Tennessee.

The Chair recognizes the former Chairman of the House Judiciary Committee, the distinguished gentleman from Michigan, for his opening statement.

Mr. CONYERS. Thank you very much, Chairman Coble and Ranking Member. I am very happy to be with you all today and to also recognize, in addition to the distinguished witnesses, our former colleague, Sherwood Boehlert of New York. We are grateful that he is once again up on the Hill in this hearing room.

But today we focus on H.R. 10. Now what does REINS stand for? Regulations From the Executive in Need of Scrutiny. REINS. This is the fourth time in this Subcommittee in less than a month and a half that we considered the state of the Nation's regulatory system. I want to thank Chairman Coble for having this hearing. It was at my request. But I am raising the question of this incredible amount of attention that is being paid in a number of ways. I have

one, two, three, four, five, six, seven, eight, nine, ten different hearings in a number of Committees in the House of Representatives, but four of them come from this very Subcommittee.

We studied and had a hearing on this same bill on January 24. And then we had a hearing on the Regulatory Flexibility Improvement Act on February 10. And then on February 28 we had a hearing on the APA at 65: Is reform needed to create jobs, promote economic growth, and reduce costs? And then, of course, today we are having yet another hearing on Regulations From the Executive in Need of Scrutiny.

Now, we have got some incredible comments coming in. And what I would like to do, if I can, is make the point that there must be some concern among ourselves as a Committee and the witnesses, who should be very much interested in whether or not this bill will threaten the health, the safety, and the welfare of the citizens in our country.

From my experience, we are undeniably in a better place in this country today than we were several decades ago, largely as a result of regulations that have promoted worker safety, improved the environment, and ensured the purity of our foods and drugs. Within a generation we have restricted lead in gasoline and paint, required autos to be equipped with seat belts and air bags, reduced the number of carcinogens that appear in our Nation's food, drugs, and cosmetics. We have engineered startling health and safety advances, from catalytic converters to scrubbers required on smoke stacks, and the elimination of chemicals, among them freon and others, that were actually burning a hole in the ozone layer. Yet, it is unlikely that these health and safety gains we have enjoyed would have been possible under the very legislative proposal, H.R. 10, that we are considering.

This measure before us today for the fourth time would effectively strip Federal agencies of the authority to implement environmental public health and safety protections unless a majority in both House and Senate approved the rules and then they were signed by the President. I needn't tell you how that would slow the process down, how it would complicate the agencies from taking care of their responsibility. Things move slowly enough in the congressional process now. We certainly don't need to have the Congress now reviewing and passing on agency regulations.

Some have gone as far as to suggest that the removal of lead from gasoline in the seventies wasn't a result of the Congress, that indeed I question if REINS were enacted, we would never get anything done. And so my feeling is that giving lawmakers a personal stake in updating statutes is totally the wrong direction in which to go.

We have some new Members, the newest party in American politics, the Tea Party. I always worry about their positions on things as well. And we have had at least one Member before the Committee on various regulatory subjects.

As has been demonstrated in every prior hearing of this Subcommittee, we have repeatedly talked about the costs, but apparently—I hope accidentally—ignored the benefits. And so what I want to do is refer you not only to the Center for Progressive Reform, which has recently released "Setting the Record Straight,"

the Crane and Crane report on regulatory costs, as well as the Office of Management and Budget that estimated that the benefits associated with major regulations were between $126 billion to $663 billion—more than ten times their cost. This is OMB.

I will submit the rest of my statement, Mr. Chairman, and thank you for your indulgence.

Mr. COBLE. Without objection.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Today's hearing, focuses on H.R. 10, the "Regulations From the Executive in Need of Scrutiny Act of 2011" (otherwise known as the "REINS Act"). This hearing marks the fourth time this Subcommittee—in less than a month and a half—considers the state of the Nation's regulatory system.

Unfortunately, my colleagues on the other side of the aisle appear to be absolutely committed to pursuing a divisive partisan agenda that has little prospect of creating jobs and improving the economy.

Nevertheless, I appreciate Chairman Coble's concurrence with my request to hold a legislative hearing on H.R. 10 to follow-up on the oversight hearing held on this legislation last January.

If anything, this second hearing on the REINS Act gives me yet another opportunity to highlight this bill's numerous flaws.

In sum, the REINS Act, if enacted, would impose a drastic cost on society.

It would dramatically change the way necessary and beneficial rules are promulgated, by requiring all new major regulations to be affirmatively approved by both Houses of Congress and the President before they can take effect.

I am gravely concerned that this bill will threaten the health, safety and welfare of our country.

We are undeniably in a much better place in this country today than we were several decades ago largely as a result of regulations that have promote worker safety, improve the environment, and to ensure the purity of our food and drugs.

In the span of a generation, we have restricted lead in gasoline and paint, required automobiles to be equipped with seatbelts and air bags, and reduced the number of carcinogens that appear in our Nation's food, drugs and cosmetics.

We have engineered startling health

and safety advances from catalytic converters to scrubbers on smoke stacks and the elimination of chemicals like Freon that were burning a hole in the ozone layer.

Yet, it is unlikely that any of the health and safety gains we have enjoyed would have been possible under H.R. 10.

This bill would effectively strip federal agencies of the authority to implement environmental, public health, and safety protections unless a majority in both the House and the Senate approved the rules and they were signed by the President.

Proponents of the REINS Act claim it will increase accountability and transparency in the regulatory process.

For example, one of our witnesses today will argue that Congress is no longer accountable to voters because it gives federal agencies the responsibility to decide controversial issues.

He seems to suggest in his written testimony that members of Congress cannot be trusted to make hard decisions. He cites the effort to remove lead from gasoline in the 1970s.

Let's talk about lead and gasoline.

Professor Schoenbrod suggests in his written testimony that in 1970, Congress wasn't able to protect children from lead and gasoline.

He claims that Congress was stymied by competing demands: the demand to protect children and voters' desire to keep gas cheap.

If that, indeed, was the case, I question why he would believe that in 2011 or 2012, if the REINS Act were to be enacted, Congress would be any less stymied?

Is there reason to believe that "the past is no longer prologue" with respect to Congress?

Professor Schoenbrod suggests twice in his written testimony that the REINS Act would give lawmakers a "personal stake" in updating statutes, and make Congress more accountable and responsible to the people.

Professor Schoenbrod, I invite you to look around.

Do you really see a commitment to compromise, and to modulate personal views for the greater good from our newest members of Congress?

Do you *honestly believe* that our newest, Tea Party members of Congress are interested in compromising for the greater good, in order to update statutes?

I am afraid the answer is no. In reality, H.R. 10, will serve to block essential public health, environmental, and safety protections.

As demonstrated at each of the three prior hearings on the state of our Nation's regulatory system, my colleagues on the other side of the aisle repeatedly cite the costs of regulations, but conveniently ignore their benefits, which in most instances **greatly** exceed their costs.

We already discussed in the first hearing on H.R. 10 the flawed economic analysis underlying these claims, and the fact that the key study cited in support of this legislation fails to account for the overwhelming *benefits* of regulation—including both cost-benefits and benefits improving quality of life.

At the hearing this Subcommittee held on February 10, 2011 on H.R. 527, the Regulatory Flexibility Improvements Act of 2011, we entered into the hearing record the report that clarifies this issue from the Center for Progressive Reform entitled *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs.*

Also, I should remind my colleagues that the Office of Management and Budget—during both the Bush and Obama Administrations—found that the benefits of regulation **overwhelmingly** outweigh the costs.

Specifically, OMB estimated that the benefits associated with major regulations were between $126 to $663 billion, that is, more than ten times their cost!

Others have similarly agreed with this analysis and I expect these reports will also be offered to be included in today's hearing record.

Another concern that H.R. 10 presents is that it will violate fundamental separation of powers principles.

The bill goes well-beyond the careful balance of power envisioned by the Constitution by giving Congress both the power to make the laws and, in effect, to execute those laws, which would raise significant separation of powers concerns.

As a result, H.R. 10 turns the constitutional process for amending legislation on its head.

In effect, it would authorize either the House or Senate to void or block enacted laws when those laws are executed by agencies through implementing regulations.

Moreover, the bill threatens to create what would in effect be an unconstitutional one-House legislative veto, because all it requires is for one chamber to not act in order to veto a major rule.

By way of background, the legislative veto is a clause in a statute that provides that a particular agency action will not take effect if Congress nullifies it by resolution within a specified time period.[1] The details of the legislative veto could vary from statute to statute, but whatever the particulars, the legislative veto was the means by which Congress reserved the power to nullify the executive branch's exercise of delegated agency authority.[2] The basic goal of the legislative veto was to allow Congress an opportunity to oversee and veto agency decisions, particularly when agencies acted under statutes that gave them broad discretion that amounted to a form of lawmaking.[3] The legislative veto was incorporated into many individual statutes rather than one overarching statute.

In 1983, the United States Supreme Court held in *Immigration & Naturalization Serv. v. Chadha* [4] that the legislative veto was unconstitutional Chadha was a foreign student who overstayed his student visa and was, therefore, subject to deportation.[5] When the Immigration and Naturalization Service (INS) started deportation proceedings against Chadha, he applied for a suspension of deportation.[6] Under the Immigration and Nationality Act, the INS had the authority to suspend deportations for humanitarian reasons—authority that Congress delegated to the Attorney General, who, in turn, delegated it to the INS.[7] The Act, however, contained a legislative veto provision that required the Attorney General to report to Congress all instances in which the INS suspended deportation and allowed each House of Congress to pass a disapproval resolution within a certain amount of time.[8] If either House passed such a resolution, the suspension of deportation was invalidated and

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[1] Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, & Matthew L. Spitzer, Administrative Law and Regulatory Policy, p. 80 (4th ed. 1999).
[2] *Id.*
[3] *Id.* at 81.
[4] 462 U.S. 919 (1983).
[5] *Id.* at 923.
[6] *Id.* at 924.
[7] *Id.* at 923–924.
[8] *Id.* at 925.

the deportation had to proceed.[9] In Chadha's case, Congress exercised that veto and Chadha challenged its constitutionality in court in response.[10] The Court concluded that the legislative veto provision violated the Bicameralism and Presentment Clauses of Article I of the Constitution.[11] These Clauses required, respectively, that legislation, including a resolution vetoing an agency action, must pass both Houses of Congress and be presented to the President for his approval or, if he disapproved, that the bill be re-passed by two-thirds of both Houses of Congress.[12]

The *Chadha* decision had a profound impact on the administrative system because at the time the decision was handed down, more than 200 statutes contained legislative veto provisions.[13] The *Chadha* decision invalidated all of them and Congress lost an important form of control over many types of agency action.

While Congress continued to have the power to check agency behavior through more limited delegations of authority, the appropriations process, or oversight, Congress also explored a number of ways that it could achieve the objectives of the legislative veto while comporting with Article I's mandates after the *Chadha* decision. One response was the Congressional Review Act (CRA), which was enacted with bipartisan support in 1996 as part of then-Speaker Newt Gingrich's Contract with America.[14]

The CRA requires an agency promulgating a rule[15] to submit a report to both Houses of Congress and to the Government Accountability Office (GAO) containing: (1) a copy of the rule; (2) a concise general statement describing the rule, including whether it is a major rule (i.e., one that will likely have an annual effect on the economy of $100 million or more, increases costs or prices for consumers, industries or State and local governments, or have significant adverse effects on the economy)[16]; and (3) the proposed effective date of the rule.[17]

If the rule is a major rule, the agency must further submit to GAO and each House of Congress: (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act[18] and the Unfunded Mandates Reform Act of 1995[19]; and (3) any other relevant information required under any other act or executive order.[20]

The CRA authorizes Congress to disapprove an agency rule to which it objects. Congress can do so by enacting a joint resolution of disapproval.[21] Such a joint resolution must be introduced within at least 60 days of the rule's submission to Congress.[22] For a joint resolution of disapproval to take effect, it must pass both Houses of Congress and be signed by the President (thereby meeting the Bicameralism and Presentment Clauses' requirements, as required by the *Chadha* decision.)[23] If a joint resolution is enacted into law, the disapproved rule is deemed not to have had any effect at any time.[24] Additionally, the CRA prohibits an agency from reissuing a rule that is substantially the same as a disapproved rule.[25] The CRA prescribes special expedited procedures for Senate consideration of a joint resolution of disapproval, though it does not provide for similar procedures in the House of Representatives.[26]

Barring congressional action, a major rule goes into effect on the latest of three possible dates: (1) 60 calendar days after it has been submitted to Congress or has been published in the Federal Register, (2) 30 session days after a presidential veto of a joint resolution of disapproval or earlier if either House of Congress votes and

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[9] *Id.*
[10] *Id.* at 926–928.
[11] *Id.* at 954–955, 959.
[12] *Id.* at 946–951.
[13] *Id.* at 967 (White, J., dissenting).
[14] Ben Geman, Top Republican Eyes Congressional Review Act Challenge to EPA Rules, THE HILL, Jan. 2, 2011, available at http://thehill.com/blogs/e2-wire/677-e2-wire/135595-upton-eyes-congressional-review-act-challenge-to-epa-climate-rules.
[15] As used in the CRA, the term "rule" means "the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551 (2006). See also 5 U.S.C. § 804(3) (2006) (defining "rule" by reference to § 551, with certain exceptions).
[16] 5 U.S.C. § 804(2).
[17] Pub. L. No. 104–121, subtitle E, 110 Stat. 857–74 (1996) (codified as 5 U.S.C. §§ 801–808).
[18] Pub. L. No. 96–353 (1980).
[19] Pub. L. No. 104–4 (1995).
[20] 5 U.S.C. § 801(a)(1)(B).
[21] *See* 5 U.S.C. § 802 (outlining congressional disapproval procedure).
[22] 5 U.S.C. § 802(a).
[23] U.S. Const. Art. I, § 7, cl. 2, 3.
[24] 5 U.S.C. § 801(f).
[25] 5 U.S.C. § 801(b)(2).
[26] 5 U.S.C. § 802(c).

fails to override such veto, or (3) the date on which the rule would otherwise have gone into effect absent the CRA review requirement.[27] A nonmajor rule goes into effect as otherwise provided for by law.[28] In either case, Congress still has 60 legislative or session days to disapprove the rule.

In addition to being unnecessary, because Congress already has control over agency rulemaking through the Congressional Review Act, the REINS Act is also dangerous.

This REINS Act would block or void federal laws protecting public health, safety, welfare and the environment through fundamentally anti-democratic, and arguably unconstitutional, means.

As I said during our last hearing, although Congress is charged with making the laws, Constitution demands that the Executive Branch "take care that the laws be faithfully executed."

This fundamental notion of the separation of powers is the essence of what our founding fathers envisioned in the Constitution of this great Nation.

I am concerned that H.R. 10 "unduly trammels on executive authority" under the separation of powers doctrine that the Supreme Court upheld in the 1988 case, *Morrison v. Olson.*

A group of sixty-five law professors from across this nation has written a letter opposing the REINS Act for legal and policy reasons. I would request unanimous consent to enter that letter into the record now.

In addition to the foregoing, I would also like to observe that H.R. 10 is not necessary.

I agree that we can and should ensure that we regulate American businesses only when necessary to meet broader societal objectives like limiting harmful pollution or preventing worker

injuries or reducing motor vehicle deaths, and that regulations do not needlessly burden regulated industries.

But H.R. 10 is not necessary to achieve that balance, nor is it the appropriate way to do so.

We already have checks in place to ensure regulations meet these objectives.

For example, the Executive Branch only has the power to regulate when Congress passes laws that confer regulatory authority.

As a further protection against unwarranted regulation, the Congressional Review Act allows Congress to disapprove of any regulations that a majority in both Houses deem unacceptable.

Congress also retains its authority to limit funding for regulatory programs and to enact new laws if it believes regulatory protections are no longer necessary.

In recognition of the critical role federal regulations play, most rules are subject to a very lengthy vetting process involving the agency, the Administration and the public, through notice and public participation processes.

The REINS Act is simply unnecessary, and inappropriate policy.

I look forward to discussing more of these issues and hearing from the witnesses today.

Thank you.

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[27] 5 U.S.C. § 801(a)(3).
[28] 5 U.S.C. § 801(a)(4).

ATTACHMENT

REINS Act: Number and Types of "Major Rules" in Recent Years

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Summary

Under the Congressional Review Act (CRA, 5 U.S.C. §§ 801-808), a covered agency regulation takes effect as provided by law unless Congress disapproves the rule with a joint resolution of disapproval. In contrast, the Regulations from the Executive In Need of Scrutiny (REINS) Act (H.R. 10 and S. 299, 112th Congress) would (if enacted) generally require the enactment of a joint resolution of *approval* before any "*major rule*" could take effect (e.g., rules that are expected to have a $100 million annual impact on the economy). This report provides information on the types of "major rules" that may be covered by the REINS Act, if enacted. Specifically, it identifies how many major rules have been issued in recent years, and which agencies have issued them. It also attempts to identify why certain rules published during calendar year 2010 were considered to be major rules under the CRA.

According to a database maintained by the Government Accountability Office (GAO), in 9 of the 14 full calendar years since the CRA was enacted, federal agencies published between 50 and 70 major rules. The agencies published 76 major rules in 1998, and 77 major rules in 2000. The number of major rules issued in a single calendar year first exceeded 80 in 2008 (the last full year of the George W. Bush Administration), when 95 major rules were published. In calendar year 2009, the first year of the Barack Obama Administration, federal agencies published 84 major final rules. However, 11 of those 84 rules were actually issued in early January 2009, during the final days of the Bush Administration. During calendar year 2010, federal agencies published 100 major final rules. The entities that issued the largest number of major rules from 2004 through 2010 were the Departments of Health and Human Services, Agriculture, and the Interior, and the Environmental Protection Agency.

CRS examined the 100 major rules published in 2010 and concluded that they appeared to be "major" for a variety of reasons. Thirty-seven of the rules appeared to be major because they involved transfers of funds from one party to another party, most commonly the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, special pay for members of the military, and crop payments). Ten other rules appeared to be major because they were expected to prompt consumer spending, or because they were establishing fees for the reimbursement of particular federal functions (e.g., issuance of passports and oversight of the nuclear power industry). Thirty-nine rules appeared to be major because they were expected to result in at least $100 million in annual compliance costs, regulatory benefits, or both. In 20 of those 39 rules, estimated costs and benefits were both expected to exceed $100 million. In 14 of these rules, the agencies' lowest estimates of regulatory benefits were larger than the highest estimated compliance costs. In only one rule were the lowest costs greater than the highest benefits, and the agency indicated that this result was caused by the lack of discretion provided in the underlying statute. These variations in the type of major rules do not bring into question the appropriateness of congressional oversight. However, Congress may need different types of expertise to oversee different types of major rules. H.R. 214 (112th Congress), which would create a Congressional Office of Regulatory Analysis, may provide access to that expertise.

This report will not be updated.

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Introduction

The Congressional Review Act (CRA, 5 U.S.C. §§ 801-808) requires each federal agency to send its covered final rules to the Comptroller General at the Government Accountability Office (GAO) and to both houses of Congress before the rules can take effect.[1] The CRA generally requires agencies to delay the effective dates of "major" final rules until 60 days after the date that the rules are published in the *Federal Register* or submitted to Congress, whichever is later.[2] The act also requires the Comptroller General to provide a report to the congressional committees of jurisdiction within 15 calendar days after each major rule is submitted or published, with the report summarizing the issuing agency's compliance with relevant rulemaking requirements.[3] The CRA defines a "major rule" as

> any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget [OMB] finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.[4]

The CRA also established expedited legislative procedures (primarily in the Senate) by which Congress may disapprove any final rule (not just major rules) by enacting a joint resolution of disapproval (which requires subsequent signature by the President). Signed into law on March 29, 1996, as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA, Title II of P.L. 104-121, 5 U.S.C. § 601 note), the CRA was an attempt to reestablish a measure of congressional authority over rulemaking. However, in the nearly 15 years since the CRA's enactment, it has been used to disapprove one rule.[5]

REINS Act

Under the CRA, an agency regulation takes effect as provided by law unless Congress disapproves the rule with a CRA joint resolution of disapproval.[6] In contrast, the Regulations

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[1] 5 U.S.C. § 801(a)(1)(A). For more information on the CRA, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth; and CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg.

[2] 5 U.S.C. §801(a)(3).

[3] 5 U.S.C. § 801(a)(2)(A). To access these reports, see http://www.gao.gov/decisions/majrule/majrule.php. In the reports, GAO generally summarizes the agencies' economic analyses, and does not prepare its own analysis.

[4] 5 U.S.C. § 804(2).

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

[6] Although Congress has used the CRA to disapprove only one rule, Congress regularly uses appropriations restrictions to prevent certain proposed rules from becoming final, or to prevent the implementation of particular final rules. See (continued...)

from the Executive In Need of Scrutiny (REINS) Act (H.R. 10 and S. 299, 112th Congress) would (if enacted) generally require the enactment of a joint resolution of *approval* before any "major rule" could take effect.[7] Specifically, the REINS Act would amend Chapter 8 of Title 5, United States Code, and in the new Section 802, would require that a joint resolution of approval be introduced within three session days or legislative days after a major rule is submitted to Congress. The bills also states that if a joint resolution of approval for a major rule is not enacted by the end of 90 session days or legislative days after such resolution is introduced, the rule shall be deemed not to be approved and shall not take effect. However, according to the new Section 801 of Title 5, a major rule could take effect for 90 calendar days without such approval if the President determines that it is necessary because of an imminent threat to health or safety or other emergency, for the enforcement of criminal laws, for national security, or to implement an international trade agreement.

The REINS Act states that its purpose is "to increase accountability for and transparency in the federal regulatory process." It goes on to say that

> Section 1 of article I of the United States Constitution grants all legislative powers to Congress. Over time, Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes. By requiring a vote in Congress, the REINS Act will result in more carefully drafted and detailed legislation, an improved regulatory process, and a legislative branch that is truly accountable to the American people for the laws imposed upon them.[8]

Comments Regarding the REINS Act

Reactions to the REINS Act from non-governmental observers have been mixed. Several of these observers have expressed support for the act. For example, an editorial in the *Wall Street Journal* stated that the legislation "would revolutionize government in practice and help restore the representative democracy the founders envisioned."[9] Wayne Crews of the Competitive Enterprise Institute said major rules "are the ones costing $100 million annually," and said that "reaffirming Congress' accountability to voters for agencies' most costly rules is a basic principle of good government."[10] Phil Kerpen of Americans for Prosperity said that the REINS Act "is the most important legislative effort to reform the regulatory process in Congress."[11] At a January 24, 2011, hearing held by the House Committee on the Judiciary's Subcommittee on Courts,

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(...continued)

CRS Report RL 34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland.

[7] As of February 18, 2011, the REINS Act had been referred to the House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law and the Senate Committee on Homeland Security and Governmental Affairs.

[8] H.R. 10, Section 2. Section 2 of S. 299 contains the same language, although separated into different numbered paragraphs.

[9] Anonymous, "The Congressional Accountability Act," *Wall Street Journal*, January 14, 2011, p. A14.

[10] Wayne Crews, "Tyranny of the Unelected; Congress Needs to Get a Handle on Costly Rules," *Washington Times*, October 12, 2010, p. B.1. Others have made similar comments. For example, an editorial in the *Las Vegas Review-Journal* ("Too Many Rules," January 24, 2011, p. B9) stated that the REINS Act requires an up-or-down vote on "regulations likely to cost $100 million or more...."

[11] Phil Kerpin, "Regulatory State Needs More Than a Trim; First a Red-Tape Timeout Before Adding New Restraints," *Washington Times*, January 24, 2011, p. B3.

Commercial and Administrative Law, Jonathan H. Adler, a professor of law at Case Western Reserve University School of Law, said that the REINS Act "offers a promising mechanism for disciplining federal regulatory agencies and enhancing Congressional accountability for federal regulations."[12]

Other observers, however, have expressed concerns about the legislation. For example, Sidney Shapiro of the Center for Progressive Reform said,

> The REINS Act would make Congress the final arbiter of all significant regulatory decisions. While superficially this may seem like a good idea – after all, Members of Congress are elected and regulators are not – the REINS Act would replace what is good about agency rulemaking with what is bad about the legislative process. Neither Members of Congress nor their staffs are likely to have sufficient scientific, engineering and economic expertise regarding complex regulations. And, unlike agencies, Congress does not have to have good policy reasons for refusing to approve a regulation. Instead, the approval process is likely to be nakedly political, reflecting the raw political power of special interests and the large campaign donations that they give.[13]

Concerns have also been raised regarding the constitutionality of the congressional approval process contemplated by the REINS Act, and the amount of time that it would take to approve all major rules each year. For example, at the above-mentioned January 24, 2011, hearing on the REINS Act, Sally Katzen, a professor of law and former Administrator of OIRA, raised several constitutional issues regarding the proposed legislation. Overall, she said that the REINS Act "is not well considered, it is not tailored to the problem it is attempting to solve, and it will inevitably have unintended but nonetheless significant adverse effects on the economy and society at large, including fundamentally changing our constitutional form of government."[14]

Methodology Used in This Report

This report provides information on the types of "major rules" that may be subject to the REINS Act, if it is enacted. Specifically, the report identifies how many major rules have been issued in recent years, and which agencies have issued them. It also attempts to identify why OIRA considered certain rules published during calendar year 2010 to be major rules under the CRA. The **Appendix** to this report provides a chronological list of the major rules from 2010, along with information that GAO and the agencies provided on the economic effects of the rules.

To determine the number of major rules that have been issued and which agencies issued them, CRS used the GAO database of rules submitted to the Comptroller General pursuant to the requirement in the CRA. That database (available at http://www.gao.gov/fedrules/) allows users to identify the number of rules that were published in the *Federal Register* by year and by cabinet department and within an "Independent Agencies and Government Corporations" category, and to determine which of the rules were considered "major rules." CRS considers the GAO database to

[12] See http://judiciary.house.gov/hearings/pdf/Adler01242011.pdf, p. 6.

[13] Sidney Shapiro, "The REINS Act: The Latest Conservatives Plan to Gum Up the Regulatory Works," January 14, 2011, available at http://www.progressivereform.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F.

[14] See http://judiciary.house.gov/hearings/pdf/Katzen01242011.pdf, p. 2. See also, Cheryl Bolen, "Congressional Approval of Major Rules Brings Partisan Jabs at Oversight Hearing," *BNA Daily Report for Executives*, January 25, 2010, p. A-21.

be one of the most authoritative and accessible sources of information regarding final rules and major final rules pursuant to the CRA.

Because the CRA states that the OIRA Administrator is to determine which rules are to be considered "major," CRS initially contacted OIRA and OMB officials, and asked for their assistance in determining why certain rules published during calendar year 2010 were classified as "major rules."[15] Although OIRA did not discuss exactly why particular rules were considered major, the current associate administrator of OIRA did provide information regarding the criteria that OIRA uses to make those determinations. For example, he said that OIRA considers a rule "major" if any related economic effects (e.g., compliance costs, regulatory benefits, federal budgetary transfers, fees, or consumer spending) are expected to meet or exceed the $100 million threshold in any year.[16]

The previously mentioned GAO database provides links to GAO's major rule reports that summarize agencies' compliance with certain rulemaking requirements. One section of those reports summarizes the agencies' cost-benefit analyses, to the extent that the agencies prepared such analyses. CRS used that information to analyze why the major rules appeared to be considered "major" under the CRA. When the information in the GAO reports did not clearly indicate the reason (e.g., because the agency did not prepare a cost-benefit analysis, or when the summary did not provide estimates of economic effects), CRS reviewed the preambles to the rules to determine why the rules appeared to be considered major.[17] The conclusions that CRS reached were based on the best available information, and were arrived at using the same general criteria that OIRA reportedly uses to make those determinations. Nevertheless, the conclusions are only our informed assessments. For that reason, this report states that certain rules "appeared" to be major for certain reasons.

Number of Major Rules and the Agencies That Issued Them

The previously mentioned *Wall Street Journal* editorial stated that the number of major rules issued by federal agencies had increased substantially during the Barack Obama Administration, from an average of between 30 and 40 rules per year during the previous 25 years to 59 in 2009 and 62 in 2010.[18] Susan Dudley, director of the George Washington University Regulatory Policy Center and former Administrator of OIRA, wrote that the Obama Administration had issued an average of 66 major rules per year during its first two years in office, compared to 47 and 48 major rules per year during the Clinton Administration and the Bush Administration, respectively.[19] Other observers have offered different counts for the number of major rules issued in recent years.[20]

[15] E-mails of January 26, 2011, and February 1, 2011, to the deputy administrator of OIRA, and an official in the OMB Office of the General Counsel.

[16] Telephone conversation with Michael Fitzpatrick, associate administrator of OIRA, February 18, 2011.

[17] According to the Office of the Federal Register, the preamble to a final rule contains information about the basis and purpose of the rule, but does not include the regulatory text. For more information, see the *Federal Register Document Drafting Handbook, at* http://www.archives.gov/federal-register/write/handbook/chapter-2.pdf, p. 2-6.

[18] "The Congressional Accountability Act," *Wall Street Journal*, January 14, 2011, p. A14.

[19] Susan E. Dudley, "President Obama's Executive Order: Improving Regulation and Regulatory Review," January 18, (continued...)

CRS is not aware of any data on the number of major final rules published prior to March 1996, when the CRA was enacted.[21] As **Table 1** below indicates, however, GAO's database of rules submitted to the Comptroller General shows that in 9 of the 14 full calendar years since the CRA was enacted, federal agencies published between 50 and 70 major rules. The agencies issued 76 major rules in 1998 and 77 major rules in 2000. The number of major rules issued during a single calendar year first exceeded 80 in 2008 (the last full year of the George W. Bush Administration), when 95 major rules were published. In calendar year 2009, the first calendar year of the Obama Administration, federal agencies issued 84 major final rules. However, 11 of those 84 rules were actually issued in early January 2009, during final days of the Bush Administration.[22] During calendar year 2010, federal agencies published 100 major final rules.

(...continued)

2011, available at http://www.regulatorystudies.gwu.edu/images/commentary/20110118_reg_eo.pdf. These numbers have also been cited by others in congressional testimony. See testimony of Thomas M. Sullivan before the Subcommittee on the Courts, Commercial and Administrative Law, House Committee on the Judiciary, February 10, 2011, p. 6, available at http://judiciary.house.gov/hearings/pdf/Sullivan02102011.pdf.

[20] For example, in testimony before the House Committee on Oversight and Government Reform on February 10, 2011, James Gattuso, Senior Research Fellow in Regulatory Policy for the Heritage Foundation, stated that "Last year…the number and cost of new regulations imposed by federal agencies reached unprecedented levels." He also said that federal agencies had issued 43 major rules during FY2010 that were "increasing regulatory burdens." See http://oversight.house.gov/images/stories/Other_Documents/Testimony_-_Gattuso_2011_0210.pdf to view a copy of this testimony. The statements were referenced to a study by Mr. Gattuso and two co-authors entitled "Red Tape Rising: Obama's Torrent of New Regulations," available at http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation. GAO's database indicates that federal agencies issued 104 major rules during FY2010.

[21] The definition of a "major rule" in the CRA was taken from Executive Order 12291, which was abolished when Executive Order 12866 was issued in September 1993. Data from the Regulatory Information Service Center (at http://www.reginfo.gov) indicates that OIRA reviewed an average of 67 "economically significant" or "major" regulatory actions per year from 1982 through 1996, but that average includes both proposed and final rules.

[22] Of the 16 major rules that were published in the *Federal Register* during January 2009, the GAO database indicates that 11 of them were published on or before January 21, 2009. Although President Obama was sworn into office on January 20, 2009, the rules that were published on January 21 (including one major rule) had already been submitted to the Office of the Federal Register.

Table 1. Number of Final Rules and Major Final Rules by Calendar Year: 1997-2010

Calendar Year	Number of Final Rules	Number of Major Final Rules
1997	3,960	61
1998	4,420	76
1999	4,373	51
2000	4,113	77
2001	3,454	70
2002	3,608	51
2003	3,785	50
2004	3,703	66
2005	3,352	56
2006	3,083	56
2007	2,971	61
2008	3,117	95
2009	3,492	84
2010	3,271	100

Source: GAO rules database, available at http://www.gao.gov/fedrules/, as of February 15, 2011.

Another way to discuss the GAO data on major rules is by comparing time periods during recent administrations. The results vary depending on which time periods are chosen. For example, see the following:

- During the last full year of the Bush Administration (from January 22, 2008, through January 21, 2009), federal agencies published 102 major rules. During the first full year of the Obama Administration (from January 22, 2009, through January 21, 2010), federal agencies published 79 major rules.
- During the last two full years of the Bush Administration (from January 22, 2007, through January 21, 2009), federal agencies published 168 major rules. During the first two full years of the Obama Administration (from January 22, 2009, through January 21, 2011), federal agencies published 175 major rules.
- During the first full year of the Bush Administration (from January 22, 2001, through January 21, 2002), federal agencies published 54 major rules. During the first full year of the Obama Administration (from January 22, 2009, through January 21, 2010), federal agencies published 79 major rules.
- During the first two full years of the Bush Administration (from January 22, 2001, through January 21, 2003), federal agencies published 103 major rules. During the first two full years of the Obama Administration (from January 22, 2009, through January 21, 2011), federal agencies published 175 major rules.

Table 1 also indicates that the number of major rules issued in a particular year is not strongly correlated with the number of final rules that were issued during the year. For example, in 1999, federal agencies published 4,373 final rules (the second largest number of rules during the 14 full calendar years since the enactment of the CRA), but only 51 major rules (the second lowest

number of major rules during this period). The years with the largest number of major rules (2008 and 2010) were also years in which the total number of final rules issued was relatively low.

Agencies Issuing Major Rules

Table 2 below shows the number of final rules and major final rules by cabinet department and agency from 2004 through 2010. (The starting point of 2004 was selected because that was the first full year that the Department of Homeland Security was in existence, and government organization has been relatively stable since that date.) The table indicates that the number of rules and major rules issued has varied considerably by department and agency, and that the number of final rules that an agency issues is not necessarily an indication of how many major rules the agency will issue. For example, although the Department of Commerce published more than 2,000 final rules during this period, only 6 of those rules (0.2%) were considered "major." In contrast, the Department of Health and Human Services (HHS) issued 627 final rules from 2004 through 2010, of which 144 (23%) were considered major rules.

Table 2. Number of Final Rules and Major Final Rules by Department or Agency: Calendar Years 2004-2010

Department/Agency	Number of Final Rules	Number of Major Final Rules
Agriculture (USDA)	1,266	49
Commerce (DOC)	2,144	6
Defense (DOD)	662	15
Education (ED)	142	16
Energy (DOE)	192	17
Health and Human Services (HHS)	627	144
Homeland Security (DHS)	4,938	20
Housing and Urban Development (HUD)	151	6
Interior (DOI)	540	49
Justice (DOJ)	145	6
Labor (DOL)	180	17
State (DOS)	100	2
Treasury (TREAS)	693	8
Transportation (DOT)	5,658	31
Veterans Affairs (DVA)	157	6
Environmental Protection Agency (EPA)	3,119	40
Federal Communications Commission (FCC)	759	14
Federal Reserve System (FRS)	70	15
Nuclear Regulatory Commission (NRC)	126	9

Department/Agency	Number of Final Rules	Number of Major Final Rules
Other Independent Agencies and Government Corporations	1,190	14
Total	23,003	518

Source: GAO rules database, available at http://www.gao.gov/fedrules/, as of February 15, 2011.

Note: Agencies in the "Other Independent Agencies and Government Corporations" grouping include the Federal Deposit Insurance Corporation, the General Services Administration, and the Social Security Administration. DOD rules include those that GAO reports separately for the Department of the Air Force and the Department of the Army.

Rules Appear to Be "Major" for a Variety of Reasons

As noted earlier in this report, the CRA generally defines a "major rule" as one that OIRA concludes "has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." Within the first of these three definitional categories, OMB reports, agency rules, and the current OIRA associate administrator indicate that a rule may have a $100 million annual "effect on the economy" in any of several ways.[23] For example, if a rule is expected to have $100 million in compliance costs in any one year, it would likely be considered a "major" rule. If a rule is expected to produce economic benefits in any one year that are valued at $100 million, that rule would also likely be considered "major." Other rules that increase or reduce federal grants, subsidies, or other types of "transfer" payments by at least $100 million in any year, or rules that increase federal fees or other revenues by at least $100 million in a year, would also appear to meet this definition of a major rule. Also, if a rule is expected to yield a $100 million "consumer surplus" during a year by triggering consumer spending, it would also appear to be a "major rule."

Table 3 below takes the 100 major rules that were published during calendar year 2010 and, using information in GAO's reports on the major rules and information in the preambles to the rules themselves, illustrates which of the various definitions of a "major rule" appear to be applicable to them (i.e., why the rules were considered "major"). The table divides the category of "$100 million annual effect on the economy" into five subcategories (compliance costs, regulatory benefits, transfers, consumer surplus, and fees and revenues). In some cases, more than one category or subcategory applies to a single rule. For example, if a rule was expected to result in at least $100 million in annual compliance costs and was also expected to result in at least $100 million in annual benefits, then both subcategories would appear to apply. Therefore, the number of explanations provided overall (and sometimes by agency) exceeds the number of rules issued.

[23] See, for example, OMB's *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, available at http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf. On p. 10 of that report, OMB stated that certain rules were considered major rules "primarily due to their impact on the economy (i.e., estimated benefits or costs were in excess of $100 million in at least one year)." The report also indicated that other rules were considered major because of federal and non-federal transfers, consumer surpluses (also referred to as "consumer welfare increase"), and non-monetized impacts. Within the category of "transfer rules" were rules setting fees from program beneficiaries.

However, if a rule appeared to be major because it had $100 million or more in annual compliance costs, CRS did not also code it as having a "major" increase in costs or prices.

