THE VIEWS OF THE INDEPENDENT AGENCIES ON REGULATORY REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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CONTENTS

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THURSDAY, JULY 7, 2011

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

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2322 of the Rayburn House Office Building, Hon. Cliff Stearns (chairman of the subcommittee) presiding.

Members present: Representatives Stearns, Terry, Burgess, Blackburn, Bilbray, Scalise, Gardner, Griffith, Barton, DeGette, Schakowsky, Castor, Markey, Green, Christensen, and Waxman (ex officio).

Staff present: Allison Busbee, Legislative Clerk; Stacy Cline, Counsel, Oversight; Todd Harrison, Chief Counsel, Oversight & Investigations; Brian McCullough, Senior Professional Staff Member, Commerce, Manufacturing, and Trade; Andrew Powaleny, Press Assistant; Alan Slobodin, Deputy Chief Counsel, Oversight; Sam Spector, Counsel, Oversight; Kristin Amerling, Democratic Chief Counsel and Oversight Staff Director; Michelle Ash, Democratic Chief Counsel, Commerce, Manufacturing, and Trade; Phil Barnett, Democratic Staff Director; Tiffany Benjamin, Democratic Investigative Counsel; Jocelyn Gutierrez, DOE Detailee; Karen Lightfoot, Democratic Communications Director, and Senior Policy Advisor; Felipe Mendoza, Democratic Counsel; Ali Neubauer, Democratic Investigator; and Roger Sherman; Democratic Chief Counsel, Communications and Technology.

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

Mr. STEARNS. Good morning, everybody. The Subcommittee on Oversight and Investigation will come to order, and there will be an opportunity for each of us to give an opening statement, and I shall open with mine.

President Obama's Executive Order 13563 states that agencies must take into account the costs and benefits of proposed regulations; use the least burdensome methods to achieve regulatory goals; maximize net benefits; and evaluate alternatives to direct regulation.

The Order also requires agencies to conduct periodic reviews of significant regulations to determine whether they are outmoded, ineffective, insufficient, or excessively burdensome. These retrospective reviews have been required for more than 30 years, and

if conducted as intended, could be a crucial tool in reducing the burden of regulation on our economy today.

As chairman of this subcommittee, I have set out to ensure that these goals are simply achieved. Regulations cost money, and in today's weak economy, we cannot afford such burdens when they are totally unnecessary. During our June 3rd hearing, Mr. Cass Sunstein of OMB indicated that although independent agencies were not bound to comply with the Executive order, he believed that they should.

Unfortunately, none of the independent agencies under the committee's jurisdiction have to date complied with the Executive order.

We are holding this hearing today to ask the CPSC, the FCC, the FTC and FERC to explain why they did not submit a regulatory review plan to Cass Sunstein by May 18th, as they were asked to do. While each of these agencies engages in some degree of regulatory review, none of them conduct the kind of top-to-bottom, regular retrospective review that will help to unburden our economy.

The CPSC, perhaps more than any other agency today, seems determined, in our opinion, to pass regulations without even a hint of regulatory humility. Commissioner Northup will testify that CPSC regulations are estimated to cost industry billions of dollars with no cost-benefit analysis done to justify those regulations and no analysis done to show improved safety for our children. Commissioner Northup has also submitted for the record today a list of businesses that have closed their doors in part because of CPSC regulations.

Now, we realize many of the CPSC's most damaging regulations are required by the CPSIA, which has had a number of unintended consequences. Until Congress can act to reform that law, we would hope the CPSC would use its discretion where possible to comply with the President of the United States Executive order. Where CPSC doesn't have discretion, we would hope the CPSC Democrat commissioners would be cooperative in helping this committee identify where they need more discretion rather than sending last-minute partisan letters meant to derail the reform process.

Meanwhile, Congress asserted deregulatory goals in regard to the FTC decades ago, removing its authority to operate under the Administrative Procedure Act and instead instituting Mag-Moss procedures, created under a Democratic Congress to halt the agency from further significant rulemaking. Today, the agency resorts to rulemaking through orders and guidelines that do not undergo a notice and comment process.

Although FERC does not issue a large number of regulations, there is room to improve in its rulemaking and regulatory review also. FERC regulations call for broad ranges of data sets without a clear indication on how the agency utilizes this information. It has not conducted a top-to-bottom review of its regulations since the Clinton Administration. And it is unclear what, if any, cost-benefit analysis is done of the impact its policies have on the energy industry and consumers.

Now, as for the FCC, in drafting both the Communications and Telecommunications Acts, Congress emphasized the importance of deregulation. The FCC is required to review its telecommunications

regulations every 2 years and its media ownership rules every 4 years. But these reviews fall short of what the President and this committee have asked agencies to do. They only cover a narrow set of rules at the FCC and the commission can't seem to get these reviews done on time, and the commission hasn't repealed or modified any significant regulations in recent review periods. Perhaps that is because the commission is too busy taking conclusion-driven actions, such as the Net Neutrality Order and the Chairman's Section 706 report.

So my colleagues, I look forward to learning more about what each agency will do to adopt the principles of the President's Executive order. I hope the format of this hearing gives you all the opportunity to learn about what other agencies are doing to improve these processes.

[The prepared statement of Mr. Stearns follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS

President Obama's Executive Order 13563 states that agencies must take into account costs and benefits of proposed regulations; use the least burdensome methods to achieve regulatory goals; maximize net benefits; and evaluate alternatives to direct regulation. The Order also requires agencies to conduct periodic reviews of significant regulations to determine whether they are outmoded, ineffective, insufficient, or excessively burdensome. These retrospective reviews have been required for more than 30 years, and if conducted as intended, could be a crucial tool in reducing the burden of regulation on our economy.

As Chairman of this Subcommittee I have set out to ensure that these goals are achieved. Regulations cost money, and in today's economy we cannot afford such burdens when they are unnecessary. During our June 3 hearing, Cass Sunstein of OMB indicated that although independent agencies were not bound to comply with the Executive order, he believed that they should. Unfortunately, none of the independent agencies under the Committee's jurisdiction have to date complied with the Executive order.

We are holding this hearing today to ask the CPSC, FCC, FTC, and FERC to explain why they did not submit a regulatory review plan to Cass Sunstein by May 18, as they were asked to do. While each of these agencies engages in some degree of regulatory review, none of them conduct the kind of top to bottom, regular retrospective review that will help to unburden our economy.

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I look forward to learning more about what each agency will do to adopt the principles of the President's Executive order. I hope the format of this hearing gives you all the opportunity to learn about what other agencies are doing to improve their processes.

Mr. STEARNS. With that, I yield to the ranking member, Ms. DeGette.

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

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

This is the fourth in a series of hearings examining the government's regulatory review process, and I frankly am pleased to hear you today embrace the President's Executive order that sets forth principles of regulation protecting public health, welfare, safety and the environment while at the same time promoting economic growth and competitiveness. I thought that Cass Sunstein was an excellent witness talking to us about how we can all agree on a bipartisan basis that we should eliminate unnecessary regulations at the agencies.

Now, today we have witnesses, and I am happy to welcome all of them, particularly our former colleague, Congresswoman Northup, and these witnesses represent four important independent federal agencies: the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, and the Federal Trade Commission. Now, Congress created these agencies as independent entities, and so therefore, as you noted, Mr. Chairman, they are not covered explicitly by the President's Executive order on regulatory review. But it is important, though, for the subcommittee and the public to understand whether the independent regulatory review processes at these agencies are effective and efficient.

I would like to correct the record. Mr. Sunstein when he testified, he said he had urged these independent agencies to conduct regulatory review processes but he did not say that they should submit reports to him like the agencies under the purview of the Executive order, so I was a little confused, Mr. Chairman, when you had said that somehow they should submit reports because not only are they not required to but Mr. Sunstein himself does not believe that these agencies are directly subject to the Executive order and that is an order to pervert any President, Democrat or Republican, from overreaching their authority.

Now, as we hear from these agencies on their regulatory review efforts, I think we need to keep a few thoughts in mind. First of all, these agencies were created originally as independent entities

to insulate them from political influence and we have given them decision-making flexibilities that other agencies do not have. Secondly, irrespective of the Executive order, as I mentioned, there are a number of statutory requirements concerning transparency and efficiency in the regulatory process that already apply to the independent agencies. For example, the Regulatory Flexibility Act requires federal agencies, including independent agencies, to analyze the impact of their rules on small organizations. The Administrative Procedure Act broadly lays out the scheme under which agencies propose and finalize regulations, and provides for public participation in the rulemaking process.

Finally, it is important to remember that the underlying mission of all of the agencies before us today is to ensure the safety and the health of all of our citizens. While we should make sure that the regulations they propose are well crafted and not overly burdensome, we should also acknowledge the importance of the work hey do and the regulations they promulgate. For example, this year, the FCC issued a report and order to adopt a rule requiring mobile providers to enter data roaming arrangements with other providers, allowing consumers to remain connected when they travel outside of their provider's coverage area. FTC recently established the Do Not Call registry, which lets consumers choose whether they want to receive calls from telemarketers. This is wildly popular with my constituents, by the way. And every day, FERC acts as a neutral adjudicatory body handling extremely complicated technical issues on the electricity market.

But I want to talk just in the last minute that I have about the recent proposals on the other side of the aisle that would undermine the Consumer Product Safety Commission and some of the other good work that they have done. Three years ago, this committee and this Congress worked hard in a significantly bipartisan manner to put meaningful reforms for consumers into the Consumer Product Safety Improvement Act. This has yielded unbelievable benefits. The CPSC has initiated a wide range of recent efforts to protect children from mandatory standards to cribs to the problem of dangerous toys to banning certain phthalates, and on and on. And this evidence shows that it is beginning to happen.

So I think it is important to notice that these reforms were worked out by this committee in one of the last great efforts that was completely bipartisan. We should embrace that. If there are problems with the way the regulations are being promulgated, we need to talk about that, but eliminating these important consumer product safety provisions is simply not an option.

Thank you, Mr. Chairman.

[The prepared statement of Ms. DeGette follows:]

PREPARED STATEMENT OF HON. DIANA DEGETTE

Today, we are holding the fourth in a series of hearings examining the Federal Government's regulatory review process. The Subcommittee has been focused in particular on President Obama's Executive order setting forth principles of regulation that include protecting public health, welfare, safety, and the environment while promoting economic growth and competitiveness; and providing for public participation and transparency.

The witnesses before us today represent four important federal agencies: the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the

Federal Communications Commission, and the Federal Trade Commission. Because Congress created these agencies as independent entities, they are not covered by the President's Executive order on regulatory review. It is important, however, for the Subcommittee and the public to understand whether the regulatory process employed by each of these agencies is effective and efficient.

As we hear from these agencies on their regulatory review efforts, we should keep a few thoughts in mind. First, Congress created these agencies as independent entities to insulate them from political influence and granted them decisionmaking flexibilities other agencies do not have.

Second, irrespective of the Executive order there are a number of statutory requirements concerning transparency and efficiency in the regulatory process that already apply to the independent agencies. For example, the Regulatory Flexibility Act requires federal agencies, including independent agencies, to analyze the impact of their rules on small organizations. The Administrative Procedure Act broadly lays out the scheme under which agencies propose and finalize regulations, and provides for public participation in the rulemaking process.

Finally, it is important to remember that the underlying mission of all of the agencies before us today is to ensure the health and safety of our citizens. While we should make certain the regulations they propose are well crafted, we must also acknowledge the importance of the work that they do and the regulations they promulgate. For example:

o This year, FCC issued a report and order to adopt a rule requiring mobile providers to enter data roaming arrangements with other providers, allowing consumers to remain connected when they travel outside of their provider's coverage area.

o FTC recently established the Do-Not-Call registry, allowing consumers to choose whether they want to receive calls from telemarketers.

o CPSC has initiated a wide range of recent efforts to protect our children, from developing mandatory standards for cribs . to addressing the problem of dangerous toys . to banning certain phthalates in children's products.

o And every day, FERC acts as a neutral adjudicatory body handling extremely complicated technical issues concerning our electricity market. Through its work the Commission limits regional disparities in electricity, natural gas, and oil pricing.

I am pleased that we have before us today Commissioners from both parties. One of the ways Congress ensured bipartisan input at these agencies was to provide that no more than three Commissioners at the agencies can be of the same party. I hope that the Subcommittee will use this opportunity to hear a variety of perspectives on how to best ensure an effective regulatory process at the independent agencies, and that avoid focusing on policy or personality disagreements among Commissioners. I look forward to hearing from our distinguished witnesses.

Mr. STEARNS. I thank the gentlelady.

The gentleman from Nebraska, Mr. Terry, is recognized for 3 minutes.

OPENING STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. TERRY. Well, thank you, Mr. Chairman. I appreciate you holding this important regulatory reform hearing.

I applauded the President when he issued his Executive order creating this cost-benefit analysis and look towards creation of jobs versus elimination of jobs by regulation, and I feel that it is time that the independent agencies adopt this and that is why I have introduced H.R. 2204, the Employment Act, which will require that all major regulations include a statement of the number of jobs created, lost, or sent overseas because of the new rules and regulations. Under this Act, all major federal action significantly affecting jobs and job opportunities require rigorous analysis compared to that given to the environmental impacts, and this legislation would establish a policy that jobs are important as is public health and the environment. And this would be an issue of, you could take into effect the jobs lost by certain American toy companies when we fig-

ure out that children don't eat ATVs but yet banning children ATVs could have an impact on jobs.

Now, we have already seen the problems caused by regulators not paying enough attention to the effect their actions have on jobs. In my own district, regulations enacted by the Consumer Product Safety Commission acting far beyond its authority or intent of this law, what I feel isn't one of the most important ones, it is important but I think it may be an example of one of the most poorly written bills too. For example, Wes and Willie's. I shouldn't have used their name but it is a local small business making children's clothes, some of which they have contracted to have done in China as well as Omaha. Does it really make sense that the same design has to be tested on every size of tee shirt, different color of tee shirts? Does it make sense that they have to add 10 tee shirts together assuming a child is going to completely eat 10 tee shirts in one sitting? None of this really makes sense.

So this type of system where it is one size fits all, Mattel versus Wes and Willie's, it really doesn't make a lot of sense. I have found out the irony is that many of these rules don't really protect the consumers but just make it more difficult to do their job, really putting small businesses in particular on the brink of extinction because of these unnecessary rules and regulations.

So I appreciate this hearing so we can protect, and I will give my time back to the chairman.

Mr. STEARNS. I thank the gentleman, and I yield 2 minutes to the gentlelady from Tennessee, Mrs. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and welcome to our witnesses. We appreciate that you are here to talk with us about the President's Executive Order 13563 and its non-application to the independent agencies.

These agencies have refused to voluntarily comply with the order to require justification for the cost and the burdens of their regulations. Some agencies believe that their political ends justify their regulatory means and that their insulation from the traditional checks and balances is a blank check for them to pursue hyperactivist causes. Bureaucrats bolted a restrictor plate to our economic engine and they really have flagged private sector job growth to the pits and now they are resisting voluntary compliance with the Obama order because failing to justify their costly regulations means Congress and the American people are going to raise more questions instead of delegating more power and authority.

Now, these agencies don't know how to make the best individual decisions for us, what foods we eat, what toys we buy, what privacy settings we want on our mobile devices or what light bulbs we prefer to use in our homes. These agencies that use explicit regulatory intimidation and threats of government taking to impose voluntary regulations on job creators aren't even willing to hold themselves to the same standard. They refuse. We need to hold these agencies accountable. Let us ensure greater efforts are taken to balance the economic harms with the agencies that these agencies are causing on our economic growth and jobs, and I yield back.

Mr. STEARNS. The gentlelady yields back, and I recognize the distinguished ranking member, Mr. Waxman, for 5 minutes for his opening statement.

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

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

This is the fourth hearing this subcommittee has had on the issue of regulations. The others have been on the President's Executive order, and the third focused on health regulations that were recently adopted. Now we are looking at the independent regulatory agencies. The President's Executive order applies to those agencies that are under the Office of Management and Budget. They are not independent. The agencies before us are determined by law to be independent. That doesn't mean they don't take into consideration costs and benefits when they issue regulations. They have to have notice and comment and get full input. I think that what we need to do is to make sure we don't have regulations that are unnecessary but these hearings that we have had devolved into forums for questioning health, environment, and consumer protection laws that my colleagues on the Republican side of the aisle find objectionable. I was struck by the comments of the last speaker that we don't want these independent agencies, they don't make good decisions, they don't know how to make the best decisions, they are using regulatory intimidation on jobs creators. I can think of no other expression of hyper view of all this. We shouldn't have a lopsided focus on the costs with no seeming consideration of the benefits, and we haven't had hearings that have resulted in any substantial legislation or important oversight findings.