Table 3. Why Rules Appeared to be "Major" by Agency: Calendar Year 2010

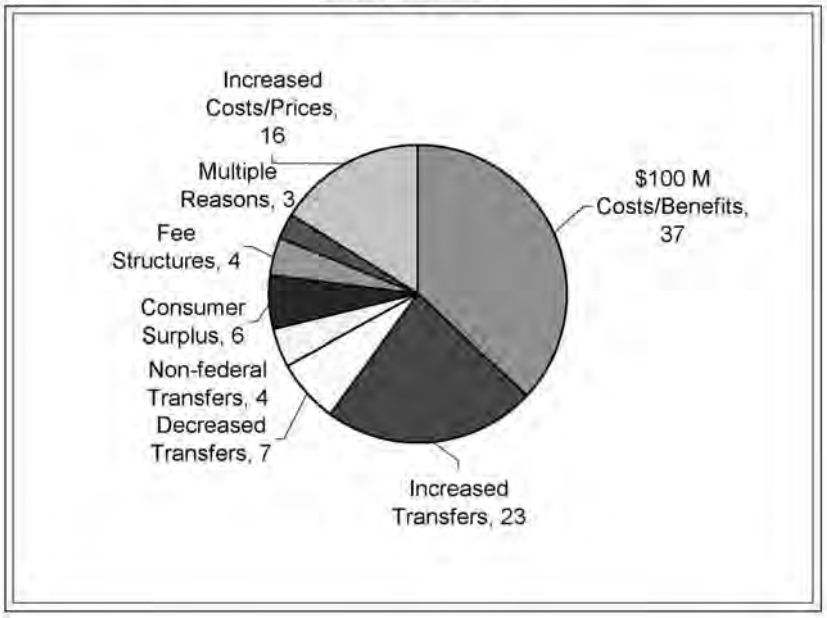
	$100 Million Annual Effect on the Economy Due to…					
Agency (Number of Major Rules)	**Regulatory Costs**	**Regulatory Benefits**	**Transfers**	**Consumer Surplus**	**Fees and Revenues**	**Major Increase in Costs/ Prices**
USDA (6)	—	—	5	—	—	1
DOD (4)	—	—	4	—	—	—
ED (5)	1	—	4	—	—	—
DOE (4)	2	3	1	—	—	—
HHS (21)	6	2	16	—	—	—
DHS (3)	—	—	1	—	2	—
HUD (1)	—	1	—	—	—	—
DOI (7)	1	1	—	6	—	—
DOJ (3)	2	3	—	—	—	—
DOL (3)	2	2	—	—	—	1
DOS (1)	—	—	—	—	1	—
DOT (4)	4	4	—	—	—	—
TREAS (3)	—	2	—	—	—	1
DVA (2)	—	—	2	—	—	—
CPSC (1)	1	—	—	—	—	—
EPA (8)	7	8	—	—	—	—
FRS (5)	—	1	—	—	—	4
NRC (1)	—	—	—	—	1	—
SEC (9)	2	1	—	—	—	6
TREAS/ DOL/ HHS (6)	—	—	4	—	—	3
TREAS/ FRS/ FDIC (1)	—	—	—	—	—	1
FRS/ FTC (1)	1	—	—	—	—	—
EPA/ DOT (1)	1	1	—	—	—	—
Total (100)	**30**	**29**	**37**	**6**	**4**	**17**

Source: CRS, based on information in GAO's major rule reports and the rules themselves.

Notes: A rule may appear to be "major" for more than one reason (e.g., annual regulatory costs and benefits are each expected to exceed $100 million). Therefore, the number of rules issued by an agency may be less than the number of explanations provided. Agencies are presented first by cabinet department, then by independent agency, and finally by groups of agencies that issued certain rules. Agency abbreviations not previously identified are CPSC (Consumer Product Safety Commission), FDIC (Federal Deposit Insurance Corporation), and FTC (Federal Trade Commission).

Figure 1 below indicates how many rules were associated with each category (or categories) of explanation. As the figure shows, 37 of the rules appeared to be "major" only because they were expected to produce $100 million in costs, $100 million in benefits, or both; 34 of the rules appeared to only involve some type of transfer (23 were increased transfers, 7 were decreased transfers, and 4 were non-federal transfers); 16 rules appeared to be major only because they were expected to result in increased costs or prices (but not at or above the $100 million threshold); 6 rules appeared to only involve "consumer surplus" issues; 4 rules appeared to only involve changes to fee structures; and 3 rules appeared to be major for multiple reasons.

Figure 1. The 100 Major Rules in Calendar Year 2010 Appear to Be "Major" for a Variety of Reasons



Source: CRS, based on information in GAO's major rule reports and the rules themselves.

Transfer Rules, Fee Rules, and Consumer Surplus Rules

As **Table 3** and **Figure 1** illustrate, the 100 major rules that were issued during calendar year 2010 appeared to have been considered "major" for a variety of reasons. Most of these rules appeared to be major because they were expected to have a $100 million annual "effect on the economy," but those effects sometimes seemed not directly related to expected regulatory compliance costs or the expected benefits of the rules.

Transfer Rules

For example, 37 of the 100 rules appeared to be "major" at least in part because they involved transfers of funds from one party to another party, most commonly the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, special pay for members of the military, and crop payments).[24]

Increased Federal Transfers

In 23 of these transfer rules, the federal transfer payments appeared to be increasing. For example, see the following:

- A January 25, 2010, DOE rule on "Weatherization Assistance Program for Low-Income Persons" reduced the procedural burdens on evaluating applications from buildings that are part of HUD assisted and public housing programs, the Federal Low Income Housing Tax Credit Program, and the USDA Rural Development Program. DOE indicated that the $5 billion in grants provided under this program by the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) made the rule a major rule, and "constitute transfer payments, meaning that they do not represent a change in the total resources available to society."[25]
- A January 29, 2010, USDA Food and Nutrition Service rule established new eligibility and certification requirements for the receipt of food stamps. USDA said that it expects this rule to simplify program administration, allow states greater flexibility, and provide enhanced access to eligible populations. The agency estimated that the total transfer costs to the government of this rule would be $2.669 billion in FY2010 and $13.541 billion during the five-year period from FY2010 through FY2014.[26]
- A March 12, 2010, rule issued by the Office of Innovation and Improvement within ED established priorities, requirements, definitions, and selection criteria under the Investing in Innovation Fund, which provides funding support to local educational agencies (LEAs) and nonprofit organizations in a partnership with one or more LEAs or a consortium of schools with a record of improving student achievement and attainment. ED estimated that the final rule would result in

[24] Thirty-four of the rules appeared to be "major" only because of transfers, and three rules involved transfers and one other category of explanation. OMB's *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* notes (on p. 21) that transfer rules "may impose real costs on society to the extent that they cause people to change behavior, either by directly prohibiting or mandating certain activities, or, more often, by altering prices and costs. The costs resulting from these behavior changes are referred to as 'deadweight loss' associated with the transfer."

[25] U.S. Department of Energy, "Weatherization Assistance Program for Low-Income Persons," 75 *Federal Register* 3847, January 25, 2010. DOE stated (p. 3854) that the $5 billion in grants for the weatherization program "at a level greater than $100 million makes this rulemaking economically significant under [Executive Order 12866]." As noted later in this report, the definition a "major rule" in the CRA is slightly broader than the definition of "economically significant" in the executive order. DOE also indicated (on p. 3856) that the rule was "major" under the CRA.

[26] U.S. Department of Agriculture, Food and Nutrition Service, "Food Stamp Program: Eligibility and Certification Provisions of the Farm Security and Rural Investment Act of 2002; Final Rule," 75 *Federal Register* 4911, January 29, 2010.

associated "annual monetized transfers" of $643 million per year from the federal government to LEAs and nonprofit organizations.[27]

- An April 16, 2010, DOD rule provided for retroactive stop loss special pay to members of the military service as authorized and appropriated in the Supplemental Appropriations Act, 2009 (Section 310 of P.L. 111-32). Although DOD did not provide a cost-benefit analysis with the final rule, in the preamble to the rule the department stated that the rule would have a $100 million annual impact on the economy in that the "Supplemental Appropriations Act, 2009 appropriated $534,400,000 to the Department of Defense, to remain available for obligation until expended."[28]
- A July 22, 2010, rule issued by the Centers for Medicare and Medicaid Services (CMS) within HHS announced the annual update to the hospice wage index for FY2011 and continued the phase out of the wage index budget neutrality adjustment factor. As a result, CMS estimated that total federal hospice payments would increase by $220 million in FY2010.[29]
- A July 30, 2010, rule issued by the Office of Consumer Information and Insurance Oversight (OCIIO) within HHS implemented Section 1101 of the Patient Protection and Affordable Care Act of 2010 (PPACA, P.L. 111-148, March 23, 2010), which required HHS to establish, either directly or through contracts with states or nonprofit entities, a temporary high-risk health insurance pool program to provide affordable health insurance coverage to uninsured individuals with pre-existing conditions. OCIIO estimated that the annual reporting and recordkeeping costs would be less than $2 million, but said that $5 billion in federal funds would be transferred from the Secretary to contractors to aid in administering the program from July 1, 2010, to December 31, 2013.[30]
- An August 31, 2010, DVA rule amended the department's adjudication regulations to implement the decision of the Secretary of Veterans Affairs that there is a positive association between exposure to certain herbicides and the subsequent development of hairy cell leukemia and other chronic B-cell leukemias, Parkinson's disease, and ischemic heart disease. DVA estimated that the total cost for this rulemaking (primarily retroactive and ongoing benefits payments) to be $13.6 billion during FY2010, $25.3 billion for 5 years, and $42.2 billion over 10 years.[31]

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[27] U.S. Department of Education, Office of Innovation and Improvement, "Investing in Innovation Fund; Final Rule and Notice," 75 *Federal Register* 12003, March 12, 2010.

[28] U.S. Department of Defense, Office of the Secretary, "Retroactive Stop Loss Special Pay Compensation," 75 *Federal Register* 19878, April 16, 2010. For more information on the stop loss special pay program, see http://www.defense.gov/home/features/2010/0710_stoploss/.

[29] U.S. Department of Health and Human Services, "Medicare Program; Hospice Wage Index for Fiscal Year 2011; Notice," 75 *Federal Register* 42943, July 22, 2010.

[30] U.S. Department of Health and Human Services, Office of Consumer Information and Insurance Oversight, "Pre-Existing Condition Insurance Plan Program," 75 Federal Register 45013, July 30, 2010.

[31] U.S. Department of Veterans Affairs, "Diseases Associated With Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B-Cell Leukemias, Parkinson's Disease and Ischemic Heart Disease)," 75 *Federal Register* 53202, August 31, 2010.

- An October 25, 2010, rule issued by the Farm Service Agency (FSA) within USDA provided emergency assistance to reestablish the purchasing of rice, cotton, soybeans, and sweet potatoes in specified counties for which a disaster designation was issued based on excessive moisture and related conditions for the 2009 crop year. The rule specified the eligibility requirements, payment calculations, and application procedures for the Crop Assistance Program. FSA estimated that the total cost to the government for the program would be between $137 million and $543 million, depending on how many producers in disaster counties applied for payments.[32]

One other rule appeared to be "major" because federal loans were expected to be converted into transfer payments (which we coded as a transfer increase). On January 19, 2010, the Federal Emergency Management Agency (FEMA) within DHS published a rule that amended the agency's Special Community Disaster Loan (CDL) Program regulations to establish procedures and requirements for Special CDL cancellations. The cancellations were authorized by Section 4502(a) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (P.L. 110-128). The Special CDL Program and the cancellation provisions applied to communities in the Gulf Coast region who received Special CDLs following Hurricanes Katrina and Rita. FEMA estimated that up to $1.3 billion in loans, interest, and costs could be forgiven under this effort.[33]

Decreased Federal Transfers

Nine other major rules appeared to be "major" at least in part because they were decreasing the amount of federal transfers provided.[34] For example, see the following:

- An August 12, 2010, CMS rule implemented a new prospective payment system for Medicare outpatient end-stage renal disease dialysis facilities, in compliance with the Medicare Improvements for Patients and Providers Act of 2008 (P.L. 110-275). The rule also replaced the previous payment system and the methodologies for the reimbursement of separately billable outpatient end-stage renal disease services. CMS estimated that there would be an approximately $200 million decrease in payments to all end-stage renal disease facilities for renal dialysis during calendar year 2011, compared to what the payments would have been that year in the absence of this rule.[35]
- An August 16, 2010, CMS rule revised the Medicare hospital inpatient prospective payment systems (IPPS) for operating and capital-related costs of

[32] U.S. Department of Agriculture, Farm Service Agency, "Crop Assistance Program," 75 *Federal Register* 65423, October 25, 2010.

[33] U.S. Department of Homeland Security, Federal Emergency Management Agency, "Special Community Disaster Loans Program," 75 *Federal Register* 2800, January 19, 2010. FEMA stated (p. 2815) that although "the impact of the rule could be spread over multiple years as applications are received, processed, and loans cancelled, the total economic effects of a specific loan cancellation would occur once, rather than annually."

[34] Seven of these rules appeared to be "major" only because of decreased transfers, and two other rules involved decreased transfers and one other category of explanation.

[35] U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, "Medicare Program; End-Stage Renal Disease Prospective Payment System; Final Rule and Proposed Rule," 75 *Federal Register* 49029, August 25, 2010.

acute care hospitals to implement changes arising from the agency's continuing experience with these systems, and to implement certain statutory provisions. The rule also described the changes to the amounts and factors used to determine the rates for Medicare acute care hospital inpatient services for operating costs and capital-related costs, and updated the rate-of-increase limits for certain hospitals excluded from the IPPS that are paid on a reasonable cost basis subject to these limits. In addition, the rule updated the payment policy and the annual payment rates for the Medicare prospective payment system (PPS) for inpatient hospital services provided by long-term care hospitals (LTCHs) and set forth the changes to the payment rates, factors, and other payment rate policies under the LTCH PPS. CMS estimated that the final applicable percentage increase to the IPPS rates required by the statute, in conjunction with other final payment changes in the rule, would result in a $440 million decrease in FY2011 operating payments and an estimated $21 million decrease in FY2011 capital payments.[36]

- An October 15, 2010, DOD rule implemented Section 703 of the National Defense Authorization Act for Fiscal Year 2008, which stated that, with respect to any prescription filled on or after the date of enactment, the TRICARE Retail Pharmacy Program shall be treated as an element of DOD for purposes of procurement of drugs by federal agencies under 38 U.S.C. § 8126, to the extent necessary to ensure pharmaceuticals paid for by DOD that are provided by network retail pharmacies to TRICARE beneficiaries are subject to Federal Ceiling Prices (FCPs). Section 8126 established FCPs for covered drugs (requiring a minimum 24% discount) procured by DOD and three other agencies from manufacturers. DOD estimated that the rule would result in cost reductions from applying FCPs to the TRICARE Retail Pharmacy Network in FY2010 through FY2015 of between $375 million and $560 million for Defense Health Program spending, and between $474 million and $707 million for Medicare-Eligible Retiree Health Care Fund spending.[37]

Non-federal Transfers

Five major rules appeared to be "major" not because of increases or decreases in the transfer of federal funds, but because they were (at least in part) expected to result in annual transfers of $100 million or more from one population group to another.[38] Four of the rules were jointly issued by the Internal Revenue Service (IRS) within the Department of the Treasury, the Employee Benefits Security Administration (EBSA) within the Department of Labor, and CMS within the Department of Health and Human Services. For example, see the following:

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[36] U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, "Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System Changes and FY2011 Rates; Provider Agreements and Supplier Approvals; and Hospital Conditions of Participation for Rehabilitation and Respiratory Care Services; Medicaid Program: Accreditation for Providers of Inpatient Psychiatric Services," 75 *Federal Register* 50041, August 16, 2010.

[37] U.S. Department of Defense, Office of the Secretary, "Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)/TRICARE: Inclusion of TRICARE Retail Pharmacy Program in Federal Procurement of Pharmaceuticals," 75 *Federal Register* 63383, October 15, 2010.

[38] Four of these rules appeared to be "major" only because of non-federal transfers, and one other rule also involved another category of explanation.

- A February 2, 2010, rule required parity between mental health or substance use disorder benefits and medical/surgical benefits with respect to financial requirements and treatment limitations under group health plans and health insurance coverage offered in connection with a group health plan. The rule replaced regulations implementing the Mental Health Parity Act of 1996, and made conforming changes to reflect modifications to the act. The agencies said that the rule was considered "major" because total health care premiums were expected to rise 0.4%, and that increase was considered a transfer from those individuals not using mental health and substance use disorder benefits to those who do. The agencies estimated that those undiscounted transfers to be about $25.6 billion during the next 10 years.[39]
- A May 13, 2010, rule implemented the requirements for group health plans and health insurance issuers in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding dependent coverage of children who have not reached age 26. Specifically, a plan or issuer that makes available dependent coverage of children was required to make such coverage available for children until attainment of 26 years of age. The agencies estimated the 2011 to 2013 transfers associated with this rule at between $3.5 and $6.9 billion, with the funds moving from individuals with family health insurance coverage who do not have dependents aged 19-25 to those individuals with family health insurance coverage that do have such dependents.[40]

One other rule issued by the Commodity Credit Corporation within USDA also appeared to be a major rule because of these kinds of non-federal transfers.[41]

"Consumer Surplus" Rules and Rules Establishing Fees

Six of the 100 major rules appeared to be "major" because they were expected to trigger a certain type of economic activity by the public (termed a "consumer surplus").[42] All six of these rules were issued by DOI's Fish and Wildlife Service (FWS), and established hunting seasons and bag limits for certain types of migratory birds. For example, a September 23, 2010, FWS rule

[39] U.S. Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services, Centers for Medicare and Medicaid Services, "Interim Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008," 75 *Federal Register* 5409, February 2, 2010. Discounted benefits or costs are sometimes referred to as "discounted present values," or simply "present values," and are used when the costs and the benefits of rules are expected to occur at different times. OMB Circular A-4 recommends that agencies use both a 7% and a 3% discount rate. The annual undiscounted transfer estimates ranged from $2.36 billion to $2.81 billion per year.

[40] U.S. Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services, Centers for Medicare and Medicaid Services, "Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act," 75 *Federal Register* 27121, May 13, 2010.

[41] U.S. Department of Agriculture, Commodity Credit Corporation, "Conservation Reserve Program," 75 *Federal Register* 44067, July 28, 2010. According to the GAO major rule report, certain provisions in the rule would "largely substitute one [conservation reserve program] participant for another, or one practice for another, leading in a shift in costs and benefits to different participants and practices, but little net cost or benefit for the [commodity reserve program] as a whole."

[42] In this case, the consumer surplus is an estimate of the amount individuals are willing to pay to hunt waterfowl and other types of migratory birds.

prescribed final late-season frameworks from which the states could select season dates, limits, and other options for the 2010-2011 migratory bird hunting seasons.[43] Based on an economic analysis prepared for an earlier season, FWS estimated that the rule would result in a consumer surplus of between $205 million and $270 million. The other five FWS rules had similar consumer surplus estimates.[44]

Four other rules appeared to be considered "major" because they established fee structures that were intended to fund certain government operations. For example, see the following:

- A June 16, 2010, NRC rule amended the licensing, inspection, and annual fees charged to the agency's applicants and licensees. NRC said it viewed these amendments as necessary to implement the Omnibus Budget Reconciliation Act of 1990, as amended (42 U.S.C. § 2214), which the agency said generally requires the NRC to recover through fees approximately 90% of its budget authority in FY2010. NRC determined that its required fee recovery amount for FY2010 was approximately $912.2 million and that, after accounting for billing adjustments, the total amount to be billed as fees was approximately $911.1 million.[45]
- A June 28, 2010, Department of State rule adjusted the Schedule of Fees for Consular Services based on an independent cost of service study's findings that the United States was not fully covering its costs for providing these services under the previous fee structure. The department said that it's primary objective was to ensure that fees for consular services reflected the costs to the United States of providing the services to the extent possible. Among other things, the rule increased the Passport Book Application Services fee (for applicants age 16 and older) from $55 to $70, which was expected to produce additional fees of about $138 million. An increase in the Passport Book Security Surcharge from $20 to $40 was expected to generate additional fees of nearly $239 million.[46]
- A September 24, 2010, DHS rule adjusted the fee schedule for the U.S. Citizenship and Immigration Services to fully recover costs and maintain adequate service. DHS said that the rule would provide it with an average of $209 million in FY2010 and FY2011 annual fee revenue over the fee revenue that would have been collected under the previous fee structure. DHS said that the increased revenue would be used to fund the full cost of processing immigration benefit applications and associated support benefits, providing similar benefits to asylum and refugee applicants, and providing similar benefits to others at no charge.[47]

[43] U.S. Department of the Interior, Fish and Wildlife Department, "Migratory Bird Hunting; Final Frameworks for Late-Season Migratory Bird Hunting Regulations," 75 *Federal Register* 58249, September 23, 2010.

[44] The REINS Act states that "any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping… shall take effect at such time as the Federal agency promulgating the rule determines." Therefore, it appears that these migratory bird hunting rules would not be subject to congressional approval procedures before being allowed to take effect.

[45] U.S. Nuclear Regulatory Commission, "Revision of Fee Schedules; Fee Recovery for FY 2010," 75 *Federal Register* 34219, June 16, 2010

[46] U.S. Department of State, "Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates," 75 *Federal Register* 36522, June 28, 2010.

[47] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "U.S. Citizenship and (continued...)

Expected Compliance Costs, Regulatory Benefits, or Both

Executive Order 12866 requires covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to prepare a cost-benefit analysis for any rule that is expected to be "economically significant."[48] According to OMB, the definition of an "economically significant" rule in the executive order is somewhat narrower than the definition of a "major rule" under the CRA (e.g., a $100 million annual "effect on the economy").[49] Also, Section 1 of the executive order 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. 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.

Thirty-nine of the 100 major rules that were published during calendar year 1999 appeared to be "major" at least in part because they were expected to result in at least $100 million in annual compliance costs, $100 million in annual benefits, or both.[50] (Thirty of the rules were expected to have regulatory costs of at least $100 million, and 29 rules were expected to have regulatory benefits of at least $100 million.) In 20 of the 39 rules, estimated costs and benefits were both expected to exceed $100 million. In the 19 other major rules, the agencies did not provide a monetary estimate of either annual costs or benefits, or those estimates were less than $100 million.

In almost all of the rules in which both benefits and costs were estimated and monetized, the agencies' average or central estimates of regulatory benefits were larger than their average or central estimates of compliance costs. However, in some of these cases, the ranges of estimated benefits and costs overlapped, or could overlap. Therefore, while these rules appeared likely to produce net benefits, it is theoretically possible that the costs of the rules could exceed the benefits (assuming the agencies' estimates of the range of costs and benefits are accurate). For example, see the following:

- A February 9, 2010, rule issued by the Environmental Protection Agency (EPA) revised the primary nitrogen dioxide national ambient air quality standards. The rule established a new 1-hour standard at a level of 100 parts per billion, and

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(...continued)

Immigration Services Fee Schedule," 75 *Federal Register* 58961, September 24, 2010.

[48] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

[49] Section 3(f)(1) of the executive order defines an economically significant rule as one that may "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." In its guidance on the CRA, OMB said that the main difference between "economically significant" and "major" rules is that some rules may be captured by the CRA definition that are not considered "economically significant" under EO12866, "notably those rules that would have a significant adverse effect on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." See http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf.

[50] Thirty-seven of the rules appeared to be "major" only because of such costs and/or benefits, and two other rules also involved one other category of explanation.

established requirements for a nitrogen dioxide monitoring network that will include monitors at locations where maximum nitrogen dioxide concentrations are expected. Nevertheless, EPA estimated that the cost of the rule in the year 2020 would be between $270 million and $510 million (in 2006 dollars), and the estimated benefits that year would be between $120 million and $580 million (in 2006 dollars). Therefore, EPA said the rule could result in either positive or negative net benefits.[51]

- A March 3, 2010, EPA rule promulgated national emission standards for hazardous air pollutants for certain existing stationary compression ignition reciprocating internal combustion engines. The rule also promulgated national air standards for hazardous air pollutants for certain existing non-emergency stationary compression ignition engines. EPA estimated the total national capital cost for the final rule to be $744 million, with a total national annual cost of $373 million in 2013. EPA estimated the monetized benefits of the rule to be between $850 million and $2.3 billion in 2013. Therefore, if $478 million or more of the expected capital costs occur in 2013, the total estimated costs of the rule in that year would exceed the lowest estimated benefits.[52]
- A May 28, 2010, rule issued by the Federal Aviation Administration (FAA) within DOT amended the agency's regulations by adding equipage requirements and performance standards for Automatic Dependent Surveillance-Broadcast (ADS-B) Out avionics on aircraft operating in Classes A, B, and C airspace, as well as certain other specified classes of airspace within the U.S. National Airspace System. FAA said that the rule facilitated the use of ADS-B for aircraft surveillance by FAA and DOD air traffic controllers to safely and efficiently accommodate aircraft operations and the expected increase in demand for air transportation. The agency estimated that the undiscounted quantified benefits of the final rule ranged from $6.8 billion to $8.5 billion, and estimated the undiscounted incremental costs at between $3.3 billion and $7.0 billion.[53] Therefore, although average expected benefits substantially exceeded average expected costs, the highest estimate of cost ($7.0 billion) was slightly higher than the lowest estimate of benefits ($6.8 billion).
- A September 15, 2010, rule issued by the Civil Rights Division within DOJ revised the regulation that implements Title II of the Americans with Disabilities Act (ADA), relating to nondiscrimination on the basis of disability in state and local government services. The department reportedly issued this rule in order to adopt enforceable accessibility standards under the ADA that are consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (Access Board), and to update or

[51] U.S. Environmental Protection Agency, "Primary National Ambient Air Quality Standards for Nitrogen Dioxide," 75 *Federal Register* 6473, February 9, 2010. Although EPA prepared a cost-benefit analysis for the rule, EPA said that the Clean Air Act and judicial decisions "make clear that the economic and technical feasibility of attaining ambient standards are not to be considered in setting or revising [national ambient air quality standards]."

[52] U.S. Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines," 75 *Federal Register* 9647, March 3, 2010.

[53] U.S. Department of Transportation, Federal Aviation Administration, "Automatic Dependent Surveillance—Broadcast (ADS-B) Out Performance Requirements To Support Air Traffic Control (ATC) Service," 75 *Federal Register* 30159, May 28, 2010.

amend certain provisions of the Title II regulation so that they comport with the department's legal and practical experiences in enforcing the ADA since 1991. DOJ's estimate of compliance costs ranged from $12.8 billion to $25.8 billion, and the estimate of benefits ranged from $22.0 billion to $66.2 billion. Therefore, although average expected benefits substantially exceeded average expected costs, the highest estimate of cost ($25.8 billion) was higher than the lowest estimate of benefits ($22.0 billion).[54]

Net Benefits

In 14 of the 20 rules with estimated annual regulatory costs and benefits of at least $100 million, the agencies' *lowest* estimates of regulatory benefits were larger than the *highest* estimated compliance costs. Therefore, assuming that the agencies' estimates of the range of costs and benefits were correct, the rules should produce positive net benefits. For example, see the following:

- A March 9, 2010, DOE rule established energy conservation standards for small electric motors. The department estimated that the annualized costs of this rule would be about $264 million per year. DOE estimated a range of possible values for the total monetary benefits of this final rule from $867.5 million to about $1.36 billion.[55]
- A March 19, 2010, rule issued by the Food and Drug Administration (FDA) within HHS was identical to the provisions of the final rule on cigarettes and smokeless tobacco published by FDA in 1996, with certain required exceptions. The rule prohibited the sale of cigarettes and smokeless tobacco to individuals under the age of 18 and imposed specific marketing, labeling, and advertising requirements. Although FDA did not include a cost-benefit analysis in the 2010 rule, in the 1996 rule, the agency said that the rule could prevent 60,000 early deaths. The monetary value of these and other health benefits was estimated to be between $9.2 billion and $43 billion per year. FDA estimated the rule's overall compliance costs at from $174 million to $187 million in one-time costs, and from $149 million to $185 million in annual operating costs.[56] Therefore, even if the highest estimated one-time costs occurred in the same year as the highest estimated annual operating costs, the total would still be less than the lowest estimated benefits for that year.
- An April 5, 2010, rule issued by the Federal Motor Carrier Safety Administration (FMSCA) within DOT incorporated new performance standards for electronic on-board recorders (EOBRs) installed in commercial motor vehicles manufactured on or after June 4, 2012. The rule also made motor carriers that have demonstrated serious noncompliance with hours-of-service rules subject to

[54] U.S. Department of Justice, Civil Rights Division, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 75 *Federal Register* 56163, September 15, 2010.

[55] U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, "Energy Conservation Program: Energy Conservation Standards for Small Electric Motors," 75 *Federal Register* 10873, March 9, 2010.

[56] U.S. Department of Health and Human Services, Food and Drug Administration, "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents," 61 *Federal Register* 44569, March 19, 2010.

mandatory installation of EOBRs meeting the new performance standards. FMSCA said that the costs of the final rule on an annualized basis over a 10-year period would be $139 million. FMCSA determined the benefits of the final rule to be $182 million annually, which included safety benefits of electronic on-board recorder use by estimating reductions in hours of service violations and resulting reductions in fatigue-related crashes.[57]

- An April 16, 2010, DOE rule amended the existing energy conservation standards for residential water heaters (other than tabletop and electric instantaneous models), gas-fired direct heating equipment, and gas-fired pool heaters. DOE determined that the annualized monetized benefits of the rule would be between $1.67 billion per year and $2.02 billion per year, with costs estimated to be between $1.25 billion per year and $1.28 billion per year.[58]
- An August 9, 2010, rule issued by the Occupational Safety and Health Administration (OSHA) within DOL revised the agency's "Cranes and Derricks Standard" and related sections of the "Construction Standard" to update and specify industry work practices necessary to protect employees during the use of cranes and derricks in construction. This rule also addressed advances in the designs of cranes and derricks, related hazards, and the qualifications of employees needed to operate them safely. OSHA estimated that the total annualized costs of the rule would be $154.1 million. OSHA estimated that the annual benefits included injuries prevented (175), fatalities prevented (22), and property damage from tipovers prevented ($7 million), for total monetized benefits of $209.3 million.[59]

Net Costs

In only one of the major rules did the agency indicate that the rule would likely result in net costs (i.e., that the highest estimate of benefits was less than the lowest estimate of costs). On January 15, 2010, the Federal Railroad Administration (FRA) within DOT issued a rule on "Positive Train Control Systems" that were required on certain passenger and freight rail lines by the Rail Safety Improvement Act of 2008 (P.L. 110-432, 122 Stat. 4854, October 16, 2008).[60] Congress enacted the statutory requirement in the wake of several serious rail accidents involving dozens of fatalities and hundreds of injuries. FRA estimated that the rule would reduce deaths and injuries from this type of accident by more than 50%, and estimated the monetized benefits of the rule at between $440 million and $674 million. However, the agency estimated the 20-year costs at between $9.5 billion and $13.2 billion—about 20 times greater than the estimated benefits. FRA noted this imbalance in the rule, but said it was "constrained by the requirements of [the Rail

[57] Department of Transportation, Federal Motor Carrier Safety Administration, "Electronic On-Board Recorders for Hours-of-Service Compliance," 75 *Federal Register* 17207, April 5, 2010.

[58] Department of Energy, "Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters," 75 *Federal Register* 20112, April 16, 2010.

[59] U.S. Department of Labor, Occupational Safety and Health Administration, "Cranes and Derricks in Construction," 75 *Federal Register* 47905, August 9, 2010.

[60] U.S. Department of Transportation, Federal Railroad Administration, "Positive Train Control Systems," 75 *Federal Register* 2598, January 15, 2010. "Positive train control systems" refers to technology that can prevent accidents such as train-to-train collisions and train movements through a switch left in the wrong position.

Safety Improvement Act of 2008], which do not provide latitude for implementing [positive train controls] differently."[61]

Monetized Costs but Non-monetized Benefits

In several other rules, the agencies estimated the annual compliance costs at $100 million or more, but provided only qualitative descriptions of expected regulatory benefits. Nevertheless, the agencies indicated in many of these rules that the value of the expected benefits, if monetized, would exceed or "justify" the costs. For example, see the following:

- A January 11, 2010, rule issued by the Securities and Exchange Commission (SEC) amended the custody and recordkeeping rules under the Investment Advisers Act of 1940 and related forms by providing additional safeguards when a registered adviser has custody of client funds or securities. The SEC estimated the aggregate compliance costs at more than $126 million; it said the non-monetized benefits would be "substantial," and would include increasing investors' confidence when obtaining advisory services from registered investment advisers, which could lead to more efficient allocation of investor assets and an increase in the availability of capital.[62]
- An April 14, 2010, FDA rule amended the agency's regulations on the use of ozone-depleting substances in self-pressurized containers to remove the essential-use designations for certain substances used in oral pressurized metered-dose inhalers (MDIs). As a result, the agency estimated that private, third-party, and public expenditures on inhaled medicines would increase by roughly $90 million to $280 million per year. FDA characterized the benefits as "environmental and public health improvements from protecting stratospheric ozone by reducing chlorofluorocarbons (CFCs) emissions" and "expectations of increased return on investments in environmentally friendly technology."[63]
- An October 29, 2010, ED rule amended the agency's regulations under certain programs (e.g., the Federal Family Education Loan (FFEL) Program, the William D. Ford Federal Direct Loan Program, and the Federal Pell Grant Program) to improve the integrity in these programs. The department indicated that annual paperwork-related costs could exceed $100 million,[64] but provided only qualitative descriptions of the expected benefits (e.g., "updated administrative structures for federal student aid programs," and "enhanced reliability and security of ability-to-benefit tests"). Nevertheless, ED stated in the rule that it believed "that the benefits of these regulations for students, consumers, and taxpayers justify the burdens of institutional compliance."[65]

[61] U.S. Department of Transportation, Federal Railroad Administration, "Positive Train Control Systems," 75 *Federal Register* 2598, January 15, 2010, p. 2685.

[62] U.S. Securities and Exchange Commission, "Custody of Funds or Securities of Clients by Investment Advisers," 75 *Federal Register*, 1455, January 11, 2010.

[63] U.S. Department of Health and Human Services, Food and Drug Administration, "Use of Ozone-Depleting Substances; Removal of Essential-Use Designation (Flunisolide, etc.)," 75 *Federal Register* 19213, April 14, 2010.

[64] The agency indicated that the rule could add more than 5 million hours of annual paperwork burden. Using OMB's estimate of the cost of completing this paperwork of $30 per hour, compliance costs would exceed $100 million.

[65] U.S. Department of Education, Office of Postsecondary Education, "Program Integrity Issues," 75 *Federal Register* (continued...)

Rules Expected to Result in Major Increases in Costs or Prices

Seventeen of the 100 major rules published in calendar year 2010 appeared to be "major rules" at least in part because they were expected to result in "major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions."[66] CRS included rules in this category (instead of the earlier category of rules with a $100 million annual "effect on the economy") if those costs were either not monetized, or if they were estimated to be less than $100 million in any year. For example, see the following:

- A February 17, 2010, rule issued by the Agricultural Marketing Service (AMS) within USDA amended livestock and related provisions of the national organic program's regulations. The rule generally requires that producers maintain ruminant slaughter stock on pasture for each day that the finishing period corresponds with the grazing season for the geographical location. AMS did not monetize the benefits or the costs of the rule, but said that the benefits of the rule include uniformity in application to the livestock regulations especially as they relate to the pasturing of ruminants, which should result in a near elimination of violations of the pasture regulations. The agency said that the costs of the rule include an increase in the cost of production for producers who currently do not pasture their ruminant animals and those producers who do not manage their pastures at a sufficient level to provide at least 30% dry matter intake. AMS also said there may be an increase in consumer prices, but did not estimate the size of those increases.[67]
- A July 14, 2010, SEC rule addressed "pay to play" practices in investment advising, and prohibited an investment adviser from providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees make a contribution to certain elected officials or candidates. The rule also prohibited an adviser from providing payment to any third party for a solicitation of advisory business from any government entity on behalf of such adviser, unless such third parties are registered broker-dealers or registered investment advisers. The SEC said that advisers with government clients would incur costs to monitor contributions and establish compliance procedures, and estimated initial compliance costs of approximately $2,352 per smaller firm, $29,407 per medium firm, and $58,813 per larger firm. The Commission also estimated that the rule would impose annual, ongoing compliance expenses of approximately $2,940 per smaller firm, $117,625 per medium firm, and $235,250 per larger firm. In addition, the Commission estimated that advisers will incur an aggregate cost of approximately $200,246 per year and the non-labor costs of $20,080,000. The SEC did not monetize the expected benefits of the rule, but said it should (among other things) help

(...continued)

66831, October 29, 2010.

[66] Sixteen of the rules only had this effect, and one rule also appeared to be major for another reason.

[67] Department of Agriculture, Agricultural Marketing Service, "National Organic Program; Access to Pasture (Livestock)," 75 *Federal Register* 7154, February 17, 2010.

minimize or eliminate manipulation of the market for advisory services to state and local governments.[68]

- A July 16, 2010, rule issued by the Employee Benefits Security Administration (EBSA) within DOL required that certain service providers to employee pension benefit plans disclose information to assist plan fiduciaries in assessing the reasonableness of contracts or arrangements, including the reasonableness of the service providers' compensation and potential conflicts of interest that may affect the service providers' performance. EBSA did not quantify the expected benefits of the rule, but said that mandatory proactive disclosure would reduce sponsor information costs, discourage harmful conflicts of interest, and enhance service value. EBSA estimated that the annual cost of this rule from 2011 to 2020 would be between $54.3 million and $58.7 million.[69]
- A July 28, 2010, rule issued by the Office of the Comptroller of the Currency within the Department of the Treasury and other agencies implemented provisions of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (P.L. 110-289). The final rule required mortgage loan originators employed by national banks to register with the Nationwide Mortgage Licensing System and Registry and maintain their registration. Mortgage loan originators were also required to obtain a unique identifier through the registry that will remain with that originator, regardless of changes in employment. In addition, the rule required mortgage loan originators and national banks to provide these unique identifiers to consumers in certain circumstances, and requires national banks to adopt and follow written procedures to assure compliance with the registration requirements. Although the agencies indicated that these requirements would impose certain regulatory costs, they did not provide monetized estimates of those costs in the rule.[70]

"Major Rules" in Other Years

To determine whether our conclusions regarding major rules published during calendar year 2010 were consistent with other years and perspectives, CRS also examined the most recent edition of OMB's reports to Congress on the benefits and costs of federal regulations. OMB prepares these reports in accordance with the "Regulatory Right-to-Know Act,"[71] which requires the agency to identify the total annual benefits and costs of federal rules in the aggregate, by agency and agency program, and by "major rule." Although the act does not define the term "major rule," OMB has defined it as any rule (1) meeting the definition in the CRA (5 U.S.C. § 804(2), (2) meeting the analysis threshold in the Unfunded Mandates Reform Act (2 U.S.C. § 1532), or (3) designated as "economically significant" under Section 3(f) of Executive Order 12866. These three definitions

[68] Securities and Exchange Commission, "Political Contributions by Certain Investment Advisers," 75 *Federal Register* 41018, July 14, 2010.

[69] Department of Labor, Employee Benefits Security Administration, "Reasonable Contract or Arrangement Under Section 408(b)(2)- Fee Disclosure," 75 *Federal Register* 41600, July 16, 2010.

[70] U.S. Department of the Treasury, Comptroller of the Currency and Office of Thrift Supervision; Federal Reserve System; Federal Deposit Insurance Corporation; Farm Credit Administration; and National Credit Union Administration, "Registration of Mortgage Loan Originators," 75 *Federal Register* 44655, July 28, 2010.

[71] Section 624 of the Treasury and General Government Appropriations Act, 2001 (P.L. 106-54).

overlap considerably, and any rule meeting the CRA definition is likely to be covered by the other two.[72]

According to the most recent "Regulatory Right-to-Know" report, which was issued in July 2010, OMB said that it concluded review of 66 major final rules during the 12-month period beginning October 1, 2008, and ending September 30, 2009.[73] Under Executive Order 12866, OMB does not review rules that are issued by independent regulatory agencies like the SEC and the NRC. However, OMB said that it used information from GAO's CRA database, and reported that independent regulatory agencies issued another 11 major final rules during this one-year period, bringing the total number of major rules discussed in the OMB report to 77.

Transfer Rules

OMB categorized 33 of the 77 major rules as "transfer rules" implementing federal budgetary programs, which OMB said primarily caused income transfers from taxpayers to program beneficiaries. In 22 of the 33 transfer rules, the agencies provided estimates of only the transfers themselves, which were almost always more than $100 million. In the other 11 transfer rules, the agencies provided no estimates of costs, benefits, or transfers, but OMB nonetheless categorized them as major rules. OMB reported that three other rules had transfer estimates of more than $100 million, with cost and benefits estimates that were always less than $100 million. Therefore, although OMB did not categorize these three rules as "transfers," a total of 36 rules (46.8% of the 77 rules) could be viewed as "major rules" either because of their OMB categorization as transfers, or because of the size of the transfers involved.

In three DOI/FWS migratory bird hunting rules, the agency only estimated the economic benefit (i.e., "consumer surplus") of the rules, all of which were more than $100 million. In 15 other major rules, the agencies provided monetary estimates of only regulatory costs. However, in 5 of these 15 rules, the estimates of regulatory costs were less than $100 million, and in 5 other rules issued by independent regulatory agencies, OMB did not report the size of the cost estimates.[74] In 9 other major rules (including 7 of the 11 rules issued by independent regulatory agencies), the agencies provided no monetized estimates of benefits or costs.

In 15 of the remaining 16 rules, OMB provided monetized estimates of both benefits and costs.[75] In 3 of these 15 rules, only the estimated benefits approached or exceeded $100 million. In contrast, none of the 15 rules had regulatory costs of at least $100 million that did not also have regulatory benefits at that level. In 12 of these 15 rules, the mid-point of the benefits estimate was greater than the mid-point of the cost estimate. Even when using the highest estimate of costs and

[72] As noted earlier in this report, the definition of an "economically significant" rule under EO12866 is not as broad as the definition of a "major rule" under the CRA. The definition of a covered rule under the Unfunded Mandates Reform Act is much more narrow, excluding (among other things) rules issued without a prior notice of proposed rulemaking, rules that do not require $100 million in "expenditures" (instead of "costs"), and rules issued by independent regulatory agencies. See U.S. Government Accountability Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

[73] To view this report, see http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf.

[74] One of these rules was an NRC fee recovery schedule for FY2009, so the "costs" were likely the fees recovered from the licensees and others for the operation of the program.

[75] The one exception was an SEC rule in which OMB said the agency provided benefit and cost estimates, but OMB did not include them in its report.

the lowest estimates of benefits, 8 of the 15 rules were expected to produce positive net benefits. Alternatively, using the highest estimate of benefits and the lowest estimate of cost, all 15 rules were expected to produce positive net benefits.

These results regarding major rules issued during calendar years 2008 and 2009 appear to be consistent with our analysis of major rules issued during calendar year 2010. That is, rules seem to be considered "major" for a variety of reasons. The most common reason why OMB considered rules "major" was because of the transfer of federal funds, not because of the agencies' estimates of regulatory costs or benefits. Where rules appeared to be "major" because of estimated costs or benefits, the size of the estimated benefits were often larger.

Concluding Observations

The REINS Act, like the Congressional Review Act that it seeks to amend, is an attempt to reestablish a measure of congressional authority over agency rulemaking. The bill's supporters have asserted that the number of "major rules" that impose at least $100 million in annual costs on regulated entities has grown significantly in recent years. Because all agency rulemaking authority is delegated from Congress, supporters of the REINS Act assert that it is appropriate for Congress to vote on whether or not these major rules should take effect.

Number of Rules and Why Considered "Major"

While supporters and opponents of the REINS Act can vigorously debate the merits of a congressional approval process as contemplated in the legislation, the factual underpinnings of that debate should be as clear and agreed upon as possible. However, there appear to be some misconceptions regarding the number of major rules that have been issued in recent years, and why those rules were considered "major."

Several observers have said that the number of rules, and the number of major rules, has increased sharply during the Obama Administration.[76] An editorial in the *Wall Street Journal* stated that federal agencies had issued 59 major final rules in 2009 and 62 in 2010, up from an average of between 30 and 40 major rules in the previous 25 years.[77] However, GAO's federal rules database indicates that the number of major final rules has been at or above 50 in every full calendar year since the CRA was enacted in March 1996, and the number of major rules first exceeded 80 during the last calendar year of the George W. Bush Administration, when federal agencies issued 95 major rules. The number of major rules fell somewhat in 2009, the first year of the Obama Administration (to 84), but 11 of those rules appear to have been issued during the final days of the Bush Administration. In 2010, federal agencies published 100 major rules.

[76] The George W. Bush Administration was also described as increasing the number of rules and major rules. See Veronique de Rugy, "Bush's Regulatory Kiss-Off," *Reason.com*, January 2009, available at http://reason.com/archives/2008/12/10/bushs-regulatory-kiss-off, which said that there had been a "significant increase in regulatory activity and cost since 2001."

[77] "The Congressional Accountability Act," *Wall Street Journal*, January 14, 2011, p. A14. Others have also indicated that the number of rules issued during the Obama Administration had risen sharply. See also Jennifer Rubin, "Change Comes in the Form of Congressional Oversight," *Washington Post*, January 27, 2011, available at http://voices.washingtonpost.com/right-turn/2011/01/change_congressional_oversight.html.

Also, although several observers have indicated that all major rules have annual costs of at least $100 million,[78] this report indicates that the major rules published in recent years appeared to be "major" for a variety of reasons. Many of the rules seemed to have been placed in that category because they substantially increased or decreased federal transfer payments—not because of expected regulatory compliance costs or benefits. Some observers may contend that at least some of these transfers are, in fact, regulatory costs (e.g., system-wide increases in the cost of health insurance, with the benefits flowing primarily from one group to another). Even under this view, however, those costs are somewhat different than compliance costs that are imposed upon particular industries or groups.

Of the major rules that had annual compliance cost estimates of $100 million or more, the rules frequently had estimated benefits that were much higher. In fact, in 14 of the major rules that were published in calendar year 2010, the agencies' highest estimated compliance costs were less than the lowest estimated benefits. In contrast, only one rule had estimated benefits that were lower than the lowest estimated costs (the DOT rule on "positive train control systems"), and in that rule the agency indicated that the costs were driven by the specific requirements in the underlying statute. In many other rules, the agencies provided monetized estimates of regulatory costs, but provided only qualitative descriptions of expected regulatory benefits. Other rules were expected to result in increased costs or prices, but the estimates for those increases were either less than $100 million or were not monetized.

Congressional Oversight

Although the reasons why certain rules are considered major appear to be more varied than just compliance costs, that fact does not bring into question the appropriateness of congressional oversight of agency regulations, or the appropriateness of considering the type of congressional approval process contemplated by the REINS Act. For example, see the following:

- If a major rule is expected to increase or decrease federal transfer payments by more than $100 million, Congress may want to examine and/or approve the manner in which those regulatory transfers are constructed to ensure that they are consistent with the intent of the underlying statute, and that they are sustainable in the current budgetary environment.
- If a major rule is expected to result in additional fee revenue, Congress may want to ensure that the fee structure is appropriate, and that the amount of fees expected to be derived from the regulatory change are neither too high nor too low to cover the costs of the governmental function being funded.
- If an agency indicates that a major rule is expected to result in regulatory costs that are substantially greater than the expected benefits (as appears to be the case in the "positive train control systems" rule), Congress may want to examine those

[78] Wayne Crews, "Tyranny of the Unelected; Congress Needs to Get a Handle on Costly Rules," *Washington Times*, October 12, 2010, p. B.1, in which the author states that Congress need not approve all rules, "just the 'major' one costing more than $100 million annually, of which there are less than 200 each year." See also an editorial in the *Las Vegas Review-Journal* ("Too Many Rules," January 24, 2011, p. B9), which stated that the REINS Act requires an up-or-down vote on "regulations likely to cost $100 million or more…." Also, in testimony before the House Judiciary Committee's Subcommittee on the Courts and Commercial and Administrative Law on January 24, 2011, former Representative David McIntosh said that major rules are "those projected to impose cost on the American economy of more than $100 million each." See http://judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf.

estimates more closely, and may ultimately decide to prevent the rule from taking effect. Congress may also want to examine whether (as DOT indicated in the positive train control systems rule) the requirements in the underlying statute are, in fact, the source of the negative net benefits.

- On the other hand, if an agency indicates that a rule is expected to produce regulatory benefits well in excess of its expected costs, Congress may want to question the accuracy of those estimated benefits and costs. If Congress concludes that a rule will cost much more than the agency estimated, or will yield much lower estimated benefits, then Congress may decide not to approve the rule.

To carry out these kinds of congressional oversight actions, either as part of a disapproval action under the CRA, or as part of an approval action under the REINS Act, Congress may need particular types of expertise. For example, to determine whether a CMS rule has properly established prospective payment systems for hospitals and doctors, Congress may want to consult with experts in how such systems are constructed and operate. To determine whether EPA has properly estimated the future benefits of a rule, Congress may want to consult with experts in risk analysis to determine whether certain health benefits are likely to materialize. H.R. 214 (112th Congress), if enacted, may help provide some of the expertise that may be needed. The bill would create a Congressional Office of Regulatory Analysis (CORA), transferring to the director of that office the Comptroller General's responsibilities under the CRA. The CORA director would be required to prepare a report on each major rule, including potential benefits and costs and an analysis of less costly alternatives. In carrying out these and other functions, the director is permitted to procure temporary experts and consultants.

Statutory Requirements

In some cases, the agency issuing the rule appeared to have little or no discretion in determining whether or not the rule would be a "major rule." For example, see the following:

- DOE said the January 25, 2005, rule on weatherization assistance for low income persons was "major" because of the $5 billion in grants provided by the American Recovery and Reinvestment Act of 2009.
- DOD said its April 16, 2010, rule on retroactive stop loss special pay to members of the military service was "major" because of the more than $534 million authorized and appropriated for that purpose in the Supplemental Appropriations Act, 2009.
- The NRC said its June 16, 2010, was "major" because the Omnibus Budget Reconciliation Act of 1990, as amended, generally requires the agency to recover through fees approximately 90% of its FY2010 budget authority through fees (about $900 million).

If a major rule that is of congressional concern is simply implementing statutory requirements, and the statute requires recurring rules, Congress may want to revisit those statutory requirements to prevent future major rules with the same types of effects.

Specificity of Statutory Rulemaking Authority

Finally, some observers have asserted that one way to prevent burdensome federal regulations is for Congress to be more specific in the statutes underlying those rules. Congress can assign regulatory responsibilities to federal agencies in any number of ways, and the manner in which Congress does so can determine the amount of discretion given to the agencies and, conversely, the amount of control that Congress retains for itself. When Congress requires that a regulation be issued or made effective by a particular date, that it contain certain substantive elements, and that the rule be developed following certain procedures, then the delegation of legislative rulemaking authority is somewhat limited and Congress retains a measure of control over the subsequent policymaking process.

However, specificity in the statutes underlying agency rules can also constrain the agencies from developing regulations that are most cost effective. For example, the Federal Railroad Administration rule on "positive train control systems" was the only major rule issued in 2010 that was clearly expected to produce negative net benefits. The agency said that the expected costs of the rule were about 20 times the expected benefits. FRA noted this imbalance in the rule, but said it was "constrained by the requirements of [the Rail Safety Improvement Act of 2008], which do not provide latitude for implementing [positive train controls] differently."[79]

[79] U.S. Department of Transportation, Federal Railroad Administration, "Positive Train Control Systems," 75 *Federal Register* 2598, January 15, 2010, p. 2685.

Appendix. "Major Rules" from Calendar Year 2010

Table A-1. Chronological Listing of "Major Rules" from Calendar Year 2010 That Would Have Been Covered by the REINS Act

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Energy	Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Microwave Ovens, and Electric and Gas Kitchen Ranges and Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers) (1904-AB93)	1/8/2010	DOE considered the cost and benefits of the rule and determined that the costs outweigh the benefits. The benefits include energy savings, life cycle costs (LCC) savings for CCW consumers, positive national net present value, and emissions reductions. The costs include loss of manufacturer industry net present value and LCC increases for some CCW consumers. [DOE indicated in the preamble to the rule that it was expected to result in losses to manufacturers of less than $10 million, but the net present value of consumer benefits were estimated to be between $400 million and $900 million (in 2008 dollars).]
Securities and Exchange Commission	Custody of Funds or Securities of Clients by Investment Advisers (3235-AK32)	1/11/2010	The Commission analyzed the potential costs and benefits of the final rule. Though the Commission states the benefits to investors may be hard to quantify, it believes that the benefits will be substantial, including, generally, increasing investors' confidence when obtaining advisory services from registered investment advisers. In addition, the Commission believes the amendments to the rule could, to a limited extent, promote efficiency and capital formation as a result of such increased investor confidence. In particular, the Commission states that increased investor confidence could lead to more efficient allocation of investor assets, which could result in an increase in the assets under management of investment advisers and, depending on how those assets are invested, a potential increase in the availability of capital. Additionally, the Commission anticipates that investment advisers will find it easier to understand and comply with the rule as a result of the amendments, which may result in cost savings for advisers. The Commission believes the amendments will improve the clarity of the rule by adding several definitions. The Commission estimates that the aggregate costs for complying with the amendments to the final rule and related forms will be $126,278,204. Of this amount, the Commission estimates that $1,195,000 is a one-time computer system programming cost related to account statement legends, while the remainder will be recurred on an annual basis. The recurring costs under the rule are for the surprise examinations, internal control reports, and the burden hours associated with the changes to two related forms.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Housing and Urban Development	HOPE for Homeowners Program; Statutory Transfer of Program Authority to HUD and Conforming Amendments To Adopt Recently Enacted Statutory Changes (2502-AI76)	1/12/2010	According to the Department of Housing and Urban Development (HUD), it did not prepare an analysis of the costs and benefits of this interim rule. HUD did prepare an Economic Analysis for this rule. [The economic analysis reads as follows: HUD found that the economic impacts from the changes in this interim rule stem largely from increased participation in the H4H program. HUD estimates that, with 10,000 participants annually, the H4H program will generate $273 million in net benefits to society and that H4H participation could be as high as 137,500 households over the life of the program, with commensurately higher benefits.]
Department of Transportation, Federal Railroad Administration	Positive Train Control Systems (2130-AC03)	1/15/2010	The Federal Railroad Administration (FRA) analyzed the costs and benefits of this final rule. The costs FRA anticipates to accrue from adopting this final rule include: (1) costs associated with developing implementation plans and administrative functions related to the implementation and operation of positive train control (PTC) systems, including the information technology and communication systems that make up the central office; (2) hardware costs for onboard locomotive system components, including installation; (3) hardware costs for wayside system components, including installation; and (4) maintenance costs for all system components. FRA estimates the total 20-year discounted costs to be $13,205,614,091 at a 3-percent discount rate and $9,547,522,721 at a 7-percent discount rate. FRA expects two types of benefits to result from the implementation of this final rule—benefits from railroad accident reduction and business benefits from efficiency gains. The first type would include safety benefits or savings expected to accrue from the reduction in the number and severity of casualties arising from train accidents that would occur on lines equipped with PTC systems. FRA estimates the total 20-year discounted benefits to be $673,801,919 at a 3-percent discount rate and $439,705,397 at a 7-percent discount rate.
Federal Reserve System and Federal Trade Commission	Fair Credit Reporting Risk-Based Pricing Regulations (3084-AA94)	1/15/2010	The Federal Reserve System (the Board) and Federal Trade Commission (the Commission) (collectively, the agencies) analyzed the costs and benefits of this final rule. According to the Commission, the estimated average annual labor cost for all categories of entities covered by this final rule will be $252,048,000 or $1,263 per covered entity. The benefits of this final rule identified by the Commission include: (1) educating consumers about the role that their consumer reports play in the pricing of credit; and (2) alerting consumers to the existence of potentially negative information in their consumer reports so that they may check their reports and correct any inaccurate information. The Commission expects more consumers will check their credit reports because of the rule, which will result in improving the accuracy of credit reports generally. Thus, the Commission believes that the benefits of the rule substantially outweigh the costs to those engaged in risk-based pricing.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Homeland Security, Federal Emergency Management Agency	Special Community Disaster Loans Program (1660-AA44)	1/19/2010	FEMA determined that the overall cost impact of this rule is the cost to the applicant to apply for the cancellation, as well as the impact on the economy of potentially forgiving all Special Community Disaster Loans (CDLs) and any related interest and costs. FEMA estimated that the annual estimated cost to submit the application for loan cancellation will be $4,850.32. FEMA determined that if all 152 recipients of Special CDLs apply for and are found eligible for full cancellation under the rule, up to $1,270,501,241, plus any applicable interests and costs, could be forgiven. Therefore, the maximum total economic impact of this final rule was determined by FEMA to be approximately $1.3 billion. However, FEMA notes that it is impossible to predict the economic impact with precision because it cannot know the dollar amounts or number of loans that will be cancelled. Also, although the impact of the final rule may be spread over multiple years as applications are received, processed, and loans cancelled, the total economic effects of a specific loan cancellation would only occur once, rather than annually.
Department of Energy	Weatherization Assistance Program for Low-Income Persons (1904-AB97)	1/25/2010	DOE prepared a cost-benefit analysis in conjunction with the final rule. DOE states that the American Recovery and Reinvestment Act of 2009 provided $5 billion for the weatherization program, and that the grants provided under this program constitute transfer payments, meaning that they do not represent a change in the total resources available to society. DOE states that the final rule will have the benefit of improving weatherization. DOE acknowledges that the final rule could impact the process used by grantees and subgrantees to evaluate applications with respect to multi-unit buildings for the purpose of distributing funds provided under the Recovery Act, and that could potentially result in a change of the distribution of funding.
Department of the Treasury, Office of the Comptroller of the Currency; Federal Reserve System; Federal Deposit Insurance Corporation; Department of the Treasury, Office of Thrift Supervision	Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Regulatory Capital; Impact of Modifications to Generally Accepted Accounting Principles; Consolidation of Asset-Backed Commercial Paper Programs; and Other Related Issues (1557-AD26, 3064-AD48, 1550-AC36)	1/28/2010	In its submission to the Comptroller General, the agencies did not include a cost-benefit analysis of the final rule. [In the preamble to the rule, the agencies stated that the rule (among other things) "eliminates the exclusion of certain consolidated asset-backed commercial paper programs from risk-weighted assets." Affected parties indicated that this and other changes in the rule could increase the cost of lending to consumers and businesses.]
Department of Agriculture, Food and Nutrition Service	Food Stamp Program: Eligibility and Certification Provisions of the Farm Security and Rural Investment Act of 2002 (0584-AD30)	1/29/2010	The Department of Agriculture (USDA) analyzed the costs. USDA estimates that the total costs to the government of this rule to be $2.669 billion in fiscal year 2010 and $13.541 billion over the 5 years fiscal year 2010 through fiscal year 2014. [In the preamble to the rule, USDA indicated that the first-year costs would be less than $70 million, and costs would be less than $5 million in each subsequent year.]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services, Centers for Medicare and Medicaid Services	Interim Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (1545-BJ05; 1210-AB30; 0938-AP65)	2/2/2010	The Departments analyzed the costs and benefits of the rule. According to the Departments, the costs include costs associated with increased utilization of mental health and substance use disorder benefits and costs associated with cumulative financial requirements and quantitative treatment limitations, including deductibles. Additionally, the Departments include compliance review costs and costs associated with MHPAEA disclosures. The Departments expect that the largest benefit associated with MHPAEA and these regulations will be derived from applying parity to cumulative quantitative treatment limitations such as annual or lifetime day or visit limits (visit limitations) to help ensure that vulnerable populations—those accessing substantial amounts of mental health and substance use disorder services—have better access to appropriate care. The Departments cannot estimate how large this benefit will be, because sufficient data is not available to estimate the number of covered individuals that had their benefits terminated because they reached their coverage limit. The Departments state that another potential benefit associated with MHPAEA and these regulations is that use of mental health and substance use disorder benefits could improve. The Departments note that the finding that treatment can help increase the productivity of those suffering from mental illness suggests that increasing access to treatment of mental disorders could have a beneficial impact on lost productivity cost and lost earnings that stem from untreated and under treated mental health conditions and substance use disorders. The Departments, however, do not have sufficient data to determine whether this result will occur, and, if it does, the extent to which lost productivity cost and lost earnings could improve. According to the Departments, because expenditures on mental health and substance use disorder benefits only comprise 3–6 percent of the total benefits covered by a group health plan and 8 percent of overall healthcare costs, the Departments expect that group health plans will lower cost-sharing on mental health and substance use disorder benefits instead of raising cost-sharing on medical/surgical benefits.
Environmental Protection Agency	Primary National Ambient Air Quality Standards for Nitrogen Dioxide (2060-AO19)	2/9/2010	EPA prepared a regulatory impact analysis of the potential costs and benefits associated with the final rule. However, the Clean Air Act and judicial decisions do not permit EPA to consider the economic and technical feasibility of attaining ambient air standards, so EPA did not consider the results of the cost-benefit analysis in developing the final rule. [According to the regulatory impact analysis for the rule, EPA estimated that in 2020, the costs would be between $270 million and $510 million, and the monetized benefits would be between $120 million and $580 million (all in 2006 dollars).]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Agriculture, Agricultural Marketing Service	National Organic Program; Access to Pasture (Livestock) (0581-AC57)	2/17/2010	AMS considered the cost and benefits of the rule. AMS notes that the benefits include uniformity in application to the livestock regulations especially as they relate to the pasturing of ruminants, which will create equitable, consistent performance standards for all ruminant livestock producers and allow the accredited certifying agents (ACAs) and AMS to administer the livestock regulations in a way that reflects consumer preferences regarding the production of organic livestock and their products. AMS states that an additional benefit of uniform application of the NOP livestock regulations should result in a near elimination of violations of the pasture regulations. AMS believes this will eliminate the filing of complaints regarding the pasturing of ruminants. AMS states that the costs include an increase in the cost of production for producers who currently do not pasture their ruminant animals and those producers who do not manage their pastures at a sufficient level to provide at least 30 percent DMI. AMS notes the costs associated with complying with this rule would vary based on the livestock producer's current practices and the degree to which they conform to the amended livestock regulations. Additionally, AMS believes ruminant livestock operations currently pasturing their animals may see minimal increased costs, if any. According to AMS, the potential costs include land and seed for pasture and costs associated with providing sufficient vegetation for grazing throughout the grazing season, which would include the time (labor) spent seeding the pastures, fuel for equipment used in seeding, and the cost of seed. AMS believes costs of pasture vary depending on location, with costs likely being higher for certified organic pasture. AMS also believes seed costs will vary depending on what is to be grown and how many acres are to be grown. AMS states such costs may be offset by the benefits of using improved pasture, which include a lower cost of purchased feed (grains and forages) per hundredweight of milk or meat produced, reduced forage harvest costs, and reduced veterinary costs. Also, AMS notes that at the retail level, there may be increased consumer prices. AMS believes for organic slaughter stock producers, an increase in costs might result in a greater volume of slaughter animals, at least in the short term, entering the market driving down prices. Additionally, AMS states that longer term these increased costs could result in increased consumer prices unless the increased costs are offset by reductions in other costs of production. AMS states other costs of production that could be expected to go down are costs associated with producer harvest and purchase of feed and the cost of herd health. AMS also notes that dairy producers not currendy pasturing their animals and those not managing their pastures at a level sufficient to provide at least 30 percent DMI are also expected to experience increased costs, which could, at least in the short term, lead to a reduced organic milk supply.
Federal Reserve System	Truth in Lending (Docket No. R-1370)	2/22/2010	The Board did not perform a cost-benefit analysis in conjunction with the final rule. [In the rule summary, FRS stated that the rule "establishes a number of new substantive and disclosure requirements to establish fair and transparent practices pertaining to open-end consumer credit plans, including credit card accounts. In particular, the rule limits the application of increased rates to existing credit card balances, requires credit card issuers to consider a consumer's ability to make the required payments, establishes special requirements for extensions of credit to consumers who are under the age of 21, and limits the assessment of fees for exceeding the credit limit on a credit card account."]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Environmental Protection Agency	National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (2060-AP36)	3/3/2010	EPA performed a cost-benefit analysis in conjunction with the final rule. EPA determined that the air quality impacts of the final rule would be to reduce total hazardous air pollutant (HAP) emissions from stationary reciprocating internal combustion engines (RICE) by 1,010 tons per year (tpy) beginning in 2013. The final rule is expected to reduce other pollutants, such as carbon monoxide (by 14,000 tpy in 2013), fine particulate matter (PM) (by 2,800 tpy in 2013), and volatile organic compounds (VOC) (by 27,000 in 2013). The final rule will also reduce emissions of sulfur oxide through the use of ultra low sulfur diesel (ULSD) fuel by zero to 31,000 tpy in 2013, depending on the number of engines that used ULSD prior to the enactment of the final rule. EPA estimated the total national capital cost for the final rule for existing stationary RICE to be $744 million, with a total national annual cost of $373 million in 2013. EPA estimated the monetized benefits of the rule, which it calculated in terms of the co-benefits associated with reducing PM, to be between $940 million and $2.3 billion (using a 3-percent discount rate) or between $850 million and $2.1 billion (using a 7-percent discount rate) in 2013.
Securities and Exchange Commission	Money Market Fund Reform (3235-AK33)	3/4/2010	The Securities and Exchange Commission (the Commission) analyzed the costs and benefits of this final rule and concluded that the benefits justify the costs. The Commission believes that the benefits of this rule include reducing money market funds' exposure to credit, interest rate, and liquidity risks, among other benefits. The Commission also recognized that this rule may cause the yields of funds to decrease in some circumstances, among other costs….. The Commission determined that this final rule contains three new information collections requirements and revises three existing information collection requirements under the Act. The Commission has submitted these information collection requirements to the Office of Management and Budget (OMB) for review… The Commission estimates that the total burden hours associated with the amendments to the 2a-7 information collection requirement will increase the renewal estimate to 395,779 hours annually. The Commission estimates that the total annual burden associated with the 22e-3 information collection for all money market funds and conduit funds will be approximately 110 minutes. The Commission estimates that the total annual burden associated with Form N-MFP information collection will be 94,189 burden hours, on average, for all money market funds in the first three years. Finally, the Commission estimates that the total annual burden associated with the 30b1-6T information collection will be 2,100 hours for all money market funds required to submit portfolio schedules.
Department of Energy	Energy Conservation Program: Energy Conservation Standards for Small Electric Motors (1904-AB70)	3/9/2010	The Department of Energy (DOE) analyzed the costs and benefits of this final rule. DOE estimated that the annualized costs of this rule to be $263.9 million per year at a 7-percent discount rate and $263.7 million per year at a 3-percent discount rate. DOE estimated a range of possible values for the total monetary benefits of this final rule, depending on the discount rate, low versus high energy prices, and other factors. DOE's lowest estimate of the benefits of this rule is $867.5 million and its highest estimate is $1,358.8 million.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Securities and Exchange Commission	Amendments to Regulation SHO (3235-AK35)	3/10/2010	The Securities and Exchange Commission (the Commission) evaluated the costs and benefits of this final rule. The Commission identified various benefits of this rule, including promoting capital formation and restoring investor confidence in the securities market. The Commission believes that this rule's approach strikes the appropriate balance between preventing short selling—including potentially manipulative or abusive short selling—from being used as a tool to exacerbate a declining market in a security and the continued smooth functioning of the markets, including the provision of liquidity and price efficiency. The Commission believes that the rule will have minimal, if any, impact on market liquidity, price efficiency, and quote depths. The Commission estimates that this rule will have an average one-time initial cost of $86,880 per self regulating organization (SRO) trading center and $68,381 per non-SRO trading center required to establish the written policies and procedures under this rule. The Commission also estimates an average annual on-going cost of $18,588 per trading center to ensure that the written policies and procedures are up-to-date and remain in compliance. In addition, the Commission estimates an average annual cost of $102,768 per trading center for on-going monitoring for and enforcement of trading in compliance with the rule. The Commission also estimates that this rule will have an average one-time initial cost of $68,381 per broker-dealer establishing the written policies and procedures under the rule. The Commission estimates an average annual on-going cost of $18,588 per broker-dealer to ensure that written policies and procedures are up-to-date and remain in compliance. In addition, the Commission estimates an average annual cost of $102,768 per broker-dealer for on-going monitoring for and enforcement of trading.
Department of Education	Investing in Innovation Fund (1855-AA06)	3/12/2010	Education believes that the costs associated with the final rule would be limited to the paperwork burden related to preparing an application, and that the benefits of the rule would outweigh any costs incurred by applicants. Education believes that the benefits of the final rule would be priorities, requirements, definitions, and selection criteria that would result in the selection of high-quality applications that are most likely to have a significant national impact on educational reform and improvement. Education estimates that the final rule will result in associated expenditures of $643 million from the federal government to local educational agencies (LEAs) and nonprofit organizations.
Department of Health and Human Services, Food and Drug Administration	Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents (0910-AG33)	3/19/2010	In its current submission to the Comptroller General, the FDA did not include a cost-benefit analysis of the final regulations under this Act. [In the preamble, FDA referenced an earlier rule in which the agency estimated the annual costs at between $174 million and $187 million, and monetized the health benefits (e.g., 60,000 premature deaths avoided) at between $28 billion and $43 billion per year.]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Environmental Protection Agency	Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (2060-AO81)	3/26/2010	The Environmental Protection Agency (EPA) analyzed the costs and benefits of this final rule. In its Regulatory Impact Analysis for this rule, EPA estimated the impacts of an expansion of renewable fuel use as required by this rule, but did not evaluate to what extent such an expansion would have occurred in the absence of this rule. EPA estimated that the 2022 impact on gasoline costs would be -2.4 cents per gallon; on diesel costs, -12.1 cents per gallon; on overall fuel costs, -$11.8 billion; and on gasoline and diesel consumption, -13.6 billion gallons. EPA also estimated that the total capital costs through 2022 would be $90.5 million. The estimated food costs would be 8.2 percent for corn, 10.3 percent for soybeans, and $10 per capita. EPA estimated the economic impacts of this rule to be $2.6 billion for energy security, between -$630 million and -$2.2 billion for monetized health impacts, between $600 million and $12.2 billion for monetized greenhouse gases impacts, -$41.5 billion in oil impacts, 3.6 billion in farm gate food, $13 billion in farm income, -$57 million in corn exports, and -$453 million in soybean exports. EPA estimates the total benefit for this rule in 2022 to be between $13 billion and $26 billion.
Department of Justice, Drug Enforcement Administration	Electronic Prescriptions for Controlled Substances (1117-AA61)	3/31/2010	DEA performed a cost-benefit analysis in conjunction with the final rule. DEA estimates that the total annual costs will be: for practitioners' offices: $30,244,615, using a 7-percent discount rate ($29,602,769 using a 3-percent discount rate); for hospitals: $6,241,658 using a 7-percent discount rate ($5,352,737 using a 3-percent discount rate); for pharmacies: $2,026,046 using a 7-percent discount rate ($1,936,927 using a 3-percent discount rate); and for application providers: $4,817,509 using a 7-percent discount rate ($4,886,478 using a 3-percent discount rate). DEA estimates that the total annualized costs associated with the interim final rule will be $43,328,829 using a 7-percent discount rate ($41,778,910 using a 3-percent discount rate). DEA estimates that the annualized gross benefits of the final rule from eliminating a number of callbacks to clarify prescriptions from pharmacies to doctors will be $419,745,516 using a 7-percent discount rate ($438,502,110 using a 3-percent discount rate). The interim final rule could also reduce the patient's wait time at the pharmacy, which DEA estimates will provide annualized savings over 15 years of $1 billion using a 7-percent discount ($1.03 billion using a 3-discount). However, the estimate for public wait time is an upper bound, and DEA did not include it in the primary estimate for the benefits of the interim final rule. The interim final rule will also allow pharmacies to eliminate file cabinets currently used to store original prescriptions for 2 years, which DEA estimates will provide a cost-savings for pharmacies of $1.38 million using a 7-percent discount rate ($1.4 million using a 3-percent discount rate). DEA also lists other benefits, which it did not attempt to quantify or monetize. DEA believes the interim final rule will directly affect drug diversion effectuated through stealing prescription pads, altering legitimate prescriptions, or altering a record at a pharmacy to hide diversion from pharmacy stock. DEA also believes that the interim final rule will help reduce adverse drug events that result from medication errors.
Federal Reserve System	Electronic Fund Transfers (Docket No. R-1377)	4/1/2010	The Board did not perform a cost-benefit analysis in conjunction with the final rule. [In the rule summary, FRS stated that the rule "restricts a person's ability to impose dormancy, inactivity, or service fees for certain prepaid products, primarily gift cards. The final rule also, among other things, generally prohibits the sale or issuance of such products if they have an expiration date of less than five years. The amendments implement statutory requirements set forth in the Credit Card Accountability Responsibility and Disclosure Act of 2009."]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Education	Race to the Top Fund (1810-AB10)	4/2/2010	Education determined that this interim final rule will not impose additional costs to state applicants, grantees, or the federal government. A state applicant may take additional time to create or revise its Race to the Top budget so that it conforms to the required budget range if the state had intended to request more than the maximum in the range. However, Education believes that the benefits outweigh any potential burden that the interim final rule may cause. [In the preamble to the rule, DOEd stated that the fund "seeks to spur reform of the country's education system," and that the final rule was issued without prior public comments "in order to make timely grant awards with ARRA funds."]
Department of Transportation, Federal Motor Carrier Safety Administration	Electronic On-Board Recorders for Hours-of-Service Compliance (2126-AA89)	4/5/2010	FMCSA performed a cost-benefit analysis in conjunction with the final rule. FMCSA determined that the costs of the final rule on an annualized basis over a 10-year horizon will be $139 million. The costs analysis estimates the cost of carriers coming into compliance with the hours of service rules, and includes the electronic on-board recorders required to be compliant with the rule, as well as training time costs for drivers, administrative staff, and state enforcement personnel. FMCSA determined the benefits of the final rule to be $182 million annually, which includes safety benefits of electronic on-board recorder use by estimating reductions in hours of service violations and resulting reductions in fatigue-related crashes.
Department of Defense, Office of the Secretary	TRICARE; Relationship Between the TRICARE Program and Employer-Sponsored Group Health Coverage (0720-AB17)	4/9/2010	DoD completed an estimated annual impact analysis. An updated analysis of DoD's cost and population data for FY2009 indicates that the average MHS cost per active duty family members (NADFM) user under age 65 was $3,975 (in FY2009 dollars). After adjusting for inflation to FY2010, DoD estimates that the current year (FY2010) cost per NADFM user is $4,293. Multiplying this cost per user by the 14,921 NADFMs who would shift to OHI rather than using TRICARE, due to section 707, yields an annual estimated cost impact of $64.1 million in savings for Fiscal Year 2010. Based on a trend of 7-percent inflation offset by a projected 2-percent annual decrease in non-active duty family members under age 65, DoD estimates the following impact: $64.1 million in savings for Fiscal Year 2010; $67.3 million in savings for Fiscal Year 2011; $70.6 million in savings for Fiscal Year 2012; $74.2 million in savings for Fiscal Year 2013; $77.9 million in savings for Fiscal Year 2014; and $81.8 million in savings for Fiscal Year 2015.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services, Food and Drug Administration	Use of Ozone-Depleting Substances; Removal of Essential-Use Designation (Flunisolide, etc.) (0910-AF92)	4/14/2010	The Food and Drug Administration (FDA) analyzed the costs and benefits of this final rule. According to FDA, the benefits of this rule include environmental and public health improvements from protecting stratospheric ozone by reducing chlorofluorocarbons (CFCs) emissions. FDA also expect the benefits to include expectations of increased returns on investments in environmentally friendly technology and continued international cooperation to comply with the spirit of the Montreal Protocol, thereby potentially reducing future emissions of ozone-depleting substances (ODSs) throughout the world. FDA determined that the costs of the final rule would include increased spending for needed medicines used to treat asthma and Chronic Obstructive Pulmonary Disease (COPD). FDA determined that the social costs of the final rule include the health benefits lost through decreased use of medicines that may result from increased prices. FDA was unable to quantify the economic costs of reducing the variety of marketed products from which consumers, and their doctors, can choose. FDA estimated that, depending on whether asthma and COPD patients use the most or least expensive of alternatives, private, third-party, and public expenditures on inhaled medicines would increase by roughly $90 million to $280 million per year.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs (0938-AP77)	4/15/2010	The Centers for Medicare & Medicaid Services (CMS) analyzed the costs and benefits of this final rule. CMS estimated the costs and savings of this rule for calendar years 2010 through 2015. CMS estimates that the total cost of this rule in calendar year 2010 will be approximately $260.3 million, and that the rule will have a total net savings over the 6-year period 2010 to 2015 of $341.70 million. CMS also predicts that this rule will improve coordination of care, increase quality of data reporting, increase ability to comply with existing regulations and policies, enhance appeal and grievance procedures, and curtail illegal marketing practices. Additionally, CMS expects this rule to clarify timeframes and notification requirements.
Department of Defense, Office of the Secretary	Retroactive Stop Loss Special Pay Compensation (0790-AI59)	4/16/2010	DoD did not include a cost-benefit analysis with the final rule. [In the preamble to the rule, DOD indicated that it was economically significant because "The Supplemental Appropriations Act, 2009 appropriated $534,400,000 to the Department of Defense, to remain available for obligation until expended: Provided, that such funds shall be available to the Secretaries of the military departments only to make payment of claims specified by this law."]
Department of Energy	Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters (1904-AA90)	4/16/2010	DOE prepared a cost-benefit analysis in conjunction with the final rule. DOE determined that the standards adopted in the final rule will save approximately 2.81 quads Btu of energy over a 30-year period, and eliminate the need for approximately three new 250 MW power plants. The energy savings were estimated to result in cumulative greenhouse gas emission reductions of approximately 164 million tons of carbon dioxide, and alleviate air pollution by resulting in cumulative emissions reductions of approximately 124 kilotons of nitrogen oxides and 0.54 tons of power plant mercury. DOE determined that the annualized monetized benefits of the rule would be $1,676 million per year, using a 7-percent discount rate, and $2,020.5 million per year using a 3-percent discount rate. The costs are estimated to be $1,284.9 per year using a 7-percent discount rate, and $1,249.3 per year using a 3-percent discount rate.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicaid Program; Final FY2008, Revised Preliminary FY2009, and Preliminary FY2010 Disproportionate Share Hospital Allotments and Final FY2008, Revised Preliminary FY2009, and Preliminary FY2010 Disproportionate Share Hospital Institutions for Mental Disease Limits (0938-AP66)	4/23/2010	CMS states that there are no changes between the preliminary and final FY2008 disproportionate share hospital (DSH) allotments and FY2008 IMD DSH limits because FY2008 was not determined to be the fiscal year specified for any state. CMS states that the revised preliminary FY2009 DSH allotments published in this notice are about $308 million greater than the preliminary FY2009 DSH allotments published in the Federal Register correction notice on January 26, 2009. 74 Fed. Reg. 4439. CMS states that this occurred because of the application of a higher CPI–U (4.4 percent in the revised preliminary determination compared to 4.0 percent in the original preliminary determination) and the application of the Recovery Act increase to states' DSH allotments for FY2009. The revised preliminary FY2009 IMD DSH limits being published in this notice are about $22 million greater than the preliminary FY2009 IMD DSH limits published in the Federal Register notice on December 19, 2008. 73 Fed. Reg. 77,704. CMS notes that this is because the DSH allotment for a fiscal year is a factor in the determination of the IMD DSH limit for the fiscal year, and since the original preliminary FY2009 DSH allotments were increased in the revised preliminary FY2009 DSH allotments, the IMD DSH limits for some states were also increased. Additionally, CMS states that the preliminary FY2010 DSH allotments being published in this notice are about $277 million greater than the revised preliminary FY2009 DSH allotments being published in this notice and about $585 million greater than the preliminary FY2009 DSH allotments published in the Federal Register correction notice on January 26, 2009. 74 Fed. Reg. 4439. CMS explains that these increases are a direct result of the application of the Recovery Act provisions which in this case resulted in the FY2010 DSH allotments being determined as 2.5 percent greater than the FY2009 DSH allotments as determined under the Recovery Act. CMS states that the preliminary FY2010 IMD DSH limits being published in this notice are about $21 million greater than the revised preliminary FY2009 IMD DSH limits being published in this notice, and about $43 million greater than the preliminary FY2009 IMD DSH limits published in the Federal Register notice on December 19, 2008. 73 Fed. Reg. 77,704. CMS explains that this is because the DSH allotment for a fiscal year is a factor in the determination of the IMD DSH limit for the fiscal year, and since the preliminary FY2010 DSH allotments were increased as compared to the preliminary FY2009 DSH allotments, the associated FY2010 IMD DSH limits for some states were also increased.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicaid Program; State Flexibility for Medicaid Benefit Packages (0938-AP72)	4/30/2010	CMS states that the estimated aggregate federal savings for fiscal years 2006 through 2014 is $4.97 billion. CMS also states that the estimated aggregate state savings for fiscal years 2006 through 2014 is $3.36 billion. In the December 3, 2008, rule, CMS estimated aggregate impacts for fiscal years 2006 through 2010 of $2.28 billion in federal savings and $1.72 billion in state savings. In this final rule, the updated aggregate impacts, for the same time period of fiscal years 2006 through 2010, are $1.84 billion in federal savings and $1.05 billion in state savings. As a result, relative to the December 3, 2008, final rule, CMS notes that this yields a reduction in the aggregate impacts of $440 million in federal savings and $670 million in state savings, for fiscal years 2006 through 2010. CMS estimated the impact of this rule by analyzing the potential federal savings related to lower per capita spending that may be achieved if states choose to enroll beneficiaries in eligible populations in plans that are less costly than projected Medicaid costs.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Inpatient Psychiatric Facilities Prospective Payment System Payment—Update for Rate Year Beginning July 1, 2010 (RY 2011) (0938-AP83)	4/30/2010	The net effect of the updates described in this notice results in an overall estimated $95 million increase in payments from rate year 2010 to rate year 2011. CMS does not expect changes in the quality of care or access to services for Medicare beneficiaries due to this notice. CMS contends that access to inpatient psychiatric facility (IPF) services will be enhanced due to the patient- and facility-level adjustment factors, all of which are intended to adequately reimburse IPFs for expensive cases. Also, the outlier policy is intended to assist IPFs that experience high-cost cases.
Department of the Treasury, Office of Thrift Supervision	Unfair or Deceptive Acts or Practices; Amendment (1550-AC38)	5/4/2010	In its current submission to the Comptroller General, OTS did not include any analysis of the final regulations. [In the preamble, OTS indicated that this rule removed a requirement that had been established by an earlier rule, which had been estimated to cost more than $100 million.]
Department of Health and Human Services, Office of the Secretary	Early Retiree Reinsurance Program (0991-AB64)	5/5/2010	The Department of Health and Human Services (HHS) analyzed the costs and benefits of this interim final rule. HHS believes that the costs imposed on sponsors that want to receive the early retiree reimbursement will not be significant relative to the payments received. The costs will consist of staff or contractor time to complete the applications to participate, file claims for reimbursement, and to comply with program requirements such as requests related to an audit. HHS determined that this interim final rule contains information collection requirements under the Act. These information collection requirements are covered by the Office of Management and Budget (OMB) Control Number 0938-1087. HHS estimates that 11,300 respondents will generate 45,800 responses for a total burden of 854,675 hours and a total cost of $39,820,607. [In the preamble, HHS stated that "Congress appropriated funding of $5 billion for the temporary program," which "provides reimbursement to participating employment-based plans for a portion of the cost of health benefits for early retirees and their spouses, surviving spouses and dependents."]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Environmental Protection Agency	Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program (2070-AJ55)	5/6/2010	EPA performed a cost-benefit analysis in conjunction with the final rule. The benefits of the final rule result from the prevention of adverse health affects attributable to lead exposure from renovations in pre-1978 buildings. The adverse health affects include impaired cognitive function in children and several illnesses in children and adults, such as increased cardiovascular outcomes (including increased blood pressure, increased incidence of hypertension, cardiovascular morbidity, and mortality) and decreased kidney function. EPA determined that annualized benefits from the final rule may range from approximately $870 million to $3.2 billion assuming a discount rate of 3 percent, and $920 million to $3.3 billion assuming a discount rate of 7 percent. The costs of the final rule result from removing the opt-out provision and requiring firms performing renovation, repair, and painting work for compensation in housing previously eligible for the opt-out provision to follow the training, certification, and work practice requirements of the Lead Renovation, Repair, and Painting (RRP) rule. In addition, the final rule adds recordkeeping requirements that will increase costs of renovations in all target housing and child-occupied facilities. EPA estimates that the final rule will cost approximately $500 million in the first year, with the cost expected to drop to approximately $300 million per year starting with the second year, when improved test kits for detecting the presence of lead-based paint are assumed to become available. Training for renovators and workers and certification for firms working in housing previously covered by the opt-out provision is estimated to add approximately $50 million per year to the cost, and requiring renovators to provide owners and occupants with copies of the recordkeeping required to document compliance with the RRP rule training and work practice requirements costs approximately $30 million per year, with about two-thirds incurred in housing that was previously eligible for the opt-out provision.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Environmental Protection Agency and Department of Transportation, National Highway Traffic Safety Administration	Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule (2060-AP58; 2127-AK50)	5/7/2010	The agencies summarized the projected costs and benefits of the CAFE and GHG emissions standards. The agencies note that for several reasons, the estimates for costs and benefits presented by NHTSA and EPA, while consistent, are not directly comparable, and thus should not be expected to be identical. The agencies also state that it is important to note that there is significant overlap in costs and benefits for NHTSA's CAFE program and EPA's GHG program and therefore combined program costs and benefits, which together comprise the National Program, are not a sum of the two individual programs. Notably, NHTSA estimates that the total benefits of these CAFE standards will be more than three times the magnitude of the corresponding costs. NHTSA has analyzed in detail the costs and benefits of the final CAFE standards. NHTSA estimates that these new CAFE standards will lead to fuel savings totaling 61 billion gallons throughout the useful lives of vehicles sold in model years (MYs) 2012–2016. NHTSA states that at a 3-percent discount rate, the present value of the economic benefits resulting from those fuel savings is $143 billion and $112 billion at a 7-percent discount rate. NHTSA further estimates that these new CAFE standards will lead to corresponding reductions in CO2 emissions totaling 655 million metric tons during the useful lives of vehicles sold in MYs 2012–2016. Additionally, NHTSA estimates that the increases in technology application necessary to achieve the projected improvements in fuel economy will entail considerable monetary outlays. NHTSA estimates that incremental costs for achieving its standards—that is, outlays by vehicle manufacturers over and above those required to comply with the MY2011 CAFE standards—will total about $52 billion (i.e., during MYs 2012–2016). NHTSA projects that manufacturers will recover most or all of these additional costs through higher selling prices for new cars and light trucks. To allow manufacturers to recover these increased outlays (and, to a much lesser extent, the civil penalties that some companies are expected to pay for noncompliance), NHTSA estimates that the standards would lead to increases in average new vehicle prices ranging from $457 per vehicle in MY2012 to $985 per vehicle in MY2016. NHTSA concludes that its standards would produce net benefits of $130.7 billion at a 3-percent discount rate (with FFV credits, $138.2 billion) or $94.5 billion at a 7-percent discount rate over the useful lives of vehicles sold during MYs 2012–2016. EPA analyzed in detail the costs and benefits of the final GHG standards. Overall, EPA estimates that these new GHG standards for MY2012-2016 will lead to a combined fuel savings for light trucks and cars of 77.7 billion gallons of fuel. EPA states that at a 3-percent discount rate, the present value of the economic benefits resulting from those fuel savings is $182 billion and $142 billion at a 7-percent discount rate. The agency further estimates that these new GHG standards will lead to corresponding reductions in CO2 emissions totaling 962 metric tons. EPA's estimated incremental and total technology outlays for cars and trucks for each of the model years 2012–2016 will total about $52 billion. EPA notes the technology outlays are for the industry as a whole and do not account for fuel savings associated with the program. EPA estimated the incremental cost increase of the average new vehicle for each model year 2012–2016. EPA explains that the values are incremental to a baseline vehicle and are not cumulative—in other words, the estimated increase for 2012 model year cars is $342 relative to a 2012 model year car absent the National Program, while the estimated increase for a 2013 model year car is $507 relative to a 2013 model year car absent the National Program (not $342 plus $507).