Now, the four independent agencies have done a lot to make the lives of American citizens better. The Consumer Product Safety Commission recently launched a new consumer complaint database, which allows parents and concerned consumers to obtain important product safety information and which will improve CPSC's ability to identify trends in product hazards more efficiently. Just this morning, I released the first analysis of the product safety database. We found that in its first 3 months of operation, the database has already logged over 1,600 incident reports, including reports of almost 500 injuries or fatalities. And consumers visiting the online database have conducted almost 1.8 million product searches. Now, maybe some of these manufacturers don't want anybody looking over their shoulder but that is not the job of these agencies to do what the manufacturers want. Their job at the CPSC is to protect the consumers.

Mr. Chairman, I would ask unanimous consent that this report be included as part of the committee record.

Mr. STEARNS. Will the gentleman hold? I think we just have a copy of it.

Mr. WAXMAN. I will withdraw my——

Mr. STEARNS. Just withdraw until we have a chance to look at it.

Mr. WAXMAN. The FCC just proposed rulemaking to require cell phone companies to provide usage alerts that warn consumers of unexpected charges on their bills. Less than 7 months ago, the agency adopted a crucial rule to protect the openness of the Internet. I think these are two very important accomplishments, and Ms. DeGette pointed out others. The FTC has recently adopted

rules to protect homeowners from scams falsely promising relief from mortgage payments. In the last year alone, the FTC's Bureau of Consumer Protection filed over 60 cases to protect the rights of consumers. Is this intimidation? It seems to me these agencies are doing their job, and we want to keep them independent from the political pressure that you can see clearly in the comments of members of this committee. FERC protects consumers from price gouging in the electricity and energy markets.

These accomplishments are important. They save money for the American public, prevent fraud and improve public safety and public health. They may offend powerful companies that would like to take advantage of consumers, and which may have support by some members of Congress in carrying their water, but that is no reason for us to browbeat the agencies. The focus of our oversight should be to help these agencies advance the goal of enhancing the lives of the American family.

Our committee is responsible in the area of legislation in some key areas: health care for seniors, setting our Nation's energy policy, promoting telecommunications innovation and competitiveness, and ensuring appropriate consumer protections for American families and children. The oversight work of this subcommittee should shed light on how to best legislate in these and other important subjects.

That is why there are real costs when this committee focuses its time on partisan wheel spinning and messaging. We lose the opportunity to move legislation that will promote jobs, promote economic security and protect the health, safety and welfare of the American public.

I hope that we make good use of our time today with the commissioners, and I urge the chairman and all members to support their efforts on behalf of the American public, and I yield back the balance of my time.

[The prepared statement of Mr. Waxman follows:]

PREPARED STATEMENT OF HON. HENRY A. WAXMAN

Today, this subcommittee is holding its fourth hearing on regulatory reform. The first two hearings focused on the President's Executive order on regulatory review. The third hearing focused on the Administration's recent health regulations.

This time we are focusing on four independent agencies—the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Federal Trade Commission—which are not subject to the President's Executive order.

I support efforts to ensure that federal regulations are clearly drafted and narrowly tailored, and I believe in transparency and eliminating needless regulation. But the focus of the Subcommittee's hearings on regulatory review thus far has not been on improving the regulatory process. These hearings have devolved into forums for questioning health, environment, and consumer protection laws that my colleagues on the other side of the aisle find objectionable. These sessions also have been marked by a lopsided focus on costs with no seeming consideration of benefits. And they have not resulted in any substantial legislation or important oversight findings.

The four independent agencies before us have done a lot to make the lives of American citizens better.

The Consumer Product Safety Commission recently launched a new consumer complaint database, which allows parents and concerned consumers to obtain important product safety information and which will improve CPSC's ability to identify trends in product hazards more efficiently. Just this morning, I released the first analysis of the product safety database. We found that in its first three months of

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These accomplishments are important. They save money for the American public, prevent fraud, and improve public safety and public health. They may offend powerful companies that would like to take advantage of consumers, but that is no reason for us to browbeat the agencies. The focus of our oversight should be to help these agencies advance the goal of enhancing the lives of American families.

Our Committee is responsible for forging legislation in key areas: providing health care for seniors; setting our nation's energy policy; promoting telecommunications innovation and competitiveness; and ensuring appropriate consumer protections for American families and children. The oversight work of this Subcommittee should shed light on how to best legislate in these and other important areas.

That is why there are real costs when the Committee focuses its time on partisan wheel-spinning and messaging: we lose the opportunity to move legislation that will promote jobs, promote the economic security, and protect the health, safety, and welfare of the American public.

I hope the Subcommittee makes good use of our time today with the Commissioners, and I urge the Chairman and all members to support their efforts on behalf of American families.

Mr. STEARNS. I thank the gentleman, and all opening statements are concluded.

I ask unanimous consent that the written opening statement of Mr. Upton and others who wish to provide opening statements for this hearing be made part of the record. Without objection, the documents will be entered into the record.

[The prepared statements of Mr. Upton and Mrs. Myrick follow:]

PREPARED STATEMENT OF HON. FRED UPTON

In January, President Obama issued Executive Order 13563 and joined a government-wide dialogue about regulatory reform. While he is not the first president who has tried to tackle this challenge, his stated commitment to reining in overregulation was a hopeful first step this year. Regulatory relief is essential to a strong economic recovery and boosting job creation. That's why it plays a leading role in the GOP's Plan for America's Job Creators.

Five months later, however, I must say that I am disappointed with the Executive order's results. The President's stated goals are far from being realized and nowhere is that more true than among the independent regulatory agencies.

The Office of Information and Regulatory Affairs estimates that independent agencies have a $230 billion a year impact on the U.S. economy—not an insignificant figure. Nevertheless, Executive Order 13563, like those which preceded it, does not expressly apply to these agencies.

According to a February guidance memo sent by OIRA Administrator Cass Sunstein, the independent agencies "are encouraged to give consideration to all [of the Executive order's] provisions. . .Such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules." Shamefully, at this Subcommittee's June 3, 2011 hearing, Mr. Sunstein confirmed for us that not one of the independent agencies under this Committee's jurisdiction had voluntarily submitted to his office such a plan.

In a June 1st letter to the editor printed in the Wall Street Journal, Nancy Nord, a Commissioner of the Consumer Product Safety Commission, noted that, under the Obama administration, CPSC has "ignored the recent direction to look for and eliminate burdensome regulations. We are just too busy putting out new regulations." Two of Ms. Nord's fellow CPSC Commissioners are here today, along with several other representatives from independent agencies. I hope they can provide us with

an update on their efforts to provide regulatory relief and answer troubling questions about what appears to be inaction until now in complying with the letter and spirit of the President's Executive order.

Independent regulatory agencies contribute their fair share of burdensome regulations that affect all aspects of our economy and stifle job creation. The President's push for regulatory reform is meaningless if independent regulatory agencies are left out of this effort.

PREPARED STATEMENT OF HON. SUE WILKINS MYRICK

I appreciate the Subcommittee's examination of how independent agencies are approaching the "Improving Regulation and Regulatory Review" Executive order issued by President Obama. As we're all well aware, regulations can create unnecessary burdens that hinder economic development and job creation.

An electric utility headquartered in my home state of North Carolina is tangled up in an ongoing hydropower relicensing problem which I think exemplifies the real world detriment that can result from a lack of coordination at the federal level.

As I understand it, Duke Energy is trying to relicense a set of dams in the Catawba-Wateree river basin in South Carolina. Working with local stakeholders and the local office of the National Marine Fisheries Service (NMFS), the Federal Energy Regulatory Commission (FERC) agreed to incorporate a set of recommendations to protect the endangered short-nose sturgeon as part of the project's Final Environmental Impact Statement for the project. Unfortunately, the regional NMFS in St. Petersburg, Florida ultimately recommended a different set of recommendations that continue to delay the relicensing process.

Not only does this seem to be a case in which two federal entities cannot agree on the appropriate path forward, it highlights a case in which two offices within the same agency cannot agree. A NMFS office several hundred miles away is substituting its judgment for a local office that has been involved throughout the process.

Aside from affecting utility rates paid by consumers in North Carolina and South Carolina, the provisions sought by the regional NMFS office could potentially jeopardize a carefully-negotiated water rights apportionment settlement.

Sadly, the Catawba-Wateree relicensing issue is just one of many situations in which federal regulatory actions harm Americans. It is my hope that today's hearing will lead to improvements in the regulatory environment.

Mr. STEARNS. Now it is my opportunity to welcome our distinguished panel. I don't remember in my experience in Congress where I have ever seen these many agencies collected together, and I don't think there ever has been, at least in my experience. So it is a very auspicious occasion to have this distinguished group here to meet, and we appreciate you coming.

I thought for the members I would just give you a brief bio of each of the witnesses. Commissioner Robert Adler, Consumer Product Safety Commissioner, is a commissioner at the United States Consumer Product Safety Commission. He was appointed in August 2009. Prior to assuming office, he served as a professor of legal studies at the University of North Carolina at the Luther Hodges Junior Scholars in Ethics in Law at Chapel Hill's Kenan-Flagler Business School. At the University of North Carolina, he served as the Associate Dean of the MBA program as Associate Dean of the school's bachelor of science in business. Welcome.

Commissioner Anne Northup is the honorable—in fact, she serves the 3rd Congressional District of Kentucky representing Louisville district in the United States House of Representatives as a Republican from 1997 to 2006. Before her tenure in Congress, she served in the Kentucky House of Representatives for 9 years from 1987 to 1996. On July 30, 2009, President Obama nominated her to a seat on the Consumer Product Safety Commission and was confirmed by the Senate on August 7, 2009. Welcome, Anne.

Commissioner Robert McDowell was first appointed to a seat on the Federal Communications Commission by President Bush in 2006. He was reappointed to the commission by President Barack Obama in 2009. He brings over 16 years of private sector experience in the telecommunications industry to the commission. Welcome.

Chairman Jon Wellinghoff was named chairman of the Federal Energy Regulatory Commission, FERC, the agency that oversees wholesale electric transaction and interstate electric transmission and gas transportation in the United States by President Obama on March 19, 2009, a member of the commission since 2006. The U.S. Senate confirmed him to a full 5-year FERC term in December 2009. He is an energy specialist with more than 34 years experience in the field. Welcome.

Commissioner Philip Moeller is currently serving his second term on the commission of FERC, having been nominated by President Obama and sworn in for a term expiring on June 30, 2015. He was first nominated to FERC by President Bush in 2006 and sworn into office on July 24, 2006. From 1997 through 2000, he worked in Congress, serving as an energy policy advisor to Senator Slade Gordon, where he worked on electricity policy.

And then we have Chairman Jon Leibowitz from the Federal Trade Commission. He served as chairman of this commission since February 2009. He was appointed to the FTC as commissioner in the fall of 2004. Before coming to the commission, he had a long career in the public sector, working for the U.S. Senate Judiciary Committee for almost 10 years, and prior to that, in the office of Senator Paul Simon. Welcome.

Commissioner William Kovacic served on the Federal Trade commission since January 2006 and served as chairman from March 2008 to March 2009. He was the FTC's General Counsel from 2001 through 2004 and worked for the commission from 1979 until 1983. He has been a professor of law at George Washington University Law School and has also taught law at George Mason University School of Law. Welcome.

As you know, the testimony that you are about to give is subject to Title 18, section 1001 of the United States Code. When holding an investigative hearing, this committee has the practice of taking testimony under oath. Do any of you have any objection to testifying under oath? No? OK.

The Chair then advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today? If not, then if if you would please rise and——

Mr. BILBRAY. Mr. Chairman.

Mr. STEARNS. Yes?

Mr. BILBRAY. I hate to interrupt right now, but one thing I would ask, at least of one member here, is that pictures are not taken while they are being sworn in. I know this is done, but I just think that is unfair to the witnesses. I think it sends a message that it is not appropriate and I would ask the camera people not to take a picture of individuals with their right hand raised. I just think it is used to often to send the wrong message to the public. Everyone here is voluntarily participating and we should not be giving

a false impression to the public. That is just one member's statement but I think in the environment of fairness on both sides, I am going to raise this issue again and again, and I am doing that today, and I apologize.

Mr. STEARNS. I thank the chairman, and as you know, he and I are good friends. Unfortunately, I will have to overrule you. I think the press has a right to take pictures when they want, and I think that is probably what I have seen in my experience being involved with so many Oversight and Investigation hearings as well as others that it is customary to let the press have access, so I am sorry to have to overrule you. And if all of you would please stand up and raise your right hand?

[Witnesses sworn.]

Mr. STEARNS. Well, it is my pleasure now to start with the opening statements, and Mr. Adler, we welcome you and look forward to your statement.

TESTIMONY OF ROBERT S. ADLER, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; ANNE NORTHUP, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; ROBERT MCDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; JON WELLINGHOFF, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION; PHILIP D. MOELLER, COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION; JON LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION; AND WILLIAM E. KOVACIC, COMMISSIONER, FEDERAL TRADE COMMISSION

TESTIMONY OF ROBERT S. ADLER

Mr. ADLER. Thank you very much, and good morning, Chairman Stearns, Ranking Member DeGette and the members of the Subcommittee on Oversight and Investigations. Thank you for the opportunity to testify along with my colleague, Anne Northup, on behalf of the Consumer Product Safety Commission. My name is Bob Adler and I have been a commissioner at the agency since August of 2009.

I am honored to sit in the company of so many of my fellow independent agency commissioners, and I bring you regrets from Chairman Tenenbaum, who is not able to be here today.

In order for me to respond to the subcommittee's request for the agency's response to Executive Order 13563 and similar Executive orders, I briefly need to review a few critical points about rulemaking at the CPSC. I do so to make the point that we have undertaken the promulgation of regulations and their retrospective review in the full spirit of the policies incorporated in the Executive orders despite our being exempt from the orders, so I would like to make a few observations and I promise I will be brief.

First, since 1981, the CPSC has been required under amendments to the Consumer Product Safety Act and to the other acts that it enforces to conduct an exhaustive cost-benefit analysis when we write safety rules. Under these amendments, our cost-benefit approach is as comprehensive, if not more so, as that set forth in any Executive order issued by the Office of the President, and I think in the case of any other agency. In fact, over the years, in

part because of the detailed and lengthy cost-benefit procedures contained in our laws, the commission has actually promulgated very few mandatory safety rules under these procedures.

Now, I did a count, so I could be off by one or two, but by my count, in 30 years we have issued a grand total of nine mandatory safety standards, or about one every 3⅓ years, which has meant we have had to turn to alternative approaches, one of which is working with the voluntary standards sector to promulgate voluntary standards and to upgrade voluntary standards. The other thing that we have done is to work through a very successful corrective action recall program, and I think that has been successful.

With respect to regulatory review, you did note the passage of the Regulatory Flexibility Act in 1980. At that time, the CPSC choose to undertake a retrospective review of every safety rule under its jurisdiction from the very beginning, not just those identified as having a significant impact on a substantial number of small economic entities. Since this review, we have continued for the past 30 years to comply with the requirements for retrospective review of our regulations under the Regulatory Flexibility Act.

In addition to conducting a retrospective review of regulations under the RFA, the CPSC has voluntarily undertaken a comprehensive review of its regulations beginning in 2004 and temporarily suspended in 2007 in a spirit consistent with Executive Order 13563. In fact, in conducting our review, we have committed the agency to using OMB's assessment tool. The only departure from our approach arises because of the enactment of the Consumer Product Safety Improvement Act in 2008. In response to its grave concerns about the need to protect the lives of young children, Congress voted overwhelmingly, and in the House it was a vote of 424 to 1, to set a number of very tight guidelines for the commission to meet. Our general counsel did a count of the number of deadlines imposed on us. There were 42 separate deadlines imposed by the Consumer Product Safety Improvement Act.

But recognizing the difficulty of meeting these guidelines, Congress streamlined our rulemaking authority when writing these children's safety rules and limited the requirements in the CPSIA for economic analysis of the impact of the rules. The streamlined procedure directed to regulate hazardous children's products such as infant bath seats, baby walkers and cribs, all of which were associated with an unacceptable number of fatalities and serious injuries has, I believe, resulted in significantly more expeditious and protective safety standards that should save numerous lives in the coming years and could not have been accomplished otherwise.