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services, Office of the Secretary	Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act (1545-BJ46; 1210-AB41; 0991-AB66)	5/13/2010	The Department of the Treasury, Internal Revenue Service (IRS); Department of Labor, Employee Benefits Security Administration (EBSA); and Department of Health and Human Services, Office of the Secretary (HHS) (collectively, the agencies) analyzed the costs and benefits of these interim final rules. The agencies determined that the benefits are expected to outweigh the costs to the regulated community. For 2011, the agencies estimated the number of previously uninsured individuals who will be covered under their parents' coverage. The agencies estimated that under their low-range assumptions, 190,000 such individuals would be covered; under their mid-range assumptions, 650,000 such individuals; and under their high-range assumptions, 1.64 million such individuals. According to the agencies, expanding coverage options for the 19–25 population should decrease the number uninsured, which in turn should decrease the cost-shifting of uncompensated care onto those with coverage, increase the receipt of preventive health care, and provide more timely access to high quality care, resulting in a healthier population. In particular, the agencies predict children with chronic conditions or other serious health issues will be able to continue coverage through a parents' plan until age 26. The agencies also expect that allowing extended dependent coverage will permit greater job mobility for this population as their health coverage will no longer be tied to their own jobs or student status. The agencies estimated the annual monetized costs of these interim final rules for 2011 through 2013 to be $11.2 million at a discount rate of 7 percent and $10.4 million at a discount rate of 3 percent.
Department of Education	Teacher Incentive Fund (1810-AB08)	5/21/2010	Education believes that the final priorities, requirements, definitions, and selection criteria outweigh any associated costs. Education believes that the costs imposed on applicants by the final rule will be limited to the paperwork burden related to preparing an application. The benefits of the final rule were expected to be the selection of high-quality applications to implement activities that are most likely to improve the quality of teaching and educational administration. The final rule was expected to result in an annualized monetary transfer of $437 million from the federal government to states, local educational agencies, and nonprofits.
Department of Transportation, Federal Aviation Administration	Automatic Dependent Surveillance—Broadcast (ADS-B) Out Performance Requirements To Support Air Traffic Control (ATC) Service (2120-AI92)	5/28/2010	FAA performed a cost-benefit analysis in conjunction with the final rule. FAA determined that the benefits of the final rule include the dollar savings in fuel, time, net reduction in CO2 emissions, and the consumer surplus associated with the additional flights accommodated because of the rule. FAA estimated that the quantified benefits of the final rule range from $6.8 billion ($2.1 billion at 7 percent present value) to $8.5 billion ($2.7 billion at 7 percent present value). FAA determined that the estimated incremental costs of the final rule range from a low of $3.3 billion ($2.2 billion at 7 percent present value) to a high of $7.0 billion ($4.1 billion at 7 percent present value). The costs include costs to the government, as well as to the aviation industry and other users of the National Airspace System (NAS), to deploy ADS-B, and are incremental to maintaining surveillance via current technology (radar). The aviation industry would begin incurring costs for avionics equipage in 2012 and would incur total costs ranging from $2.5 billion ($1.4 billion at 7 percent present value) to $6.2 billion ($3.3 billion at 7 percent present value) with an estimated midpoint of $4.4 billion ($2.3 billion at 7 percent present value) from 2012 to 2035.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and Fiscal Year 2010 Rates and to the Long-Term Care Hospital Prospective Payment System and Rate Year 2010 Rates; Final Fiscal Year 2010 Wage Indices and Payment Rates Implementing the Affordable Care Act (0938-AQ03)	6/2/2010	CMS conducted a cost-benefit analysis of this notice. CMS estimates that the operating payments to the IPPS will increase by approximately $75.7 million in FY2010; the capital payments will increase by approximately $94.7 million in FY2010. CMS estimates that payments to the LTCHs will decrease by approximately $11 million in FY2010. Both of these estimates reflect changes from the previously published estimates for FY2010.
Department of Agriculture, Commodity Credit Corporation	Conservation Stewardship Program (0578-AA43)	6/3/2010	CCC prepared a cost-effectiveness analysis (CEA) of the final rule, which is an approach used when benefits are not well understood or difficult to measure, but activity costs are available. The CEA compares the impact of these conservation activities in generating environmental benefits with program costs. The CEA describes how the improvements can produce beneficial impacts concerning onsite resource conditions, such as conserving soil, and significant offsite benefits, such as cleaner water, improved air quality, and enhanced wildlife habitat. The total cumulative program costs for four program ranking periods are estimated to be $2.990 billion in constant 2005 dollars, discounted at 7 percent, or $3.520 billion in constant 2005 dollars discounted at 3 percent. Since the Conservation Stewardship Program is a voluntary program, it is not expected to impose any obligation or burden upon agricultural producers and non-industrial private forestland owners who chose not to participate.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Environmental Protection Agency	Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (2060-AP86)	6/3/2010	EPA examined the economic impacts of the final rule including the expected benefits and costs for affected sources and permitting authorities. EPA believes that this final rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for smaller GHG emission sources and for permitting authorities. According to EPA, there are no direct economic burdens or costs as a result of this final rule for larger sources of GHGs that will be required to obtain title V permits and/or comply on PSD requirements. EPA states that although larger sources will become subject to permitting on January 2, 2011, those impacts are not attributable to the present rulemaking because they are mandated by the CAA and existing regulations and automatically take effect independent of this action. EPA also examined the social costs which will impose costs to society in the form of foregone environmental benefits resulting from GHG emission reductions that, absent this rule, might otherwise have occurred at sources deferred from permitting during the phase-in period. According to EPA, the net benefits of this GHG tailoring rule represent the difference between the benefits and costs of this rule to society. EPA states that the net benefits of the final rule for Steps 1 and 2 are $193,598+B–C million for the 2 and one half year period where B denotes the unquantified benefits and C the quantified costs of this final rule. EPA states that these unquantified benefits of this rule include the avoided PSD best available control technology (BACT) costs for new and modifying sources and relate to the foregone environment benefits or GHG emission reductions that might be possible during the 2.5 year Step 1 and 2 phase-in period. EPA notes that these estimates are subject to significant uncertainties. EPA states that all dollar estimates shown are based upon 2007 dollars.
Federal Reserve System	Electronic Fund Transfers (Docket No. R-1343)	6/4/2010	In its current submission to the Comptroller General, the Board did not include an analysis of the final regulations. The Board analyzed the cost and benefits of the final regulations in the November 2009 publication. See 74. Fed. Reg. 59,033. [The *Federal Register* citation provided indicates that "[u]sing the Federal Reserve's method, the total estimated annual burden for all financial institutions subject to Regulation E, including Federal Reserve-supervised institutions, would be approximately 853,059 hours." Based upon this information, CRS concluded that the paperwork costs are under $100 million.]
Nuclear Regulatory Commission	Revision of Fee Schedules; Fee Recovery for FY2010 (3150-AI70)	6/16/2010	In its submission of this final rule, the Nuclear Regulatory Commission (NRC) indicated that an analysis of cost and benefits was not applicable with respect to this rule. NRC stated that the annual fees, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by NRC and will be assessed to those licensees NRC, in its discretion, determines can fairly, equitably, and practicably contribute to their payment. [In the rule summary, NRC stated that "the NRC's required fee recovery amount for the FY2010 budget is approximately $912.2 million. After accounting for billing adjustments, the total amount to be billed as fees is approximately $911.1 million."]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services	Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act (1545-BJ51; 1210-AB42; 0991-AB68)	6/17/2010	With an estimated 2.2 million grandfathered plans in 2011, EBSA and IRS estimate an hour burden of approximately 538,000 hours with equivalent costs of $30.7 million. The Departments have estimated this as a one-time cost incurred in 2011, because after the first year, the Departments anticipate that any future costs will be de minimis. Overall, for both the grandfathering notice and the recordkeeping requirement, the Departments expect there to be a total hour burden of 1.1 million hours and a cost burden of $291,000. With an estimated 98,000 grandfathered plans and 7,400 grandfathered individual insurance products in 2011, HHS estimates an hour burden of approximately 26,000 hours with equivalent costs of $1.5 million. HHS has estimated this as a one-time cost incurred in 2011, because after the first year, HHS assumes any future costs will be de minimis. Overall, for both the grandfathering notice and the recordkeeping requirement, HHS expects there to be a total hour burden of 53,000 hours and a cost burden of $318,000.
Environmental Protection Agency	Primary National Ambient Air Quality Standard for Sulfur Dioxide (2060-AO48)	6/22/2010	EPA stated that the Clean Air Act and judicial decisions make clear that the economic and technical feasibility of attaining the national ambient standards cannot be considered in setting or revising NAAQS, although such factors may be considered in the development of state implementation plans to implement the standards. Consequently, although EPA performed a cost-benefit analysis of the final rule, EPA did not consider the analysis in developing this final rule. [In the preamble, EPA estimated the costs of the rule at between $260 million and $4.4 billion, and estimated the net benefits at between $240 million and $79 billion (all in 2006 dollars).]
Department of State	Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates (1400-AC58)	6/28/2010	The Department conducted a cost-benefit analysis of this interim final rule. The Department noted that it generally sets consular fees at an amount calculated to achieve recovery of the costs to the United States of providing the consular service, in a manner consistent with general user charge principles. The increased fees include, for example, an increase in the application fee for a passport book for an adult from $44 to $70, and an increase in the passport book security surcharge from $20 to $40 to cover the costs of increased border security. [In the preamble to the rule, the Department estimated that passport book application fees would increase by about $138 million per year, and the passport book security charge fee would increase about $238 million per year. Other fees were also expected to increase, but not by more than $100 million.]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; and Department of Health and Human Services	Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections (1545-BJ61; 1210-AB43; 0991-AB69)	6/28/2010	The Department of the Treasury, Internal Revenue Service (IRS); Department of Labor, Employee Benefits Security Administration (EBSA); and Department of Health and Human Services (HHS) (collectively, the agencies) analyzed the costs and benefits of these interim final rules. The agencies stated that they crafted these interim final rules in the most economically efficient manner possible. The agencies estimate that these interim final rules will have an annual monetized cost of $4.9 million from 2011 to 2013. The agencies expect these interim final rules will expand coverage for children with preexisting conditions and individuals who face rescissions, lifetime limits, and annual limits as a result of high health care costs. The agencies expect these benefits to manifest in a number of ways including: (1) increasing access to health care, improving health outcomes, improving worker productivity, and reducing family financial strain and "job lock"; (2) promoting equity, in the sense that the benefits will be enjoyed by those who are especially vulnerable as a result of health problems and financial status; (3) building better, sustained patient-provider relationships through choice of physician, resulting in decreased malpractice claims and improved medication adherence and health promotion; and (4) reducing administrative and time burdens on both patients and physicians while improving health outcomes by allowing quicker access to medical services when necessary by removing referrals and prior authorizations for primary care, obstetrical and gynecological care, and emergency services.
Federal Reserve System	Truth in Lending (Docket No. R-1384)	6/29/2010	According to the Federal Reserve System (Board) submission, the Board did not prepare an analysis of the costs and benefits with respect to this final rule. [In the preamble, FRS said that the rule "requires that penalty fees imposed by card issuers be reasonable and proportional to the violation of the account terms. The final rule also requires credit card issuers to reevaluate at least every six months annual percentage rates increased on or after January 1, 2009. The final rule also requires that notices of rate increases for credit card accounts disclose the principal reasons for the increase."]
Securities and Exchange Commission	Political Contributions by Certain Investment Advisers (3235-AK39)	7/14/2010	The Commission evaluated the costs and benefits of the final rule. With regard to benefits, the Commission stated that, overall, the rule is intended to address "pay to play" relationships that interfere with the legitimate process by which advisers are chosen based on the merits rather than on their contributions to political officials. The Commission noted that the potential for fraud to invade the various, intertwined relationships created by "pay to play" arrangements is without question. In addition, by leveling the playing field among advisers competing for state and local government business, the Commission expects the final rule will help minimize or eliminate manipulation of the market for advisory services provided to state and local governments. With regard to costs, the Commission recognized that an adviser with government clients will incur costs to monitor contributions and to establish procedures to comply with the final rule. The initial and ongoing compliance costs imposed by the final rule will vary significantly among firms. The Commission estimates that to establish and implement adequate compliance procedures, the final rule would impose initial compliance costs of approximately $2,352 per smaller firm, $29,407 per medium firm, and $58,813 per larger firm. The Commission also estimates that the final rule would impose annual, ongoing compliance expenses of approximately $2,940 per smaller firm, $117,625 per medium firm, and $235,250 per larger firm. In addition, the Commission estimates that to comply with provisions of this rule, advisers will incur an aggregate cost of approximately $200,246 per year and the non-labor cost burden to be $20,080,000.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Labor, Employee Benefits Security Administration	Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure (1210-AB08)	7/16/2010	The Employee Benefits Security Administration (EBSA) evaluated the costs and benefits of this interim final rule. EBSA believes that mandatory proactive disclosure will reduce sponsor information costs, discourage harmful conflicts of interest, and enhance service value and that additional benefits will flow from EBSA's enhanced ability to redress abuse. EBSA did not quantify the benefits of this rule, but is confident they more than justify the cost. EBSA estimates that the annual cost of this rule from 2011 to 2020 to be approximately $58.7 million at a 7-percent discount rate and $54.3 million at a 3-percent discount rate. EBSA acknowledges in the rule that its estimates of the effects of the rule are, however, subject to some uncertainty.
Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; and Department of Health and Human Services	Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act (1545-BJ60; 1210-AB44; 0938-AQ07)	7/19/2010	The agencies analyzed the potential costs and benefits of these interim final regulations. The agencies anticipate the qualitative costs from 2011 to 2013 to include new costs to the health care system resulting when beneficiaries increase their use of preventive services in response to the changes in coverage and cost-sharing requirements of preventive services. The agencies note that the magnitude of this effect on utilization depends on the price elasticity of demand and the percentage change in prices facing those with reduced cost sharing or newly gaining coverage. The agencies anticipate four qualitative benefits from 2011 to 2013. First, individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease. Second, healthier workers and children will be more productive with fewer missed days of work or school. Third, some of the recommended preventive services will result in savings due to lower health care costs. Fourth, the cost of preventive services will be distributed more equitably.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Hospice Wage Index for Fiscal Year 2011 (0938-AP84)	7/22/2010	CMS estimates that the total hospice payments will increase by $220 million in FY2010 when both the 2.6 percent hospital market basket update and the 25 percent reduction in the BNAF and updated wage data are taken into account.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for Fiscal Year 2011 (0938-AP87)	7/22/2010	The Centers for Medicare & Medicaid Services (CMS) analyzed the costs and benefits of this notice. CMS estimates that overall payments for skilled nursing facilities will increase by $542 million, or 1.7 percent, in fiscal year 2011 as compared to fiscal year 2010.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2011 (0938-AP89)	7/22/2010	CMS prepared a cost-benefit analysis for this notice and estimates that the total impact of these charges for fiscal year 2011 will be a net increase of $135 million in payments to IRF providers. Overall, the estimated payments per discharge for IRFs in fiscal year 2011 are projected to increase by 2.16 percent, compared with revised estimated payments in fiscal year 2010. IRF payments per discharge are estimated to increase 2.17 percent in urban areas, and 2.05 percent in rural areas, compared with the revised estimated fiscal year 2010 payments.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; and Department of Health and Human Services	Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act (1545-BJ63; 1210-AB45; 0991-AB70)	7/23/2010	The Internal Revenue Service (IRS), the Employee Benefits Security Administration (EBSA), and the Department of Health and Human Services (HHS) (collectively, the agencies) analyzed the costs and benefits of this final rule. In assessing the benefits of this rule, the agencies found the following: "A more uniform, rigorous, and consumer friendly system of claims and appeals processing will provide a broad range of direct and indirect benefits that will accrue to varying degrees to all of the affected parties. These interim final regulations could improve the extent to which employee benefit plans provide benefits consistent with the established terms of individual plans. While payment of these benefits will largely constitute transfers, the transfers will be welfare improving, because incorrectly denied benefits will be paid. Greater certainty and consistency in the handling of benefit claims and appeals and improved access to information about the manner in which claims and appeals are adjudicated should lead to efficiency gains in the system, both in terms of the allocation of spending across plans and enrollees as well as operational efficiencies among individual plans. This certainty and consistency can also be expected to benefit, to varying degrees, all parties within the system, particularly consumers, and to lead to broader social welfare gains." The agencies estimated the costs of this rule to (1) administer and conduct the internal and external review process, (2) prepare and distribute required disclosures and notices, and (3) bring plan and issuers' internal and external claims and appeals procedures into compliance with the new requirements. The agencies estimate these costs to be between $51.2 million and $51.6 million per year for the period 2011 to 2013, depending on the discount rate. The agencies also estimated the dollar amount of claim denials reversed in the external review process. While this amount is a cost to plans, it represents a payment of benefits that should have previously been paid to participants, but was denied. Part of this amount is a transfer from plans and issuers to those now receiving payment for denied benefits. These transfers will improve equity, because incorrectly denied benefits will be paid. Part of the amount could also be a cost if the reversal leads to services and hence resources being utilized now that had been denied previously. The agencies estimated the amount attributable to reversals to be between $24.4 million and $24.7 million per year for the period 2011 to 2013, depending on the discount rate. The agencies stated that they crafted the rules to secure the protections intended by Congress in the most economically efficient manner possible.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Agriculture, Commodity Credit Corporation	Conservation Reserve Program (0S60-AH80)	7/28/2010	CCC states that the changes to CRP in this rule are expected to cost about $6.7 million per year over 10 years (2011–2020). CCC explains that this is a net cost that reflects roughly $77 million in additional CRP payments to participants over the next 10 years for additional land enrolled through the county maximum acreage waivers to exclude certain acreage and revised cropping history requirements and payments for pollinator habitat practices, minus roughly $10 million in reduced payments for the revised permissive uses. CCC states that the benefits to participants will be the net additional $6.7 million per year over the next 10 years. CCC notes that there are expected to be additional non-quantifiable environmental benefits from the waivers to exclude that will allow more environmentally sensitive acres to be enrolled through continuous signup, from additional highly erodible land enrollment that could result from making land in long-term hay rotations eligible, and from the incentives for pollinator habitat. Additionally, CCC states that the other provisions in this rule, such as local preference, are expected to have little to no cost. CCC believes that these provisions will largely substitute one CRP participant for another, or one practice for another, leading in a shift in costs and benefits to different participants and practices, but little net cost or benefit for CRP as a whole.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare and Medicaid Programs; Electronic Health Record Incentive Program (0938-AP78)	7/28/2010	The Centers for Medicare & Medicaid Services (CMS) analyzed the costs and benefits of this final rule. CMS estimates that the total cost to the Medicare and Medicaid programs will be $9.7 billion in transfers under a low scenario, and $27.4 billion under a high scenario, over a 10-year timeframe. In its analysis, CMS assumes that benefits to the program would accrue in the form of savings to Medicare, through the Medicare eligible professional payment adjustments. At this time, CMS is unable to quantify the expected qualitative benefits. However, CMS did identify benefits for eligible hospitals and professionals including reductions in medical recordkeeping costs, reductions in repeat tests, decreases in the length of stays, and reduced errors. CMS also identified benefits to society, including improved quality of care, better health outcomes, and more efficient delivery of health care.
Department of the Treasury, Office of the Comptroller of the Currency	Registration of Mortgage Loan Originators (1557-AD23)	7/28/2010	OCC performed a cost-benefit analysis of the final rule. OCC determined that, given the constraints imposed on OCC by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, and based on the estimated mean cost, the final rule was the least cost option available to OCC. [The preamble indicated that the rule required mortgage loan originators employed by national banks to register with the Nationwide Mortgage Licensing System and Registry and maintain their registration. Mortgage loan originators were also required to obtain a unique identifier through the registry that will remain with that originator, regardless of changes in employment. In addition, the rule required mortgage loan originators and national banks to provide these unique identifiers to consumers in certain circumstances, and requires national banks to adopt and follow written procedures to assure compliance with the registration requirements. Although the agencies indicated that these requirements would impose certain regulatory costs, they did not provide monetized estimates of those costs in the rule.]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services	Pre-Existing Condition Insurance Plan Program (0991-AB71)	7/30/2010	The Department of Health and Human Services (HHS) analyzed the costs and benefits of this interim final rule. In assessing the benefits of this rule, HHS stated that the Pre-existing Condition Insurance Plan (PCIP) will provide uninsured Americans with pre-existing conditions and that have been denied coverage or otherwise excluded from purchasing insurance coverage an opportunity to obtain coverage. HHS determined that providing this insurance option will increase access to health care and reduce financial strain for participants and will likely improve health outcomes and worker productivity. HHS found that individuals who are especially vulnerable as a result of existing health problems and financial status may receive the greatest benefit from this program. HHS estimated that the annual reporting and recordkeeping costs associated with this interim final rule will be $1,939,020. HHS determined that, to the extent PCIP increases access to health care services, increased health care utilization and costs will result due to increased uptake. HHS also identified administrative costs of the rule, including the cost of contractors to apply, the time cost for individuals to apply, and the contractors' costs of complying with program rules (e.g., conducting appeals, preventing fraud). Finally HHS estimates that under this rule $5 billion in federal funds will be transferred to contractors to aid in administering the program.
Department of Homeland Security, U.S. Customs and Border Protection	Electronic System for Travel Authorization (ESTA): Travel Promotion Fee and Fee for Use of the System (1651-AA83)	8/9/2010	DHS conducted a cost-benefit analysis of this interim final rule. DHS concluded that the annualized cost to applicants, primarily in the form of transfers from foreign citizens to the U.S. government, is estimated between $152 million and $258 million. With respect to benefits, DHS states that this interim final rule allows DHS to comply with the Travel Promotion Act of 2009 (TPA), which was contained in section 9 of the United States Capitol Police Administrative Technical Corrections Act of 2009, P.L. 111-145, and enhances security.
Department of Labor, Occupational Safety and Health Administration	Cranes and Derricks in Construction (1218-AC01)	8/9/2010	Occupational Safety and Health Administration (OSHA) analyzed the costs and benefits of this final rule. OSHA estimated that the annualized costs include the costs of crane assembly and disassembly ($16.3 million), power line safety ($68.2 million), crane inspections ($16.5 million), ground conditions ($2.3 million), and operator qualification and certification ($50.7 million) for a total annualized cost of $154.1 million. OSHA estimated that the annual benefits include injuries prevented (175), fatalities prevented (22), and property damage from tipovers prevented ($7 million) for total monetized benefits of $209.3 million.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; End-Stage Renal Disease Prospective Payment System (0938-AP57)	8/12/2010	The Centers for Medicare & Medicaid Services (CMS) analyzed the costs and benefits of this final rule. CMS's analysis shows an overall decrease in payments to all end-stage renal disease facilities for renal dialysis of 2 percent, or approximately $200 million, from what the payments would have been in the absence of this rule in calendar year 2011.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Securities and Exchange Commission	Amendments to Form ADV (3235-AI17)	8/12/2010	The Commission conducted a cost-benefit analysis of this final rule. With respect to benefits, the Commission stated, in part, that the new narrative brochures and electronic filing provide substantial benefits to advisory clients and prospective clients. The brochures present clients with critically important information they need to determine whether to hire or continue the services of a particular adviser. This information will be presented in a uniform format easy for most investors to understand. In addition, investors searching for an adviser will be able to access the firm's brochures through the Commission's public disclosure Web site. With respect to costs, the Commission estimates that advisers would incur costs of approximately $33,639,960 in drafting the new brochures and supplements in the first year. Advisers may also incur costs of approximately $22,775,400 in connection with their use of outside legal services and compliance consulting services to assist in preparation of their Form ADV. The Commission also estimates that advisers would incur annual costs of $1,620,462. The Commission estimates annual delivery costs of $18,918,802.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System Changes and FY2011 Rates; Provider Agreements and Supplier Approvals; and Hospital Conditions of Participation for Rehabilitation and Respiratory Care Services; Medicaid Program: Accreditation for Providers of Inpatient Psychiatric Services (0938-AP80; 0938-AP33)	8/16/2010	The Centers for Medicare & Medicaid Services (CMS) analyzed the costs and benefits of this final rule. CMS estimated that the final applicable percentage increase to the inpatient prospective payment systems (IPPS) rates required by the statute, in conjunction with other final payment changes in this final rule, will result in a $440 million decrease in fiscal year 2011 operating payments (or -0.4 percent decrease) and an estimated $21 million decrease in fiscal year 2011 capital payments (or -0.5 percent change). In addition, long-term care hospitals (LTCHs) are expected to experience an increase in payments by $22.3 million (or 0.5 percent).
Federal Reserve System	Electronic Fund Transfers (Docket No. R-1377)	8/17/2010	In its submission to the Comptroller General, the Board did not include a cost-benefit analysis. [In the preamble, FRS stated that the rule implemented the recently enacted "Gift Card Amendment" (P.L. 111-203), which provides a delayed effective date with respect to provisions the Credit Card Act (P.L. 111-24) in order to permit the sale of existing card stock through January 31, 2011. Among other things, the delayed provisions would have imposed certain restrictions on a person's ability to impose dormancy, inactivity, or service fees with respect to gift certificates, store gift cards, and general-use prepaid cards.]
Environmental Protection Agency	National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (2060-AP36)	8/20/2010	Based on estimated compliance costs on all sources associated with this final rule and the predicted change in prices and production in the affected industries assuming passthrough of costs to affected consumers, EPA believes the estimated social costs of this final rule are $253 million (2009 dollars). EPA states that the total monetized benefits of this final rule in 2013 range from $510 million to $1.2 billion (2009 dollars, 3 percent discount rate).