I particularly want to note the commission's new crib standards, which was unanimously approved by all of our commissioners and became effective last Tuesday, June 28. This standard sets the most stringent safety requirements for cribs in the world and ensures that the place that infants spend the most time and the most time alone will be the safest place in their homes. Having noted that, I hasten to add that even with this new authority under CPSIA, the commission remains obligated to conduct economic analyses under the Regulatory Flexibility Act assuring that our most vulnerable small business sector is safeguarded along with safeguarding our most vulnerable young consumers.

The commission is well on its way to meeting the deadlines imposed under the CPSIA. We haven't met all of them, and we are going to miss a few more, but as we wind down the bulk of our CPSIA rulemaking, it is my understanding that Chairman Tenenbaum has directed staff to develop options to restart the retrospective review process.

In closing, notwithstanding that independent agencies do not fall under the direct purview of Executive orders like 13563, we at CPSC have always tried to implement the wisdom contained in those Executive orders and to coordinate our efforts in the spirit of such orders to the best of our ability.

Finally, I note that CPSC's jurisdiction is very broad. Roughly speaking, if you walk into a department store, a sporting goods store, a hardware store, a toy store or you go to a school, that is us. Those products that are in those institutions are the things we regulate. But we are an agency that has barely above 500 people and a budget just about $118 million. In other words, I am sitting at a table with agencies that are between two and a half and three times our size. But given these limits on our resources, I think we have done a good job in advancing consumer safety, and thank you very much.

[The prepared statement of Mr. Adler follows:]

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Statement of
Robert S. Adler
Commissioner
United States Product Safety Commission

Before the
House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations

July 7, 2011
Rayburn House Office Building, Room 2322

"The Views of the Independent Agencies on Regulatory Reform"

Good morning Chairman Stearns, Ranking Member DeGette, and the members of the Subcommittee on Oversight and Investigations. Thank you for the opportunity to testify along with my colleague Anne Northup on behalf of the Consumer Product Safety Commission (CPSC). My name is Bob Adler, and I have been a Commissioner at the CPSC since August 2009. I am honored to sit in the company of so many of my fellow independent agency commissioners.

An Overview of CPSC and Regulatory Reform

In order for me to respond fully to the subcommittee's request for the agency's response to Executive Order 13563 and similar executive orders, I briefly need to review the history of the CPSC's rulemaking. I do so to make the point that we have undertaken both the promulgation of regulations and their retrospective review in the full spirit of the policies incorporated in the executive orders. So, I begin with several observations:

1. Since 1981, the CPSC has been required under amendments to the Consumer Product Safety Act (and the other acts it enforces) to conduct an extensive cost-benefit analysis when we promulgate safety rules. Under these amendments, our cost-benefit approach is as comprehensive, if not more so, as that set forth in any executive order issued by the Office of the President.
2. Over the years, the CPSC has promulgated extremely few mandatory safety rules requiring cost-benefit analyses, a grand total of nine in thirty years – or about one every 3 1/3 years – opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products.

3. Under the Regulatory Flexibility Act of 1980,[1] the CPSC chose to undertake a retrospective review of every safety rule under its jurisdiction from its beginning, not just those identified as having a substantial impact on a number of small entities (and, therefore, requiring a mandatory review).
4. In addition to the retrospective review of agency regulations mandated by the Regulatory Flexibility Act, the CPSC voluntarily undertook a comprehensive review of its regulations beginning in 2004 in a spirit consistent with Executive Order 13563 and anticipates continuing to do so in the future.
5. The only departure from the approach I've just described arises because of the enactment of the Consumer Product Safety Improvement Act in 2008. In response to its grave concerns about the need to protect the lives of young children, Congress voted overwhelmingly to streamline the CPSC's rulemaking authority when writing children's safety rules and to limit (but not eliminate) the requirements in our laws for economic analyses of the impact of CPSC rules.

1. Cost-Benefit Analysis

In 1981, Congress added a broad and comprehensive set of cost-benefit requirements to the Consumer Product Safety Act (and the other acts enforced by the CPSC) for consumer product safety rules promulgated by the CPSC. These provisions easily match, if not surpass, in their stringency and scope the cost-benefit provisions of the various executive orders on cost-benefit

[1] 5 U.S.C. §§ 601-12.

analysis recommended by the Office of Management and Budget. Among other things, prior to promulgating almost every safety rule,[2] they require the CPSC to:

- Make findings with respect to the degree and nature of the risk of injury the rule is designed to eliminate or reduce; the approximate number of consumer products, or types or classes thereof, subject to such rule; the need of the public for the consumer products subject to such rule, and the probable effect of such rule on the utility, cost, or availability of such products to meet such need; and any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.[3]
- Prepare a final regulatory analysis of the rule containing the following information: a description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs; a description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen; a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.[4]

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[2] While the 1981 changes to the acts enforced by the CPSC require the agency to undertake cost-benefit analysis with respect to almost every safety rule it promulgates, some labeling requirements under § 3(b) of the FHSA do not require the same regulatory analysis.

[3] 15 U.S.C. §2058(f)(1).

[4] 15 U.S.C. § 2058(f)(2).

- Find that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product; that the promulgation of the rule is in the public interest; in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under the CPSA would adequately protect the public from the unreasonable risk of injury associated with the product; in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard that compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard.[5]
- Find that the benefits expected from the rule bear a reasonable relation to its costs and that rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.[6]
- Give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions.[7]

Speaking from personal experience, I note that the analysis and findings contained in section 9 of the CPSA (and similar provisions in other acts the agency enforces) have resulted in rulemaking proceedings that span years of effort and cost the agency millions of dollars. I find it hard to

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[5] 15 U.S.C. § 2058(f)(3).

[6] 15 U.S.C. § 2058(f)(3).

[7] 15 U.S.C § 2058(d)(2).

believe that OMB or Congress could expect any more analysis by a regulatory agency, especially one that is directed to protect the lives and safety of young children.

2. Alternative Approaches to Protecting the Public

Both in response to the extremely detailed, time-consuming requirements in section 9 of the CPSA[8] (and our other laws) and because of its success in working with the voluntary standards sector, the CPSC has opted, wherever possible, to look to the promulgation and strengthening of voluntary standards as an alternative to developing mandatory standards. The Commission, of course, has always retained the option to undertake mandatory rulemaking where voluntary standards have proven to be inadequate. As I noted, the burdens of mandatory rulemaking have resulted in the Commission's promulgation of only nine standards in the 30 years since the 1981 amendments. In sharp contrast, the Commission has actively participated in the development or enhancement of hundreds of voluntary standards in that same time period. As I shall mention, the Commission's infrequent promulgation of mandatory rules and reliance on voluntary standards has not gone without criticism in Congress, especially when it comes to protecting the lives and safety of young children.

The Commission has also used its recall authority to great effect over the years. Under section 15(b) of the Consumer Product Safety Act, companies are required to notify the Commission whenever they obtain information that one of the products they have placed in commerce:

- fails to comply with an applicable consumer product safety rule,

[8] Section 9 specifically requires that, before CPSC promulgates a mandatory consumer product safety rule, the agency must determine that no voluntary consumer product safety standard would adequately reduce or eliminate a risk of injury. Where an adequate voluntary standard exists and is substantially complied with, the agency must defer to the voluntary standard.

- fails to comply with a voluntary consumer product safety standard upon which the Commission has relied,
- fails to comply with any other rule enforced by the agency,
- contains a defect which could create a substantial product hazard, or
- creates an unreasonable risk of serious injury or death.[9]

These so-called "15(b) reports" have become the basis upon which the Commission has taken action to negotiate Corrective Action Plans (CAP) with companies that have led to the recall of numerous dangerous products. The Commission has participated in thousands of recalls over the years involving hundreds of millions of potentially hazardous products. Although it is impossible to quantify the number of lives saved and injuries avoided through this program, they undoubtedly number in the millions.

There are limits both on the use of voluntary standards and recalls in protecting American consumers, but they have, of necessity, become important tools in CPSC's approach to product safety.

3. CPSC and the Regulatory Flexibility Act (RFA)

Section 610 of the RFA requires agencies to periodically review rules that have a significant impact on a substantial number of small entities.[10] Each agency is required to publish a plan demonstrating its approach to its review. Accordingly, on September 14, 1981, the CPSC

[9] 15 U.S.C. § 2064.

[10] 5 U.S.C. § 610.

published its plan for reviewing existing rules under the RFA, as well as subsequent rules within 10 years of their publication.[11]

The CPSC went far beyond the requirements of the RFA in its plan. In fact, the agency not only solicited and reviewed comments for rules that we determined would have a significant economic impact on a substantial number of small entities, we actually conducted a review of every safety rule under our jurisdiction. In addition to soliciting comments from the general public in the Federal Register, we directly contacted affected parties and their trade associations through appropriate trade publications. Moreover, the Commission made an effort personally to contact those persons who submitted comments during the earlier rulemaking proceedings. Based on the information received in the comments, as well as other information available to the Commission, CPSC staff then conducted an assessment of the degree of economic impact on small entities and sought to identify appropriate actions required to minimize the impact on those entities consistent with the objective of the statute under which the regulations were issued.

Under section 610(b) of the RFA, the Commission sought comments on, and reviewed its rules according to, the following factors: (1) the continued need for the rule, (2) the nature of complaints or comments received concerning the rule from the public, (3) the complexity of the rule, (4) the extent to which the rule overlapped, duplicated, or conflicted with other federal rules (and the Commission also considered, to the extent feasible, the extent to which the rule overlapped, duplicated, or conflicted with state and local government rules), and (5) the length of

[11] 46 Fed. Reg. 45621.

time since the rule had been evaluated or the degree to which technology, economic conditions, or other factors had changed in the area affected by the rule.

Since 1981 and the passage of the RFA, our agency has carefully reviewed its regulations. This effort has continued over the last 30 years. On the whole, I believe these reviews have been good both for consumers and the regulated community. Under the RFA (and other provisions of the CPSA requiring rule reviews), the Commission issued reports involving 17 rules under the CPSA, as well as nine rules promulgated under the Federal Hazardous Substances Act (FHSA),[12] eight rules under the Flammable Fabrics Act(FFA),[13] and four rules under the Poison Prevention Packaging Act (PPPA).[14]

4. Voluntary Regulatory Review Efforts

In addition to the rule reviews required by the RFA, the Commission also has recently voluntarily undertaken efforts to review its regulations in a manner consistent with the spirit of Executive Order 13563 and similar executive orders. Specifically, on January 28, 2004, the Commission published a notice in the Federal Register announcing a pilot rule review program.[15] In the notice, the agency committed itself to using OMB's Program Assessment Rating Tool

[12] 15 U.S.C. §§ 1261-1278.

[13] 15 U.S.C. §§ 1191-1204.

[14] 15 U.S.C. §§ 1471-1477.

[15] *See Pilot Program for Systematic Review of Commission Regulations: Request for Comments and Information*, 69 Fed. Reg. 4095 (Jan. 28, 2004) (requesting comments on Commission regulations for walk-behind power mowers, electrically operated toys, standards for flammability of vinyl plastic film, and child resistant packaging for certain salicylate compounds).

(PART) to help provide a consistent approach to rating programs across the federal government.[16]

In the notice, the Commission listed four rules for review, and asked for public comment on each regulation. Specifically, the notice asked: (1) whether the regulation is consistent with CPSC program goals, (2) whether the regulation is consistent with other CPSC regulations, (3) whether the regulation is current with respect to technology, economic or market conditions, and other mandatory or voluntary standards, and (4) whether the regulation could be streamlined to minimize regulatory burdens, particularly those affecting small businesses.

Out of this pilot program, the Commission then conducted annual reviews that looked at four to six rules per year in 2005,[17] 2006,[18] and 2007.[19] Out of this review, the CPSC clarified its rules regarding standards for carpets, rugs and bicycles. In addition, the Commission also established projects to examine amendments to the electrical toy and cigarette and multi-purpose lighter rules.

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[16] A description of the PART process and associated program evaluation materials is available at http://www.whithouse.gov/omb/budintegration/part_assessing2004.html.

[17] *See Fiscal Year 2005 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 70 Fed. Reg. 18,338 (April 11, 2005) (requesting comments on Commission regulations for cigarette lighter and multi-purpose lighter safety standards, bicycles, surface flammability of carpets and rugs, and child resistant packaging for controlled substances).

[18] *See Fiscal Year 2006 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 71 Fed. Reg. 32,882 (June 7, 2006) (requesting comments on Commission regulations for matchbooks, toy rattles, baby bouncers, walkers-jumpers, and baby walkers).

[19] *See Fiscal Year 2007 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 72 Fed. Reg. 40,265 (July 24, 2007) (requesting comments on Commission regulations banning certain unstable refuse bins and safety requirements for pacifiers).

The voluntary rule review program was temporarily suspended in 2008 with the passage of CPSIA due to limited resources, tight deadlines, and Congress' specific directions for the Commission to review and revise many of its existing regulations as part of that legislation.

As we wind down the bulk of our CPSIA rulemakings, it is my understanding that CPSC Chairman Tenenbaum has directed staff to develop options to continue the voluntary review process. As part of this review, staff will be looking at ways to maximize openness and public participation, as well as ways to most effectively to target rules that may require revision, repeal, or strengthening to protect the public against the risk of unreasonable danger from consumer products.

5. The Consumer Product Safety Improvement Act of 2008

In 2008, Congress became concerned about the large number of violative toys and other children's products recalled by the CPSC in 2006 and 2007 – as well as the slow pace of agency rulemaking under existing procedures. Accordingly, Congress enacted by overwhelmingly large bipartisan majorities (424-1 in the House and 89-3 in the Senate) the Consumer Product Safety Improvement Act (CPSIA). Focusing particularly on children's hazards, Congress added several new provisions to the agency's acts: (1) Congress legislatively imposed several safety standards for children's products,[20] (2) Congress set numerous deadlines within which the CPSC was obligated to write safety standards for children's products, and (3) Congress streamlined the rulemaking process that the Commission must follow, lifting some of the burdens of section 9 of the CPSA, and similar provisions in our other laws.

[20] Because these provisions were added by act of Congress, they automatically applied without the need for CPSC rulemaking.

The rationale behind Congress' action seems to be clear. Congress wanted to protect young children – society's most vulnerable and involuntary risk takers - as fully and expeditiously as possible. Congress did not eliminate economic analyses – the agency remains obligated to conduct such analyses under the RFA – but it did remove some of the more time-consuming procedures from the laws enforced by the CPSC. The result has been more expeditious drafting of new safety standards specifically designed to protect the lives and safety of young children. Among the new standards promulgated by the agency since passage of the CPSIA have been improved safety requirements for baby walkers, bath seats, and children's toys. Perhaps the most significant new standard advancing children's safety has been the Commission's safety standard for cribs, unanimously approved by the Commissioners and effective this past Tuesday, June 28. This standard sets the most stringent safety requirements for cribs in the world and should save numerous lives in the coming years.

Even with this new authority, however, the Commission has taken steps to insure that the economic impact of new rules and regulations is considered during the rulemaking process. In fact, other than regulations where Congress, by law, made an exception every substantive safety rule the Commission has written under the CPSIA has been analyzed under the RFA to determine the impact of that requirement on small businesses – assuring that our most vulnerable business sector is safeguarded along with protecting our most vulnerable consumers.

Speaking for myself, I applaud the streamlined authority the Congress gave the agency to write standards for children's hazards. I think we all appreciate how critical it is to protect children – who can't read safety labels and who don't realize how dangerous some consumer products can

be – to the greatest extent possible. Accordingly, I think Congress struck the proper balance between minimizing unnecessary costs imposed on businesses (and, ultimately, consumers) and safeguarding our most vulnerable consumers.

Conclusion

The CPSC's jurisdiction is very broad: roughly speaking we regulate most products found in a department store, sporting goods store, hardware store, toy store, or in a school (with the exception of items regulated by other agencies, such as food, drugs, cars, boats, planes, guns, and tobacco). Yet we are an agency of barely 500 people with a budget just over $118 million. Given these limits on resources, I believe that the agency has done a good job in advancing consumer safety with minimal disruption to the marketplace.

Mr. STEARNS. I thank the gentleman.

Ms. Northup, welcome. It is particularly nice to have a former member.

TESTIMONY OF ANNE NORTHUP

Ms. NORTHUP. Thank you. Chairman Stearns and Ranking Member DeGette, thank you so much for the opportunity to testify in front of you, and I am delighted to be back on Capitol Hill with you. I have great respect and appreciation for the challenges you face every day and the decisions you make. I do appreciate the opportunity to come and give you some idea of what it looks like from the other side, from a regulatory agency.

You just heard an excellent history of review of the Consumer Product Safety Commission and the past, the way they operated, primarily through the development of voluntary guidelines, through risk assessment and intervention when there were real risks based on science and the ability to intervene when they were dangerous products. However, all of what was said about the reviews of our regulations and the reasonableness of that changed in 2008 when the Consumer Product Safety Improvement Act went into effect, and in fact, very little of that would be present today. As a matter of fact, we no longer have the option to consider risk in most of the things we do. We are required to write rules based on numbers that were given to us in the CPSIA but that hasn't stopped us in the regulatory process of casting a wider net including maybe more toys and more children's products or more products than the law requires us to do to make steps where the testing is more rigid than required by the law. And so while the law is very difficult, it has been very hard for small businesses in particular to comply with it, we have at the agency, in my opinion, gone beyond what the law has required us to do.

Let me just give you some idea. In the time since the CPSIA passed, we have been involved in about 50 rulemakings if you include the statements of policies, the notice of requirements and lab accreditations, and by the way, lab accreditations are huge because any time we do a notice of requirements for labs to be accredited, within 6 months every product under that category has to begin sending every component and every part of their product to a lab for a third-party test and certify based on those tests and label their product to reflect what those certifications are.

So in truth, while I appreciated what Representative Waxman said about big companies complaining, it is actually the opposite. Very few of our largest companies complain. Most of them make products in such large numbers that they can spread their costs around, and what we have really done is put out of competition the smaller businesses that made things primarily in this country. Those are the people that we hear from because they cannot spread their costs over so many products.

You know, I hear so often people say oh, yes, that is the law we passed to decrease the number of things coming in from China or that is the law we passed to make the big companies comply, but in fact, the effect of the cost of these regulations has been the burden that has put many, many small businesses out of business. It has caused those smaller businesses to leave the children's product

market. We have the public that has fewer choices than they have ever had in the past and we are told that if we—our four, by the way, biggest rules are still to come. They are expected to come before December 31st or to take effect by December 31st.

I thought I would share with the committee one that I anticipate that we will agree on, the majority. I expect it to be a 3–2 vote, and that is allowing the parts per million of lead in any component of a child's product to reduce to 100 parts per million as of August 15th. This is what our economic team said about this: "Economic impacts are likely to occur. They are going to have to use more expensive low-lead materials rather than the non-conforming materials used today. The cost associated with the reengineering products to make the new materials, the cost to make leaded components that are inaccessible, the increased testing costs, the increased consumer products, the reductions in the types and quantities of the children's products available to consumers, businesses that are exiting the children's product market, manufacturers going out of business, reduction in the utility of products and the reduction in the durability of products." This is all for this one rule that we are about to—or this one step-down that we are about to take effect, and it says there is no anticipated benefit in health to children because of this. And so I would just point out to you that 10 out of 40 of the small manufacturers of bicycles left the market with the original step-down. We anticipate more will exit the market. And my question, I guess, is, what sort of regulation sort of rationalization can be brought to this process. I have proposed many times ways to within the limits of the law to lessen the impact of this, and I am disappointed that we haven't done more of that at the commission. Thank you.

[The prepared statement of Ms. Northup follows:]

Testimony of Anne M. Northup
Commissioner
United States Consumer Product Safety Commission

Hearing: "The Views of the Independent Agencies on Regulatory Reform"

Before the

U.S. House of Representatives
Committee on Energy and Commerce

Subcommittee on Oversight and Investigations

July 7, 2011

Chairman Stearns and Ranking Member DeGette, thank you for the opportunity to provide testimony to this Subcommittee on the response of our independent agency, the Consumer Product Safety Commission (CPSC), to the Administration's goal of regulatory reform.

Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, said recently in an op-ed for *The Wall Street Journal*: "This insistence on pragmatic, evidence-based, cost-effective rules is what has informed our [the Administration's] regulatory approach over the past two and a half years."[1] Unfortunately, this cannot be said for the CPSC. Although the Commission is a relatively small agency (FY 2011 budget of $114.8 million), the agency's actions over the last two and one half years to implement the Consumer Product Safety Improvement Act of 2008 (CPSIA) have substantially added to the economy's woes, causing small businesses to leave the children's product market, reduce jobs, and/or close.

Since the beginning of 2009, the Commission has focused its time and resources principally on implementing the CPSIA. My testimony today will focus on the devastating impact the law and its regulations are having on American business growth and competitiveness, all with little or no offsetting improvement in product safety. I will also discuss the opportunities the Commission's Majority has failed to take to reduce the law's burdens when the statute has allowed such flexibility.

Finally, I will also propose today, as I did before a hearing of the Commerce, Manufacturing and Trade Subcommittee, specific actions that this Committee and Congress can take to ameliorate the CPSIA's effects. With regard to Mr. Sunstein's and this Committee's calls for independent agencies to voluntarily review burdensome or outdated regulations for potential reforms, I am unaware that our Chairman has responded. I know that, notwithstanding my request to contribute to the formulation of any Commission views on the subject, she has not asked for my input. Thus, without a willingness on the part of our Chairman or the Commission's Majority to proactively seek cost-benefit analyses of our rules and/or to roll back unnecessary parts of our rulemakings put forth to implement the CPSIA, only Congress will be able to stop the damage.

I. The CPSIA:

Background

As you may know, the CPSIA was passed following a number of high-profile recalls involving lead in paint found on children's toys imported from China. While the law passed with broad support in 2008, its many unintended consequences have since led both Democrat and Republican Members of Congress to introduce bills reforming the law. In January 2010, the Appropriations Committees of the House and Senate requested

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[1] Cass Sunstein. "21st Century Regulation: An Update on the President's Reforms," *The Wall Street Journal*. May 25, 2011.
http://online.wsj.com/article/SB10001424052702304066504576345230492613772.html

a Report from the five Commissioners on ways to amend the CPSIA. (*See the following link for the Report to Congress and the Commissioners' five statements: www.cpsc.gov/about/cpsia/cpsiareport01152010.pdf*). Most recently, the Commerce, Manufacturing and Trade Subcommittee voted to approve a bill to reform the CPSIA, which may soon be marked-up by the full Energy and Commerce Committee. Thus, the law no longer enjoys the broad support it received in 2008.

Unfortunately, neither the Commission's Democrats nor the law's original Democrat supporters in Congress have shown interest in any more than minor tweaks to the statute, which will not address small businesses' concerns. Democrats at the Commission acknowledge and even sympathize with the many requests for relief that we receive from small businesses, but have missed numerous opportunities to implement the statute in a less burdensome way. They blame the statute for being too inflexible, but do not request, even when asked, more than negligible relief from Congress. At the same time, the law's strongest supporters in Congress blame the Commission for not using the flexibility in the law. Meanwhile, nothing changes and the statute and its regulations continue to undermine the economic recovery.

It's not about safety: The CPSIA's non-risk based requirements

While the Commission's budget has grown substantially since the law's passage in 2008 (by nearly 44 percent), new and old resources have been shifted away from more risk-based priorities to implement the arbitrary, non risk-based mandates of the CPSIA, including the lead-in-substrate and phthalates bans, the Public Database, and the third-party testing, certification and labeling requirements. Over the last two and one half years, the Commission has issued an estimated 3,500 pages of regulations and guidance documents as a result of the CPSIA—a large portion of which must be read and understood by every affected company in order for them to grasp the law's complex requirements.

The diversion of the Commission's resources to CPSIA implementation reduces our focus on genuine safety hazards. Our agency is charged with "protecting the public from unreasonable risks of serious injury or death" from consumer products—but we cannot fulfill this mission if our time is spent primarily enforcing the CPSIA, including its complex, non-risk-based, testing and certification requirements.

Indeed, since 2008, there has been a significant delay in progress on actions to address many genuine safety hazards, such as promulgating standards to reduce the risk of death and injuries caused by cigarette lighters, table saw blades and portable generators. These issues would be front and center on the Commission's schedule if it were not for the CPSIA.

The new Public Database also will be a substantial drain on Commission resources, without any likely safety benefit, due to the Commission's flawed database regulation. [2] While consumers have always been able to report to the CPSC experiences of harm or risk of harm involving a consumer product, such reports were not made public unless the CPSC took reasonable steps to ensure accuracy. That is why this Committee's draft CPSIA reform bill has called for changes to ensure that incident reports published in the database are at least verifiable. Potentially inaccurate and unverifiable information on a public database is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information. If this Commission is to have a public database funded by taxpayers, it should be ***different and better*** than any source of information that already exists in the public domain, such as websites like Amazon.com or Yelp.com. Many believe the Commission's ".gov" database, if left unchanged, will be useful only to trial lawyers or advocacy groups that will be able to populate it with unverifiable, second-hand information for their own purposes.

II. Economic Impact of the CPSIA

The lack of cost-benefit analyses

In March 2009, Commission staff reported that the economic costs associated with the CPSIA would be "in the billions of dollars range."[3] Industry associations representing manufacturers of furniture, mattresses, sports equipment, children's clothing and handmade toys, just to name a few, have all told us that they will be saddled with enormous costs, first to reengineer their products to satisfy the new standards imposed by the law, and then to third-party test every component of every product they make to demonstrate compliance with all of the applicable standards.

This Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to product standards, and the potential reputational and litigation costs that will result from the upcoming Public Database. **Attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and

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[2] The Commission Majority's database rule suffers from three major infirmities: 1) It interpreted the statute to allow *anyone* to report incidents to the database—even consumer advocacy groups, trial lawyers, and others with ulterior motives and who may not have firsthand knowledge of the incident; 2) the rule fails to require enough information from submitters so that reports are even verifiable; and 3) the rule requires that all reports will be made public on the 10th day following transmittal to the manufacturer, regardless of whether there's a pending, valid claim of material inaccuracy.

[3] Letter from Acting CPSC Chairman Nancy Nord to Representative John Dingell, March 20, 2009.

Labeling Rule. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.[4]

I believe such analyses would reveal that much of our CPSIA mandated regulation cannot be justified. To begin with, there is no scientific evidence suggesting there is any benefit from many of the law's requirements. For instance, no government health agency, including the CPSC, has ever concluded that the components of children's products containing either 300ppm lead content or the interim-banned phthalates pose a safety risk to children. It has long been established that the lead absorbed by children overwhelmingly comes from leaded paint or from lead in gasoline that got into the dirt and was tracked into homes near older gas stations. The Environmental Protection Agency (EPA) and the Centers for Disease Control (CDC) report that in 1978, about 13.5 million children ages 1-5 had elevated blood lead levels. However, by 2007-2008, this number had declined to about 250,000 children.[5] Similarly, 2007 data indicates that one percent of children selected nationwide for testing, who are targeted due to their higher risk profile, showed an elevated blood lead level as established by the CDC. This number was down from nearly eight percent in 1997, [6] and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the EPA have issued guidance for reducing children's exposure to lead, and neither has ever suggested that parents take away a child's bicycle because of the lead in the substrate of the metal comprising the spokes, pedals or handlebars. Nor has it ever been argued that the CPSIA, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level.

Burdensome testing and certification requirements on manufacturers

Given the tools available to manufacturers to determine compliance and our own improved enforcement methods, I do not believe the complex, third-party testing and certification requirements of the CPSIA are necessary or helpful to ensure compliance with the law's new requirements. In fact, relief from the law's testing requirements is the number one request of small businesses, many of whom may be able to comply with the law's lead and phthalates limits but still cannot afford the mandatory third-party testing.

By requiring all manufacturers of children's products to send their products to be tested at a third-party lab, regardless of risk, the law disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation. The CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product is entirely unnecessary—and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a "bad actor" with a

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[4] Most of the CPSIA mandated regulations are **not required** to be promulgated under Section 9 of the CPSA, which normally would entail a cost-benefit analysis. However, the statute does not **prohibit** the agency from doing so, if the Commission recognizes a need for such analyses.

[5] http://www.epa.gov/opeedweb/children/body_burdens/b1-graph.html

[6] http://www.cdc.gov/nceh/lead/data/national.htm

casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

The CPSIA also requires the creation of massive new paperwork and tracking systems, often without any safety enhancing product changes. A member of the American Home Furnishings Alliance reported that it spent $13 million dollars on tests, new systems and tracking processes, despite the fact that every single component it used on children's furniture already complied with the current lead standard. The company was therefore not required to change a single material used in its manufacture of children's furniture, and there was no corresponding benefit in the improved safety of its children's furniture to justify the costs.

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in its public comments on the Component Parts rule:

> As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.[7]

The testing and certification requirements of the law have yet to be fully implemented. Therefore, I would continue to request that Congress intervene to prevent the Commission from enforcing these requirements, at least until a full cost-benefit analysis has been performed.

III. Commission Actions Have Made the Law's Impact Worse

I no longer believe that action by the Commission to alleviate the law's unnecessary burdens is likely. Before my Senate confirmation hearing, I was asked by both Democrat and Republican Senators to "find flexibility" in the law wherever possible, because the law had resulted in many unintended or unforeseen consequences. Once confirmed as a Commissioner, I took this request seriously.

However, the flexibility that I have found in the following rules was rejected by a majority of Commissioners:

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[7] American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

- ***Absorption exclusion***: I argued that the absorption ***exclusion*** under Section 101 was actually intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term "any lead" in that section may be interpreted to mean a *de minimis*, harmless amount of lead in a children's product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axles on toys would be legal—since lead in the substrate of these products is not harmful. This interpretation would have allowed American standards to mirror European standards more closely and reduced the number of components that need to be tested. Because the Commission rejected this interpretation, it voted to reject the petition of a manufacturer of toy cars, even though the car's brass fitting contained less absorbable lead than the Food and Drug Administration deems to be acceptable in a piece of candy.[8]

- ***Civil Penalties Factors*** – In the Commission's interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that, while the overall civil penalty ceiling was raised, "technical" violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.[9] Unfortunately, a majority of the commissioners did not want to provide that leeway.

- ***Definition of Children's Product*** – The CPSIA applies to all "children's products", statutorily defined as products "primarily intended for a child 12 years of age or younger." The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended for ages 10-12 or for an age range falling both inside and outside the upper age limit of 12. The purpose of defining the term was to guide manufacturers in determining which of their products fall within the purview of the CPSIA. After receiving these comments, the Commission had a chance to put a much narrower "fence" around the scope of covered products—or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helps neither the CPSC staff, [10] nor the regulated community.[11]

- ***"Children's product safety rules"*** – I offered a valid, alternative interpretation of the statute with regard to the requirement to impose third-party testing on all "children's product safety rules." A clear distinction can be made between "children's product safety rules" and more general "consumer product safety rules" promulgated well before the passage of the CPSIA. Unfortunately, because the Majority chose to view all consumer product safety rules of the Commission as potential "children's product

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[8] http://www.cpsc.gov/pr/northup110409.pdf
[9] http://www.cpsc.gov/pr/northup03102010.pdf
[10] Justin Pritchard, "Feds dismiss need to recall lead drinking glasses,"*Associated Press*. December 11, 2010. http://news.yahoo.com/s/ap/20101211/ap_on_he_me/us_cadmium_lead_glassware
[11] http://www.cpsc.gov/pr/northup09292010.pdf

safety rules," it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step—and there is no risk associated with these products that necessitates *new* third-party testing requirements.[12]

- ***Public Database***: I proposed an alternative database rule that would have responded to a number of manufacturer concerns and made the database a more accurate source of information for consumers. The Commission's Majority instead passed a rule that went well beyond the statute's requirements, allowing "anyone" to submit reports of harm—even advocacy groups, attorneys, random bystanders, and, as has actually occurred, people perusing the internet that may not have firsthand knowledge of the incident. In total, the Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers--particularly small businesses.

- ***Cribs***: In December 2010, the Commission set a six-month effective date for a new mandatory, retrospective crib rule that it was required to promulgate under the CPSIA. Beginning in April 2011, the Commission received appeals from associations representing hundreds of small and medium-sized crib retailers asking for an extension of time to sell through crib inventory that did not comply with the new standard and therefore could not lawfully be sold after June 28, 2011. Data received by the Commission from a small fraction of all crib retailers indicated that as of May 2011, there were at least 117,800 noncompliant cribs, valued at approximately $32,000,000, still in retailer inventory. While I voted in favor of the new crib standard in December 2010 and the original six-month effective date for both retailers and manufacturers, I realized in hindsight that due to the chain of commerce, it was illogical to set the same effective date for both. Two weeks ago, the Commission held a public meeting to determine whether to extend by any amount of time the period during which retailers could lawfully sell new, non-drop-side cribs that satisfy the most recent voluntary standard. The Commission had previously given day care providers and the hospitality industry until December 2012 to meet the new mandatory standards, so there was no issue regarding the safety of the cribs that would have been the subject of the extended deadline. Nonetheless, the Commission decided on a 3-2 party-line vote not to extend the effective date by even 30 days, thus missing another opportunity to avoid unnecessary economic waste without sacrificing safety.