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of the Interior, Fish and Wildlife Service	Migratory Bird Hunting; Final Frameworks for Early-Season Migratory Bird Hunting Regulations (1018-AX06)	8/30/2010	Interior relied on the economic analysis that was prepared for the 2008-09 season, because it chose to issue identical regulations to past seasons for ducks, and made only minor modifications to the season frameworks for other species. According to Interior, the modifications will not significantly change the economic impacts of the rule which were not quantified for other species. Interior estimated a consumer surplus of $205-270 million.
Department of the Interior, Fish and Wildlife Service	Migratory Bird Hunting; Early Seasons and Bag and Possession Limits for Certain Migratory Game Birds in the Contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands (1018-AX06)	8/31/2010	Interior relied on the economic analysis that was prepared for the 2008-09 season, because it chose to issue identical regulations to past seasons for ducks, and made only minor modifications to the season frameworks for other species. According to Interior, the modifications will not significantly change the economic impacts of the rule which were not quantified for other species. Interior estimated a consumer surplus of $205-270 million.
Department of Veterans Affairs	Diseases Associated With Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B-Cell Leukemias, Parkinson's Disease and Ischemic Heart Disease) (2900-AN54)	8/31/2010	In the proposed rule, VA estimated the total cost for this rulemaking to be $13.6 billion during FY2010, $25.3 billion for 5 years, and $42.2 billion over 10 years. However, VA now knows that based on the publication date of the final rulemaking the timing will not allow payments to begin prior to FY2011. As a result, VA expects FY2010 and FY2011 costs will both now occur in FY2011. These costs include retroactive benefit costs in the first year and increased benefit costs for veterans currently on the rolls.
Department of the Interior, Fish and Wildlife Service	Migratory Bird Hunting; Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 2010-11 Early Season	9/1/2010	Interior relied on the economic analysis that was prepared for the 2008-09 season, because it chose to issue identical regulations to past seasons for ducks, and made only minor modifications to the season frameworks for other species. According to Interior, the modifications will not significantly change the economic impacts of the rule which were not quantified for other species. Interior estimated a consumer surplus of $205-270 million.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Environmental Protection Agency	National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants (2060-AO15; 2060-AO42)	9/9/2010	EPA summarizes the total monetized benefits for the final NESHAP and NSPS amendments in the implementation year, 2013. EPA estimates that the total monetized benefits will be between $7.4 to $18 billion (2005 dollars), at a 3-percent discount rate and $6.7 to $16 billion (2005 dollars), at a 7-percent discount rate. EPA performed two separate cost analyses for this final rule, an engineering analysis and an Industrial Sector Integrated Solutions (ISIS) model. In the engineering analysis, EPA estimates the total capital cost of installing alkaline scrubbers and ACI systems for mercury control, including monitoring systems, will be $339 million with an annualized cost of $113 million. EPA notes that where ACI does not provide sufficient control of organic hazardous air pollutants (HAP) and THC, RTO/wet scrubbers are used with an estimated capital cost of installation at $253 million with annualized cost of $49 million. EPA states that the capital cost of adding scrubbers for the control of HCl is estimated to be $1,882 million with an annualized cost of $261 million. EPA also states that the capital cost of adding membrane bags to existing fabric will be $57 million with annualized cost of $16 million. Additionally, EPA believes the total capital cost for the final amendments for kilns subject to existing source emissions limits will be an estimated $2.2 billion with an annualized cost of $377 million. EPA states that the estimated emission control capital cost per new 1.2 million tons per year (tpy) kiln is $3.2 million and the annualized costs are estimated at $1.2 million for mercury and THC/organic HAP control, and $3.6 million for HCl control. According to EPA, because the new kiln will be equipped with a baghouse even in the absence of the rule and because the ACI system, which includes a polishing baghouse, will be installed for mercury and organic HAP control, there will be no additional cost for PM control. EPA notes that under the NSPS, 7 new kilns will install SNCR to control NOX and add NOX CEMS at a capital cost of $19.6 million and an annualized cost of $10.9 million. EPA believes that the control of SO2 under the NSPS will be accomplished by wet scrubbers installed for HCl control under the NESHAP so that no control costs are attributable to the NSPS. EPA states that there will be SO2 monitoring cost estimated at $1.1 million capital cost and $0.3 million annualized cost for the 7 new kilns subject to the NSPS. EPA notes that flow monitoring devices are needed in conjunction with CEMS for NOX and SO2. Additionally, EPA states that capital costs for flow monitoring devices will be $0.25 million capital and $0.1 million annualized costs. According to EPA, national annualized cost by the end of the fifth year for all new kilns will be an estimated $80.6 million. In the ISIS results, EPA is not able to separate costs by pollutant because the model provides an overall optimization of the production and air pollution control costs. EPA notes that the total annual costs of the ISIS model for the NESHAP and NSPS are $350 million in 2013. EPA believes that this estimate is significantly lower than the total costs estimated by traditional methods.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Justice	Nondiscrimination on the Basis of Disability in State and Local Government Services (1190-AA46)	9/15/2010	The Department's final regulatory impact analysis (RIA), estimates the benefits and costs for all new (referred to as "supplemental") requirements and revised requirements across all types of newly constructed and existing facilities. The Department states that the final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). The Department notes that under every scenario assessed in the final RIA, the final rules have a positive NPV. According to the Department, the final RIA's first scenario examines the incremental impact of the final rules using the "main" set of assumptions (i.e., assuming a primary baseline (the original 1991 ADA Standards), that the safe harbor applies, and that for title III entities barrier removal is readily achievable for 50 percent of elements subject to supplemental requirements). Under this set of assumptions, the Department states that the final rules have an expected NPV of $9.3 billion (7 percent discount rate) and $40.4 billion (3 percent discount rate). Additionally, the Department states that the RIA recognizes that additional benefits are likely to result from the new standards. According to the Department, many of these benefits are more difficult to quantify. The Department explains that among the potential benefits that have been discussed by researchers and advocates are reduced administrative costs due to harmonized guidelines, increased business opportunities, increased social development, and improved health benefits.
Department of Justice	Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (1190-AA44)	9/15/2010	The Department's final regulatory impact analysis (RIA), estimates the benefits and costs for all new (referred to as "supplemental") requirements and revised requirements across all types of newly constructed and existing facilities. The Department states that the final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). The Department notes that under every scenario assessed in the final RIA, the final rules have a positive NPV. According to the Department, the final RIA's first scenario examines the incremental impact of the final rules using the "main" set of assumptions (i.e., assuming a primary baseline (the original 1991 ADA Standards), that the safe harbor applies, and that for title III entities barrier removal is readily achievable for 50 percent of elements subject to supplemental requirements). Under this set of assumptions, the Department states that the final rules have an expected NPV of $9.3 billion (7 percent discount rate) and $40.4 billion (3 percent discount rate). Additionally, the Department states that the RIA recognizes that additional benefits are likely to result from the new standards. According to the Department, many of these benefits are more difficult to quantify. The Department explains that among the potential benefits that have been discussed by researchers and advocates are reduced administrative costs due to harmonized guidelines, increased business opportunities, increased social development, and improved health benefits.

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Securities and Exchange Commission	Facilitating Shareholder Director Nominations (3235-AK27)	9/16/2010	SEC believes that Rule 14a–11 and the amendment to Rule 14a–8(i)(8), where applicable, will offer four benefits. First, SEC states that the final rule will facilitate shareholders' abilities to exercise their traditional state law rights to nominate and elect directors. Second, SEC notes that the final rule will establish a minimum uniform procedure pursuant to which shareholders will be able to include their director nominees in a company's proxy materials and enhance shareholders' abilities to propose alternative procedures that further shareholders' rights to nominate and elect directors. Third, SEC states that the final rule will potentially improve overall board and company performance. Finally, SEC believes the final rule will result in more informed voting decisions in director elections due to improved disclosure of shareholder director nominations and enhanced communications between shareholders regarding director nominations. SEC anticipate that the new rules, where applicable, may result in costs related to potential adverse effects on company and board performance; additional complexity in the proxy process; and preparing the required disclosures, printing and mailing, and costs of additional solicitations. SEC also states that the new rules may result in additional costs. SEC explains that with respect to investment companies, one commenter stated that if a shareholder nomination causes an election to be "contested" under rules of the New York Stock Exchange, brokers would not be able to vote client shares on a discretionary basis, making it difficult and more expensive for investment companies to achieve a quorum for a meeting. SEC recognizes that it may be more costly for investment companies to achieve a quorum in such a situation, but believes, however, that the costs imposed on investment companies will be limited. SEC notes that its decision to adopt, as proposed, the revisions to Rule 14a–6(a)(4) and Note 3 to the rule means that the inclusion of a shareholder director nominee in the company's proxy materials will not require the company to file preliminary proxy materials, provided that the company was otherwise qualified to file directly in definitive form. SEC states that because the proxy materials will not be filed in preliminary form, SEC staff may not have the opportunity to review these proxy materials before companies make definitive copies available to shareholders. SEC believes staff review of preliminary materials can benefit shareholders by helping to assure that companies comply with the federal proxy rules and provide appropriate disclosure to shareholders. SEC believes, however, that any cost related to the staff's inability to review preliminary proxy materials is mitigated by the staff's ability to review the disclosure contained in the Schedule 14N as well as in any additional soliciting materials filed by either the company or the nominating shareholder or group. Further, SEC notes that it recently stated that the staff retains the right to comment on proxy materials filed in definitive form if the staff deems that to be appropriate under the circumstances.
Department of the Interior, Fish and Wildlife Service	Migratory Bird Hunting; Final Frameworks for Late-Season Migratory Bird Hunting Regulations (1018-AX06)	9/23/2010	Interior relied on the economic analysis that was prepared for the 2008-09 season, because it chose to issue identical regulations to past seasons for ducks, and made only minor modifications to the season frameworks for other species. According to Interior, the modifications will not significantly change the economic impacts of the rule which were not quantified for other species. Interior estimated a consumer surplus of $205-270 million.

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Department of Homeland Security	U.S. Citizenship and Immigration Services Fee Schedule (1615-AB80)	9/24/2010	The final rule will provide DHS with an average of $209 million in FY2010 and FY2011 annual fee revenue, based on a projected annual fee-paying volume of 4.4 million immigration benefit requests and 1.9 million requests for biometric services, over the fee revenue that would be collected under the current fee structure. The increased revenue will be used to fund the full cost of processing immigration benefit applications and associated support benefits; the full cost of providing similar benefits to asylum and refugee applicants; and the full cost of similar benefits provided to others at no charge.
Department of the Interior, Fish and Wildlife Service	Migratory Bird Hunting: Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds (1018-AX06)	9/24/2010	Interior relied on the economic analysis that was prepared for the 2008-09 season, because it chose to issue identical regulations to past seasons for ducks, and made only minor modifications to the season frameworks for other species. According to Interior, the modifications will not significantly change the economic impacts of the rule which were not quantified for other species. Interior estimated a consumer surplus of $205-270 million.
Department of the Interior, Fish and Wildlife Service	Migratory Bird Hunting; Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 2010-11 Late Season (1018-AX06)	9/24/2010	Interior relied on the economic analysis that was prepared for the 2008-09 season, because it chose to issue identical regulations to past seasons for ducks, and made only minor modifications to the season frameworks for other species. According to Interior, the modifications will not significantly change the economic impacts of the rule which were not quantified for other species. Interior estimated a consumer surplus of $205-270 million.
Department of the Interior, Bureau of Ocean Energy Management, Regulation and Enforcement	Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf (1010-AD68)	10/14/2010	BOEMRE states that the cost-benefit analysis for this rule was conducted using a scenario analysis. BOEMRE explains that the cost-benefit analysis considers a regulation designed to reduce the likelihood of a catastrophic oil spill, while the costs are the compliance costs of imposed regulation. BOEMRE notes that if another catastrophic oil spill is prevented, the benefits are the avoided costs associated with a catastrophic oil spill (e.g., reduction in expected natural resource damages owing to the reduction in likelihood of failure). Noting that the estimated costs of this rulemaking, as reflected in the compliance costs of the enumerated requirements of approximately $180 million per year, have a strong foundation and are based on surveys of public and industry sources, BOEMRE states that quantification of the benefits is uncertain. BOEMRE believes the benefits are represented by the avoided costs of a catastrophic spill, which are estimated under the stipulated scenario as being $16.3 billion per spill avoided. According to BOEMRE, these regulations will reduce the likelihood of another blowout and associated spill, but the risk reduction associated with the specific provisions of this rulemaking cannot be quantified because there are many complex factors that affect the risk of a blowout event.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Defense, Office of the Secretary	Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)/TRICARE: Inclusion of TRICARE Retail Pharmacy Program in Federal Procurement of Pharmaceuticals (0720-AB45)	10/15/2010	DOD referenced a Government Accountability Office report, "DOD Pharmacy Program: Continued Efforts Needed to Reduce Growth in Spending at Retail Pharmacies," April 2008 (GAO–08–327), which found that DOD's drug spending "more than tripled from $1.6 billion in fiscal year 2000 to $6.2 billion in fiscal year 2006" and that retail pharmacy spending "drove most of this increase, rising almost nine-fold from $455 million to $3.9 billion and growing from 29 percent of overall drug spending to 63 percent." DOD concurs in these findings and notes that the principal economic impact of this final rule is to moderate somewhat the rate of growth in spending in the retail pharmacy component of the program. At various times since the enactment of NDAA–08, DOD estimated the reduced spending associated with applying FCPs to the Retail Pharmacy Network. DOD funds the Military Health System through two separate mechanisms. One is the Defense Health Program (DHP) appropriation, which pays for health care for all beneficiaries except those who are also eligible for Medicare. DOD-funded health care for DOD beneficiaries who are also eligible for Medicare is paid for by way of an accrual fund called the Medicare-Eligible Retiree Health Care Fund (MERHCF) under 10 U.S.C. chapter 56. Funds are paid into the MERHCF from military personnel appropriations and the general U.S. treasury. At the time of the 2008 proposed rule, for example, DOD estimated Fiscal Years (FY) 2010 reduced spending of $388 million for the DHP and $404 for the MERHCF. At the time of the 2009 final rule, DOD used a different estimating model and estimated much larger savings, including for FY–10 for example, reduced spending of $761 million for the DHP and $910 for the MERHCF. Based on experience since issuance of the final rule and a refined estimating model, DOD now estimates that the reduced spending will be closer to the original, lower estimates. DOD's current estimated cost reductions from applying FCPs to the TRICARE Retail Pharmacy Network in Fiscal Years 2010 through 2015 ranges from $375 million to $560 millon for DHP reduced spending and $474 million to $707 million for MERHCF reduced spending. FCP savings estimates will continue to be updated as actual refunds are received and estimating methodologies are refined. As a frame of reference, total TRICARE Pharmacy Benefits Program spending is estimated to be $8.5 billion in FY2010.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Labor, Employee Benefits Security Administration	Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans (1210-AB07)	10/20/2010	The Department of Labor, Employee Benefits Security Administration (EBSA), analyzed the costs and benefits of this final rule and concluded that the benefits of the rule justify its costs. EBSA identified two primary benefits of this rule: (1) reduced time for plan participants to collect investment-related information and organize it into a format that allows the information to be compared and (2) improved investment results for plan participants due to the enhanced disclosures available to them. EBSA estimates that the present value of the benefits over the 10-year period 2012–2021 will be about $14.9 billion, with a low estimate of $7.2 billion and a high estimate of $29.9 billion. EBSA expects the costs of this final rule to include: (1) costs due to upfront review and updating of plan documents, (2) costs due to production of quarterly dollar amount disclosures, (3) costs due to assembling required information for chart and web site, (4) costs due to the web site requirement, (5) cost of distribution and materials for disclosures, and (6) discouragement of some employers from sponsoring a retirement plan. EBSA estimates that the present value of the costs over the 10-year period 2012–2021 will be $2.7 billion, with a low estimate of $2.0 billion and a high estimate of $3.3 billion. Overall, EBSA estimates that this final rule will generate a net present value (or net present benefit) of almost $12.3 billion.
Securities and Exchange Commission	Reporting of Security-Based Swap Transaction Data (3235-AK73)	10/20/2010	The Commission performed a preliminary cost-benefit analysis in conjunction with the interim final temporary rule and requested comments on the costs and benefits. The Commission determined that the interim final temporary rule will provide a means for the Commission to gain a better understanding of the security-based swap markets and help the Commission analyze the security-based swap market as a whole and identify risks. The interim final temporary rule will also facilitate the reports the Commission is required to provide to Congress on security-based swaps and the security-based swaps marketplace, along with having possible benefits in encouraging management review of internal procedures and controls by market participants. The Commission preliminarily estimates that the interim final temporary rule could affect more than 1,000 market participants and cover approximately 2.4 million security-based swap transactions. The Commission preliminarily estimates that amending internal procedures, reprogramming systems, and implementing compliance processes to ensure that pre-enactment security-based swap transaction data is preserved could result in a cost to each respondent of approximately $6,236 and an aggregate cost of approximately $6,236,000. The Commission preliminarily estimates that the requirement to report the transaction confirmation and time, if available, of execution could result in a cost to each reporting entity of approximately $43,900 and an aggregate cost of approximately $43,900,000. Finally, the Commission preliminarily estimates that responding to Commission requests for information and documents could result in a cost to each reporting entity of approximately $6,352 and an aggregate cost of approximately $6,352,000.
Department of Agriculture, Farm Service Agency	Crop Assistance Program (0560-AI11)	10/25/2010	The Farm Service Agency (FSA) analyzed the costs and benefits of this interim rule. FSA estimated that the total cost to the government, and the corresponding benefit to producers, for the Crop Assistance Program will be between $137 million and $543 million, depending on how many producers in disaster counties apply for payment.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Education	High School Equivalency Program and College Assistance Migrant Program, The Federal TRIO Programs, and Gaining Early Awareness and Readiness for Undergraduate Program (1840-AD01)	10/26/2010	Education determined that the potential costs associated with the final rule are those resulting from statutory requirements and those determined by Education as necessary for administering the program effectively and efficiently. Education determined that the benefits of the regulation, which include $1.233 billion in grant funds from the federal government to institutions of higher education, public and private agencies and organizations, and secondary schools, justify the costs.
Department of Agriculture	Commodity Credit Corporation: Biomass Crop Assistance Program (0560-AH92)	10/27/2010	USDA prepared a cost-benefit analysis in conjunction with the final rule. The total outlays are $461 million in constant (2011) dollars. Because the payments under the final rule are essentially transfer payments, the costs to the government equal the benefits to biomass crop assistance program (BCAP) producers and biomass crop farms.
Department of Education	Program Integrity Issues (1840-AD02)	10/29/2010	The Department of Education (Education) analyzed the costs and benefits of this final rule. Education identified benefits provided in these regulations, including: updated administrative procedures for federal student aid programs; a definition and process to determine the validity of a student's high school diploma; enhanced reliability and security of ability-to-benefit tests; an additional option for students to prove ability to benefit by successfully completing college coursework; increased clarity about incentive compensation for employees at institutions of higher education; reporting of information on program completers for programs leading to gainful employment, including costs, debt levels, graduation rates, and placement rates; the establishment of minimum standards for credit hours; greater transparency for borrowers participating in the programs offered under written agreements between institutions; greater detail about misrepresentation in marketing and recruitment materials; a more structured and consistent approach to the development and implementation of satisfactory academic progress policies; updated and simplified procedures for verifying Free Application for Federal Student Aid (FAFSA) applicant information; updated regulations related to the return of title IV of the Higher Education Act, as amended, (title IV, HEA) funds when a student withdraws; harmonization of Direct Loan and Teach Grant disbursement procedures with other title IV, HEA programs; and revised disbursement requirements to ensure Federal Pell Grant recipients can access funds in a timely manner.
Department of Transportation, Federal Highway Administration	Real-Time System Management Information Program (2125-AF19)	11/8/2010	FHWA analyzed the costs and benefits of this final rule. FHWA determined that this final rule will not adversely affect, in a material way, any sector of the economy and estimates that the net present value of the estimated costs and benefits through 2021 represents at least a $315 million benefit to American travelers and taxpayers, corresponding to a benefit-cost ratio of 1.3. [DOT estimated the annualized cost of the rule at between $141.1 million and $145.9 million, and estimated the annualized benefits at between $162.3 million and $177.3 million.]

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Medicare Part B Monthly Actuarial Rates, Premium Rate, and Annual Deductible Beginning January 1, 2011 (0938-AP81)	11/9/2010	CMS estimates the standard Part B premium rate of $115.40 is $4.90 higher than the premium for 2010, so there will be about $700 million of additional costs in 2011 to the approximately 12 million Part B enrollees who pay the increase in the Part B premium.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for CY2011 (0938-AP86)	11/9/2010	CMS estimates that the total increase in costs to beneficiaries is about $900 million due to the increase in the deductible and coinsurance amounts and the change in the number of deductibles and daily coinsurance amounts paid.
Securities and Exchange Commission	Regulation SHO (3235-AK35)	11/9/2010	The Commission generally considers the costs and benefits of its rules. According to the Commission, the delay of the compliance date for the amendments to Rule 201 and Rule 200(g) of Regulation SHO will delay the benefits of the rules, but will also delay the ongoing costs of complying with the amendments. The Commission determined that the limited extension is necessary and appropriate because it will provide certain exchanges additional time to modify their current procedures for conducting single-priced transactions for covered securities that have triggered Rule 201's circuit breakers in a manner that is consistent with the goals and requirements of Rule 201, and industry participants additional time for programming and testing for compliance with the requirements of Rule 201 and Rule 200(g).
Securities and Exchange Commission	Risk Management Controls for Brokers or Dealers With Market Access (3235-AK53)	11/15/2010	The Securities and Exchange Commission (Commission) analyzed the costs and benefits of this final rule. The Commission expects that this final rule will benefit investors, broker-dealers, their counterparties, and the national market system as a whole by reducing the risks faced by broker-dealers and other market participants as a result of various market access arrangements by requiring financial and regulatory risk management controls to be implemented on a uniform, market-wide basis. A specific benefit identified by the Commission is a reduction of systemic risk associated with market access through the elimination of "unfiltered" or "naked" access. The Commission estimates that the total annual initial cost for all broker-dealers will be approximately $114.4 million and that the total annual ongoing cost for all 1,375 broker-dealers will be approximately $112.9 million.
Department of Defense, Office of the Secretary	Homeowners Assistance Program—Application Processing (0790-AI58)	11/16/2010	In its submission to the Comptroller General, DOD did not include a cost-benefit analysis of the final rule.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices (0938-AP88)	11/17/2010	CMS prepared a cost-benefit analysis in conjunction with the final rule. CMS estimates that the net impact of the final rule will be approximately $960 million in CY2011 savings. CMS estimates the distributional effects of an updated wage index will account for a $20 million increase, the 1.1 percent home health market basket update will account for a $210 million increase, while the 3.79 percent case-mix adjustment applicable to the national standardized 60-day episode rates will account for a $700 million decrease, and the 2.5 percent returned form the outlier provisions of the Affordable Care Act will result in a $490 million decrease.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program: Hospital Outpatient Prospective Payment System and CY2011 Payment Rates; Ambulatory Surgical Center Payment System and CY2011 Payment Rates; Payments to Hospitals for Graduate Medical Education Costs; Physician Self-Referral Rules and Related Changes to Provider Agreement Regulations; Payment for Certified Registered Nurse Anesthetist Services Furnished in Rural Hospitals and Critical Access Hospitals (0938-AP82; 0938-AP80)	11/24/2010	CMS performed a cost-benefit analysis of the final rule with comment period. CMS estimates that the total increase (from changes in the final rule with comment period as well as enrollment, utilization, and case-mix changes) in expenditures under the hospital outpatient prospective payment system (OPPS) for calendar year (CY) 2011 compared to CY2010 will be approximately $3.2 billion. CMS also estimates that the total increase (from changes in the final rule with comment period as well as enrollment, utilization, and case-mix changes) in expenditures under the ambulatory surgical center (ASC) payment system provisions for CY2011 compared to CY2010 will be approximately $230 million.
Department of Health and Human Services, Centers for Medicare & Medicaid Services	Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY2011 (0938-AP79)	11/29/2010	CMS prepared a cost-benefit analysis of the final rule. CMS estimates that the final rule will result in a decrease in expenditures of $17.6 billion for physician fee schedule (PFS) conversion factor update. CMS estimates an increase in expenditures of $1.97 billion for Affordable Care Act provisions.

Agency	Title of Rule (RIN)	Date Published	Cost-Benefit Analysis Information Provided in GAO Report
Department of Health and Human Services	Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act (0950-AA06)	12/1/2010	In developing this interim final regulation, HHS considered its potential effects including both costs and benefits. Because of data limitations, HHS did not attempt to quantify the benefits of this regulation. Nonetheless, HHS was able to identify several potential benefits. HHS believes one potential benefit to this regulation is greater market transparency and improved ability of consumers to make informed insurance choices. In addition, HHS states that issuers that would not otherwise meet the MLR minimum defined by this regulation may increase spending on quality-promoting activities. According to HHS, these programs, which include case management, care coordination, chronic disease management and medication compliance, have the potential to create a societal benefit by improving outcomes and population health. HHS notes that issuers that would not otherwise meet the MLR minimum may also expand covered benefits or reduce cost sharing. HHS believes that to the extent that these changes result in increased consumption of effective health services, the regulation could result in improved health outcomes, thereby creating a societal benefit. HHS has identified the primary sources of costs associated with this regulation as the costs associated with reporting, recordkeeping, rebate notifications and payments, and other costs. HHS estimates that issuers will incur approximately $33 million to $67 million in one-time administrative costs, and $11 million to $29 million in annual ongoing administrative costs related to complying with the requirements of this interim final regulation from 2011 through 2013. HHS notes that there are two other potential types of costs associated with this regulation: costs of potential increases in medical care use, the cost of additional quality-improving activities, and costs to consumers if some issuers decide to limit offered products as a result of this interim final regulation.
Department of Veterans Affairs	Payment for Inpatient and Outpatient Health Care Professional Services at Non-Departmental Facilities and Other Medical Charges Associated With Non-VA Outpatient Care (2900-AN37)	12/17/2010	VA performed a cost-benefit analysis in conjunction with the final rule. VA analyzed the expected savings from using the Medicare outpatient payment methodologies rather than the current VA method in four different categories. VA determined the cost reduction for clinical lab claims, as a percentage of payments made under current VA methodology, would be 74.6 percent. The cost reduction for outpatient dialysis facility claims would be 38.8 percent. The cost reduction for non-VA ambulatory surgery center claims would be 11.2 percent. And finally, the cost reduction for non-VA hospital outpatient department and emergency room facility claims would be 33.2 percent. VA estimates that the annual savings resulting from adoption of Medicare pricing standards for payment of outpatient services to be $274.6 million in fiscal year 2011, and approximately $1.8 billion total over the next five fiscal years.
Department of the Treasury	Management of Federal Agency Disbursements (1510-AB26)	12/22/2010	GAO's website does not contain a major rule report for this rule. However, in the rule itself, Treasury estimated the benefits of the rule at $117 million reduced costs to the federal government.
Consumer Product Safety Commission	Safety Standards for Full-Size Baby Cribs and Non-Full Size Baby Cribs	12/28/2010	The final rule does not include a cost-benefit analysis. However, the Commission estimated a total one-time cost to child care centers of $97 million nationwide for replacing all of their full-size cribs, and a one-time cost of $290 million nationwide for replacing all of their non-full-size cribs. The Commission determined that the impact on child care centers, family child care homes, and places of public accommodation could be significant and provides a 6-month effective date with an additional 18-month compliance period for these entities to meet the standard.

Source: CRS, using the GAO Federal Rules Database, located at http://www.gao.gov/fedrules/.

Note: For the analysis in the text of this report, when the GAO report did not provide sufficient information to discern the costs and benefits of the rule, CRS consulted the rules themselves.

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Mr. COBLE. Without objection, additional opening statements from other Members will be made a part of the record.

We welcome our panel today. Let me give you some background. David Schoenbrod is a Trustees Professor of Law at the New York School of Law and a Visiting Scholar at the American Enterprise Institute. He is the co-director of the project, "Breaking the Logjam: An Environmental Law for the 21st Century." The project is a call for bipartisan action for smarter, more flexible regulatory programs to protect the environment, encourage green technology, and stimulate the economy. Professor Schoenbrod is a frequent contributor to the Wall Street Journal and the New York Times editorial pages. He has been an attorney at the Natural Resources Defense Council, published several books, and held faculty positions at Yale School of Law and the New York University School of Law.

At NRDC Professor Schoenbrod has served as codirector of the Council's Project on Urban Transportation with Professor Sandler. Professor Schoenbrod is a nationally recognized expert on injunctions, congressional relations with regulatory agencies, and environmental law. He was graduated magna cum laude from Yale and was a Marshall Scholar at Oxford.

Eric Claeys is our second witness. He is a professor at the George Mason University School of law. Professor Claeys has also taught at the St. Louis University School of Law and the University of Chicago School of Law. Prior to teaching, Professor Claeys practiced appellate and tort litigation at Kirkland & Ellis, and clerked for the Honorable Chief Justice William Rehnquist and the Honorable Melvin Brunetti. Professor Claeys' scholarship focus is on American property and constitutional law, and particularly on the influence of American natural law/natural rights theory on the law. He was graduated from Princeton University and received his J.D. From the University of Southern California.

Our third and final witness is Mr. David Goldston, who I believe is a good friend of yours, Mr. Boehlert, our colleague from New York. Mr. Goldston is the Director of Government Affairs at the Natural Resources Defense Council. As director, Mr. Goldston oversees the development and implementation of NRDC strategies for interacting with Congress and the Obama administration. Mr. Goldston is a former chief of staff of the U.S. House Committee on Science, where he served under Chairman Boehlert for 6 years. Mr. Goldston left Capitol Hill in 2006, and since then has taught at Princeton and Harvard. He also has written a monthly column, "Party of One," on science policy for the journal Nature. Mr. Goldston graduated magna cum laude from Cornell University and was awarded his Ph.D. From the University of Pennsylvania.

Gentlemen, it is good to have all three of you with us. I would ask you, if you could, we try to comply with the 5-minute rule. When the amber light appears, this will be your warning that the red light is imminent. And the red light usually calls for conclusion, if you will, shortly after that.

Mr. COBLE. Professor Schoenbrod, good to have you with us. If you will kick us off.

TESTIMONY OF DAVID SCHOENBROD, TRUSTEE PROFESSOR OF LAW, NEW YORK LAW SCHOOL

Mr. SCHOENBROD. Chairman Coble, Ranking Member Cohen, Members of the Subcommittee, thank you for the opportunity to testify. My experience at the Natural Resources Defense Council, heading the campaign to protect children from lead, is the reason I am here today to support the REINS Act.

In the Clean Air Act of 1970, Congress took responsibility for a rule requiring cars made from 1975 on, to use unleaded gasoline. That was the easy choice. It was easy because lead would ruin the pollution control devices required on these cars. But this easy choice would do nothing to reduce lead in gasoline for 5 years; and even after that 5 years, there would be a hundred million cars on the road still burning lead. What to do about those cars, that lead, that was the hard choice. Voters wanted to "GET THE LEAD OUT." That is what the bumper sticker said. But they also wanted cheap gasoline.

Congress avoided this hard choice by ordering EPA to set a health goal for lead pollution and achieve it by 1976, thereby claiming credit for the benefit of protecting health and avoiding blame for any possible increase in gas prices. EPA, understandably, went into a stall. We sued EPA and won many victories in court. But EPA accomplished very little at the gas station.

If Congress could not have avoided responsibility for the hard choices in 1970, it would have adopted a rule to eliminate at least half of the lead in gasoline in the early 1970's. After all, Congress told the auto manufacturers to reduce their pollution from their new cars over the same period by 90 percent.

The result of Congress avoiding responsibility is that many children died or suffered permanent brain injury, especially in inner cities. Using EPA data, I estimate that the deaths and injuries to be on the scale of American casualties in the war in Vietnam. And I set it all out in a book called "Saving our Environment from Washington" (Yale University Press, 2005).

Lead is no aberration. The biggest successes on air pollution have come when Congress did take responsibility, and the biggest failures have come when Congress avoided it. This, too, is documented in another book coauthored with the former chairman of the Environmental Defense Fund. The book is called "Breaking the Logjam" (Yale University Press, 2010).

This experience with the Clean Air Act led me when I became an academic to search for ways to help Congress to take responsibility. And I wrote another book ("Power Without Responsibility" Yale University Press, 1993)). In it, I quote James Landis, the New Deal's sage of administrative law, who urged in 1938 that agency regulations be presented to Congress for approval: "It is an act of political wisdom to put back upon the shoulders of Congress responsibility for controversial choices." REINS would do that,

thereby making regulation more effective and efficient.

Consider environmental regulations again. It suffers from polarized politics—the swinging pendulum in Congress left to right, right to left. REINS would help by inducing EPA to talk to centrist legislators. Both parties would find they must adopt a modulated position or voters will punish them at the polls, as voters have pun-

ished both parties at various times in the past. This is how we should get the sensible results in a democracy, not by elected lawmakers hiding behind unelected agency officials.

REINS would also induce changes in how Congress delegates to agencies. Knowing that the big decisions would come back to it, Congress would order the agency to shape their rules to achieve compromise standards rather than telling agencies to achieve the best of everything for everyone.

Finally, environmental regulation also suffers from obsolete statutes. Congress has not passed a major environmental statute for 20 years. Most of the statutes on the book owe their basic structures to the early 1970's or late 1970's. The reason that Congress does not update the obsolete statutes is that the problems that they create for the environment and for the economy are not problems for legislators who, after all, can blame these problems on EPA. REINS, by bringing the rules back to Congress, would give legislators a reason to reexamine their handiwork from the 1970's.

Thank you again for the opportunity to testify today. I look forward to answering your questions.

Mr. COBLE. Professor, thank you as well.

[The prepared statement of Mr. Schoenbrod follows:]

Statement of David Schoenbrod

Trustee Professor, New York Law School
&
Visiting Scholar, American Enterprise Institute

before the

Subcommittee on Courts, Commercial and Administrative Law
of the
House Committee on the Judiciary

on the

Regulations from the Executive in Need of Scrutiny Act (REINS)

March 8, 2011

The views expressed in this testimony are those of the author alone and do not necessarily represent those of New York Law School or the American Enterprise Institute.

Chairman Coble, Ranking Member Cohen, Members of the Subcommittee, thank you for inviting me to testify today.

As you know I now am a professor at New York Law School and a visiting scholar at the American Enterprise Institute. Previously, through most of the 1970s, I was one of the principal attorneys at the Natural Resources Defense Council. In that capacity, I headed the campaign of environmental and anti-poverty organizations to protect children from lead in gasoline.

Lead in gasoline: a tragedy illustrating the need for Congress to take responsibility

Congress passed the Clean Air Act in 1970 because the public demanded protection. The pollution that worried voters most came from lead in gasoline. Lead was known to poison children. The bumper stickers read: "GET THE LEAD OUT."

In the 1970 legislation, Congress did take responsibility for a rule that would eventually reduce lead exposure, but the reason was not to protect children. The act authorized the EPA to require that new cars made from 1975 onward use only lead-free gas. The reason was that Congress had decided that auto manufacturers must, from 1975 onwards, include pollution-controlling devices in their cars. The device of choice, the catalytic converter, cut many pollutants, but not lead — in fact, lead would ruin it. For Congress to require motorists to pay for the device and then let it be ruined by leaded gas would look foolish.

Legislators could not tell voters in 1970 that this rule to protect pollution control devices and their own reputations was sufficient to protect children from lead. Children would still be exposed to lead from gasoline for many years after

1970. The rule did not even take effect until the 1975 cars became available. Even then, pre-1975 cars would still use leaded gas and in 1975, there would be roughly 100 million such cars using leaded gas. Many of them would remain on the road emitting lead well into the 1980s.

So Congress in 1970 had to do more to satisfy the demand to protect children from lead. But lawmakers could not simply ban leaded gasoline forthwith; voters also wanted cheap gasoline, and adding lead reduces slightly the cost of refining it. Congress was caught between voters' demand to protect children and voters' desire to keep gas cheap.

When Congress is faced with a controversial choice, it often follows a two-step plan. It (1) announces a lofty goal, but (2) orders an agency to achieve the goal, thus letting the agency take the heat for failing to achieve it or the painful steps necessary to do so. Congress danced this two-step with lead. It (1) announced that a health-based air quality standard for lead must be achieved by May 1976 and (2) ordered EPA to establish the rules to achieve that standard by the deadline.

After passing the statute, diverse members of Congress — Democrats and Republicans, liberals and conservatives — lobbied the EPA, often on the quiet, to do nothing about the leaded gasoline used by the pre-1975 cars. Other members complained about the failure to protect health. As often happens when an agency is caught in such a cross fire, the EPA went into a stall.

In late 1972, my colleagues and I at the Natural Resources Defense Council won a decision against the EPA that prompted it, at last, to issue a rule to reduce the amount of lead in gasoline used in the pre-1975 cars. This victory was followed by many others. Yet, those legal victories did not translate into any

reductions in lead for many years. In fact, the amount of lead used in gasoline increased slightly from 1970 to 1975. Meanwhile, the May 1976 deadline to protect health was approaching.

When Jimmy Carter won the presidential election in 1976, I hoped that his tough campaign talk on the environment would translate into tough action on lead. But, to the contrary, President Carter eventually ordered the EPA to weaken the already weak lead reduction schedule adopted by his Republican predecessors.

Fortunately, lead in gasoline began to decline in the late 1970s, mostly because the pre-1975 cars were being replaced by new cars that could use only unleaded gasoline rather than anything the EPA was doing to protect health. By 1985, so many of the old cars had gone to the junkyard that the large oil companies found it unprofitable to continue distributing leaded gasoline in addition to the unleaded variety. But they did not want to drop leaded gas on their own, for fear of losing market share to small refiners who would still sell it. So Big Oil asked Ronald Reagan's EPA to ban lead additives to gasoline on the grounds that it is dangerous to health, and the agency complied. The EPA finally got tough on lead, but only after powerhouse corporations, protecting their bottom lines, got involved.

If Congress in 1970 had *not* given the EPA the responsibility to make the hard choices on protecting health from lead, Congress would still have had to do something in response to the popular demand to protect the children. Congress would have had to enact a rule cutting lead in gasoline, but that rule would have been a compromise, getting rid of more than half of the lead over the next several years with further reductions to come. After all, in the same statute, Congress had required the powerful auto industry to reduce emissions 90 per cent by 1975.

The reason that Congress did not enact a rule to cut lead in 1970 is that legislators would have been criticized on two fronts: by voters who wanted all the lead out right away and other voters upset by a small rise in gas prices. So, instead of enacting such a law, which would been good for the American people, legislators enacted a statute avoiding responsibility that was perfect for themselves.

The upshot is that lead came out of gasoline much more slowly than if Congress had made the hard choice itself. As a result, massive numbers of children, especially inner-city children, died and or had their IQs reduced below 70. Using EPA data on the health effects of lead in gasoline, I estimate the scale of the disaster in a book published by Yale University Press.[1] *Suffice it to say that the body count from Congress's evading responsibility was on the scale of American casualties in the War in Vietnam.*

The lead in gasoline is far from the only instance to suggest that the people fare better when the elected lawmakers take responsibility. The most striking advances under the Clean Air Act have come when Congress did take responsibility. For example, Congress in 1970 took responsibility for requiring auto manufacturers to cut emissions from new autos by 90 percent. Then, in 1990, Congress took responsibility for requiring power plants to cut sulfur emissions by 50 percent and for phasing out completely stratospheric ozone destroying chemicals. In contrast, where Congress left responsibility for the hard choices to the EPA, as it did with hazardous air pollutants in 1970, the agency was unable to deal with the great bulk of them for 20 years until Congress acted in 1990. Yet,

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[1]DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE (Yale U. Press, 2005) at ch. 4.

Mr. COBLE. Professor Claeys, you are recognized for 5 minutes.