- ***Reduction to 100 ppm of Lead***: The CPSIA banned as a hazardous substance children's products containing over 300 ppm of lead. It also provides that children's products containing over 100 ppm of lead shall be treated as a banned hazardous substance beginning on August 14, 2011, "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category." The Commission is scheduled to decide by majority vote on July 13,

[12] http://www.cpsc.gov/pr/northup07122010.pdf

2011, whether reducing the lead limit to 100 ppm for any product or product category is not technologically feasible. Staff has prepared a public decisional package on the issue and presented its views during a public briefing held last week. During the briefing, staff acknowledged the common sense fact that the economic impact of reducing the limit to 100 ppm is a factor in determining the technological feasibility of doing so. In addition, staff has identified significant "economic impacts that are likely to occur", including: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility of products due to the substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard. With respect to any potential counterweight to this economic harm, Commission staff concludes that the "overall contribution of" products with lead content between 100 ppm and 300 ppm "to lead exposure in children is minimal." Notwithstanding staff's acknowledgment that reducing the lead limit to 100 ppm will cause substantial economic harm with no offsetting improvement in product safety, I believe it is likely that the Commission's majority will still vote to reduce the standard.

IV. Lack of a Regulatory Review

To my knowledge, the Commission has not undertaken a retrospective review of its regulations since before passage of the CPSIA in 2008, and on-going small businesses analyses are minimal. The Commission's only evaluation of the impacts of its regulations on small businesses has been performed under the Regulatory Flexibility Act (RFA). Since I have been at the Commission, Regulatory Flexibility Analyses have been as perfunctory as one paragraph or as lengthy as a dozen pages – and the Commission seldom if ever bases its decisions on such analyses. As you know, the RFA also requires retrospective review of regulations, but only every ten years—and only if the Commission has deemed such rules to have a "significant" impact on small businesses.

Prior to the passage of the CPSIA, the Commission undertook a voluntary, annual review of certain regulations, including notice and comment to the public, in order to determine whether any should be rolled back or updated. From 2004 – 2007, the Commission reviewed 11 rules, standards and bans. I understand that those reviews resulted in modifications to only one of the rules – the flammability standard for carpets and rugs. In some cases, staff reviews of regulations produced recommendations for change, but the Commission never did the work necessary to implement them. Finally, a review of the bicycle standard done at that time also helped to inform some recent changes made to that standard, which were done principally to allow bicycle manufacturers to comply with the CPSIA's testing and certification requirements.

V. Going Forward - Recommendations to Reform the CPSIA:

Reforming the CPSIA to focus on risk would greatly relieve the strain on agency resources caused by implementing and enforcing non-risk based regulations and monitoring low risk products. It would also free the agency to redirect its limited resources toward more effectively fulfilling its safety mission. This can be accomplished in a variety of ways:

- Amend the law's Absorbability Exclusion §101(b)(1)(A) so that it is meaningful:

The CPSIA included three statutory exclusions from the lead limits. But the Commission has meaningfully interpreted only two of them. The law's third exclusion, based on the absorbability of lead in a product, has not excepted a single product from the CPSIA's scope. The CPSIA should therefore be amended to exclude products or materials with a level of absorbable lead that the CPSC determines not to be harmful to a child's health.

Drawing the line at the level of absorbable lead that is harmful to a child's health is consistent with the findings of our leading scientific agencies, the National Institutes of Health, the CDC and the EPA. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt near old gas stations are the main source of environmental lead presenting a danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead in dirt that is tracked into a home or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the EPA standard for lead in soil is 400 ppm (http://www.epa.gov/lead/). This standard for safety is less strict even than the current 300ppm lead content standard provided in the CPSIA for children's products, including bicycle handlebars where lead is embedded in the metal substrate and cannot be absorbed.

Unlike other Commission rules, regulations promulgated under the CPSIA, as interpreted by the Majority, have led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, the CPSIA has led to a ban on children's books published before 1986, because the ink in them is likely to contain lead above the allowable level. But children are not likely to eat the pages of old books or ingest more than minuscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed in meaningful amounts. Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a bicycle handlebar, the CPSIA

treats these items in exactly the same way it treats products that truly could hurt a child by increasing her blood lead level.

If the law is amended to unambiguously exclude products with a level of absorbable lead that is not harmful to a child's health, the scope of the CPSIA will be considerably narrowed, and the Commission can focus its limited resources on real risks to children.

- Lower the age-range of products impacted by the law:

Under the CPSIA, a "children's product" is any product intended primarily for use by children twelve years old or younger. The CPSIA thus treats all products intended primarily for use by children under thirteen the same, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented by the same products to different age groups, CPSC staff have suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be one of the most efficient ways to amend the law in order to exclude those products which many believe should not be impacted.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that the products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced as applied to products for older children who are well past the age when they mouth things or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children under age six, while giving the agency discretion to raise that age limit for particular materials or categories of products that are found in the future to pose a risk to older children. And in any event, the CPSC would retain the authority to issue a stop-sale order or to recall any product determined to pose "substantial product hazard" under the Federal Hazardous Substances Act.

- Eliminate third-party testing and certification requirements:

As stated previously, the law's third-party testing, certification, tracking and labeling requirements are the most burdensome for small manufacturers. They are also unnecessary for verifying compliance, particularly given the agency's improved traditional enforcement tools. As a result, Congress could eliminate current third-party testing and certification requirements all together, allowing manufacturers to test in-house and/or in the best way they know how to determine

compliance. The Commission would retain the discretion to impose third-party testing requirements on products whose risk justifies the cost.

- Public Database – require reforms to the Database Rule to ensure that incident reports are verifiable and useful.

Finally, the Commission's Database Rule could be revised in order to ensure that incident reports going up on the new, public database are verifiable. Potentially inaccurate and unverifiable information is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information.

Several features of the Majority's rule guarantee a database populated by inaccurate information. The Majority has broadly defined the statutory categories of submitters to the Database to include groups and individuals with no direct knowledge of the incident or the person harmed. Such groups include consumer advocacy groups, trade associations and attorneys, for whom the accuracy of the incidents they report may be secondary to their own agendas, giving them no incentive to avoid the posting of false or misleading information.

The Database Rule also does not require sufficient information from the submitter to ensure that Commission staff or consumers can tell one type of product from another. Only the minimal amount of information is required, including manufacturer name and a "description of the product" which could include simply "baby stroller." But one company may have manufactured dozens of different models of baby strollers, some of which may no longer be in production. As a result, the limited product information required is insufficient to permit the Commission to investigate the claim, and of no value to a consumer seeking to identify a safe model of baby stroller.

The problems created by permitting inadequate product identification and allowing individuals and groups without firsthand knowledge to report alleged incidents of harm, are compounded by the rule's failure to require the identification of the victim or product owner who experienced the risk of harm. As a result, the Commission's staff may be unable to verify the accuracy of the report by speaking to the only party with actual knowledge of the product and incident. Moreover, because manufacturers bear the burden of proving a material inaccuracy, the Commission will publish a report that contains the minimal required information, even where inadequate product identification or the absence of victim contact information leaves the report unverified. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the

manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Inaccurate information will likely also be posted on the database - at least temporarily - even when there is sufficient information to eventually confirm the truth. That is because the Majority's rule requires the Commission to publish an incident report on the public database by the 10th day after sending notification to the manufacturer, notwithstanding that a manufacturer has adequately supported a claim that the report is materially inaccurate. Unless the Commission can conclude within 10 days that the report is materially inaccurate, it is published on the 11th day and remains on the Database while the Commission completes its investigation. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely.

Thank you, Chairman and Members of the Subcommittee for calling this hearing and for inviting me to testify today on the burden to the economy of the CPSIA's non-risk-based regulations. I look forward to your questions.

ECONOMIC IMPACT OF THE CPSIA - EXAMPLES
2009 - 2011

Costs associated with the CPSIA

1. In a letter from the CPSC to Representative Dingell in March 2009, Commission staff reported that the overall economic impact of the CPSIA would be in the "**billions of dollars range**." The Commission also acknowledged that the testing and certification costs will fall disproportionately on small-volume businesses. (*Letter from Acting Chairman Nancy Nord to Representative Dingell, March 20, 2009*)

2. **"MAJOR RULE"** - CPSC acknowledges in its FY 2011 Regulatory Agenda that its main rule pertaining to the CPSIA's testing requirements (**[PDF] CPSC Docket No. CPSC-2010-0038)** is a "major rule" under the Congressional Review Act, resulting in, or likely to result in: 1) an annual effect on the economy of $100,000,000 or more; 2) a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

3. In an article entitled "Makers Are Pushing Back on Toxic-Toy Law" (*Wall Street Journal*, March 5, 2009 http://online.wsj.com/article/SB123621357629835121.html), Joe Periera reported the following loss statistics:

    - Goodwill Industries to destroy **$170 million** in merchandise.
    - Salvation Army expects to lose **$100 million** in sales and disposal costs.
    - The Toy Industry Association estimates inventory losses at **$600 million**.
    - Members of the Coalition for Safe and Affordable Childrenswear lost **$500 million.**
    - The California Fashion Association estimates troubled inventory at **$200 million**.
    - The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least **$125 million**.

4. On March 11, 2009, *Playthings Magazine* reported updated data from the Toy Industry of America (see http://www.playthings.com/article/CA6643505.html), including:

- From a pool of nearly 400 manufacturers and 220 retailers, the TIA estimates **losses of $2 billion in retail value**.
- More than **$1 billion** in already shipped merchandise has been returned or is being withheld for return.
- More than **$800 million** in compliant merchandise is at risk of return.
- **40%** of all respondents plan to eliminate jobs to pay for the CPSIA, with more than 1200 jobs reported to be in jeopardy.

"TIA: Safety Act puts $2B crimp in toy biz"
3/11/2009

5. Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members' businesses could total **$1 billion**. See: http://1st5ive.com/new-lead-rule-could-cost-motorcycle-industry-1-billion-annually.html

6. In May 2011, the Commission learned that there were at least 117,800 safe, but non-compliant, cribs nationwide that retailers possessed in inventory that would have to be disposed of by June 28th due to the retroactive effects of the CPSIA-mandated crib standard. The Commission could have modestly extended the effective date for retailers to avoid unnecessary, substantial economic losses from the disposal of safe, brand-new cribs; but it declined to provide such relief. The known potential losses at the time: 117,800 X $275 (estimated wholesale price/crib) = $32,395,000. http://www.cpsc.gov/pr/northup06272011.pdf

Examples of businesses closed due to CPSIA
Most names provided by the Handmade Toy Alliance

1. Whimsical Walney, Inc. – Santa Clara, CA
2. Fish River Crafts – Fort Kent, ME
3. Kungfubambini.com – Portland, OR
4. Baby Sprout Naturals – Fair Oaks, CA http://www.babysproutnaturals.com/about/
5. Gem Valley Toys – Jenks, OK
6. Angel Dry Diapers – Michigan
7. Abracadabra Educational Craft Kits for Kids – Bend, OR
8. Hailina's Closet – Ellensburg, WA (thrift store)
9. Eleven 11 Kids
10. Perfect Circle Consignment – Bremerton, WA
11. JenLynnDesigns
12. A Kidd's Dream – Conway, AK
13. Storyblox – New Vienna, OH
14. Phebe Phillips, Inc. – Dallas, TX http://www.phebephillips.com/shopnow.htm
15. Pops Toy Shop - mountains of Tennessee, Virginia, North & South Carolinas

14. Hands and Hearts History Discovery Kits – Greenwood, SC
15. The Lucky Pebble – Kailua, HI
17. My Sister's Closet – Arizona
18. Honeysuckle Dreams
19. Sullivan Toy Co.

Businesses that have stopped production of certain children's lines due to CPSIA
Most names provided by the Handmade Toy Alliance

1. Creative Artworks – Greenwood, AK
2. Craftsbury Kids – Montepeliar, VT
3. "Pockets of Learning" *Special Needs Products Being Driven from Market By Testing Costs – Rhode Island*
4. Creative Learning Connection
5. Giverny, Inc / Mini Me Geology
6. HABA
7. Challenge & Fun, Inc. - http://online.wsj.com/article/SB10001424052748703478704574612573263963560.html
8. Hands and Hearts Far East History Discovery Kit – Greenwood, SC
9. Moon Fly Kids – Las Vegas, NV
10. Louisville Slugger ® – Louisville, KY

Businesses that closed and list the CPSIA as one of the factors
Most names provided by the Handmade Toy Alliance

1. Due Maternity – San Francisco, CA
2. Frog Kiss Designs – Fairfield, CT
3. Waddle and Swaddle – Berkley, CA
4. Lora's Closet – Berkley, CA
5. Baby and Kids Company – Danville, CA
6. Baby and Beyond – Albany, CA
7. Obabybaby – Berkley, CA
8. Bellies N Babies – Oakland, CA
9. Oopsie Dazie
10. Bears on Patrol – not a business, but program by police departments to hand out stuffed animals to scared children - http://learningresourcesinc.blogspot.com/2009/10/cpsia-cpsia-casualty-of-week-for.html
11. Simple Treasures

Other companies hurt by retroactivity of the CPSIA's lead content and phthalates bans:

1. Gymboree – "change in safety requirements related to levels of phthalates rendered about 1.7 million of its inventory obsolete"
    i. http://www.reuters.com/article/idUSBNG44760220090305

2. Constructive Playthings, Inc – "'We have millions of dollars worth of merchandise sitting in 30 40-foot-long trailers waiting to be hauled out to a landfill somewhere," says Michael Klein, president of Constructive Playthings Inc....The banned products include beach balls, inflatable toy guitars and blow-up palm trees.' http://online.wsj.com/article/SB123621357629835121.html

3. Louisville Slugger ® – Destruction of $500,000 in safe, non-compliant inventory (baseball bats) due to the retroactive effects of the law

Businesses no longer exporting to the U.S. due to the CPSIA
Most names provided by the Handmade Toy Alliance

1. Hess – Germany
2. Selecta – Germany http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cspia/
3. Finkbeiner – Germany
4. Saling – Germany
5. Simba – Germany
6. Bartl GmbH dba Wooden Ideas – Germany
7. Woodland Magic Imports – France
8. Brio
9. Helga Kreft – Germany
10. Eichorn – Germany
11. Kapla
12. Kallisto Stuffed Animals

EuroToyShop – On this company's homepage, you will find links at the bottom with a list of "endangered toys" or "extinct toys" that are still sold to children in Europe but which the company will no longer be able to sell in the U.S. due to the CPSIA.

> *Endangered Toys The CPSIA (Consumer Product Safety Improvement Act) has unintended consequences. Now, some European toys are no longer available in the USA.*
>
> http://www.eurotoyshop.com/

Associations that have voiced concerns to the Commission regarding CPSIA's costs (list is not exhaustive):

> Association of Home Appliance Manufacturers

International Sleep Products Association
Retail Industry Leaders Association
Specialty Graphic Image Association
American Coatings Association
The Carpet and Rug Institute
National Retail Federation
Association of American Publishers
Consumer Healthcare Products Association
Toy Industry Association
Glass Association of North America
American Honda Motor Company, Inc.
Society of the Plastics Industry, Inc
American Home Furnishings Alliance
Sporting Goods Manufacturers Association
Handmade Toy Alliance
Consumer Specialty Products Association
Footwear Distributors and Retailers
Fashion Jewelry Association
Craft and Hobby Association
National Association of Manufacturers
Halloween Industry Association
American Apparel and Footwear Association
Juvenile Products Manufacturers Association
National School Supply and Equipment Association
National Federation of Independent Business
Promotional Products Association International
Bicycle Product Suppliers Association

Killing Small Businesses:
CPSIA in the News, Letters and Public Comments

A MESS OF A LAW:
March 11, 2011

"President Obama has been on a campaign to shake his antibusiness reputation, so a good place to start would be to revisit the Consumer Product Safety Improvement Act, a mess of a law that has put new burdens on small businesses..."

http://online.wsj.com/article/SB10001424052748703408604576164510202890494.html "Get the Lead Out, Sir," *The Wall Street Journal*, March 11, 2011. Editorial.

HIGHER COSTS FOR SCHOOLS:
January 11, 2010

"NSSEA members sell educational supplies, equipment and instructional materials to schools, parents, and teachers...