TESTIMONY OF ERIC R. CLAEYS, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. CLAEYS. Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee, thank you very much for inviting

me to testify. I would like to restate my written testimony as three points:

First, Congress has constitutional authority to enact the REINS Act. The power to promulgate legislative rules becomes an executive power if, to the extent, and under whatever constitutionally proper conditions Congress establishes on the agency, using the necessary and proper clause.

Even if the pros of legislative rulemaking sometimes outweigh the cons, legislative rulemaking does have cons. Executive-ordered rules can jeopardize the liberties of citizens, seem politically illegitimate, or undermine ordinary political accountability. This Congress may reasonably decide that these cons outweigh rulemaking's pros when $100 million or more is on the line. This Congress may reasonably decide that executive rulemaking is unnecessary and improper for executing Congress' constitutionally enumerated powers without a prior congressional approval.

The testimony on January 24 raised two other issues that I would be happy to discuss in question and answer.

Now, for my other two points, I am grateful to Mr. Goldston to offer his testimony because the difference between his testimony and my testimony illustrates and

highlights some important issues of principles for this Committee to consider. I would like to restate my other two highlights in relation to that testimony.

First, Mr. Goldston states that the REINS Act threatens to replace a process based on expertise, rationale, and openness with one based on political maneuvering, economic clout, and secrecy.

My second point: That contrast states a false choice. In reality, in one process the federalist theory of government, the process is openly political and it makes legislators write laws and be accountable for bad laws at the voting booth. In the other, which my testimony calls the Progressive New Deal theory of government, the process is covertly political. Agency experts claim that all the political choices have been settled. They then use agency policymaking powers to impose their choices with less accountability to voters at the voting booth.

For example, last Congress, cap-and-trade legislation failed. And last November, some cap-and-trade supporters were voted out of office. Right now, however, the EPA is going ahead with rulemakings on greenhouse gas standards for petroleum refineries and fossil fuel power plants. In response, this House's Commerce Committee is a considering a bill more drastic than the REINS Act to eliminate the EPA's jurisdiction to make rules on greenhouse gases.

Some of the EPA supporters are criticizing that bill on the grounds the bill defies the scientific consensus. They are using rulemaking and the authority of science to cover over difficult tradeoffs between clean air and the technology that is available to make clean air, and the economics. If the EPA does this, then it avoids having—it undoes the settlement that happened by legislation, by elections last year.

Separately, Mr. Goldston defends executive branch

rulemaking on the grounds that some kind of decisions require deep technical expertise somewhat insulated from political horse trading and power plays. Progressive and New Deal political theo-

rists believe this. By contrast, the federalists disagreed on the ground that the latent causes of faction are sown in the nature of man.

Recent economic and political science scholarship has confirmed the federalist portrait as the product of extremely complicated coalitions between Baptists and bootleggers. And here I apologize to both Baptists in real life and to bootleggers in real life.

An example from my testimony. For the last 16 years, the Consumer Product Safety Commission has been working on a rulemaking petition to order manufacturers to make a furniture that won't ignite if a cigarette that is lit is sitting on it. On both sides of the dispute,

bootleggers—regulated industries—are coopting

Baptists—agencies in seemingly idealistic advocacy

groups—to fight one another.

The rulemaking was petitioned by the National Association of Fire Marshals. The fire marshals had received considerable financial assistance from and were getting free lobbying from cigarette companies, which tried to head off proposals to have the CPSC order them to make self-extinguishing cigarettes.

On the other side of the table, furniture companies slowed down the rulemaking by citing health and environmental concerns. They persuaded Congress to order the rulemaking delayed until the Federal Government could fund medical studies on the impact of the retardant chemicals.

Mr. Goldston portrays regulation as all Baptist, all the time. With James Madison, I believe the bootleggers divert the right regulatory process fairly often.

Members of the Subcommittee, I am sure you have more experience and familiarity than I do to decide which of the two of us is describing the regulatory process more accurately. If you agree that it is impossible to take all of the politics out of regulation, it would be better if we all admitted as much and forced agencies to seek permission from Congress. Deeply political choices will be made more transparently and your constituents will know who is accountable for the choices. And the REINS Act does this—and only for regulations where $100 million or more are on the line.

Thank you. I would be happy to answer questions.

Mr. COBLE. Thank you Mr. Claeys.

[The prepared statement of Mr. Claeys follows:]

Prepared Testimony of

Eric R. Claeys
Professor of Law
George Mason University

Before the
Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives, 112th Congress

Tuesday, March 8, 2011
Hearing on the
Regulations from the Executive in Need of Scrutiny ("REINS") Act

Introduction

Chairman Coble, Ranking Member Cohen, and members of the Subcommittee: Thank you very much for inviting me to testify. I am honored that the members of the House Judiciary Subcommittee on Courts, Commercial and Administrative Law think my testimony may be instructive as they consider the Regulations of the Executive in Need of Scrutiny ("REINS") Act.

The REINS Act is of first importance because it implicates a fundamental feature of our form of government. Although Congress has many responsibilities over domestic affairs, three deserve pride of place over the others: to tax, to spend on programs properly within the national government's jurisdiction, and to make general laws regulating the affairs of individual Americans on topics also within that jurisdiction.[1] Congress has guarded the two powers associated with the purse vigilantly ever since the Founding. Sadly, however, since the New Deal, Congress has gradually fallen into the habit of writing regulatory statutes that are not models of clarity. Since the Great Society, Congress has granted to many new federal agencies power to promulgate binding legislative rules—I would prefer to say "laws"—and it has acquiesced in already-established agencies' asserting the same powers.

The REINS Act proposes to make Congress take stronger responsibility for enacting the specific and binding legal rules that regulate the conduct of American citizens, firms, and other associations for "major rules" as defined in the Act. The REINS Act strengthens several important features of republican and constitutional government—most of all, the connection between legislation, electoral politics, and ordered liberty.

In the following testimony, I offer background on the political theory most relevant to the REINS Act. I hope to clarify two fundamental political issues for Congress to consider:

> First, according to the natural-rights principles informing the Declaration of Independence and the Constitution of 1787, why may Congress conclude it is no longer necessary and proper for federal administrative agencies to promulgate what the REINS Act calls "major rules" by administrative rulemaking?
>
> Second, what motivated previous Congresses or specialists in administrative governance to insist that "legislative rules," which are for most practical purposes *laws*, be promulgated by agencies—and not through the legislative process laid out in Article I of the U.S. Constitution?

Before proceeding, please allow me to explain my qualifications to testify on these questions. I clerked for the Honorable William Rehnquist, Chief Justice of the United States. My scholarship has focused on the influence of natural-rights/natural-law political theory and

Progressive political theory on American government. I rely substantially here on two academic articles I have written contrasting the Founders' theory of separation of powers and leading Progressive and New Deal theorists' justification for centralized administrative governance.[2] I have taught Administrative Law, which covers the separation of powers doctrines most relevant to the REINS Act. At George Mason University School of Law, I am currently developing with two other professors a course titled "Constitutional Law: The Founding." In this course, a mandatory first-year course, we teach George Mason law students the history and political theory that informed the drafting of the Constitution of 1787, and we also cover how the New Deal significantly transformed the operations of the federal government. (Of course, my testimony reflects my own considered opinions as a scholar, not any official policy of George Mason University School of Law or any course it offers.) Last but definitely not least, from 1989-91, before attending law school, I served this House as a legislative assistant to the Honorable Ronald Packard (Oceanside, CA).

I. The Constitutional Basis for the REINS Act

Let me begin by recounting briefly why the Constitution authorizes Congress to enact the REINS Act. In this Part, I testify as a lawyer and law scholar predicting the likely outcome if a litigant adversely affected by the REINS Act were to challenge its constitutionality in court. For reasons that should become clear in subsequent parts of my testimony, I do not necessarily agree in my capacity as a scholar with all the judicial precedents or institutional practices I follow in this part as a lawyer.

The Necessary and Proper Clause, article I, section 8, clause 18 of the Constitution, confers on Congress wide discretion to authorize agencies to make policy choices in the course of administering organic statutes over which they have jurisdiction. Among other things, Congress may authorize agencies to promulgate legislative rules. On the basis of new evidence as it comes to light, however, Congress may decide that it is no longer necessary or proper that federal agencies promulgate such rules. The REINS Act embodies just such a judgment, for rules with more than $100 million impact on the U.S. economy or other specified conditions. Since no other provision of the Constitution creates a general obstacle to Congress's exercising such judgment, the REINS Act constitutes a legitimate exercise of Congress's authority.

The REINS Act implicates three main constitutional provisions. First, the Article I Vesting Clause, article I, section 1:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Second, the Article II Vesting Clause, article II, section 1, clause 1:

> The executive power shall be vested in a President of the United States of America....

Last, the Necessary and Proper Clause, article I, section 8, clause 18:

> The Congress shall have power ... to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department thereof.

Administrative agencies cannot promulgate legislative rules until this Congress exercises "legislative power" authorizing them to do so. Because "Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States,' it permits no delegation of those powers." Instead, Congress must "confer[] decisionmaking authority upon agencies," and do so by "'lay[ing] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[3]

After Congress confers such authority, the agency enjoys executive power, namely power to administer policy within the parameters and using the tools Congress designated by statute. In many different agency organic statutes, Congress has authorized federal administrative agencies to execute congressional policies in many different ways. Different organic statutes give agencies powers to investigate, to inspect, to issue citations, to buy and sell property, and so forth. The most potent of these powers are the power to adjudicate disputes involving the organic statute and—central here—the power to promulgate a legislative rule. A legislative rule is a statement made by an agency, of general and prospective applicability, the violation of which provides sufficient grounds for penalizing a party violating the rule.[4] An agency may not exercise any of these powers, however, unless the Constitution enumerates a power authorizing Congress to give the agency such powers. Congress supplies agencies with rulemaking and other powers pursuant to the Necessary and Proper Clause—because and to the extent that the power to investigate, adjudicate, or make rules is "necessary and proper for carrying into execution" some other enumerated constitutional power.[5]

Against this backdrop, the REINS Act simply reflects a legislative judgment to recalibrate the rulemaking powers Congress has granted different agencies previously in their organic statutes. The Act prevents certain legislative rules from taking effect unless and until a

joint resolution is enacted, pursuant to Article I, section 7's bicameralism and presentment requirements, approving of those rules. The rules covered are what proposed 5 U.S.C. § 804 calls "major rules"—simplified slightly, rules determined by the Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management in Budget to result in at least $100 million in effect on the U.S. economy or significant increases in prices for consumers or industries. Proposed 5 U.S.C. § 801 embodies a determination that, when agencies carry into execution their organic statutes and the constitutional powers those statutes implement, it is no longer necessary or proper that they do so by promulgating legislative major rules. Section 2, the Act's statement of purpose, identifies legitimate reasons why it may no longer be necessary or proper for agencies to promulgate legislative major rules without congressional approval—more carefully drafted legislation, a better regulatory process, and more accountability. In the rest of my testimony, I will suggest other reasons supporting the same determination. In short, since federal agencies need statutory decisionmaking authority from Congress to promulgate *any* legislative rules, Congress has power to retract authority from agencies to promulgate *some* such rules, major rules as defined in the REINS Act.

In her testimony before this Subcommittee on January 24, 2011, Sally Katzen suggested that the REINS Act creates the prospect of "fundamentally changing the constitutional structure of our government." Ms. Katzen makes two arguments: that the REINS Act creates bicameralism and presentment problems under *INS v. Chadha* (1983), and that it threatens core Article II prerogatives of the President. I had the pleasure and honor to work with Ms. Katzen when she taught at George Mason University 2007-08, and I am grateful to have been her colleague. With all due respect and collegial affection, however, neither argument has force.[6]

In *Chadha*, the Supreme Court declared unconstitutional a legislative veto. Federal immigration law required officers of the Immigration and Naturalization Service (INS) to deport foreign nationals who overstayed their U.S. visas. Another provision of the law (§ 244(a)(1) of the Immigration and Naturalization Act) gave the INS discretion to suspend the deportation if certain statutory factors were met. If either House of Congress enacted a resolution disapproving of the suspension, however, the suspension ceased to have legal effect and the INS was required to deport the foreign national. The Court characterized the resolution of disapproval as a legislative act because it tried to alter the legal rights and powers of Chadha and executive officers who otherwise would have had legal power to suspend Chadha's deportation. Yet a

legislative act was not valid under the Constitution, the Court concluded, unless the act was enacted consistently with the requirements of bicameralism and presentment set forth in Article I, section 7.[7]

The REINS Act accords with what *Chadha* requires of Congress. Under proposed 5 U.S.C. § 801(b)(1), no major rule may take effect unless it is approved by a joint resolution as specified in proposed 5 U.S.C. § 802. The determination whether any legislative rule is a "rule" (under the Administrative Procedure Act) or a "major" rule (under the REINS Act) is an executive function. That function is carried out by an officer of the executive, the Administrator of OIRA. There is nothing constitutionally problematic about the OIRA Administrator's making an executive determination, under criteria set forth by one valid statute, limiting the power of another executive officer (the officer of an agency vested with power to promulgate a legislative rule) to execute a function entrusted to him by another valid statute. (In this respect, the REINS Act mirrors the interplay by which the executive function of suspending deportations limited the previous exercise of the executive function of *ordering* deportations—an interplay which *Chadha* assumed to be perfectly legitimate.) Once the agency's rulemaking power has been limited by OIRA's determination under the REINS Act, the agency then lacks statutory authority to promulgate the major legislative rule in question. The REINS Act then provides a way for such authority to be restored—if Congress approves the rule by a joint resolution. By requiring Congress to act through a joint resolution, the REINS Act avoids all the problems *Chadha* identified with the legislative veto. By definition, a "joint" resolution satisfies Article I, section 7's bicameralism requirement. Separately, the House and Senate both construe a "joint resolution" to require presentment to the President except when the resolution recommends an amendment to the Constitution.[8] In reasonable context, the REINS Act incorporates this construction by reference and accordingly satisfies Article I, section 7's presentment requirement.

Ms. Katzen doubts this analysis. If an agency recommends a rule, and one house fails to approve that rule, she asks, "Can this easily be distinguished from *Chadha*?"[9] Yes—in fact, *Chadha* suggests how. In *Chadha*, the Supreme Court acknowledged that, if Congress did not like how the INS was using its discretion in suspension cases, it could have amended, revised, or repealed § 244(a)(1), the statute which gave the INS power to suspend deportation. Here, if Congress has concerns about how agencies are now using their rulemaking powers in

economically-significant regulatory disputes, it may revise amend the grants of rulemaking authority—as long as the revisions are enacted in "a statute duly enacted pursuant to Art. I, §§ 1, 7."[10] The REINS Act will satisfy that proviso if it is passed by both Houses of Congress and signed or enacted after a veto override. No constitutional problem arises because the REINS Act (Ms. Katzen's words) "amend[s] the underlying delegation of rulemaking authority to require explicit approval of any major rules by Congress and the President" in one fell swoop, rather than doing so one statute at a time.[11] Congress has the same constitutional power to revise, expand, or limit agency authority whether it does so on a case-by-case basis or globally. Congress may do the former in organic statutes or the latter by amending or adding provisions parallel to the Administrative Procedure Act. The Congressional Review Act imposed such an across-the-board limitation, and the REINS Act proposes to do so as well.[12]

Separately, citing *Morrison v. Olson* (1987), Ms. Katzen suggests that the REINS Act may unduly diminish the President's Article II executive powers. On its face, *Morrison* seems far removed from the REINS Act. *Morrison* considered and rejected a challenge to a federal law authorizing the creation of an independent counsel who investigated allegations of wrongdoing by executive-branch officers, without supervision by the President or the Department of Justice.[13] The prosecution of offenses against the laws of the United States is an inherently executive function, because it is part of the Article II power "to take care that the laws be faithfully executed."[14] In addition, the act authorizing independent counsels stripped the President of this power and transferred it to an officer outside the executive, the independent counsel. The REINS Act is different on both grounds. The power to promulgate legislative rules is not inherently executive, as the power to prosecute is. Rulemaking cannot be executive if "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulation is limited to the authority delegated by Congress."[15] Nor does the REINS Act strip any executive officer of power and transfer it to a non-executive officer. Again, an executive officer, the Administrator of OIRA, makes the determination whether a legislative rule is a major rule, pursuant to general legislative criteria set forth in the REINS Act.

To be sure, *Morrison* does contain language suggesting that Article II separation of powers challenges be judged by whether the congressional act under challenge imposes "restrictions ... of such a nature that they impede the President's ability to perform his constitutional duty."[16] Perhaps Ms. Katzen is reading this language to suggest that the President

cannot do his constitutional duty if Congress scales back the powers of all agencies to promulgate major legislative rules. If that is the suggestion, it represents an aggressive and far-fetched reading of vague opinion language. Because the possibility *Morrison* held out in this passage was not robust enough to provide a reason for voiding the independent counsel statute, it should not be read to ground strong separation of powers arguments in the future. In addition, the executive's prerogatives are much narrower in relation to legislative rulemaking than they were in relation to the prosecuting power at issue in *Morrison*. Even after *Morrison*, because of the Take Care Clause the prosecutorial power is relatively close to the core of the President's executive powers in domestic affairs. The power to promulgate legislative rules is not. As *Youngstown Sheet & Tube Co. v. Sawyer* (1952) confirms, in domestic affairs, the federal executive's power is ordinarily limited to executing "a congressional policy … in a manner prescribed by Congress."[17] If Congress decides to limit the "manner" by which the President makes policy by rescinding agencies' powers to promulgate one subset of legislative rules, Article II does not gives the President any grounds for complaint. And it makes no difference that Congress is limiting this authority across the board rather than in one organic statute at a time. The President has no power of the purse—and he could not complain on constitutional grounds if Congress cut the funds of the executive branch by half in one bill as opposed to doing so in 300 or 1000 bills. The same principle applies to the REINS Act.

In short, under controlling precedent and practices, Congress has constitutional authority to enact the REINS Act if it concludes in its discretion that the power to promulgate legislative rules by agency rulemaking is less necessary or proper for carrying constitutional powers into execution than it seemed when such power was conferred in different agency organic statutes. Neither Article I, section 7 nor Article II stands in the way; the REINS Act limits major rulemaking consistently with both.

II. The Founders' Theory of Natural Rights Encourages *Legislators* to Write Laws

This Subcommittee, however, should pause to consider Ms. Katzen's charge that the REINS Act "would change dramatically the constitutional structure of our government," and her assertion that agencies have "traditionally engaged" in rulemaking.[18] Although these claims state a weak legal argument, they illustrate a strongly-held policy commitment, shared among many elite lawyers and policy-makers: Rulemaking, by seemingly-impartial and -expert agencies, is so central to American government that it should not be scaled back. The power to

prosecute has been an executive power ever since the Founding; depending on how one counts, the power to promulgate legislative rules has been a regular feature of American government for only 40 to 80 years. To Ms. Katzen, however, the power to promulgate legislative rules is so time-honored and desirable that it *ought* to be constitutionally protected even if it is not.

This commitment explains much of the likely opposition to the REINS Act. Morally, *if* this commitment is true, American government is retrograde or delinquent unless it establishes broad rulemaking by agencies insulated largely from partisan and legislative politics. Distributively, if this commitment is true, two sets of citizens deserve to be treated as leading citizens: lawyers who specialize in public administrative law, and public-policy experts who specialize in industrial, labor, health, safety, the environment, or many other similar fields.

In the course of deciding whether the REINS Act constitutes an appropriate exercise of Congress's constitutional discretion, Congress should engage these moral and distributive questions. To help this Subcommittee start the process of doing so, I offer in the remainder of my testimony a survey of the relevant political theory. In this Part, I begin that survey by explaining why legislative rulemaking *strains* the best elements of the United States' political and constitutional tradition. The REINS Act legislates on a fundamental issue in American government—delegation. Is it legitimate for Congress to write blank checks to agencies, or should Congress write into those checks as many terms as it can specify? Little or nothing was said about delegation in the Philadelphia Convention. Early Congresses considered a few delegation issues in detail, but not often. All the same, if one understands the political theory that informs the Declaration of Independence and *The Federalist*, it is fairly obvious why the phrase "legislative power" presumes a non-delegation principle.

The Declaration of Independence may be understood to restate principles understood to count as common political and moral knowledge among American citizens as of 1788. The Declaration holds the following propositions to count as self-evident truths:

> [A]ll men are created equal, that they are endowed by their Creator with certain unalienable Rights.—That to secure these rights, Governments are instituted among Men, deriving their powers from the just consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

These truths were assumed to set criteria by which the Constitution of 1787 should be judged. Madison, for instance, writing as Publius, the author of the *Federalist*, argued for replacing the Articles of Confederation with the Constitution by appealing to "the transcendental and precious right of the people," as proclaimed in the Declaration, "to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.'"[19]

The Constitution of 1787 attempts to secure natural rights while confronting a basic problem in human nature. As *Federalist* No. 51 explains:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must enable the government to control the governed; and in the next place oblige it to control itself.[20]

Let me illustrate the problems Publius identifies by working out the possibilities that follow if and when a federal agency decides to regulate benzene. (I choose this example because the Supreme Court considered and found deficient a proposed benzene rule in a leading administrative law case. This case illustrates vividly many important problems agencies routinely face when promulgating rules.) Benzene is used in motor fuels, solvents, detergents, and other organic chemicals, and it is also a by-product from refining petroleum. It is lethal when inhaled at extremely high concentrations (20,000 parts per million (ppm)), and it may cause nausea, leukemia, or blood disease at lower concentrations (above 25 ppm) above ordinary background levels (0.5 ppm or lower). The U.S. Occupational Safety and Health Administration promulgated a legislative rule barring benzene at levels of 1 ppm or higher in the late 1970s.[21]

Benzene's uses and its medical risks create challenges for regulators. Let me frame those challenges in terms of individual liberty, the framework *Federalist* No. 51 presumes. Ordinarily, businesses deserve the liberty to decide how to run their affairs, and workers deserve the liberty to decide for what sorts of employers and in what sorts of conditions they want to work. From those liberties follow more specific liberties to engage in specific productive activities (refining, or the manufacture of organic chemicals) that generate benzene as a by-product. Even if benzene can be toxic, the activities generate genuine benefits for customers. Even though these activities jeopardize the liberties of employees (by threatening their health), the employer, employees (plant or station workers), and insurance companies can normally process the toxicity risks, through some combination of wages, insurance, or changes to plant working conditions.

Yet these liberties may be abused. Because men are not angels, firms, workers, and insurers cannot always be trusted to work out ideal working arrangements with adequate respect for the legitimate interests of other parties. There are two competing risks. On one hand, in the absence of government, some individuals in a community will be tempted to prey on others. Some employers may turn a blind eye to the facts that their workplaces have high levels of benzene and thus expose their employees to significant health threats. Government should regulate against that possibility, to protect the workers' natural rights to their lives.

On the other hand, once a community institutes law and government, it creates another risk. Instead of trying to profit by doing their own work, firms or workers may try to profit by co-opting government processes to extract benefits. In contemporary legal and economic scholarship, this phenomenon goes under the name of the "theory of economic regulation," but *The Federalist* was aware of it as well. As *Federalist* No. 10 warns, because "[t]he regulation of … various and interfering interests, forms the principal task of modern legislation," it necessarily "involves the spirit of party and faction in the necessary and ordinary operations of government."[22] Thus, private-employee unions might lobby a law-making body to impose a benzene rule even when the health risks of benzene were not significant. By getting such a rule instituted, the union would give workers an employment benefit for which they normally would have needed to bargain, and it would restrain the employers' natural rights to bargain over all legitimate conditions of employment. Alternatively, petroleum companies, organic-chemical-making companies, or other companies might acquiesce in the imposition of a benzene-safety rule even when such a rule was not strictly necessary. They might do so if the rule made it harder for start-up companies to enter their industries and compete with them. If benzene were not dangerous enough that a minimum-benzene-level rule were strictly necessary, labor unions and companies already in the regulated industries would then be co-opting the legislative process to raise the costs to outsiders to enter those industries. Such regulation would then restrain the liberties of potential new entrants into the petroleum industry, of other industries handling benzene, and of would-be workers in those industries.

In short, government faces a choice between errors of omission and errors of commission. Leading Founding Era statesmen and theorists understood the Constitution to reconcile those risks through two main solutions.

One consists of a series of structural features slowing down the process of making laws. Article II assigns all of the Constitution's executive power to the President, and Article III confers on the U.S. Supreme Court supreme authority over the Constitution's judicial power. By contrast, because Article I creates a bicameral Congress, it bifurcates the legislative power between the House and the Senate. Article 1, section 7 slows down the legislative process even further by instituting the requirement that bills be presented to the President and then either signed or overridden by concurrent two-thirds supermajorities.[23] Although bicameralism and presentment establish structural rules, they have a substantive effect. They protect individual liberty by winnowing out rights-threatening bills. If a bill manages to survive bicameralism and presentment, its survival provides some proof that the bill may really claim legitimate authority to limit the liberties of people covered by it. If the bill's claims on behalf of the public interest were weak, factions threatened by the bill should have been able to persuade at least one of the House, the Senate, or the President to prevent its passage.

The Constitution institutes a separate safeguard—elections for legislative representatives. The Constitution assigns national "legislative powers" only to the House and the Senate, and members of those bodies must (after the Seventeenth Amendment) stand for election regularly. Elections institute and embody the Declaration's expectation that a just government depends on "the consent of the governed." If Congress passes a bad law, the citizenry may rectify the law's wrongs by forcing a referendum election on the law, firing the representatives who voted for it, and then replacing them with new representatives committed to repealing the law.

Neither of these safeguards will work very well, however, unless Congress abides by the non-delegation principle—that is, Congress writes tolerably specific and clear laws. John Locke provided the most seminal articulation of this principle. "The *Legislative*, or Supream authority," he insisted, "cannot assume to its self a power to Rule by extemporary Arbitrary Decrees, but *is bound to dispense Justice*, and decide the Rights of the Subject by *promulgated standing Laws*." By requiring *legislators* to enact the "standing laws," Locke's theory of natural rights prevents the legislators from avoiding responsibility (and avoiding being replaced) for making laws that turn out to be bad laws:

> The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others.... And when the People have said, We will submit to rules, and be govern'd by *Laws* made by such Men, and in such Forms, no Body else can

> say other Men shall make *Laws* for them; nor can the people be bound by any *Laws* but such as are Enacted by those, whom they have Chosen, and Authorised to make *Laws* for them. The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.[24]

Textually, the non-delegation principle flows from Article I's references to "legislative power"; structurally, the principle performs precisely the function Locke described. Without such a principle, actors in the national government can easily circumvent bicameralism, presentment, and electoral accountability. If Congress assigns to agencies the power to make regulatory laws, citizens cannot fire the officers most responsible for making laws the citizenry finds contrary to the public interest. Consider again the Occupational Safety and Health Act and the benzene standard. If Congress had needed to pass the standard, companies and workers injured by it could have lobbied against the standard, or voted later against the members of Congress who ignored their lobbying. By contrast, citizens cannot replace the Administrator of OSHA nearly as easily as they can their own Senators and Representative.

Similarly, if federal laws and institutions do not track the non-delegation principle, regulators and factions can circumvent the fences bicameralism and presentment erect to secure individual rights. In the benzene dispute, assume that the relevant scientific, economic, and other evidence does not clearly justify requiring a 1 ppm benzene workplace safety standard. If Congress had needed to pass the standard, bicameralism and presentment would have given opponents at least three opportunities to prevent the standard's passage. The Occupational Safety and Health Act's rulemaking enabling provision eliminates those choke points. Partisans in favor of an unnecessary workplace regulation only need to convince OSHA staff to promulgate the rule.

My argument thus far has a few qualifications, to be sure. Under current law, opponents of legislative rules are not totally lacking in protection. U.S. administrative law gives them rights to submit comments in responses to notices of proposed rulemakings, and to sue in federal court to block the implementation of rules that adversely affect their interests. (For example, these protections were robust enough to convince the Supreme Court to send the benzene standard back for further findings by OSHA.) Under controlling law, however, federal courts must uphold agency legislative rules if they are based on plausible readings of agency enabling

statutes and have enough factual support not to be "arbitrary and capricious." (For example, OSHA and the Secretary of Labor later promulgated a benzene standard with the same basic features discussed so far.[25]) Individuals have greater opportunity to protect their rights in robust legislative and electoral processes than they do in judicial proceedings with these deferential features.[26]

Separately, supporters of broad legislative rulemaking may argue that rulemaking does not eliminate government by consent. After all, administrative agencies are responsible to political officers—to the President, through the organizational blueprint of the federal executive; and to Congress, through investigations, oversight, and appropriations review. Nevertheless, when Congress authorizes agencies to make policy following indeterminate statutory language, the indeterminacy and the authorization substantially dilute government by consent. In practice, it is very, very difficult for electoral coalitions to dislodge agency officers or change agency policies. If the legislative process requires Congress and the President (or a supermajority in both Houses) to agree to enact a new policy, parties threatened by new legislation only need to persuade one of three institutions to stop it. By contrast, when Congress authorizes broad agency policy-making, agency policy remains controlling law unless opponents convince all three institutions to change the agency's mandate.

In this respect, Congress should consider the country's experience with the Congressional Review Act. That Act reduced the procedural burdens opponents needed to surmount to challenge a legislative rule, by instituting procedures by which disapproval resolutions could go to a floor vote if they were bottled up in committees of jurisdiction. Even so, as of 2008, the Congressional Research Service reported that agencies had promulgated 731 legislative rules to which the Act could have applied, only 47 joint resolutions of repeal had been introduced (in relation to 35 rules), only 3 were passed by at least one house of Congress, and only one, relating to an OSHA ergonomics standard, was disapproved and made void.[27]

Morally, when Congress writes detailed and specific regulatory laws, bicameralism, presentment, and elections all secure ordered liberty. Our constitutional structure then works to secure two distributive results. It distributes to citizens the rights to which they are already entitled by what the Declaration calls "the laws of nature and nature's God": the greatest liberty they may have to determine and pursue their own legitimate life priorities consistent with the equal rights of others to do the same. Our constitutional structure also distributes honor and

pride of place to members of this House and the Senate. Lay citizens owe a debt of gratitude to members of Congress for making difficult choices in the course of writing the laws that order the liberty of American citizens. Members of Congress, however, must *earn* that honor and gratitude—by making tough-minded trade-offs, writing specific laws implementing those trade-offs, and submitting to regular elections judging those trade-offs and their consequences.

III. Legislative Rulemaking Emerged from Political Theories Hostile to Individual Liberty

It is harder to identify the precise grounds on which contemporary supporters justify broad grants of statutory discretion for agencies to set policies. Many common arguments in favor of such grants are not persuasive. For example, supporters commonly argue that federal agencies should have broad discretion to make legislative rules and otherwise set policy because agencies have more subject-matter expertise than members of Congress do. Yet Congress may incorporate expertise into the traditional three branches of government without blurring the boundaries between branches as much as legislative rulemaking does. In Article III, Congress may and has created courts with subject-matter expertise—like the Federal Circuit, which has specialized jurisdiction over patents, trademarks, and international-trade disputes. As it decides how to exercise its Article I powers, Congress may also solicit expert advice from agencies. For example, Congress established the National Institute for Occupational Safety and Health to "make recommendations" to the Secretary of Labor and OSHA "concerning new or improved occupational safety and health standards." Congress could easily restructure NIOSH to make those recommendations to Congress. In Article II, Congress may also structure executive-branch agencies to focus on particular regulatory problems whose execution requires the application of expertise. The REINS Act moves partially towards such a result. If the REINS Act passes, then for major rules, OSHA and other agencies will act first as legislative advisory boards to Congress, and then as specialized Article II executive agencies, enforcing the rules passed by Congress.[28]

Similarly, supporters of broad agency policy-making sometimes argue that conditions change too quickly for Congress to pass rules regulating individual conduct. This argument is unpersuasive, however, because Congress manages to write quite-specific legislative language quite often—even in acts with other provisions conferring broad discretion on agencies. For example, in 2008, Congress enacted the Troubled Asset Relief Program ("TARP"). TARP authorizes the Secretary of the Treasury to purchase "troubled assets from any financial

institution, on such terms and conditions as are determined by the Secretary, and in accordance" with policies including "restor[ing] liquidity and stability to the financial system of the United States," "protects home values, college funds, retirement accounts, and life savings;" "preserv[ing] homeownership and promotes jobs and economic growth;" "maximiz[ing] overall returns to the taxpayers of the United States;" and "provid[ing] public accountability for the exercise of such authority." In this language, Congress left extremely broad discretion to the Secretary of Treasury to decide which assets to buy or refrain from buying. Yet TARP was part of a package deal. Other parts of the package included amendments to the tax laws. For example, one provision excluded child toy arrows from a tax on arrows, by specifying that the tax

> shall not apply to any shaft consisting of all natural wood with no laminations or artificial means of enhancing the spine of such shaft (whether sold separately or incorporated as part of a finished or unfinished product) of a type used in the manufacture of any arrow which after its assembly--
>
> (i) measures 5/16 of an inch or less in diameter, and
>
> (ii) is not suitable for use with a bow described in [*the existing provision*].[29]

I do not mean to suggest that the REINS Act affects the administration of either TARP or this toy-arrow tax exemption. TARP authorizes case-by-case asset purchases, not the major rulemaking the REINS Act covers. My point is this: In the same enactment, the 100th Congress showed it knew how to write both determinate and indeterminate legislative language. It used *in*determinate language in the course of creating a new administrative power over troubled assets, and extremely precise language in the course of exercising a tax power over arrows. It is reasonable to suspect that this and future Congresses could pass regulatory laws as precise as tax laws—if they really wanted to. So if previous Congresses have used vague and indeterminate language to structure the mandates of federal administrative agencies, it is probable that they did so because some theory of government legitimized their doing so. Specifically, that theory of government must have deemed it a good thing for agencies to have broad and indeterminate mandates—so agencies may make controversial policy choices *substantially insulated from the electoral and institutional restrictions the non-delegation principle would impose on Congress if it were to make those same choices.*

Supporters of broad agency policy-making may make other arguments to fill in this gap. Historically, however, federal agencies now enjoy the power to promulgate legislative rules thanks to innovations by political scientists in the Progressive Era and legal scholars and public lawyers during the New Deal and the Great Society. Progressive political scientists propounded a theory of vigorous centralized administration consciously in opposition to the natural-rights constitutionalism they saw in Articles I through III of the Constitution. Charles Merriam was a political scientist at the University of Chicago. In a history of American political thought, he summarized the general intentions and accomplishments of leading Progressives by stating that "[t]he present tendency . . . is to disregard the once dominant ideas of natural rights and the social contract." Progressives, in Merriam's recounting, criticized natural-rights principles for thinking of "the function of the state in a purely individualistic way; this idea modern thinkers have abandoned, and . . . have taken the broader social view." A "social view" meant a statist view: The state deserved a freer hand than the Declaration suggested to intervene in and impose the preferences of the controlling political group on private affairs. As Merriam explained, when the Progressives established "that there are no 'natural rights' which bar the way" to state action, each policy question became "one of expediency rather than of principle. . . . [E]ach specific question must be decided on its own merits, and each action of the state justified, if at all, by the relative advantages of the proposed line of conduct."[30]

Because the Progressives prioritized state action over individual liberty, they found the Constitution's basic separation of powers unworkable. They decided the Constitution, at least as understood circa 1900, needed to be delegitimized. Frank Goodnow was a professor of administrative law at Columbia University and the first president of the American Political Science Association. In his diagnosis:

> [S]pecial care was taken [in the Constitution] to secure the recognition of the fact that the new government was one only of enumerated powers, and that powers not granted to such government were reserved to the states or to the people.
>
> For one reason or another the people of the United States came soon to regard with an almost superstitious reverence the document into which this general scheme of government was incorporated ....
>
> The question naturally arises before those who have no belief in a static political society or in permanent political principles of universal application[:] Is the kind of political system which we commonly believe our fathers established one which can with advantage be retained unchanged in the changed conditions

which are seen to exist?[31]

As an alternative to traditional constitutionalism, leading Progressives proposed "living Constitutionalism." Before he became President of Princeton University, Governor of New Jersey, and then President, Woodrow Wilson also authored pioneering scholarship on administration. He frequently insisted that "[l]iving political constitutions must be Darwinian in structure and in practice." Because constitutions are living things, statesmen do not need and should not try to follow their texts: "[A]round even a written constitution there grows up a body of practices which have no formal recognition or sanction in the written law, which even modify the written stipulations of the system in many subtle ways and become the instrument of opinion in effecting a slow transformation. If it were not so, the written document would become too stiff a garment for the living thing."[32]

Applying living constitutionalism, Progressives hoped to institute a new and (or so they thought) more fundamental distinction than that among the three branches—the distinction between politics and administration. While Goodnow described separation of powers as a "somewhat attractive political theory," he concluded that in practice it had proven to be "an unworkable and unapplicable rule of law." Goodnow appealed to a superior conception of government by observing that "[t]he state abstractly considered is usually likened to an organism." An organism has muscles, for action, and brain, for decision. Similarly, Goodnow reasoned, "the action of the state as a political entity consists either in operations necessary to the expression of its will or in operations necessary to the execution of its will." Expression was the realm of politics; execution was the realm of administration. Goodnow thus envisioned a class of administrators with training, to acquire "considerable technical knowledge," and tenure "reasonably permanent in character," to acquire the "wide and varied knowledge" they would need to regulate complicated affairs. These administrators would apply general legislative standards in a "quasi judicial manner," acting substantially like judges to apply standards to particular cases.[33] Similarly, tacitly comparing the United States to nineteenth-century Prussia, Wilson acknowledged "[i]t is better to be untrained and free than to be servile and systematic. Still there is no denying that it would be better yet to be both free in spirit and proficient in practice." As a result, Wilson concluded that "we have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments saddled with the habits of a long period of constitution-making."[34]

On that basis, Goodnow and Wilson propounded a theory of government in which politics and administration were largely kept separate. Politicians were supposed to identify broad social trends and to pass broad declaratory laws identifying social problems; administrators would then implement specific policies to fix those declared programs. But politics and administration needed to be kept separate. "[A]dministration lies outside the proper sphere of *politics*," Wilson insisted. "Although politics sets the tasks for administration, it should not be suffered to manipulate its offices." When politicians meddled with administration, Goodnow warned, "the spontaneous expression of the real state will tends to become difficult and the execution of that will becomes inefficient."[35]

Because agencies were supposed to implement specific policies, they needed to partake of all three of the branches of government as specified in Articles I through III of the Constitution. If and to the extent the non-delegation principle reinforced tripartite and separated government, the Progressives concluded, too bad for the non-delegation principle. Elihu Root, a leading lawyer, U.S. Senator, and Cabinet Secretary to two Republican Presidents, found

> inevitable ... the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority.

Before Progressive agencies like the Interstate Commerce Commission, the Federal Trade Commission, and state public utility agencies, Root pronounced, "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."[36]

During the New Deal, leading law professors, members of the Roosevelt administration, and Congress all relied on the Progressives' theory of administration to develop a new wave of federal agencies. *The Administrative Process*, by James Landis of Harvard Law School, is now regarded as a representative restatement of the reasons why New Deal leaders supported centralized administrative governance. In contrast with the Progressives, Landis justified his theory of administration not with Hegelian historicist political theory or with Darwinian analogies to animals, but rather with utilitarian arguments. An increase in "social interests," he argued, is "simply a rationalization of the growing interdependence of individuals in our civilization and the consequent necessity of insisting upon the observation of rules of conduct. It

is the fact of interdependence that is the warp for such rationalization, and it is that fact rather than the weft of rationalization that accounts today for the administrative process." With the Progressives, however, he agreed that government required a statist orientation: "a view which conceives it to be a function of government to maintain a continuing concern with and control over the economic forces which affect the life of the community." With the Progressives, he also agreed that, "[i]n terms of political theory, the administrative process springs from the inadequacy of a simply tripartite form of government to deal with modern problems." He concluded that modern government required "expertness," which

> springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem. With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.

Landis acknowledged that New Deal agencies created tension with pre-1900 separation of powers law. Nevertheless, he concluded that "intelligent realism" required government to concentrate its powers as energetically as big businesses did, and that he was "not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government organization."[37]

Now, neither the Progressives nor New Dealers argued generally for legislative rulemakings, on the scales covered by the REINS Act. Most early agencies made policy by declaring the meanings of their organic statutes in the course of case-by-case adjudication; rulemaking was reserved for a few core topics, especially ratemaking. Congress started broadening the scope of rulemaking on a wide scale only in the 1960s, during the start of the Great Society. When Congress started enacting such powers, however, it did so using the same basic rationale that Landis laid out in 1938. Indeed, Landis illustrates. In 1960, in response to a request by President-elect Kennedy, Landis complained that agencies had proven themselves not as effective as he had expected they would be when he had written *The Administrative Process* in 1938: "A prime criticism of the regulatory agencies is their failure to develop broad policies in the areas subject to their jurisdiction." As a solution, he proposed that agencies switch from slow, incremental case-by-case adjudication to "other methods of policy planning"—especially rulemaking, for "policy also emanates from rule-making where forward-planning is possible." In

response to encouragement like Landis's, agencies already in existence responded by reading their enabling statutes aggressively to find grants of rulemaking power. As Congress created a new wave of agencies during the 1960s and 1970s, it vested them with explicit legislative-rulemaking powers.[38]

I should not be misunderstood to be suggesting that, in 2011, supporters of broad agency policy-making (or, in other words, likely opponents of the REINS Act) subscribe to every principle espoused by Merriam, Wilson, Goodnow, Landis, or other figures I have treated in this section. My points are more general. First, all of these seminal figures opposed the Declaration of Independence, the Constitution, and our constitutional order as it was administered circa 1900. If contemporary supporters believe broad agency policy-making consistent with the Declaration and the Constitution's basic tripartite structure, the burden lies on them to explain why Goodnow, Landis, and the others thought broad delegations *in*consistent with those organic documents and our pre-1900 order. Second, it is striking that all the figures just treated were extremely optimistic that, if given broad legislative authorization and substantial autonomy from Congress, administrators and administrative lawyers could divine how to regulate particular problems consistent with public opinion and sound policy without getting derailed by political opposition. Third, whether they justified their beliefs on historicist, utilitarian, or other normative foundations, all of these figures assumed statist views. As a result, fourth, even if contemporary supporters do not embrace every feature of the arguments just recounted in favor of broad delegations to agencies, it is reasonable to suspect the REINS Act's opponents want government to be more interventionist than earlier American statesmen expected and hoped.

And last, arguments like the ones just recounted explain the distributive agenda of supporters of broad agency policy-making. Again, the Founders' political program proposes to distribute back to individual citizens freedom the Declaration of Independence already declares they have, and that program gives pride of place to legislators who actually legislate. In contrast, because the Progressive/New Deal program assumes interventionist political priors, it seeks to distribute much of the freedom that would otherwise go to private individuals, worker associations, and firms to regulators. And that program gives political pride of place to those regulators—administrators and administrative lawyers. Members of Congress have a helpful role to play by writing broad enabling language into agency organic statutes—but the administrative theory of government expects them to leave the administrative process alone once

they have created it. As Wilson put it, "as superintending the greater forces of formative policy alike in politics and administration, public criticism is altogether safe and beneficent, altogether indispensable." Yet "[t]he problem is to make public opinion efficient without suffering it to be meddlesome. Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is of course a clumsy nuisance, a rustic handling of delicate machinery." Goodnow warned that "[p]olitical control over administrative functions is liable . . . to produce inefficient administration in that it makes administrative officers feel that what is demanded of them is not so much work that will improve their own department, as compliance with the behests of the political party."[39]

Previous Congresses relied on the Progressives' theory, or Landis's, or other theories justifying similarly-broad agency powers to write organic statutes. However, this Congress need not be bound by the political judgments of previous Congresses. This Congress may reasonably conclude that the foregoing theories are too hostile to the Declaration of Independence, the idea of limited government under a written constitution, government by representation hedged by popular consent, or individual liberty. If this Congress agrees, then it must conclude that legislative rulemaking is less necessary or proper than it seemed to previous Congresses. Congress may reasonably enact the REINS Act to prevent agencies from limiting the liberties of American citizens in the most economically-consequential rulemakings.

IV. The Founders' Theory of Natural Rights Anticipates Important Problems with Rulemaking

Finally, thanks to four decades and more of experience with rulemaking, this Congress knows things that earlier Congresses did not. Even more striking, *The Federalist Papers* anticipate and provide a helpful framework for interpreting most of those new data. If the country's collective experience has been that broad agency rulemaking powers have been problematic in some respects, this Congress may reasonably decide to strike a balance different from previous Congresses' between broad agency power on one hand and liberty and electoral accountability on the other. To be sure, it is not easy to gather and consider that collective experience. Difficult institutional choices can invite debates in which disputants present conflicting case examples with no easy way to settle which case examples are most compelling. Nevertheless, as long as controlling law leaves Congress with discretion to decide how to structure federal administrative government, Congress must use its political judgment to

determine which institutions are most in the country's interest--even in the absence of complete and harmonious information.

A. Agencies Do Not Have Expertise or Information to Justify Rulemaking Without Legislation

First, after four decades of experience, agency claims of expertise seem less persuasive than they did mid-twentieth century. Supporters of broad agency rulemaking insist that, by virtue of their expertise, agency administrators have better information for promulgating rules than Congress does to make laws. Alternatively, if members of Congress and administrators have the same information, supporters argue, administrators' expertise qualifies them better to interpret the information to divine the correct rule. These arguments assume that agency administrators have considerable knowledge about factors directly relevant to the practical concerns that arise in regulatory politics. According to *Federalist 37*, however, this claim seems unrealistic. According to *No. 37*, statesmen must "perceive the necessity of moderating ... our expectations and hopes from the efforts of human sagacity." People must be most moderate in relation to the study of human affairs—"the institutions of man"—including especially politics and law. In those and other fields of human action, "obscurity arises as well from the object itself"—that is, the variability and ambiguity of human nature—"as from the organ by which it is contemplated"—that is, the fact that we understand very little about how the human mind comprehends and makes intelligible things in the external world.[40]

And in administrative practice, there are good reasons for suspecting that agency administrators propose major rules with far less science or other authoritative information than Progressive or New Deal theorists claimed. Here, the benzene rule discussed in Part II provides an extremely representative case study. When OSHA promulgated the 1 ppm benzene rule, it had available the following statistical evidence: In Turkey, twice as many shoe workers (13/100,000 instead of 6/100,000) contracted leukemia when exposed to benzene vapors between 150 and 650 ppm in badly ventilated conditions. In Italy, workers who made glue or ink contracted leukemia at abnormally high rates when exposed for long periods of time to solvents with benzene in concentrations between 200-500 ppm. Persistent exposures above 25 ppm were correlated with blood deficiencies and a fatal form of anemia. Other carcinogens had triggered leukemia in mice or rats exposed to the compounds at 1 ppm; it was suspected that benzene also triggered leukemia at the same levels, but previous mice and rat tests had neither confirmed nor refuted those suspicions.[41]

From one perspective, these studies provide an extremely thin factual record on which to justify a 1 ppm limitation on benzene in workplaces. From another perspective, however, legislators and regulators must make decisions all the time on the basis of information this incomplete. If the factual record is so thin, however, it hardly seems compelling to say that administrators are better qualified than legislators to make the trade-offs. First, if the available data can identify medical dangers to humans from benzene exposure between 25 and 500 ppm, but not at 1 ppm, how should regulators extrapolate from the data they have to gauge the medical risks of benzene at 1 ppm? Different chemicals pose different risks or benefits to people at different levels, and regulators must make extremely tentative and subjective forecasts to fill in the parts of a risk/exposure curve for which they do not have concrete data. Second, assuming a regulator extrapolates the risk/exposure curve, how feasible is it technologically for the industry to reduce benzene below different exposure levels? And third, assuming regulators can settle these two questions, how should the extrapolated health benefits from reducing benzene be traded off against the economic costs of doing so? The second and third considerations are not scientific; they are transparently political. Yet even the first consideration is political. Scientific method and experience may rule out *some* risk/exposure extrapolations, but they cannot settle on *only one* acceptable curve. If scientists have discretion to decide which of several plausible curves best extrapolates the risk of benzene exposure at 1 ppm, the scientists have yet another political choice.

Every major rulemaking forces similar tradeoffs, involving technology, economic consequences, and impact on health, safety, environment, or morals. Given the country's track record over the past four decades with rulemaking, Congress may reasonably conclude that it has been expecting too much from administrators by expecting them to use science or expertise to settle the tradeoffs. Since such tradeoffs are inescapably political, it is well within Congress's discretion to determine that it is no longer necessary and proper that federal agencies make such tradeoffs for economically consequential legislative rules.

B. Agency Rulemaking Encourages Special-Interest Politics More than Legislation Does

Another common argument in favor of broad legislative rulemaking is the "capture" argument: Congress is more likely to be captured by the special interests seeking to influence politics than administrative agencies are. Here, too, however, *The Federalist* anticipates a general theoretical problem. This capture argument is persuasive only if one is certain that an

agency enabling statute can create a firewall between special interests and the agencies charged with implementing administrative policy. *The Federalist* suggests that it is unrealistic, even naïve, to suggest that any institutional arrangement could ever insulate government from political pressure. "The latent causes of faction are ... sown in the nature of man," especially because from the existence of different species of property "ensues a division of the society into different interests and parties."[42]

The Federalist considered how faction influences the process of making laws most memorably in *Federalist* No. 62. During the Revolutionary Era, state legislatures overhauled the laws of their states frequently, usually because the membership in those legislatures turned over frequently. When they overhauled basic property and commercial laws, Publius complained, these legislatures undermined "every rule of prudence," which required that laws be "fixed rule[s] of action; but how can that be a rule, which is little known and less fixed." Publius identified two major problems with changing rules. First, the changes threaten liberty by

> poison[ing] the blessings of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow....

Second, changing laws confer an

> unreasonable advantage ... to the sagacious, the enterprising, and the monied few, over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said, with some truth, that laws are made for the few, not for the *many*.[43]

Here, we must extrapolate a little, because the specific problem Publius was criticizing differs in important institutional details from the problems created by agency legislative rulemaking. At a minimum, however, agency rulemaking looks dubious simply because it proceeds under the authority of broad and indeterminate legislative enabling language. Take OSHA again: In the benzene rulemaking, OSHA acted pursuant to statutory language (among other relevant authorizing phrases) to set a benzene standard that "most adequately assure[d], to

the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health."[44] To put it mildly, this language is "little known and less fixed."

Separately, lawmaking has grown extremely complex in the modern era, in ways that threaten liberty. Special interests can exploit insiders' advantages over rank-and-file citizens more effectively in a political regime with both legislation and rulemaking than in a regime with legislation only. Bruce Yandle describes how special interests influence agency policy-making in terms of "a theory of regulation [he] call[s] 'bootleggers and Baptists.'" Idealistic legislators and regulators—the Baptists—institute a new regulatory program to tackle a public problem. The regulated industry and workers—the bootleggers—then co-opt the laudatory public aims of the regulatory program for anticompetitive ends:

> [W]hat do industry and labor want from the regulators? They want protection from competition, from technological change, and from losses that threaten profits and jobs. A carefully constructed regulation can accomplish all kinds of anticompetitive goals of this sort, while giving the citizenry the impression that the only goal is to serve the public interest.[45]

To take one of many examples: It was documented that, between 1994 and 2008, more than 3600 people died, 6500 people were injured, and more than $1.5 billion of property damage was caused by fires involving flammable furniture. Many of these fires were caused when cigarette smokers fell asleep with lighted cigarettes on beds or furniture, or when cigarette smokers carelessly left cigarettes on or close to furniture. This problem is difficult to solve by federal regulation of the makers of cigarettes or furniture, because it is difficult for national law to reach into homes and stop smokers from being careless. Assuming that federal regulatory law must respond to the problem, however, there are two possible solutions: Compel cigarette companies to make self-extinguishing cigarettes, or compel furniture manufacturers to make non-flammable beds and furniture.

Cigarette companies anticipated the possibility that the Consumer Products Safety Commission (CPSC) might lobby Congress for jurisdiction to require self-extinguishing cigarettes. (By statutory exemption, the CPSC lacked jurisdiction over cigarettes.) Peter Sparber, a vice president of the Tobacco Institute, gave out hundreds of thousands of dollars to local fire departments and courted their support for the National Association of Fire Marshals (NAFM). Later, Sparber left the Tobacco Institute and lobbied in his own name. He "volunteered" as the NAFM's lobbyist while he continued to lobby extensively for the Tobacco

Institute. Not coincidentally, the NAFM then petitioned the CPSC to institute legislative rulemaking to require furniture makers to make upholstered furniture flame-retardant enough not to burn if ignited by a smoldering cigarette. Later, the manufacturers of brominated fire retardant chemicals, whose chemicals furniture makers would need if CPSC approved NAFM's petition, lent their support to that petition. (Conveniently, the chemical makers were also represented by Sparber).

Furniture makers responded similarly: They appealed to health and environment concerns to frustrate CPSC's acting on NAFM's petition. Brominated fire retardants have been correlated with thyroid disease, impaired brain development, and impaired reproductive functions in animals. Furniture makers' lobbyists persuaded concerned members of Congress to attach a rider to an appropriations bill blocking further action on the CPSC rulemaking until the National Institute of Health could study the health and environmental effects of fire-retardant chemicals.[46] After these studies were completed, CPSC finally issued the notice of proposed rulemaking in 2008—fourteen years after the NAFM petitioned for a rule. As of fall 2010, CPSC still had not yet issued a final rule.[47]

Regardless of what one thinks of the merits of the CPSC's rulemaking, the regulatory process confirms vividly how accurate Yandle's Baptist-bootlegger metaphor is. The tobacco and flame-retardant chemical industries let the NAFM act as the Baptist fronting their bootlegger agendas, and the furniture industry used health and environmental advocates as Baptists in the same way. Separately, the politics of the cigarette/furniture dispute illustrate how byzantine contemporary regulatory politics are. At different points, the dispute involved regulatory and appropriating committees in Congress, the CPSC, the National Institutes of Health, and several other agencies. The "industrious and uninformed mass of the people" have no chance in a process this complicated—not unless they hire "sagacious" lobbyists just as "the monied few" do—the cigarette, chemical, and furniture companies.

CPSC Commissioner Ann Brown complained about the furniture rulemaking petition: "I never felt any of the companies I worked with in this had the interest of the consumers at heart.... It was a hundred fingers pointing in a hundred different directions."[48] Following Publius, however, one might say that Commissioner Brown made the wrong diagnosis from the right symptoms. In a free society, furniture makers, cigarette makers, and retardant-chemical makers have every right to advocate their interests to government officials. If they are going to

participate in the processes of setting health, safety, and environment standards, however, the better solution is to force them to persuade members of Congress to write the standards as legislation. That way, rank-and-file voters, workers, and firms have slightly better odds of participating in the standard-setting process—and someone to blame squarely if the process generates bad results. On the basis of examples like the cigarette/furniture dispute, Congress may reasonably conclude that special-interest processes are *especially* threatening in major rulemakings—in which case such rules are less necessary and proper than they seemed 40 years ago.

C. Agency Rulemaking Invites Congressional Pressure without Congressional Accountability

The Federalist anticipated another evident problem in the model for agency rulemaking: the relation between agencies and Congress. Supporters defend broad rulemaking power on the ground that agencies can set policy freer from political pressure than Congress can. According to *The Federalist*, however, this expectation is naive. As *Federalist* 48 warns, "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."[49] It is therefore realistic to expect members of Congress to pressure agencies. For that reason, agency rulemaking worsens the quality of federal law and often increases the politicization of law. Members of Congress may use oversight powers, the power of the purse, and other tools to influence the output of agency rules—but then claim plausible deniability if constituents or regulated groups object to the final content of those rules.

This phenomenon certainly played a role in the cigarette/furniture dispute discussed in the last section. For better or worse, Congress delayed the CPSC's rulemaking by almost a decade using an appropriations rider to force further scientific study. The same phenomenon probably influenced the making of OSHA's benzene rule—here, almost certainly for the worse. In the late 1970s, roughly 1.4 million workers were exposed to benzene at levels higher than ordinary background levels: about 800,000 working at gas stations, and the rest in petroleum refineries, coking plants, chemical plants, rubber-making plants, benzene transporters, and laboratories. When OSHA settled on the 1 ppm benzene standard, it structured the standard not to apply to the storage, sale, or use of gasoline after discharge from bulk terminals—i.e., at gas stations.[50] If the benzene rule had taken effect, it would have excluded almost 800,000 workers—more than half of the workers whose safety justified having the rule in the first place. It is reasonable to suspect that gas stations were an influential political force in Congress, and

that OSHA excluded gas stations from the rule's coverage to make it less likely that Congress would interfere with OSHA's policy-setting for benzene everywhere else. However the intervention occurred, it made the benzene rule extremely arbitrary and politicized.

On the basis of this and other similar examples, this Congress may reasonably conclude that the risks of backdoor congressional influence are unreasonably high for major rules. On that basis, this Congress may conclude that it is less necessary and proper than current law allows that agencies be allowed to promulgate major rules.

D. Agency Rulemaking Encourages Agencies to Defy Electoral Mandates

The Federalist, however, did not and could not anticipate one further feature of agency rulemaking. *The Federalist* assumes that federal law-making and –administration will focus primarily on brokering disputes between *private* interests. Publius assumed that "[t]he regulation of … various and interfering interests" of "those who are creditors, and those who are debtors … [a] landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests," "forms the principal task of modern legislation."[51] Thanks to the Progressives, the New Deal, and the Great Society, however, the federal administrative bureaucracy now claims another seat at the table—asserting its *own* competing interest or interests. This fact creates a problem that was not as apparent when legislative rulemaking was legitimized in the 1960s and 1970s. Agencies may now become a reactionary force. If public opinion changes on an issue, administrative lawyers and policy-makers may resist, defy public opinion and Congress on the ground that they are (Woodrow Wilson's words) "meddlesome" or a "clumsy nuisance," and use rulemaking powers to forge ahead in pursuit of what agency staff *know* to be the *true* public interest.

This phenomenon is occurring more and more frequently. For example, the House of Representatives passed a cap-and-trade environmental bill in the 111th Congress, but the debate provoked opposition substantial enough that the Senate Majority Leader dropped the bill and let it die.[52] Politically, it is reasonable to construe that fact and the results of the November 2010 election as a signal that the public is strongly opposed for the time being to further environmental energy restrictions as too expensive and anti-growth. In December 2010, however, just six weeks after the November 2010 election, the Environmental Protection Agency announced it had set a plan for using its rulemaking authority under the Clean Air Act to set greenhouse gas standards for petroleum refineries and fossil-fuel power plants.[53] The Clean Air Act's

rulemaking powers give EPA the right and prerogative to promulgate rules implementing the Act—even if the American people and this Congress make a political judgment that EPA staff are overvaluing the benefits of eliminating greenhouse gases and undervaluing the economic costs.

On the basis of this behavior by the EPA and other similar behavior by other agencies, Congress may reasonably conclude that the federal government's current organization hardwires old policies too much and provides too little room for public opinion to take federal law in different directions. If so, Congress may find it no longer necessary and proper for the carrying into execution of their legitimate mandates that agencies continue to have the power to promulgate major rules.

Conclusion

In short, federal agencies have power to promulgate legislative rules only to the extent Congress supplies them with such power pursuant to an act of Congress conferring such power as necessary and proper for carrying into execution powers the U.S. Constitution enumerates for the U.S. government. By the same token, Congress may decide at a later date to scale back agencies' powers to promulgate legislative rules if it decides those powers are less necessary or proper than they seemed when originally granted.

The REINS Act already states purposes justifying why such a scale-back is necessary and proper, but in my testimony, I hope to have identified additional reasons why it is less necessary or proper than it has previously seemed why federal agencies should promulgate major rules. First, as Locke, the Declaration of Independence, and *The Federalist Papers* all warned, politics secure liberty more effectively if legislative rules are enacted by legislators. Bicameralism and presentment provide two important hedges against liberty-threatening laws, and regular elections provide a third. Yet contemporary administrative practice circumvents these hedges by letting administrative agencies promulgate what are for all practical purposes "laws." Second, as enamored as previous Congresses may have been by political theories that justify lawmaking by administration, this Congress may reasonably disagree and decide such theories are too hostile to individual liberty. Finally, because our country has now had at least four decades of experience with administrative rulemaking, this Congress may decide on the basis of that experience to limit legislative rulemaking only to economically-inconsequential rules. The *Federalist Papers* warned about the dangers of legislating with incomplete information, special-interest politics,

and congressional bullying of agencies … and in these respects the *Federalist* anticipated important problems legislative rulemaking has encountered in practice.

Thank you again for the opportunity to testify, and I am happy to answer any questions members of this Subcommittee may have.

ENDNOTES

[1] See U.S. Const. art. I, sec. 8, cls. 1 (taxing, and perhaps spending), 3 (regulation of interstate commerce), 11 (declaring war), 18 (spending).
[2] See Eric R. Claeys, "The National Regulatory State in Progressive Political Theory and Twentieth-Century Constitutional Theory," in *Modern America and the Legacy of the Founding*, Ronald J. Pestritto & Thomas G. West eds. (2007): 35-74; "Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts," *Constitutional Commentary*, 21, no. 2 (2004): 405-44.
[3] Whitman v. American Trucking Ass'n, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).
[4] See 5 U.S.C. § 551(4) & (5) (2010); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38-39 (D.C. Cir. 1974).
[5] See National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).
[6] Statement of Sally Katzen before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary on "The REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations," at 2, 8 (citing U.S. Const. art. II sec. 3).
[7] 462 U.S. 919, 952-53 (1982).
[8] See http://www.house.gov/house/Tying_it_all.shtml; http://www.senate.gov/reference/glossary_term/joint_resolution.htm.
[9] Katzen Statement, p. 8.
[10] *Chadha*, 462 U.S. at 952, 954-55 n.16.
[11] Katzen Testimony, p. 8.
[12] See 5 U.S.C. §§ 551-59, 701-06 (2010).
[13] 487 U.S. 654 (1988).
[14] U.S. Const. art. II, sec. 3.
[15] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).
[16] *Morrison*, 487 U.S. at 691.
[17] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).
[18] Katzen Statement, at 8.
[19] U.S. Declaration of Independence para. 2; see Alexander Hamilton et al., *The Federalist: The Gideon Edition*, ed. George W. Carey & James McCellan (2001), no. 40, at 205.
[20] *Federalist* No. 51, at 269.
[21] Industrial Union, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 614-16 (1980). The figures used in text are the figures the Supreme Court reported as standard in its opinion.
[22] *Federalist* No. 10, at 44. See George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Management and Science* 2 (1971): 3.
[23] See U.S. Const. art. I, secs. 1, 2, 3, 7, art. II, sec. 1, art. III, sec. 1; *Federalist* No. 51, at 269; *Federalist* No. 73, at 380-84.
[24] John Locke, *Two Treatises of Government*, ed. Peter Laslett (1960) (1689), v. II, § 136, at 358, § 141, at 362-63. See *Industrial Union Department*, 448 U.S. at 672-73 (Rehnquist, J., dissenting) (citing § 141 of the *Two Treatises*).
[25] See 29 C.F.R. § 1910.1028 (2010).
[26] See 5 U.S.C. §§ 553, 702, 706 (2010); *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984).

[27] Morton Rosenberg, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade" (May 8, 2008), p. 6, http://assets.opencrs.com/rpts/RL30116_20080508.pdf.
[28] 29 U.S.C. § 671 (2010).
[29] 12 U.S.C. § 5201, 5211; 26 U.S.C. § 4161 (2010).
[30] Charles Edward Merriam, *A History of American Political Theories* (1924), 306, 311, 322.
[31] Frank J. Goodnow, *Social Reform and the Constitution* (1911), 9-11.
[32] Woodrow Wilson, *Constitutional Government in the United States* (1911), 22, 57.
[33] Frank J. Goodnow, *Politics and Administration: A Study in Government*, intro. John A. Rohr (2003) (1900), 8-9, 21, 75-76. Page citations are to the 2003 edition.
[34] Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (1887): 197, reprinted in *American Progressivism: A Reader*, ed. Ronald J. Pestritto & William J. Atto (2008), 191, 198, 199.
[35] Wilson, "The Study of Administration," 201; Goodnow, *Politics and Administration*, 18, 72.
[36] Elihu Root, *Addresses on Citizenship and Government* (1916), 535.
[37] James M. Landis, *The Administrative Process* (1938), 1, 6-8, 11-12, 23-24.
[38] Staff of Senate Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary, 86th Congress, Report on Regulatory Agencies to the President-Elect (Committee Print 1960) (written by James M. Landis), 22, 18; Thomas W. Merrill & Kathryn Tongue Watts, "Agency Rules with the Force of Law: The Original Convention," *Harvard Law Review* 116 (2002): 467.
[39] Wilson,"The Study of Administration," 205; Goodnow, *Politics and Administration* 82-83.
[40] *Federalist* No. 37, at 182.
[41] *Industrial Union, AFL-CIO*, 448 U.S. at 617, 618 n.9, 619 n.12, 657 n.64.
[42] *Federalist* No. 10, at 43.
[43] *Federalist* No. 62, at 323-24.
[44] 29 U.S.C. § 655(b)(5) (1980), cited in *Industrial Union*, 448 U.S. at 612.
[45] Bruce Yandle, "Bootleggers and Baptists: The Education of a Regulatory Economist," *Regulation* (May/June 1983), 12, 13.
[46] Annys Shin, "Fighting for Safety: Your Couch Is Caught in a Flammable Regulatory Battle Between the Chemical and the Furniture Industries," *Washington Post*, January 26, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012503170_pf.html.
[47] 73 Fed. Reg. 11702 (Mar. 4, 2008); http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3041-AB35.
[48] Shin, "Fighting for Safety."
[49] *The Federalist* No. 48, at 257.
[50] *Industrial Union, AFL-CIO*, 448 U.S. at 615-16 & n.6, 628.
[51] *Federalist* No. 10, at 44.
[52] Gail Russell Chaddock, "Harry Reid: Senate Will Abandon Cap-and-Trade Energy Reform," *Christian Science Monitor*, July 22, 2010, http://www.csmonitor.com/USA/Politics/2010/0722/Harry-Reid-Senate-will-abandon-cap-and-trade-energy-reform.
[53] EPA, "EPA to Set Modest Pace for Greenhouse Gas Standards," December 23, 2010, http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/d2f038e9daed78de8525780200568bec!OpenDocument.

Mr. COBLE. Mr. Goldston, you are recognized for 5 minutes.

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

Mr. GOLDSTON. Thank you. Chairman Coble, Mr. Cohen, Members of the Subcommittee, thanks for having me here today, though it is a little odd to be sitting on this side of the dais.

I am here today to testify in opposition to the REINS Act, a bill that I think itself cannot withstand scrutiny on either practical or theoretical grounds. And I look forward during the Q&A to engaging with Professor Claeys on some of the points that he referenced.

Let me start with the practical problems. This bill would basically amend virtually every health and environmental law currently on the books, along with other laws, hampering their implementation. Its clear purpose is to place roadblocks in the way of protecting the public and to privilege the complaints of any industry.

How would the bill work in practice? Congress would be put in a position of quickly second-guessing decisions that are often based on years of technical analysis and policy deliberation. In response, industry lobbyists would inundate Congress both with campaign contributions and to evaluate technical and economical claims. Congress would have little choice but to fall back on political calculations, logrolling, and dealmaking, that might have little to do with the merit of the arguments before them. Industry would no longer have an incentive to cooperate with agency rulemaking processes and the regulatory process would likely become more random and less predictable. The Executive's ability to carry out the laws as they are written would be curtailed and the courts would be limited in their ability to enforce them.

All this is totally unnecessary. The rationale for delegating some decisions to agencies is as valid now as it was 100 years ago. Congress is not the best venue for reaching detailed, technically based decisions regarding every issue. And I would add that the issue is whether the REINS Act would make the situation better or worse, not whether there are any problems at all with current rulemaking procedures.

Congress does not lack the tools it needs to guide the regulatory process. It writes the laws which govern the regulations and it can intervene to change those laws or to block individual regulations anytime it chooses. It also has vast informal powers to influence the Executive. The concern the bill's sponsors have with the current system seems not to be that the current system doesn't work, but that it does. The public is protected, yet agencies are constrained by courts and the political context. The benefits of regulations outstrip the costs. The complaint is, rather, that those on the right end of the political spectrum don't always win under the current system. This bill is an effort to rewrite the rules of governance and reverse longstanding practices to make it easier for one ideological fashion to triumph.

Mr. COBLE. Mr. Goldston, if you would suspend. We were late starting your clock so the red light does not bar you right now. You have got a couple of minutes to go. That was our mistake here.

Mr. GOLDSTON. I think we would be well advised to stick to a system based on long experience and constitutional principles that has yielded public protections while allowing for economic growth. Thank you.

[The prepared statement of Mr. Goldston follows:]

David Goldston
Director of Government Affairs
Natural Resources Defense Council

Testimony before the House Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law
March 8, 2011

Chairman Coble, Ranking Member Cohen and Members of the Subcommittee,

I appreciate the opportunity to testify before you today. I am currently Director of Government Affairs for the Natural Resources Defense Council (NRDC), but I worked on Capitol Hill for more than 20 years as an aide to Rep. Sherwood Boehlert of New York, the last six of those (2001- 2006) as the Chief of Staff of the House Committee on Science. My testimony draws on that experience as much as on the views of NRDC. (I must say that despite, or perhaps because of my years on Capitol Hill, it is a daunting prospect to sit on the witness side of the dais.)

The REINS Act is a proposal that may seem benign and appealing on the surface, but in fact, it is radical in concept and would be perilous in execution. The bill could, in effect, impose a slow-motion government shutdown, and it would replace a process based on expertise, rationality and openness with one characterized by political maneuvering, economic clout and secrecy. The public would be less protected, and the political system would be more abused. Indeed, it is hard to imagine a more far-reaching, fundamental and damaging shift in the way the government goes about its business of safeguarding the public.

Goldston testimony

How could such a seemingly technical change in process have such significant consequences? How could a bill that its sponsors claim is just an exercise of Constitutional authority and oversight be so detrimental? The answers become clear as soon as one thinks through how the REINS Act system would actually work.

For more than a century -- going back at least to the creation of the Food and Drug Administration -- Congress has established federal agencies and empowered them to make decisions to protect the public. Congress did not do this because it was lazy or interested in abdicating power or responsibility. Instead, Congress rightly concluded that some kinds of decisions required deep technical expertise and a balanced, judicious decision process somewhat insulated from political horse-trading and power plays. If anything, the rationale for granting authority to federal agencies has only become stronger over the years, as science has become more complex, the Congressional docket more crowded, and the Congressional political horizon more short-term and focused on fundraising.

Under the current system, Congress still plays the central role by deciding what kinds of tasks the regulatory agencies should undertake, which is a fundamentally political decision. For example, in dealing with clean air, Congress sets policy – deciding, for example, that the government should limit pollutants that endanger public health – but agencies determine what level of a pollutant poses a danger. Congress requires that mandated pollution control technologies be available and affordable, but agencies determine which technologies meet those criteria.

Goldston testimony

The REINS Act is a summary rejection of the hard-earned knowledge that led to the creation of agencies and of a century of bipartisan experience. The Act radically repositions Congress, the most political branch of government, as the place to make the ultimate decisions that involve detailed technical matters.

How would this actually work? Agencies often take several years to formulate a particular safeguard, reviewing hundreds of scientific studies, drawing on their own experts in science and economics, empanelling outside expert advisors, gathering thousands of public comments, and going through many levels of executive branch review. Under the REINS Act, Congress, with its limited and largely inexperienced staff, and its broad and unfocused agenda, would have 70 legislative days to second-guess each and every decision covered by the Act.

So what would Congress do? It couldn't decide it didn't have the time, expertise, energy or interest to review a rule; failure to take action would kill any safeguard. No, it would have the kinds of hearings in which it probes issues that it has little capacity to evaluate. I urge Members to think about whether anyone comes away from hearings that revolve, say, around statistical methodology better informed or with a greater appreciation of Congress. Worse still, Congress could forgo hearings and race the clock with even less information and debate. And then on the House floor, debate is limited to two hours – hardly an open rule.

Lobbyists would descend on Congress with even greater fervor than is currently the case to pressure Members to take their side on individual regulations.

Goldston testimony

Industry would no longer have an incentive to work with regulatory agencies to craft sensible regulations because they could instead just hold off and try to get Congress to overturn any rule they disliked. At the same time, the outcome of the regulatory process would become less certain, denying industry the one thing it always wants most – predictability.

The one group sure to gain from REINS would be campaign fundraisers. With each major regulation dependent on Congressional action, every industry group would feel the need to ante up to be sure they had access when rules affecting them were sent up to the Hill. And Members of Congress would be given yet another enticement to use when soliciting donations. The result? The agency process, which is required by law to include public information on interactions with those trying to influence regulations, would be replaced with closed-door meetings with Members of Congress and backroom deal-making.

And one could easily see the rulemaking system becoming more arbitrary still, as political calculations will add an element of randomness to the votes. A Member might think, "Well, I can't be seen as always pro-regulation, so I have to find at least one or two regulations to vote against" – or vice versa. Or, "I better vote with Rep. X on this regulation because I'm going to need her vote on my bill next week." This kind of standard political calculus is especially ill-suited to deciding among regulations that will come from a wide variety of agencies handling a wide variety of public concerns. But Members will no doubt end up trading, say, a vote on a Food and Drug Administration safeguard against one from the Environmental Protection Agency (EPA).

Goldston testimony

This tendency will be exacerbated because, no doubt, groups will be keeping a tally of votes under the REINS Act without regard to their content.

The REINS Act would do nothing to improve how the nation is governed, but it would torque the regulatory process in industry's favor. Every feature of the bill is biased against public protections. All an industry would have to do to derail a safeguard is to convince a bare majority in one House of Congress to vote against it. There is then nothing the other body could do to resurrect the safeguard. And the Administration's role – under any President – would be limited, in effect, to advising the Congress on what a detailed regulation should say.

The assumption behind this bill – that every public protection is suspect – has led to bill drafting that flies in the face of sensible governing principles. For example, the bill prevents Congress from considering more than one rule "relating" to the same subject in a single Congress. If the REINS Act ever became law, there would no doubt be much haggling over what was to be considered "related." But let's take the simplest case. Let's say this month, Congress rejected a rule to protect the public from smog, but the debate indicated there were compromises that would make the rule acceptable. Under the REINS Act, no revised version of such a smog rule could be taken up again until 2013 even if there were agreement on what it should contain. In the meantime, the EPA would be unable to carry out its legal responsibility to update protections against smog.

Even more perversely, the bill would allow courts to overturn rules even after Congress had voted to approve them. This is bizarre, especially given complaints about "activist" courts.

Goldston testimony

But under the REINS Act, courts are required to ignore the Congressional vote and debate, presumably so that industry would have one more chance to block any safeguard. This seems to assume that Congress' judgment can't be trusted if it decides to allow a rule to go into effect.

More oddly still, the REINS Act is likely to lead to situations that amount to a Constitutional crisis. Let's say a court rules that under a statute a rule limiting, say, mercury emissions must be issued by a certain date (to take a real example). What happens if the agency then issues a rule to comply with the court ruling and Congress rejects it? Who is then in violation of the law? Under the Constitution, a court presumably can't require Congress to act, so the statute could not be enforced. But it also would not actually have been repealed. The REINS Act could quickly make a mockery of law by creating these Escher-like puzzles. Statutes could be made dead letters without ever going through the Constitutional process of repealing them.

All this is entirely unnecessary because Congress already has all the authority it needs to exercise oversight and control the regulatory system. Congress writes the laws that determine what activities get regulated and what criteria are used to write those regulations. It has the authority through normal procedures, the expedited Congressional Review Act, and control over the public purse to block or amend any rule it sees fit. Congress is hardly powerless to intervene in the rulemaking process, and agencies already keep that in mind.

Goldston testimony

It's hard not to conclude that the complaint that the REINS Act's champions have is not with the Congressional process, but with the results. In line with public opinion, agencies carry out their legal responsibilities to protect the public, and Congress has generally allowed the agencies to do their work under the law. Since the normal, time-honored processes of government have not resulted in the outcomes one ideological faction would like, they have proposed to change the rules in a manner that favors their faction. This may be the oldest political impulse there is, but it has not been a recipe for good government.

This is clear even if one just looks at the mechanics of carrying out this bill. Does Congress really want to be the arbiter of every significant rule? Does it want to adjudicate every scientific dispute, or the validity of every claim a PR shop dreams up each time an industry is asked to consider the public interest? Congress is already incapable of carrying out its most basic budget-writing responsibilities in the allotted time. Does it want to add hearings and floor debate on 80 or so rules a year to its docket?