... the costs to schools, municipalities, libraries, and others of identifying and replacing such books would be extremely high and there is no reason to impose such costs given the lack of identifiable risk.

...While we applaud the efforts the CPSC has made to find solutions for small businesses...we believe the CPSC could do more if given more discretion by Congress. The alternative is the elimination of many valuable educational toys and products, some manufactured in low volume for niche markets (such as the deaf, blind, or otherwise differently-abled children) and typically not supplied by the huge multi-national toy manufacturers."

Letter from the NSSEA (National School Supply and Equipment Association) to Commissioner Northup, January 11, 2010

HIGHER COSTS FOR PRODUCTS WITH NO LEAD RISK:
October 13, 2010.

"The government wants to regulate Hannah Montana CDs and DVDs. The bureaucrats at the Consumer Product Safety Commission (CPSC) insist that the discs marketed to children be tested for lead, but when the same young starlet churns out raunchier material under her real name, Miley Cyrus, they will escape scrutiny. Never mind that the same 10-year-olds will likely end up buying both products.

"...Never mind that Hannah Montana's fans aren't likely to eat their DVDs, the latest red tape makes no distinction between products where lead is likely to be consumed and those where it isn't."

http://www.washingtontimes.com/news/2010/oct/13/bureaucrats-way-out-of-tune/ "Bureaucrats way out of tune," *Washington Times*, October 13, 2010.

PUNISHING SMALL BUSINESSES, WHILE MATTEL AND THE BIG GUYS SQUEEZE OUT THE COMPETITION:

June 17, 2010

"Now Mattel is testing and making toys without any trouble at all, and those of us who were never the problem are in danger of losing our businesses," says Hertzler, who runs EuroSource, based in Lancaster, Pa., with his wife and two sons...

"Nearly two years after the safety law was enacted, Congress and the Consumer Product Safety Commission are still struggling to reduce its burden on small businesses while eliminating the risk of lead and phthalates in children's products."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

BORDERING ON RIDICULOUS:

June 17, 2010

..."What the law should be about is ensuring safe products," says Edward Krenik, a spokesman for the children's product alliance. "We've crossed over into ridiculousness."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

REGULATION FOR REGULATIONS' SAKE

November 8, 2010

"Regulation for regulations' sake, where there is no inherent change to a bill of materials, a process or a product indicated after extensive, statistically significant testing across multiple points of input and verification, is simply wasteful."

American Home Furnishings Alliance
November 8, 2010 – Letter to Commissioners

MATTEL FINDS CPSIA A CHALLENGE – HOW MUCH MORE FOR SMALL BUSINESSES?

November 9, 2009

"Officials of the toy manufacturer, Mattel, met separately with two CPSC commissioners November 3 to talk about how challenging it was for Mattel to comply with the CPSIA…

Peter Biersteker, a lawyer for Mattel with the law firm Jones Day in Washington D.C., said his client is finding the CPSIA difficult to decipher... "It's a lot of work. I don't know how smaller companies do it," Biersteker told Commissioner Robert Adler.

Despite Mattel's large team of in-house lawyers, he said, the company needed to hire outside lawyers to help understand the CPSIA. He said Mattel holds weekly conference calls on the issue, discussing how to comply with the act while remaining "cost competitive."

"Mattel Finds CPSIA to be a Challenge," *Product Safety Letter*, November 9, 2009.

COMMISSION ACTION ADDS TO CPSIA'S PROBLEMS:

August 16, 2010

"The latest dictates from the Consumer Product Safety Commission (CPSC) will drive up the cost of manufacturing products intended for children. The agency adopted a pair of new rules in July and August implementing the Consumer Product Safety Improvement Act of 2008, but as drafted, these regulations will force companies to waste time and money on redundant testing programs solely for the entertainment of bureaucratic busybodies.

… The redundant examinations, mostly checking flammability, can be prohibitively expensive. For instance, the regulations could require a manufacturer to build a queen-sized-bed prototype of a baby's crib just so it can be tested in an independent lab. Yet each of the component parts - the crib-sized mattresses, blankets and all other component parts - already are individually tested for the same hazards when manufactured."

Editorial: "The Red Tape Stimulus," *Washington Times*, August 16, 2010
http://www.washingtontimes.com/news/2010/aug/16/the-red-tape-stimulus/

EVEN THE NEW YORK TIMES SPOTLIGHTS THE UNINTENDED CONSEQUENCES OF THE CPSIA:

September 28, 2010

"... a new federal crackdown on dangerous toys has left some in the industry crying foul and not wanting to play."

"...Critics point to provisions in the law that they deem ludicrous. For instance, a paper clip that is included in a science kit for schoolchildren would have to be tested for lead. But a teacher can walk into any drug store and buy a box of paper clips that would not be subject to the same testing.

Similarly, a lamp that is festooned with cartoon characters would have to be tested, but a lamp without the characters would not."

http://www.nytimes.com/2010/09/29/business/29toys.html "Toy Makers Fight for Exemption From Rules," *New York Times*, September 28, 2010

SCIENCE KITS ARE "NOT BANNED" – BUT THE TOOLS USED INSIDE THEM ARE!

October 1, 2010

"The science kit makers had asked for a testing exemption for the paper clips and some other materials. On Wednesday, in a close 3-2 vote, the commission declined to give them the waiver they sought."

"...After the science kit vote, CPSC Chairman Inez Tenenbaum sought to reassure people that, "There is nothing in this rule that bans science kits."

Right. But while the commission vote doesn't ban the kits, manufacturers say it may crimp the supply of kits for elementary school children."

http://www.lvrj.com/opinion/goodbye-to-chemistry-sets-104139059.html "Goodbye to chemistry sets," *Las Vegas Review Journal*, October 1, 2010. Editorial.

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, ZERO SAFETY BENEFIT TO CHILDREN:

November 8, 2010

"...there has not been a corresponding benefit in the improved safety of children's furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008....The testing is simply being done to attempt to prove a negative."

American Home Furnishings Alliance

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, FORCED TO CUT JOBS:
November 8, 2010

"The majority of the annual costs will be in the record keeping requirements because none of the companies have the requisite IT infrastructure to handle the tracking of test reports per batch…Hooker estimates that it will cost them from $350,000 to $400,000 per year. Furniture Brands International said this will cost them over $4.5 million per year which is more than the profits from their best quarter in the last 2.5 years. In addition, this company must invest an additional $2 million in start up costs for setting up the production testing, programming computer systems to work with existing systems, and hiring and training employees for the administration of the CPSIA."

To offset these new costs, the company is forced to consider these choices: 1) shut down a small domestic plant which will mean the loss of 64 full time and 30 temporary US jobs; 2) shut down a larger domestic plant which will mean the loss of 384 US jobs; 3) significantly increase prices to offset the loss in revenue making them less competitive; 4) offer a lower quality product… or 5) shut down all domestic production which incorporates any finishing processes, which will mean the loss of approximately 460 US jobs."

American Home Furnishings Alliance
November 8, 2010 – Letter to Commissioners

NO MORE MOM AND POP TOY SALES:
July 7, 2010

"The second program involves making wooden toys that are given to the church and other charitable organizations in the county for distribution to needy children throughout the year especially at Christmas. Last year we created over 700 toys. The idea that we now are required to have these handcrafted toys certified will bring the program to a halt."

Dupage Woodworkers, Downers Grove, IL (July 7, 2010, Public Comment, Testing rule)

Mr. STEARNS. Commissioner McDowell.

TESTIMONY OF ROBERT MCDOWELL

Mr. MCDOWELL. Thank you, Mr. Chairman and Ranking Member DeGette and all members of the committee for having me here today.

During my 5 years at the FCC, I have supported policies that promote consumer choice through abundance and competition in lieu of regulation whenever possible. I therefore welcome today's dialog on regulatory reform.

Fifty years ago, there were only 463 pages in the FCC's portion of the Code of Federal Regulations, the C.F.R. During this period, Americans only had a choice of three TV networks and one phone company. Today, over-the-air TV, cable TV, satellite TV and radio, and the millions of content suppliers of the Internet offer consumers with an abundance of choices. In other words, the American communications economy was far less competitive in 1961 than it is today yet it operated under fewer rules.

In contrast, by late 1995, the FCC's portion of the C.F.R. had grown to 2,933 pages, up from 463 34 years earlier. As of the most recent printing of the C.F.R. last October, it contained a mind-numbing 3,695 pages of rules. Even after Congress codified deregulatory mandates with the landmark Telecommunications Act of 1996, the FCC still managed to add hundreds more pages of rules.

To put it another way, the FCC's rules measured in pages have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth, America's GDP grew by a substantially smaller number, 357 percent. In short, this is one metric illustrating government growth outpacing economic growth.

To be fair, some of those rules were written due to various congressional mandates and sometimes the FCC does remove regulations on its own accord or forbear from applying various mandates in response to forbearance petitions. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend. At the same time, Congress has given the FCC ample authority to deregulate. The legislative intent of key parts of the 1996 act such as sections 10, 11, 202H and 706, just to name a few, was to reduce the amount of regulation in telecommunications, broadcasting and information services. For instance, Congress ordered the FCC through section 10 of the 1996 act to forbear from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and not necessary for the protection of consumers. Similarly, section 11 requires the FCC to conduct reviews of telecom rules every 2 years to determine whether any such regulation is no longer in the public interest as a result of meaningful economic competition and to repeal or modify any regulation it determines to be no longer necessary in the public interest.

Removing unneeded rules can liberate capital currently spent on lawyers and filing fees, capital that would be better spent on powerful innovations. Accordingly, it is my hope that the FCC stays faithful to Congress's intent as embodied in section 11 by promptly

initiating a full and thorough review of every FCC rule, not just those that apply to telecom companies but all rules that apply to any entity regulated by the commission. The presumption of the FCC's review should be that a rule is not necessary unless we find compelling evidence to the contrary.

The first set of rules I would discard of course would be the recently issued Internet network management regulatory regime, also known as net neutrality. As I have stated many times before, those rules are unnecessary at best and will deter investment in badly needed next-generation infrastructure at worst. No evidence of systemic market failure exists to justify these overly burdensome regulations.

Furthermore, the FCC has too many forms. To give you some examples, there is form 603, form 611T, form 175, form 601, form 492, form 477, form 323 and forms 396, 396C—I am not sure what happened to 396A and B—form 397 and 398, among many, many others. While a few forms may be necessary, many could be eliminated or simplified. Similar repeal initiatives should be on our plate soon. For example, as I noted in a speech in May, the so-called fairness doctrine is literally still codified in the C.F.R. The doctrine regulated political speech. Political speech is core protected speech under the First Amendment and the doctrine is patently unconstitutional, as the FCC found in 1987.

Chairman Genachowski recently informed your committee that he supports removing references to the doctrine and its corollaries from the C.F.R. and intends to move forward on this effort in August. I look forward to helping him fulfill that promise.

In the same spirit, it is time to eliminate the outdated newspaper-broadcast cross-ownership rule in the upcoming review of our media ownership regulations. Evidence suggests that the old cross-ownership ban may have caused the unintended effect of reducing the number of media voices, especially newspapers in scores of American communities. Overall, however, what is needed is a comprehensive and sustained effort to repeal or, where appropriate, streamline unnecessary, outdated or harmful FCC rules. All future regulatory proceedings should start with a thorough market analysis that assesses the state of competition in a sober and clear-eyed manner.

In the absence of market failure, unnecessary regulations in the name of serving the public interest can have the perverse effect of harming consumers by inhibiting the constructive risk-taking that produces investment, innovation, competition, lower prices and jobs. In sum, decreasing the burdens of onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and serves consumers.

I look forward to working with all of you in pursuit of these goals. Thank you, Mr. Chairman.

[The prepared statement of Mr. McDowell follows:]

SUMMARY OF TESTIMONY
COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

JULY 7, 2011

My testimony will focus on four points: (1) FCC authority; (2) examples of ongoing proceedings that propose streamlining various regulations; (3) examples of regulations that are ripe for repeal; and (4) where we should go from here.

Congress envisioned that the 1996 Telecom Act would allow potential rivals, such as cable and phone companies and new entrants, to compete against each other. Added competition, lawmakers thought, would obviate the need for more rules. Unfortunately, over time, it does not appear that a net reduction of regulation has been the end result.

Chairman Genachowski has already initiated some proceedings in the past couple years that will help clear away some of the regulatory underbrush, and he should be commended for those efforts. For instance, in May, the Commission adopted a Notice of Proposed Rulemaking (NPRM) that proposed to eliminate certain reporting requirements for international telephone service. I look forward to continuing to work with my colleagues on this proceeding and others that the Chairman has initiated.

Much more work remains to be done, however. For example, I would discard the recently issued Internet network management regulatory regime, also known as "net neutrality." Also, while not as controversial, the "equal access" scripting requirements are still on the books. These rules require various phone companies to read aloud to new customers a list of independent long distance companies. Ironically, these rules no longer apply to the Baby Bells or their successors; they only apply to *smaller* phone companies. Additionally, as I noted in a speech in May, the Fairness Doctrine is literally still codified in the CFR. To his credit, Chairman Genachowski recently informed your committee that he supports removing references to the Fairness Doctrine (and its corollaries) from the CFR and intends to move forward on this effort in August. I look forward to helping him fulfill that promise. Similarly, it is time to eliminate the outdated newspaper/broadcast cross-ownership rule in our upcoming quadrennial review of our media ownership regulations. Evidence suggests that the old cross-ownership ban may have caused the unintended effect of reducing the number of media voices – especially newspapers – in scores of American communities.

Going forward, instead of an ad hoc approach, it would be more constructive to initiate a *comprehensive and sustained* effort to repeal or, where appropriate, streamline unnecessary, outdated or harmful FCC rules. In addition to a review of current regulations, the agency should approach the adoption of any new rule with caution and humility. First, all future regulatory proceedings should start with a thorough market analysis that assesses the state of competition in a sober and clear-eyed manner. Second, the FCC should view its statutory mission through a *de*regulatory lens, as Congress intended. The trend in recent years has been the opposite, unfortunately. One stark example is the FCC's regulatory use of Section 706 of the 1996 Telecom Act, which had previously been widely viewed as a deregulatory section.

In sum, decreasing the burdens of onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and serves consumers. I look forward to working with all of you as we find ways to scale back unnecessary and harmful regulations. Thank you again for the opportunity to appear before you today.

STATEMENT
OF
COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

"THE VIEWS OF THE INDEPENDENT AGENCIES ON REGULATORY REFORM"

BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 7, 2011

Thank you, Chairman Stearns and Ranking Member DeGette, for inviting me to join you today. As a commissioner, serving both in the majority and now the minority, I have supported policies that promote consumer choice offered through abundance and competition in lieu of regulation whenever possible. I therefore welcome today's dialogue on regulatory reform.

Removing unnecessary or harmful rules is by no means a partisan concept. As many of you have noted, on January 18 of this year, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome."[1] Additionally, Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs, sent a memorandum to agency heads regarding the executive order in which he noted that it "does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority."[2] Sunstein further wrote that, "[i]n particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules."[3] Moreover, Chairman Genachowski recently indicated that he would follow the spirit of this executive order and review outmoded FCC regulations. I look forward to working with him on this important endeavor.

Two months ago our office compiled some compelling Code of Federal Regulations ("CFR") statistics which now turn out to be relevant to today's hearing. We discovered that over 50 years ago, there were only 463 pages in the FCC's portion of the Code of Federal Regulations ("CFR"). During this period, Americans only had a choice of three TV networks and one phone company. Today, over-the-air TV, cable TV, satellite TV and radio, and the millions of content

[1] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

[2] Cass R. Sunstein, *Memorandum Regarding Executive Order 13563, "Improving Regulation and Regulatory Review,"* Feb. 2, 2011.

[3] *Id.* at 6.

suppliers on the Internet are overwhelming consumers with choices. In other words, the American communications economy was far less competitive in 1961 than it is today, yet it operated under fewer rules.

In contrast, by late 1995, right before the Telecommunications Act of 1996 became law, the FCC's portion of the CFR had grown to 2,933 pages – up from 463 pages 34 years earlier. In fact, the 1996 Telecom Act states that the FCC should "promote competition and reduce regulation."[4] Just the opposite occurred, however. As of the most recent printing of the CFR last October, it contained a mind-numbing 3,695 pages of rules. So, even after a landmark *de*regulatory act of Congress, the FCC *added* hundreds more pages of government mandates.