The burden of proof ought to be on the authors of the REINS Act to demonstrate exactly how the current system is broken and why their bill would be an improvement. Administrations under both parties have reviewed the aggregate impact of regulations and found their benefits to have exceeded their costs (and not all benefits are quantifiable). The mere existence of regulations in a complex, modern nation of more than 300 million people is not proof of a problem. Is the problem simply that industry does not always get its way? Is the goal simply to move all decisions into whichever venue industry is most likely to triumph?

Goldston testimony

From the bill itself, all one can conclude is that the REINS Act sponsors want to change the regulatory process in the worst way.

Mr. COBLE. Thank you all, gentlemen.

Gentlemen, we try to apply the 5-minute rule to us as well. So if you all could respond tersely, that would be of benefit to us.

Professor Schoenbrod, let me ask you this question. Does the REINS Act preclude congressional consideration of the expertise that agencies have brought to the development of a given regulation?

Mr. SCHOENBROD. No, it does not. The agencies would investigate. The agencies would analyze. Congress' job would be to render a judgment and to be accountable.

Mr. COBLE. Professor Claeys.

Mr. CLAEYS. Yes, Mr. Chairman.

Mr. COBLE. Critics of the REINS Act allege that it has constitutional flaws in light of the Supreme Court's rulings in *INS v. Chada* and *Morrison v. Olson*. Summarize, if you will, your views of this criticism.

Mr. CLAEYS. Mr. Chairman, neither of those criticisms has merit. As a background matter, agencies have no power to promulgate legislative rules unless it is given to them by Congress. So the Morrison argument runs off of the assumption that there is some core inherent prerogative of the President in relation to legislative rulemaking that is threatened by the REINS Act. However, if all of executive branch agencies' rulemakings powers must come from Congress, there can't be any such core Article 2 prerogative.

Maybe the most helpful precedent here would be *Youngstown Sheet and Tube v. Sawyer*, a 1952 case. President Truman tried to order a seizure of the steel mills and he didn't have an act of Congress to support it. The Court held that in the absence of that statute—such a statute or other kind of authorization from Congress—that the President had no authority.

So as for the Chada ruling, once it is accepted that—as it is under controlling practice and precedent—that agencies may receive delegations from Congress of Executive power to promulgate legislative rules, then trickier issues

arise about whether and in what circumstances Congress may put strings or conditions on an executive branch agency's exercise of that Executive power.

The Chada decision doesn't rule out the possibility that Congress may ever attach strings. It merely states if Congress does attach such a string, Congress must do so by a genuine bona fide legislative act that is passed by the House and the Senate and then either signed by the President or passed by two-thirds supermajority in both Houses.

The REINS Act specifies that a major rule is promulgated pursuant to valid enabling statute and there is valid Executive authority, except that the rule may not take the force of law until this Congress passes a joint resolution of approval. If that joint resolution satisfies bicameralism at presentment, it satisfies Chada.

Mr. COBLE. Professor Claeys, let me come back to you. There has been some criticism directed against the REINS Act on the charge that it is biased against public interest and public protection. What say you to that?

Mr. CLAEYS. Mr. Chairman, I taught food and drug law for 3 years. I haven't taught it recently, but I have taught it. And one

of the things that struck me was that some of the FDA's biggest successes and the legal mandates that it enforced the most successfully were ones acting in response to an implementing statute passed by Congress.

When there was a thalidomide scare, there were other significant medical scares, the FDA staff recommended to Congress that a bill be passed. And Congress took the agency's expertise and implemented and enacted the law.

I don't understand why, if a similar problem were to arise today, this Congress would not respect the agency's arguments, look at the factual record the agency put together, and look at all interpretive and other policy questions the agency needed to consider. And if Congress was satisfied, this Congress could then say, We approve of the Executive's proposed legislation and we are not going to stay in the way of its going forward.

Mr. COBLE. Thank you, sir.

Mr. Goldston, none of us is perfect. So Federal agencies from time to time do get things wrong. If they do, then why shouldn't their biggest and most important decisions be placed before the Members of Congress for a vote?

Mr. GOLDSTON. Well, I think there certainly should be an ability for Members of Congress and the public to have recourse in terms of Federal regulations. Congress has that ability right now: The Congressional Review Act. The House just passed the continuing resolution the other day that had at least 19 examples of places where Congress used its spending authority to block regulations. We didn't think that was a good idea, but it certainly was within their authority. Congress could rewrite the statutes.

Congress, as Professor Claeys mentioned, the House is right now thinking of considering legislation to change EPA's authority regarding greenhouse gases. Congress has all the tools it needs to do exactly what you asked about. The question is, What would be the impact of reversing the entire system that has grown up; who would be likely to benefit; would the solution be worse than the disease? I would argue that it would be.

Mr. COBLE. I see the red light is illuminated, therefore barring me from further questioning. I recognize the distinguished gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, sir.

Mr. Goldston, do you see constitutional problems with the separation of powers here?

Mr. GOLDSTON. I am really not an expert on the constitutional question. I would say that one concern, though, is that—there are two concerns with the bill that at least raise issues relating to the Constitution, whether they are constitutional or legal issues.

One is, I agree with Professor Claeys that Congress is the one that has the authority to delegate to agencies and it has the choice whether to do that. What this bill does is it continues to delegate, but then doesn't allow the agency to carry out the delegated authority. This is sort of a halfway measure where Congress isn't taking the authority back but it is not leaving it with the agency either. I think that is a peculiar situation and can result in a situation where the law is not able to be carried out and there is no recourse for anybody in the courts or elsewhere. So that is one issue.

The other is that regardless of whether it violates Chada or not, this bill does create a situation where the failure—where failure to act by one House will kill an Executive action, with again, no recourse to the other body or the President. Whether that is technically a constitutional issue in terms of the law, I leave to Constitution experts. But it certainly raises practical problems that the Constitution tried to avoid.

Mr. COHEN. It does raise that issue. Bills have to be passed by both Houses. And that is something we have done for a long time. In this circumstance, the Senate would have to—could on its own not pass something—and it takes 60 folks to do anything over there. It really takes more than 60. Sixty. So 41 people could stymie the entire United States Government. Pretty strange veto power they would then have over the Executive. It is something that I don't think is envisioned anywhere.

Professor Schoenbrod, you are familiar with *Morrison v. Olson*, I guess.

Mr. SCHOENBROD. Yes.

Mr. COHEN. How do you reconcile that case where Chief Justice Rehnquist said that the test for evaluating a statutory scheme under the separation of powers doctrine to see whether it can stand. It says the statute is suspect if it is an attempt by Congress to increase its own powers at the expense of the Executive branch. This indeed would be an attempt by Congress to increase its powers. How would you reconcile the REINS Act with Justice Rehnquist's ruling in *Morrison v. Olson*?

Mr. SCHOENBROD. There are cases going back to the framing of the Constitution which describe law as rules of conduct. The regulations that agencies promulgate are rules of Conduct. And in fact, courts talk about these regulations all the time as "legislative rules." So we are not talking here about Executive power fundamentally; we are talking here about legislative power. So it is a question of Congress reclaiming some of its legislative powers. So, therefore, *Morrison v. Olson* is not implicated.

Mr. COHEN. Well, the regulatory agencies, commissions, do you consider them executive or legislative?

Mr. SCHOENBROD. Well, they can't be legislative. They are not part of the legislative branch, but they are exercising legislative-type powers. And when courts talk about "legislative rules" as opposed to "interpretive rules," they are recognizing the fact that these agencies make law.

Mr. COHEN. But the agencies are executive—under the Executive.

Mr. SCHOENBROD. That is right.

Mr. COHEN. So it is taking away from the executive branch. That is the executive branch. They may be legislating, they may be rulemaking. Presidents make decisions, Vice Presidents. Secretary Clinton makes a decision. Her committees make a decision. But that doesn't make them part of the legislature. They are part of the executive.

Mr. SCHOENBROD. Pardon me, Congressman. Congress has delegated to the agencies the power to make these legislative rules. Congress could take that back or condition it.

Mr. COHEN. Right. Congress could just make all the rules themselves. Why couldn't we just under this theory, which makes more sense to me, just make all the rules ourselves; have some Committees make the rules. Since they are not going to go into effect until we approve them, why shouldn't we have the Committees pass and approve all of the rules and then just let the agencies administer them? Would that make for sense to you?

Mr. SCHOENBROD. I think not. I mean, I think there are problems given the volumes of rules that our country has. It seems to me what the REINS Act attempts to do is to draw a line and to have the more important ones come back to Congress for consideration.

Mr. COHEN. Well, what if we just did the more important ones? The fact is, we couldn't even amend the law. You have got an hour to talk about it. You talk about post offices. And we passed 70 post offices. That is a simple thing; voice vote, nobody cares. Fine and dandy. It is done. These are things that should be policy issues and people are going to want to debate them and have differences of opinion. From your testimony, and I appreciate your scholarly background, you don't have a real good impression of Congress, or attitude about it, do you?

Mr. SCHOENBROD. Well, it seems to me that I am here suggesting how it would make sense to move forward. And whatever my private opinions are, they are my private opinions. I think this bill is a good bill. And whatever my impressions are of any branch of government is really my private point of view.

Mr. COHEN. Mr. Chairman, if I could just have 30 seconds to finish.

Mr. GOWDY. [presiding.] Without objection.

Mr. COHEN. Thank you.

Mr. SCHOENBROD. I am sorry. I worked in Congress for Senator and Vice President Hubert Humphrey, going back to the sixties, and I do have a lot of respect for the institution. I do think, however, that the system as a whole sometimes fails the people. It is not Congress as a whole.

Mr. COHEN. Mr. Chairman, I will say, reading the testimony, it is obvious that your opinion of Congress is not particularly good. You think that we don't want to take decisions and make decisions that are difficult; that we take easy, easy things like naming post offices—and I forget; I am trying to find the page and how you refer to that—we don't like to take a stand.

The fact is, with the passage of this you can't guarantee that Congress will do any more about lead poisoning that was the beginning of the basis of your discussion. That doesn't mean Congress is going to belly up to the bar and do the right thing or approve some regulation or not. You might have no lead regulation at all and more children die.

So I submit to you, whether you are right or not, unless maybe you change the people, it is not the institution, and you are trying to change the institution.

Mr. SCHOENBROD. I think Congress has done many excellent things in regard to air pollution. It was Congress that passed the rule to reduce auto emissions 90 percent. It was Congress who decided to eliminate ozone-destroying chemicals. It was Congress that had the effective action on lead and gasoline. It was Congress that

decided to reduce acid rain 50 percent. I think Congress is capable of doing many wonderful things. And I think Congress works best when it is most accountable.

Mr. COHEN. Thank you, sir. Thank you Mr. Chairman.

Mr. GOWDY. Mr. Goldston, I want you to assume hypothetically that Congress were contemplating a piece of legislation—and hypothetically let's assume it was called the PATRIOT Act. Would you agree or disagree that Congress could pass a broad piece of legislation called the PATRIOT Act and then let the FBI fill in the details?

Mr. GOLDSTON. Yes. I think, again, the courts have limited how much delegation authority Congress has, but it is very broad. So yes, creating broad policy I think is the role of Congress. And then it could leave to the agencies the particulars of how to implement it with, again, always the ability to come back under current procedures.

Mr. GOWDY. So you would let the Bureau promulgate regulations that the Bureau would then interpret and enforce.

Mr. GOLDSTON. In this hypothetical, sure. I think it would behoove Congress—and I agree with Professor Schoenbrod on this—to give as much direction to the agency as possible. But if there were kinds of issues that raised either particular kinds of technical questions or that involve complicated deliberations that needed some

quasi-judicial look, then yes; I would not be inherently opposed to the agency being able to figure out the specifics of that.

Mr. GOWDY. Currently there are regulations which constitute evidence of negligence; in fact, in some instances, evidence of negligence per se in civil cases. Correct?

Mr. GOLDSTON. I am not an attorney, but yes.

Mr. GOWDY. Don't go bragging. What about—well, let me ask you if—and if I am asking a question that is not fair, then I will withdraw it. Would you disagree with me that there are criminal sanctions for the violations of certain regulations?

Mr. GOLDSTON. Absolutely.

Mr. GOWDY. And would you not agree with me further that it really is best for Congress to pass regulations or rules that carry with it criminal sanctions?

Mr. GOLDSTON. Yes. And I think that is generally what happens. Congress is the one that decides that if you are going to put an effluent into the water or a pollutant into the air, that that would constitute under certain circumstances a criminal violation. The specific level which involves, among others things, technical decisionmaking, figuring out which pollutant, and so forth, that is what was left to the agency. The agency on its own can't decide that something is a criminal violation.

Mr. GOWDY. You mentioned expertise. Are you familiar or can you give me examples where the "expertise" failed?

Mr. GOLDSTON. Not offhand, but I have no doubt that there are many. I am not arguing—my argument is not that agencies are never wrong or should be beyond the law. My argument is that the solution of the REINS Act would make worse every situation that it aims to clear up.

Mr. GOWDY. Do you challenge the constitutionality of the REINS Act?

Mr. GOLDSTON. I don't have a position on constitutionality. As I said, I think it does some things that are constitutionally suspect in sort of the way that it will leave, for example, a situation where the law could remain on the books but be unenforceable in court or elsewhere because the court couldn't get Congress to approve a regulation that would be required by the statute which would remain in effect. Whether that would be technically unconstitutional or not, I am not qualified to say.

Mr. GOWDY. Professor Claeys, can you think of any examples where the expertise fails? Because it strikes me that that is the argument in favor of the status quo, is that there are experts at these executive agencies, whereas Congress is bereft of expertise. In some instances, that may be correct. Can you cite examples where the "expertise" failed?

Mr. CLAEYS. I hope this is answering your question. It may be an answer to a different question. I can cite and did cite in my testimony examples where the claims made on behalf of expertise couldn't justify the regulation that was being put forward. So, for instance, back in 1980 the Supreme Court considered a challenge to a rule to impose bending standards to put in a one-part-per-million restriction on the amount of benzene in the workplace. And the Occupational Safety Health Administration had three or four pieces of data. Some was about studies done of workers in Turkey who made shoes and were exposed to benzene and some of them contracted leukemia. Some had to do with people who made glue in Italy and they contributed leukemia. Some had to do with general medical data and people who contracted blood deficiencies. But the exposures to which all those people were subjected were 150 parts per million up to 650 parts per million for leukemia or 25 parts per million for the people who suffered the blood deficiencies. There are laboratory tests on mice and rats that suggested that other chemicals caused health problems at one part per million, but not benzene.

The point of my testimony is just to show in a situation like that, there is a tremendous amount of extrapolation that the agency needs to take from the three or four data points to say that there is a safety problem at one part per million.

In a situation like that, there are two or three really political choices. First, how do you interpret three or four pieces of data? Second, assuming that you think it creates some possibilities of a health risk, does the agency think the technology exists to impose the standard? And, third, what are the cost-benefits economically?

And if you put the three of those together, it is just simply not expertise that is justifying the extension of this data into a rule. There are three political choices being made, and it would be better, more accountable, if Congress took ownership of those choices by embracing a joint resolution of approval.

Mr. GOWDY. All right. Thank you.

I have run into a red light, and the Committee would recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

This is an astounding hearing to me.

Are you aware, Professor, that 66 law professors, plus a former California Supreme Court justice, have all sent in a letter to us giving 5 reasons why they express their opposition to the passage of the REINS Act?

Mr. SCHOENBROD. No, I am not. Put it this way: I have been a law professor a long time, and I never cease to be astounded by what law professors conclude.

Mr. CONYERS. Well, I noticed. I have been listening to you all afternoon, and I never—I am always astounded by some of your comments. So I accept your remark.

Now, let me ask Professor Claeys, are you familiar with this letter dated February 8th, 2011, from—I am going to put it in the record, by the way—66 law professors, including a former Supreme Court justice, stating 5 reasons why they oppose the passage of the REINS Act?

Mr. CLAEYS. No, Congressman Conyers, I am not.

Mr. CONYERS. All right.

Let me ask you—you are not a professor, Mr. David Goldston?

Mr. GOLDSTON. Not currently. I have been.

Mr. CONYERS. Well, are you aware of the letter that I have been asking about?

Mr. GOLDSTON. Yes, I am.

Mr. CONYERS. So the two professors are not aware of the letter, and the one former professor is aware of the letter.

Well, I ask unanimous consent to enter the letter from the 66 law professors into the record, Mr. Chairman.

Mr. GOWDY. Without objection.

[The information referred to follows:]

March 14, 2011

The United States Senate
Washington, D.C. 20510

The United States House of Representatives
Washington, DC 20515

Dear Members of Congress:

We are writing, as individuals, to express our opposition to passage of the REINS Act. In signing the letter, we have included our titles and the institutions at which we teach for purposes of identification.

Under the proposed legislation, no "economically significant" regulation would take effect unless affirmatively approved by Congress, by means of a joint congressional resolution of approval, which is signed by the President. If a joint resolution is not enacted into law by the end of 70 session days or legislative days, the regulation is not legally valid and it will not go into effect. As law professors who teach administrative and environmental law, we consider the proposal to be unnecessary to establish agency accountability and unwise as a matter of public policy because it undercuts the implementation of laws intended to protect people and the environment.

We oppose the REINS Act because:

1). *The REINS Act would replace the strengths of agency rulemaking with the weaknesses of the legislative process.*

The current system of administrative agencies of the federal government began more than 100 years ago, and matured through the 20th century. It was codified in its present form in the Administrative Procedures Act (APA) passed in 1946. In order to take advantage of the scientific, economic, legal, and other expertise in agencies, Congress has delegated to them rulemaking authority. Congress has also recognized that agencies are more insulated from the political process. Although agencies are (and should be) subject to political influence, agencies must also have legal justifications for their actions. When agency rules are appealed, the federal courts ensure that regulations are backed up by reasonable policy justifications and are consistent with the statutes passed by Congress.

While superficially it may seem like a good idea to make Congress the final arbiter of all significant regulatory decisions – after all, Members of Congress are elected and regulators are not – neither most Members of Congress nor their staffs are likely to have sufficient expertise regarding complex regulations to make a considered decision whether to adopt a regulation, particularly within the limited time frame legislators would have to act. Congress has scaled back staffing levels and, unlike agencies, Congressional offices do not employ doctors, epidemiologists, botanists, statisticians, etc.

Even if Congress did have the necessary expertise to review regulations, the type of

careful and time-consuming review that would be required would pose a burden on it, diverting members and their staffs from other business. Since this review would have to occur within a short time frame, the REINS Act has the potential to stop (or at least slow) important other business, assuming that legislators and their staffs actually spent the time necessary to understand complex regulations.

It is also uncertain that Congress can or will tear itself away from other pressing business in order to consider approval of pending regulations. In particular, a 70-day deadline is unlikely to give the Senate sufficient time to pass a resolution of approval, turning the Act into a type of a congressional pocket veto for significant regulations.

Finally, unlike agencies, Congress does not need to have a reasonable policy justification for refusing to approve a regulation. Any disapproval is therefore more likely to reflect the political power of special interests, a potential that would be magnified in light of the fast-track process. This makes the Act a thinly veiled effort to subject regulations to greater political pressure than the opponents of regulation can bring to bear on an agency.

2) *Congress already has the power to stop regulations if extreme circumstances dictate.*

The Congressional Review Act (1996) requires agencies to submit new final rules to Congress for review, delaying the effective date of those rules to permit Congress to block them, and establishes a fast-track process for legislation proposed to overrule a regulation. Disapproval legislation must pass both houses and be signed by the President. Congress has only used this authority once, in 2001, to overrule an OSHA ergonomics rule.

More broadly, Congress can at any time narrow the rulemaking power it has delegated to an agency by amending its statutory mandate. This solution to a problem with agency discretion, should one exist, gives Congress an opportunity to consider carefully the pros and cons of limiting agency discretion, as compared to the rush to judgment required by the REINS Act.

3) The Act is counter-democratic

The congressional review law requires a majority of both the House and the Senate and a signature by the President to change what a previous Congress and President had approved – a law authorizing an agency to adopt legally effective rules. In the REINS bill, by comparison, less than a majority in either house can block what a previous Congress and President approved – the authority of an agency to adopt legally effective rules. This is not democratic; it is counter-democratic.

Moreover, the REINS Act amounts to an effort by Congress to evade responsibility, not assume it. If the President signs a joint resolution and a regulation becomes a law, regulated entities are authorized to challenge the legality of the regulation on any procedural or substantive ground they might have had if the agency itself still had discretion to adopt the regulation as legally binding. Normally, when Congress passes a law, it can be legally attacked, but only on grounds that the law is beyond Congress' authority to adopt the law or Congress failed to use the procedures to adopt the law

required by the Constitution. Yet, the language of the REINS Act would give regulated entities a surprising and peculiar gift, permitting them to challenge a regulation on grounds that would ordinarily be mooted by Congress' passage of the law. It is unclear how Congress can pass a law approving a regulation and still purport to give that approval no legal effect. But the effort to do so indicates that the sponsors of the REINS Act are unwilling to allow Congress to step forward and take the responsibility for passing a law enacting a regulation into place, despite their professed aim of increasing legislative accountability.

4) If it is not broken, don't fix it.

While the regulatory system is not perfect, it has over the years led to vast improvements in lives of millions of Americans, by making the air cleaner, the water purer, food, drugs and cars safer, and the environment more secure, among many other achievements. We believe that the REINS Act is likely to disrupt the regulatory system, and thereby deny Americans the additional reasonable protections the system can deliver. And, as we take up next, there is no sufficient reason for to risk this disruption.

5) *The regulatory process is accountable even though regulators are not elected.*

Agencies develop regulations to implement laws passed by Congress, soliciting comment from affected parties and the public. The White House Office of Information and Regulatory Affairs (OIRA) vets drafts of significant regulatory proposals. Once agencies issue final regulations, Congress has a fast-track opportunity to block them. Members of Congress can lobby the agency during the rulemaking process, and congressional committees can hold hearings to raise questions about an agency's plan to promulgate regulations (or review regulations that have been issued). And, as previously mentioned, regulations are subject to judicial review. The courts ensure that agency rulemakings are consistent with the underlying organic statutes, while also ensuring that agencies have issued an adequate written response to the evidence and policy arguments in the rulemaking record that are contrary to the rule that was adopted. Thus, under current law, by the time a regulation is finally adopted, two and usually all three branches of government have weighed in, and advocates on all sides of the relevant issues have ample opportunity to affect the outcome.

For the previous reasons, we oppose passage of the REINS Act. Thank you for consideration of our views.

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Mr. CONYERS. Now, let me ask you, Mr. Goldston—you are on the Natural Resources Defense Council—do you believe that there is quite sufficient process that already exists for us to deal with

this problem of how we get rulemaking agencies to determine their own rules?

Number five in the letter I just introduced into the record follows this sentence: "The regulatory process is accountable even though regulators are not elected," and that they have—that the agencies develop regulations to implement laws. They solicit comment from the affected parties and the public. The White House and the Regulatory Affairs goes through drafts of significant regulatory proposals. The agencies issue final regulations, but Congress has a fast-track opportunity to block them, and sometimes this happens.

Can you comment on the lack of necessity for us to bring in this incredible notion that we are going to regulate executive decisions from the White House because we feel that they are questionable?

Mr. GOLDSTON. Yes. There are, I think, at least three ways in which the theory behind this, in terms of what is missing now, is misguided. Two of them are discussed in the part of the letter you just mentioned.

So, first is that the agencies are constrained by law and by politics, actually, because they operate in a political context. So I think the agencies do not have carte blanche, or I think in Professor Claeys' testimony at one point he said a blank check. I don't think that is the case. And, in fact, Professor Schoenbrod mentioned NRDC lawsuits against agencies that he was involved in. Those are only possible because there is a statute that allows it. So that is one way in which there is accountability now, to some degree.

The second is—and I think more relevant to this—is that Congress, itself, has a huge number of tools at its disposal, formal and informal, to intervene in the regulatory process, including the ability to block individual regulations, wisely or otherwise.

But the third issue is, the matter seems to be whether there is any electoral accountability. We just went through an election, in fact, an election that gave new life to this proposal, where Members felt that they got elected because the public didn't like the regulatory regime that we have now. This seems——

Mr. GOWDY. Mr. Goldston, I hate to interrupt you. Let me ask you if you could summarize it in just a couple more sentences. We have run into the stop sign.

Mr. GOLDSTON. Sure. Absolutely.

So I think there is—the recent elections shows there is accountability. I think some of the most controversial regulations that have been brought up will feature in future elections. And so, the notion that there is no political accountability, in addition to the other kinds of accountability we are talking about, I think is hard to maintain.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

Mr. GOWDY. Thank you, Mr. Conyers.

The Chair would now recognize the distinguished gentleman from Florida, Mr. Ross.

Mr. ROSS. Thank you, Mr. Chairman.

Gentlemen, interesting, a couple of months ago, I was talking to an elementary class about American government and, of course, talked about the three branches of government. And since we have had, as the distinguished gentleman from Michigan pointed out,

had several hearings here lately on the regulatory process, I think I now have to amend my talk about the fourth branch of government called the regulatory agencies.

And I say that somewhat in jest, of course, because I think that the regulatory environment has been good. I think it has provided a good platform of a delegation of duties by the Congress to make sure that we have the proper health, safety, and welfare of the American citizens addressed. But I also think that we are here today on the REINS Act because of what I consider to be regulations gone wild.

And my concern has to do with the appellate review process. And I would like to ask the two professors specifically. If you could just summarize briefly, if I have an adverse ruling, how long does it take to have that brought to resolution?

Professor Schoenbrod?

Mr. SCHOENBROD. Well, at least the year in the court of appeals, often a couple of years. And then if the Supreme Court—then one could petition for certiorari to the Supreme Court. And if the Supreme Court takes jurisdiction, then it could be another couple—you know, a long time after that. So it is a very prolonged process. And even, you could add to that rehearings, that kind of thing. And the 70 days that—so that means that, really, by the time that the judicial review process is just getting under way, the whole REINS process is over.

Mr. ROSS. Exactly. I mean, this is an expedient way of appellate review, is it not, by the people or the body that empowers those to make the regulations?

Mr. SCHOENBROD. Yes.

Mr. ROSS. And, Professor Claeys, I mean, has it been your experience, in dealing with the Administrative Procedures Act and the regulatory environment, that the recourse out there is so prohibitive that those that are affected by it stand nothing to gain by challenging it?

Mr. CLAEYS. Congressman, I wouldn't say that litigants have nothing to gain. It happens fairly often that people can win victories using an APA lawsuit. But an APA lawsuit is very costly. And, also, there is a tremendous amount of loss of stability or security to have one's affairs be suspended for 18 months or longer while wading through a suit. And so those costs do deter people, yes.

Mr. ROSS. And so, Professor Claeys, would you say, under the REINS Act now, if the agency gets it wrong and Congress disapproves it, would it not be a way of sending a message back to that agency to go and get it right and come back with a different regulatory rule or action?

Mr. CLAEYS. Congressman, I would want to be careful here because the REINS Act is very specific to reserve to parties all APA challenges that they would have, whether or not the rules were approved.

So the REINS Act adds another check, and that check is to say that there was not the substantial consensus that you need in two branches of the House—or, sorry, the two parts to the Congress and the President to let the rule go forward politically, but then the litigant does reserve all rights to bring a suit afterwards.

Mr. ROSS. And let me clarify that a little bit. What I am suggesting to you is that, if the REINS Act were law, it would not foreclose agency action on a particular issue. It would merely mean that Congress has spoken and has now instructed that agency to go back and revisit it, and they could and address it in a different fashion.

Mr. CLAEYS. That is right. If Congress does not act, it is a signal to the agency that the agency did not come forward with the justification that seemed legitimate enough to an encompassing majority, as proven by surviving bicameralism and presentment. And if it does do its homework, it will pass, and then things can go forward.

Mr. ROSS. Mr. Goldston, I know that you are with the Natural Resources Defense Council. Has that organization ever had any officials be appointed to any agency that might oversee or interpret regulatory rules?

Mr. GOLDSTON. Do you mean, have NRDC former staff become Federal officials? Yes.

Mr. ROSS. Right, right.

And with regard to a blog that I think that you do and one that I think was just done yesterday, you indicate, "As I mentioned last week on my blog, one of the most destructive aspects of the House spending bill for the rest of this year is that it contains 19 anti-environmental riders. The list of anti-environmental riders compiled by NRDC is here. Note these riders do not change the amount of Federal spending by 1 cent. They just block public protections that are otherwise required by law."

And you list as one of those a particular amendment offered by the gentleman from Florida, Representative Rooney, that would block a plan to clean up Florida waterways. Specifically, that was the Numeric Nutrient Water Criteria deal, wasn't it?

Mr. GOLDSTON. Right.

Mr. ROSS. Now, as a native of Florida and a member of the Florida—past member of the Florida legislature, I take to heart how we handle the waterways in Florida. It is how we make a living. It is what we rely on not only for our industry but also for our tourism.

And, actually, that Numeric Nutrient Water Criteria standard has not yet—while it has been promulgated, it has not been implemented. Is that correct?

Mr. GOLDSTON. That is my understanding.

Mr. ROSS. So, in effect, what you have said there is not really true because it is not an existing law and it did not impact the environment because it has not been implemented yet.

But be that as it may, that particular rule would require over a billion dollars in expense by industry just to implement. It would cost over 1,400 jobs.

It seems to me that a cost-benefit analysis is absolutely necessary if we are going to determine the effectiveness of any particular regulatory rule. Wouldn't you agree?

Mr. GOLDSTON. Some laws allow for that, and some don't. But, under Executive order, there is usually a cost-benefit analysis done.

Again, the point of that blog was to talk about whether it was the right decision for the House to use the spending bill to block implementation of these particular pending rules. But there is no

question that Congress has the legal authority to do that, which is one of the tools that they have which seems to make the REINS Act seem both unwise and redundant.

The other thing, if I might, Mr. Ross, you talked about Congress sending back a rule to an agency to be reworked, but the REINS Act actually prevents the agency from coming back for a year, no matter how simple the change would be.

Mr. ROSS. Thank you. I think my time is up.

Mr. GOWDY. Thank you, Mr. Ross.

The Chair would now recognize the distinguished gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Professors, I know a lot of professors pay attention to United States Supreme Court rulings as they come down. Are you two also students of the U.S. Supreme Court and the various rulings that come down?

Mr. SCHOENBROD. I concentrate more on environmental law, though I read some of the Supreme Court opinions.

Mr. JOHNSON. Uh-huh. Okay.

Mr. CLAEYS. I concentrate on political theory and on property law. I try to read the major court opinions as they come down——

Mr. JOHNSON. Uh-huh.

Mr. CLAEYS [continuing]. Especially constitutional opinions.

Mr. JOHNSON. Yeah. Did you consider the constitutional opinion rendered by the Supreme Court in the case of Citizens United, which implicated the First Amendment? Did you, Professor Claeys, consider that to be a very important case and ruling?

Mr. CLAEYS. No, Congressman, I didn't because——

Mr. JOHNSON. All right, okay, all right.

Well, how about you, Professor Schoenbrod?

Mr. SCHOENBROD. No, I have not studied that case.

Mr. JOHNSON. Okay. So neither one of you would be prepared to venture an opinion as to how the ruling in Citizens United would impact, on the ground, as things work, the REINS Act, if it were passed? You would not be able to comment about the ruling in Citizens United, the effect that it would have the on rulemaking process if the REINS Act passed?

Mr. CLAEYS. If I could clarify, I want to give you two different answers.

Mr. JOHNSON. Okay. Well, I want you to keep it short.

Mr. CLAEYS. As a lawyer, I don't think the opinion is applicable.

The other part of your question asked of the political consequences, and on that I have not speculated. I don't have the expertise to speculate.

Mr. JOHNSON. Okay. All right.

And you either? You would be the same way?

Mr. SCHOENBROD. Well, I have not read the opinion. I think what may be behind your question, Congressman——

Mr. JOHNSON. Well, let me just tell you. If a corporation is recognized as a person for the purpose of a First Amendment right, and if a corporation can invest huge sums of money to control an election and that money can elect the legislators whom business favors, and as Congress does its business and lobbyists come forward to the Congresspeople and start to tell them about the effects of var-

ious rules pursuant to legislation that has passed, the effect of these rules on the corporate bottom line, I believe that that could be influential in terms of the rulemaking process.

And, certainly, politicians would be accountable for rulings so made. But is that what we really want to do, take our rulemaking away from one based on, as in your testimony, Dr. Goldston, is based on expertise, rationality, and openness and replace it with a process that is strictly political? Whoever has the most economic clout can cause whatever rules that benefit them to be the ones that are implemented? Is that what we really want here in America?

And I find it, Professor Schoenbrod, instructive that your book, "Saving Our Environment From Congress," deals with the impact of environmental regulations. And, also, you mention something about health regulations. These are the things that are under attack now by the interests that elected this new Congress. And so I find it interesting that you would be in support of the REINS Act.

But what do you have to say, Professor Claeys?

Mr. CLAEYS. Congressman Johnson, I want to bracket a few different issues. I am not competent to talk about the ways in which corporations lobby at a real specific level. What I tried to do, though, in my testimony was to restate and to provide to this Subcommittee some of the findings in economic and political-science scholarship about how businesses try to influence regulation. And there is a well-developed body of economic and political-science scholarship under the rubric of the theory of economic regulation.

And maybe, to put it in a sentence, the main lesson from that scholarship is that corporations pressure both Congress and the regulators. And when trying to figure out the way in which a certain regulatory system is going to generate outcomes, you have to anticipate that possibility and their costs all around.

Mr. JOHNSON. Thank you, sir.

Thank you, Professor.

And I am sorry I didn't get to you, Mr. Goldston.

Thank you.

Mr. GOWDY. Thank you, Mr. Johnson.

The Chair would now recognize the distinguished gentleman from Arizona, Mr. Franks.

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

Gentlemen, thank you for being here.

My first question would be for you, Professor Claeys. You know, the obstensible purpose for the REINS Act here is to try to, obviously, reassert congressional authority so that we might make the final legislative calls in an effort to help our regulatory system better conform to the Constitution itself. At least, that is the goal.

And would you take issue with that?

Mr. CLAEYS. A little. There is a—let me put it this way. Current precedent in institutional practice allows Congress to delegate considerable discretion to agencies. This bill does not reclaim all of that discretion. It leaves executive branch agencies with that discretion. It adds for significant exercise of rulemaking power a check, a permission slip.

So that formally does not reclaim the power, but it does have the effect politically of making agencies go back to Congress and mak-

ing Congress take ownership of the hard, kind of, political conflicts I talked about, in terms of evidence and science and technology and economics.

Mr. FRANKS. Well, I actually agree with you completely.

Now, you would probably agree that critics who allege that the REINS Act is biassed against the public interest and public protection—I mean, that is essentially their argument, that somehow the REINS Act is antithetical to the public interest. And I am just wondering if you agree with that or place any credibility in that in any way.

Mr. CLAEYS. Congressman Franks, one of the important points of my testimony was to provide a polite warning that there is some truth to that—there is—it is true that regulation can be—in the absence of regulation, the public interest can be heard. But it is equally true that the public interest can be heard if there is too much regulation.

And one of the things I was trying to impress in my testimony is simply that you have to be—want us to be careful that regulations may be against the public interest. And in those cases in which the regulations might be in the public interest, quite often I think it likely that Members of Congress, if they don't see a compelling argument against the regulation, will endorse the joint resolution of approval.

So, to me, the burden lies on people who oppose the REINS Act to explain precisely why Members of Congress won't endorse, embrace a joint resolution of approval for a bill that seems to be in the public interest.

Mr. FRANKS. Well, I guess my point here is that it seems like the critics of the REINS Act suggest that giving constitutional or giving congressional signoff is biased against the public interest. That is, at least, their suggestion. And they would go further and suggest that—some of us would say that the regulatory agencies seem to be biased in exactly the opposite direction.

What do you think is the reason for that understanding on the part of both sides? Do you think it is accurate? And why does that dynamic seem to—I mean, it seems to me there is something to that dynamic. It seems like a bureaucracy or a regulatory agency seems to have a tendency, a momentum to go overboard, sometimes antithetically, to the public interest, whereas, if you have people that are voted into office, it seems like the public interest is more carefully considered.

Mr. CLAEYS. And here, Congressman, I go back to a fundamental choice as stated in my opening testimony, in my written testimony. There is a dispute in this country about the proper relationship between freedom and regulation. And one political tradition is most notably in Federalist 51. It says that government is needed for men because men are somewhere between angels and beasts.

And if you take that view, you presume in favor of liberty. And there will be times when law is needed, but you want to have a system where people who want to co-opt and capture the law have to make a convincing argument to the lawgiver that it is a good law. And the Constitution can't institute that perfectly, but it can use the fact that a law has to pass through the House and the Sen-

ate and be signed by the President as indirect proof that it really is in the public interest.

There is another theory about the relationship between freedom and government that says that people aren't meaningfully free unless government is very active. And the progressives and New Dealers laid this out. I think that, in contemporary life, some agencies act to empire-build, but many do not. But many of the regulators who do not, make assumptions about the relationship between freedom and regulations similar to those of the New Dealers. And they, however well-intentioned, think that government is better if the regulations are presumptively valid unless knocked out by an APA lawsuit.

And it is perfectly legitimate for them to believe this, and there are many parts of contemporary practice that allow them to do so. But that choice is a political choice. And if this Congress wants to make a different choice and take things in a different direction, the Necessary and Proper Clause in this Congress' legislative power allow it to do so, as it is considering doing for major rules.

Mr. FRANKS. Mr. Chairman, I think that is well-said, and the red light prevents me from asking Mr. Goldston my questions. Thank you.

Mr. GOWDY. Thank you, Mr. Franks.

On behalf of all of us, we would like to—the Chair would recognize the gentlelady from Texas, Ms. Jackson Lee, is present and has been present for the majority of the testimony and the questioning. And we thank you for your presence.

Ms. JACKSON LEE. And a Member of the full Committee.

Mr. GOWDY. And a Member of the full Committee, yes, ma'am.

With that, let me thank, on behalf of all of us, the panel for your professionalism, your collegiality toward one another and during the question-and-answer session. We have all benefitted from your testimony and the Q&A.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again, on behalf of all of us, thank you for your testimony and your questions and answers. This meeting is adjourned.

[Whereupon, at 5:23 p.m., the Subcommittee was adjourned.]

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