To put it another way, the FCC's rules, measured in pages, have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth, America's GDP grew by a substantially smaller number: 357 percent.[5] In short, this is one metric illustrating government growth outpacing economic growth.

To be fair, some of those rules were written due to various congressional mandates. And sometimes the FCC does remove rules on its own accord or forbear from applying various rules in response to forbearance petitions. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend.

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[4] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Telecom Act").

[5] The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," http://www.bea.gov/national/index.htm#gdp; *see also id.*, "Current and Real Gross Domestic Product," http://www.bea.gov/national/xls/gdplev.xls.

My testimony will focus on four points:

(1) The FCC's authority;

(2) Examples of ongoing proceedings that propose streamlining various regulations;

(3) Examples of regulations that are ripe for repeal; and

(4) Where we should go from here.

THE FCC HAS AMPLE AUTHORITY FROM CONGRESS TO DEREGULATE.

The 1996 Telecom Act passed both houses of a Republican Congress with a large bipartisan vote and was signed into law by a Democratic president. Congress envisioned allowing potential rivals, such as cable and phone companies and new entrants, to compete against each other. Added competition, lawmakers thought, would obviate the need for more rules. The plain language of the statute, plus its legislative history, tell us that as competition grows, deregulation in this economic sector should take place. The legislative intent of key parts of the legislation, such as Sections 10, 11, 202(h) and 706 – just to name a few – was to *reduce* the amount of regulation in telecommunications, broadcasting and information services. Unfortunately, over time, it does not appear that a net reduction of regulation has been the end result.

Congress has already provided the Commission with the legal tools it needs to reverse the pro-regulation trend of the past 50 years. Congress ordered the FCC through Section 10 of the 1996 Telecom Act to "forbear" from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and "not necessary for the protection of consumers."[6] Similarly, Section 11 requires the FCC to conduct reviews of

[6] 47 U.S.C. §160(a)(2); see Harold Furchtgott-Roth, *FCC ignores law while blindly increasing its regulations*, THE WASHINGTON EXAMINER, (May 1, 2011), http://washingtonexaminer.com/opinion/op-eds/2011/05/fcc-ignores-law-while-blindly-increasing-its-regulations#ixzz1RFsckE4k; *see also* Randolph J. May, *Rolling Back Regulation at the FCC*, NATIONAL REVIEW ONLINE, (Apr. 11, 2011), http://www.nationalreview.com/articles/print/264898.

telecom rules every two years to determine "whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition,"[7] and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[8] Removing unneeded rules can liberate capital currently spent on lawyers and filing fees – capital that would be better spent on powerful innovations. Accordingly, it is my hope that the FCC stays faithful to Congress's intent, as embodied in Section 11, by promptly initiating a full and thorough review of *every* FCC rule, not just those that apply to telecom companies, but all rules that apply to any entity regulated by the Commission. The presumption of the FCC's review should be that a rule is not necessary unless we find compelling evidence to the contrary.

RECENT FCC PROCEEDINGS PROPOSE SOME REGULATORY STREAMLINING.

Chairman Genachowski has already initiated some proceedings in the past couple years that will help clear away some of the regulatory underbrush, and he should be commended for those efforts. For instance, in May, the Commission adopted a Notice of Proposed Rulemaking (NPRM) that proposed to eliminate certain reporting requirements for international telephone service. Also, in January of 2010, the FCC issued an NPRM that proposes to streamline the application process for satellite and earth stations. In addition, the agency issued an NPRM this past February which seeks comment on ways the FCC can reform and modernize its Form 477 data collection processes. I look forward to continuing to work with my colleagues on these pending proceedings.

MANY MORE FCC RULES SHOULD BE REPEALED.

Much more work remains to be done. The first set of rules I would discard would be the recently issued Internet network management regulatory regime, also known as "net neutrality."

[7] 47 U.S.C. §161(a)(2).

[8] 47 U.S.C. §161(b).

As I have stated several times, those rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. There has been no evidence of systemic market failure that justifies these overly burdensome regulations. Moreover, language in the net neutrality order itself concedes that the Commission did not conduct a market power analysis or make a market power finding.[9] Notably, even though the FCC adopted the net neutrality rules last December, they have yet to become effective. In the interim, America's Internet remains open and freedom-enhancing, as it *always* has been. Now, before the new rules go into effect and cause uncertainty and unintended consequences in the marketplace, is the perfect time to repeal them.

While perhaps not as controversial as net neutrality, there are many other unnecessary rules still on the books. For instance, a good number of phone companies are still required to read aloud to new customers a list of independent long-distance companies. This so-called "equal access" scripting requirement is a dusty old vestige from the break-up of the AT&T long-distance monopoly. Ma Bell's long-distance arm was declared "non-dominant" way back in 1995. In other words, the long distance market has been competitive for almost 16 years, yet our antiquated rules live on. Ironically, these rules no longer apply to the Baby Bells or their successors. It is *smaller* phone companies that must bear the burden of living under them. Such costs – be they regulations or taxes on companies – are always paid for, ultimately, by consumers.

Furthermore, the FCC has too many forms. As I mentioned, the Chairman has launched an initiative which seeks to reform the FCC's data collection processes. I support these efforts and hope that this exercise results in comprehensive reform of the FCC's burdensome data

[9] *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, n. 49 (2010) ("Open Internet Order").

collection procedures as opposed to simply shaving them around the edges. To give you an example of the current processes, there is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others. While a few forms may be necessary, many could be eliminated or simplified. Several forms require companies to submit data that is no longer needed or is supplied elsewhere. Take, for example, my "favorite" form, the Enhanced Disclosure form. Back in late 2007, over my dissent, the Commission voted to require TV licensees to fill out a form describing to the government what kind of programming they were airing to the public and when they were airing it. Broadcasters estimated that it would cost them up to two full-time jobs to hire people to do nothing all day but fill out the form and send it to Washington bureaucrats. Also, unless I'm missing something, TV stations don't aim to keep their work product a secret from anyone. If the government wants to know what is being aired, it can turn on the TV.

There is some good news on this front, however. First, the Office of Management and Budget under both Presidents Bush and Obama have prevented the Enhanced Disclosure form from going into effect because of concerns that the mandate violates Paperwork Reduction Act prohibitions. Second, a recent FCC staff report analyzing the "Information Needs of Communities"[10] recommends that the Commission scrap the form – a recommendation I heartily endorse – and replace it with a more streamlined online disclosure system. I am skeptical of any potential replacement because of the risk that it might simply resurrect the Enhanced Disclosure form's pointless and burdensome mandates in a new electronic guise. Nevertheless, I hope the FCC moves forward on a rulemaking effort to eliminate the form quickly.

[10] Steve Waldman and the FCC Working Group, *The Information Needs of Communities: The changing media landscape in a broadband age* (June 2011).

Similar repeal initiatives should be on our plates soon. For example, as I noted in a speech in May, the Fairness Doctrine is literally still codified in the CFR.[11] [12] The Fairness Doctrine was a rule that thrust the government's coercive reach into editorial decisions of broadcasters. In short, the Doctrine regulated political speech. Political speech is core protected speech under the First Amendment, and the Fairness Doctrine is patently unconstitutional. In fact, the FCC decided as much in 1987, when everyone assumed the agency had killed it. Instead, it appears that the Commission merely opted not to enforce the rule. To his credit, Chairman Genachowski recently informed your committee that he supports removing references to the Fairness Doctrine (and its corollaries) from the CFR and intends to move forward on this effort in August. I look forward to helping him fulfill that promise.

Similarly, it is time to eliminate the outdated newspaper/broadcast cross-ownership rule in our upcoming quadrennial review of our media ownership regulations. Evidence suggests that the old cross-ownership ban may have caused the unintended effect of reducing the number of media voices – especially newspapers – in scores of American communities. The FCC staff's *Information Needs of Communities* report is replete with data documenting the declining state of American newspapers, including the fact that more than 230 papers have closed their doors since 2007.[13] Although it is impossible to attribute the deaths of all those papers to the FCC restriction, I note that many knowledgeable observers for years have attributed the hobbling and

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[11] 47 C.F.R. § 73.1910 ("broadcasting"); 47 C.F.R. § 76.209 ("origination cablecasting"). *See also* 47 C.F.R. §§ 76.1612-13 (Fairness Doctrine corollaries applied to origination cablecasting).

[12] Attached as Exhibit A for the Subcommittee's convenience are copies of the speech on regulatory reform that I gave on May 19 to the Telecommunications Industry Association as well as letters I sent to Acting Chairman Copps and Chairman Genachowski in 2009 on FCC reform in general.

[13] Steve Waldman and the FCC Working Group, *The Information Needs of Communities: The changing media landscape in a broadband age* (June 2011) at 41, http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0609/DOC-307406A1.pdf (providing list of developments concerning shuttered papers between 2007 and 2010). Another 18 newspapers moved to online-only editions. *Id.*

eventual disappearance of the old *Washington Star*, once the city's premier daily, to the cross-ownership ban which forced the paper to separate from its radio and TV operations.[14] But how many modern-day *Washington Stars* could have survived the Internet's effect on traditional business models if they already had been part of a stronger, multi-platform news operation?

WHERE THE FCC SHOULD GO FROM HERE.

Although I have appreciated the FCC's review of various rules on an ad hoc basis, a more constructive approach would be to initiate a *comprehensive and sustained* effort to repeal or, where appropriate, streamline unnecessary, outdated or harmful FCC rules. The FCC should review every rule and should adopt the presumption that a rule is not necessary unless it finds compelling evidence to the contrary. A large-scale and aggressive review would signal to investors that the Commission takes seriously Congress's and the President's calls to deregulate.

In addition to a review of current regulations, the agency should approach the adoption of any new rule with caution and humility. First, all future regulatory proceedings should start with a thorough market analysis that assesses the state of competition in a sober and clear-eyed manner. Furthermore, if the FCC opts not to include a market analysis, it should explain why. It has been my philosophy that in the absence of market failure, unnecessary regulations in the name of serving the public interest can have the perverse effect of harming consumers by inhibiting the constructive risk-taking that produces investment, innovation, competition, lower prices and jobs.

Second, the FCC should view its statutory mission through a *de*regulatory lens, as Congress intended. The trend in recent years has been the opposite, unfortunately. One stark

[14] *See* James Gattuso, *The FCC's Cross-Ownership Rule: Turning the Page on Media*, Heritage Foundation Backgrounder on Internet and Technology (May 6, 2008), http://www.heritage.org/research/reports/2008/05/the-fccs-crossownership-rule-turning-the-page-on-media (citing, *e.g.*, Testimony of Jerald N. Fritz, Allbritton Communications Company, before Committee on Energy and Commerce, U.S. House of Representatives, Dec. 5, 2007, available at http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.120507.Fritz-testimony.pdf).

example is the FCC's use of Section 706 of the 1996 Telecom Act, which had previously been widely viewed as a deregulatory section.[15] Section 706 requires the FCC to determine whether "advanced telecommunications capability [broadband] is being deployed to all Americans in a reasonable and timely fashion."[16] In all of the reports starting with the first in 1999, the FCC has answered "yes" to that question. In 2010, however, the Commission dramatically reversed course and answered "no."[17] This year, the FCC made the same flawed finding.[18] I dissented from both of those Section 706 reports. The reports were unsettling, considering that America has made impressive improvements in developing and deploying broadband infrastructure and services. In addition to my concern that the reports were outcome driven, I also warned that the conclusions could be used as a pretext to impose unnecessary new rules. Unfortunately, my fears were realized only five months after the issuance of the 2010 Section 706 Report. The Commission then, in a 3-2 vote, relied heavily on the findings in that report in an attempt to

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[15] Congress stated that "[i]f the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by *removing barriers* to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b) (emphasis added) (Section 706 of the Telecommunications Act of 1996 has since been codified in Title 47, Chapter 12 of the United States Code but is commonly referred to as "Section 706"). Clearly, Congress envisioned the Commission "removing barriers" if it determined that broadband was not being deployed in a timely manner. Adding new rules, such as those regulating Internet network management, erects new barriers contrary to the directive to remove them.

[16] 47 U.S.C. § 1302(b).

[17] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 09-137, A National Broadband Plan for Our Future,* GN Docket No. 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556 (2010) ("2010 *Section 706 Report*"). In fact, the 2010 Section 706 Report explicitly included in its caption and referenced findings from the National Broadband Plan that "95% of the U.S. population lives in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps."

[18] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act,* GN Docket No. 10-159; Seventh Broadband Progress Report and Order on Reconsideration, FCC 11-78 (May 20, 2011) ("2011 Section 706 Report").

manufacture a legal foundation for the net neutrality order.[19] Given this history, it is reasonable to be concerned that reiteration of the negative Section 706 finding two years in a row may be used to bolster additional FCC regulatory efforts in other areas where Congress has not given the FCC legal authority to do so.

In sum, decreasing the burdens of onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and serves consumers. I look forward to working with all of you as we find ways to scale back unnecessary and harmful regulations.

Thank you again for the opportunity to appear before you today.

[19] *See* ¶ 6 of 2011 Section 706 Report. *See also Open Internet Order*, 25 FCC Rcd 17905 (2010).

Exhibit A

Remarks of FCC Commissioner Robert M. McDowell delivered to Telecommunications Industry Association (May 19, 2011).

Letter from FCC Commissioner Robert M. McDowell to FCC Chairman Julius Genachowski (July 20, 2009).

Letter from FCC Commissioner Robert M. McDowell to FCC Acting Chairman Michael Copps (January 27, 2009).

Remarks of FCC Commissioner Robert M. McDowell
Telecommunications Industry Association
TIA 2011: Inside the Network

Thursday, May 19, 2011
The Gaylord Texan
Dallas, Texas

As prepared for delivery

Thank you, Grant. You and your team have put together another impressive show.

It's great to be back in Texas. My family has deep roots in the Lone Star State – more than five generations worth, in fact. My great-great grandfather, James Knox McDowell, was an abolitionist who moved here before the Civil War. As a fan of Abe Lincoln's, he helped found a fledgling new political party, known as the Republican Party. That started a long line of Republicans in the McDowell family. Of course, back in those days, you could ride across the dusty plains of Texas for days and never see any sign of another Republican. There were so few Republicans here that James cast the only vote in his county against secession – the *only* vote.

After enduring a great deal of hardship during and after the War, including surviving a failed lynching at the hands of the Klan, James and his wife, Victoria, went on to raise five sons. One of them, C.K. McDowell, my great grandfather, went from working as a ranch hand and cowboy living in a frontier dugout, to reading the law and becoming an attorney. After the turn of the century, somehow he was elected chief judge of Val Verde County. Upon his election, a riot broke out in the town of Del Rio because he was … well, a Republican. The Texas Rangers had to be called in to quell the violence. (Not the baseball team, the horsemen with guns.) But his picture still hangs on a wall in the old courthouse in Del Rio. For decades, he was the *only* Republican on that wall.

In his later years, he went on to run for governor of Texas and won the Republican nomination in 1942. Keep in mind that back then the Republican Party of Texas could have held its convention in a phone booth. For all I know, he was nominated by default because no one else wanted the "honor." But while writing this speech, I thought I would look up the election results from his race. Ready? It ends up that the incumbent governor, Coke R. Stevenson, garnered 280,735 votes. Judge Caswell Kelliston McDowell hauled in 9,204 votes. That translated into a whopping 3.17 percent. Some would call that a "rounding error."

So what does any of this have to do with the FCC? Well ... it seems that we McDowells have a knack for picking places where we end up being the *only* Republican. And while there are a lot more Republicans in Texas these days, there are no more Texas Republicans on the FCC. I had no idea that my family history was preparing me for such loneliness and being on the short end of votes – the shortest of short ends, in fact. But it all makes sense to me now.

3.17 percent. That's quite a number. So let's change the subject and take a look at another number: 463. That was the total number of pages in the FCC's portion of the Code of Federal Regulations – the "CFR" – 50 years ago. The CFR is the book that contains most of the federal government's regulations affecting our country's economy. And at the time of then-FCC Chairman Newt Minow's famous "TV is a vast wasteland" speech, in 1961, all of the FCC's rules governing radio, television, telegraphs, telephones and such could fit neatly into 463 pages. Keep in mind, in 1961 Americans only had a choice of three TV networks and one phone company. Today, over-the-air and cable TV, satellite TV and radio, and the millions of content suppliers on the Internet are overwhelming consumers with choices. In other words, the American communications economy was far less competitive in 1961 than it is today, yet it operated under fewer rules.

By late 1995, right before the Telecommunications Act of 1996 became law, the FCC's portion of the CFR had grown to 2,933 pages – up from 463 pages 34 years earlier. With the '96 Act, Congress envisioned allowing potential rivals, such as cable and phone companies and new entrants, to compete. Added competition, lawmakers thought, would obviate the need for more rules. The plain language of the statute, plus its legislative history, tell us that as competition grew, deregulation – *DE*regulation – in this economic sector should take place. The legislative intent of key parts of the '96 Act, such as Sections 10, 11, 202(h) and 706 – just to name a few – was to *reduce* the amount of regulation in telecommunications, information services and broadcasting. In fact, the Act states that the FCC should "promote competition and reduce regulation."[1] But, as it ends up, just the opposite occurred. As of the most recent printing of the CFR last October, it contained a mind-numbing 3,695 pages of rules. That's right, after a landmark *de*regulatory act of Congress, the FCC *added* hundreds more pages of government mandates.

To put it another way, the FCC's rules, measured in pages, have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth of 800 percent, America's GDP grew by a substantially smaller number: 357 percent.[2] In short, this is one imperfect but relevant metric illustrating growth in government outpacing economic growth.

To be fair to the Commission, some of those thousands of pages of rules were written due to congressional mandates. And sometimes the FCC does remove rules from its books as the

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[1] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

[2] The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," http://www.bea.gov/national/index.htm#gdp; *see also id.*, "Current and Real Gross Domestic Product," http://www.bea.gov/national/xls/gdplev.xls.

result of forbearance petitions, or by its own accord, just as we did last week with some international reporting requirements. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend.

Now at this point I need to issue a warning. For the next couple of minutes, I'm going to sound like a lawyer.

As both former FCC Commissioner Harold Furtchgott-Roth and the Free State Foundation's Randy May have written recently, Congress ordered the FCC through Section 10 of the '96 Act to "forbear" from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and "not necessary for the protection of consumers."[3] Similarly, Section 11, the less famous sibling of Section 10, requires the FCC to conduct reviews of telecom rules every two years to determine "whether any such regulation is no longer in the public interest as the result of meaningful economic competition,"[4] and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[5]

Please keep in mind that removing unnecessary or harmful rules is by no means a partisan concept. The '96 Act passed both houses of a Republican Congress with a large bipartisan vote and was signed into law by a Democratic president. And on January 18 of this year, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome."[6] As he wrote in the *Wall Street Journal*, he is seeking to "remove outdated regulations that stifle job creation and make our economy less competitive."[7]

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[3] 47 U.S.C. §160(a)(2).
[4] 47 U.S.C. §161(a)(2).
[5] 47 U.S.C. §161(b).
[6] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).
[7] President Barack Obama, *Toward a 21st-Century Regulatory System,* WALL ST. J., Jan. 18, 2011.

So, having established that we have strong bipartisan support to deregulate, let's get to work. Removing unneeded rules can liberate capital currently spent on lawyers and filing fees – capital that would be better spent on powerful new communications equipment. Accordingly, I call on the Chairman and my fellow commissioners to stay faithful to Congress's intent, as embodied in Section 11, by promptly initiating a full and thorough review of *every* FCC rule, not just those that apply to telecom companies, but all rules that apply to any entity regulated by the Commission. The presumption of our review should be that a rule is not necessary unless we find compelling evidence to the contrary.

Of course, the first set of rules I would discard would be the recently issued Internet network management regulatory regime, also known as "net neutrality." As I have stated numerous times, those rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. But to be realistic, reversal of them will have to be at the hands of the courts or Congress.

Similarly, it would take congressional action to start to erase the regulatory stovepipes created by Titles I, II, III and VI. Products and services are converging across platforms. So should the statute.

But here are a few other rules the FCC could get rid of itself.

Did you know that many phone companies are still required to read aloud to new customers a list of available independent long distance companies? This so-called "equal access" scripting requirement is a dusty old vestige from the break-up of the AT&T long distance monopoly. Ma Bell's long distance arm was declared "non-dominant" way back in 1995. In other words, the long distance market has been competitive for almost 16 years, yet our antiquated rules live on like a slumbering Rip Van Winkle who fell asleep in the 1980s.

Ironically, these rules no longer apply to the Baby Bells or their successors, and have never applied to wireless carriers. It is smaller phone companies that must bear the burden of living under them. Such costs – be they regulations or taxes on companies – are always paid for, ultimately, by consumers. It took the Commission about a year to put out for public comment a 2008 petition to eliminate these dinosaurs, and we are several years overdue to repeal them.

Similarly, it is smaller non-Bell companies that must live under cost allocation requirements and ARMIS (Automatic Reporting Management Information System) reporting mandates. For carriers living under flexible price cap rules in an environment that is more competitive than a few years ago, these cumbersome and costly requirements make no sense.

Then there are the forms – lots of forms. Government bureaucracies *love* to require people to fill out forms. There is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others. Several forms require companies to submit data that is no longer needed or is supplied elsewhere. Take for example, my "favorite" form, the enhanced disclosure form. Back in late 2007, over my dissent, the Commission voted to require TV licensees to fill out a form describing to the government what kind of programming they were airing to the public and when they were airing it. Broadcasters estimated that it would cost them up to two full-time jobs to hire people to do nothing all day but fill out the form and send it to Washington bureaucrats. Proponents of this rule may have meant well. In fact, at the time of its adoption I overheard one advocate exclaim joyfully, "Two full-time jobs? That's terrific. That's job creation!" Of course, they didn't realize that the new requirement would result in the *elimination* of two jobs elsewhere at the station, such as the newsroom, to pay for the new mandate.

Also, unless I'm missing something, TV stations don't aim to keep their work product a secret from anyone. If the government wants to know what is being aired, it can turn on the TV – all Big Brother and First Amendment concerns aside.

The good news is that the enhanced disclosure form has been held up by the Office of Management and Budget (OMB) since 2008 because it raises Paperwork Reduction Act problems, among other things. And, yes, that's the same office that has temporarily held up the effectiveness of the net neutrality rules. Given that both the Bush and Obama White Houses have kept it from going into effect, why don't we just put it out of its – and our – misery and repeal it?

I'm not saying that all forms are unnecessary. But multiple forms sometimes collect the same data, such as Form 477 collecting the same ownership information required by Form 602. Do we really need to kill America's information economy with a thousand paper cuts?

And now, if you have fallen asleep, this last part should wake you up. In fact, the likely headline coming out of this speech will have nothing to do with telecom equipment. Sorry about that. Are you ready? It is rare that the English language can come up with two words that, when put together, generate so much controversy. This is potent stuff, so you'd better brace yourself. The … Fairness Doctrine. It still exists! No, it doesn't still exist the way Elvis "still exists." The Fairness Doctrine is literally still codified in the CFR.[8] We stumbled on this forgotten fact while researching material for this speech.

For those of you who have no idea what I am talking about, the Fairness Doctrine was a rule … well, still IS a rule, apparently … that thrust the government's coercive reach into editorial decisions of broadcasters. In short, the Doctrine regulated political speech. Suffice it to say that political speech is core protected speech under the First Amendment, and the Fairness

[8] 47 C.F.R. § 73.1910 (broadcasting); 47 C.F.R. § 76.209 ("origination cablecasting").

Doctrine is patently unconstitutional. The FCC decided as much in 1987 when everyone assumed the FCC killed it. We thought that this monster's dead and stinking corpse was left to rot in a government graveyard. Instead, it appears that the Commission merely opted not to enforce the rule. Its words still defile the pages of the CFR, and we should erase it with a repeal order immediately.

In closing, a comprehensive and sustained effort to repeal and streamline unnecessary, outdated or harmful FCC rules would signal to investors that the Commission takes seriously Congress's and the President's calls to deregulate. With the certainty that the Commission will not only refrain from issuing new unneeded rules, but weed out old ones as well, investment capital is more likely to start flowing again.

Congress could do its part as well. Adoption of tax policies that accelerate depreciation schedules for tech equipment and classify some capital investments as expenses have a history of stimulating economic activity and job creation. By some estimates, every one dollar in accelerated depreciation tax incentives generates nine dollars in GDP growth.[9] One study estimated that the tech tax incentives of 2002 and 2003 may have increased GDP by $20 billion and affected the creation and retention of up to 200,000 jobs.[10]

The bottom line is the bottom line. History teaches us over and over again: Decreasing the burdens of onerous regulatory and taxation policies increases investment (which means more purchases of telecom equipment), spurs innovation, accelerates competition, lowers prices, creates jobs and pleases consumers. So what is there not to like? Let's get on with such a program right away.

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[9] Robbins, Aldona and Gary, *What's the Most Potent Way to Stimulate the Economy?,* INSTITUTE FOR POLICY INNOVATION (Oct. 10, 2001).

[10] House, Christopher L. and Shapiro, Matthew D., *Temporary Investment Tax Incentives: Theory with Evidence from Bonus Depreciation,* Am. Economic Rev. (2008).

Thank you for having me here today, and I look forward to your questions.

Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

July 20, 2009

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear ~~Mr. Chairman~~ Julius:

Once again, congratulations on your nomination and confirmation as Chairman. I am greatly encouraged and energized to know that you, Commissioner Copps and I will be working together on a plethora of communications policy challenges facing the economy and American consumers. Although you have only been here for three weeks, I applaud the steps you have already taken to reform the agency. Your recent statements regarding boosting employee morale, promoting greater transparency, and creating a more informed, collaborative and considerate decision-making process are heartening. Anything we could do to advance the timely and orderly resolution of Commission business would be constructive. I am confident that you will agree that the preliminary steps Mike took during his interim chairmanship have provided a sound footing upon which to build.

Accordingly, in the collaborative and transparent spirit of my January 29, 2009, letter to Mike, I offer below a number of suggestions on achieving the important public interest objectives of reforming this agency. As you and I have already discussed, these thoughts are intended as a starting point for a more public discussion that should examine a larger constellation of ideas for moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Many of these ideas have been discussed by many people for a long period of time, and if we don't care who gets the credit we can accomplish a great deal.

Operational, financial and ethics audit.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company, the National Exchange Carrier Association and the federal advisory committees. Just as you recently articulated in your June 30 request for information on the Commission's safety preparedness, I would envision this audit as an examination akin to a due diligence review of a company as part of a proposed merger or acquisition, or after a change in top management. I would not envision the process taking a lot of time; yet, upon completion, we would be better positioned to identify and assess the current condition of the FCC and its related entities, as well as how they operate.

This undertaking would be a meaningful first step on the road to improving the agency. As with all FCC reform endeavors, I hope that all of the commissioners would be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with additional opportunities to submit comments anonymously. I also propose that we hold a series of "town hall" meetings at the FCC's Washington headquarters, at a few field offices, as well as in a few locations around the country to allow our fellow citizens to attend and voice their opinions directly to us.

As part of a financial review, it is crucially important that we examine the Commission's contracting process, as well as the processes relating to the collection and distribution of administrative and regulatory fees currently conducted exclusively by the Office of Managing Director. For instance, we should consider whether the full Commission should receive notice prior to the finalization of significant contracts or other large transactions.

In the same vein, it is time to examine the Commission's assessment of fees. Regulatory fees are the primary means by which the Commission funds its operations. You may be aware that the FCC actually makes money for the tax payers. As Mike has also noted, our methodology for collecting these fees may be imperfect. At first blush, it appears that we may have over-collected by more than $10 million for each of the last two years. Some have raised questions regarding how the fee burden is allocated. Our recent further notice of proposed rulemaking could lead to a methodology that lowers regulatory fees and levies them in a more nondiscriminatory and competitively neutral manner.

We should also work with Congress to examine Section 8 of the Act and the Commission's duty to collect administrative fees. I am hopeful that we will examine why we continue to levy a tax of sorts of allegedly $25 million or so per year on industry, after the Commission has fully funded its operations through regulatory fees. As you may know, that money goes straight to the Treasury and is not used to fund the agency. Every year, we increase those fees to stay current with the Consumer Price Index. At the same time, our regulatees pass along those costs to consumers and they are the ones who ultimately pay higher prices for telecommunications services.

Further, given the significant concerns raised about the numbers and the way the audits have been conducted, I recommend that we examine the financial management of the universal service fund. You may know that the Commission's Inspector General reported last year that the estimated erroneous payment rate for the High Cost program between July 2006 and June 2007 was 23.3 percent, with total estimated erroneous payments of $971.2 million. While I am pleased that the OIG identified this error, it is time that we get to the bottom of this matter and remedy it.

In the same spirit, an ethics audit should ensure that all of our protocols, rules and conduct are up to the highest standards of government best practices. Faith in the ethics of government officials has, in some cases, eroded over the years and we should make sure that we are doing all that we can to maintain the public's trust.

Update and republish the FCC strategic plan.

Also in connection with this review, I hope that we can work together to update and republish the Commission's strategic plan. Like me, you may find that, as we toil on day-to-day tasks, it can be easy to lose sight of our strategic direction. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

Potential restructuring of the agency.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. As you know, the Commission has been reorganized over the years – for instance, the creation of the Enforcement Bureau under Chairman Kennard and the Public Safety and Homeland Security Bureau under Chairman Martin. Close coordination among the staff in pursuit of functional commonality historically has improved the Commission's effectiveness. Nonetheless, the time is coming again to reconsider this option.

I am not suggesting that we make change for the sake of change. After all, we would agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, additional improvements we can make to increase our efficiency. As Mike emphasized, the Commission's most precious resource, really our *only* resource, are its people. Many of our most valued team members are nearing retirement age. We need to do more to recruit and retain highly-qualified professionals to fill their large shoes. I hope our next budget will give us adequate resources to address this growing challenge.

Next, I would encourage consideration of filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals. For example, there is no reason why we cannot use engineers to help investigate complaints and petitions that involve technical and engineering questions. This would be especially useful as we continue to consider matters pertaining to network management. Similarly, our economists could be better used to help assess the economic effects of our proposed actions.

Improve external communication.

As you and I have also discussed, we need to improve our external communications regarding FCC processes and actions. I greatly appreciate Mike's promptness in posting the Open Meeting dates covering his tenure. I am hopeful that we will swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

As part of these communications improvements, I look forward providing input as to updating the Commission's IT and web systems. I applaud your commitment to this endeavor and Mike's success in securing additional funding toward this end. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable. I also recommend that we update the General Counsel's part of the website to include litigation calendars, as well as access to pleadings filed by all the parties. Additionally, I suspect that our customers would prefer that licenses of all stripes be housed in one database, rather than separate databases spread across the stovepipes of our several bureaus. We should seek comment on this, and other similar administrative reform matters.

In addition, I propose that we create, publish on the website and update regularly an easy-to-read matrix setting forth a listing of all pending proceedings and the status of each. This matrix would include those matters being addressed on delegated authority. The taxpayers should know what they are paying for.

Similarly, I suggest that we establish and release a schedule for the production of all statistical reports and analyses regularly conducted by the Commission, and publish annual updates of that schedule. This would include, for example: the *Wireless Competition Report*, which has traditionally been released each September; the *Video Competition Report*, which until recently, was released at the end of each year; and the *High-Speed Services Report*, which, at one point, was released biannually. Similarly, quite some time before your arrival, I went on record calling for giving the American public the opportunity to view and comment on at least a draft or outline of the National Broadband Plan. I look forward to working with you to increase public awareness regarding the status and substance of our work on this plan. The goal here would be not only to ensure that the public is fully aware of what we are working on and when, but also to give these valuable analyses to their owners – the American people – with regularity.

In the same vein, Congress, the American public and consumers, among other stakeholders – not to mention your fellow commissioners – would greatly appreciate it if notices of proposed rulemakings actually contained *proposed rules*.

Improve internal communication.

Also, we need to overhaul our internal information flow, collaboration and processes. I am eager to work with you, Mike, and our future colleagues, to identify and implement additional measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process. The bottom line is simple: No commissioner should learn of official actions through the trade press.

An effective FCC would be one where, for instance, Commissioner offices would receive options memoranda and briefing materials long before votes need to be cast. For example, for all rulemakings, within 30 days of a comment period closing, perhaps all commissioners could

receive identical comment summaries. Also, within a fixed timeframe after receiving comment summaries, say 60 to 90 days, all commissioners could receive options memos complete with policy, legal, technical and economic analyses. In preparation for legislative hearings, it would be helpful if all commissioners received briefing materials, including witness lists, at least five business days prior to the hearing date. For FCC *en banc* hearings or meetings, we should aim to distribute briefing materials to all commissioners at least one week prior to the event date. The details here are less important than the upshot: all commissioners should have unfettered access to the agency's experts, and receive the benefit of their work. Again, I am grateful to Mike for his preliminary efforts in this regard.

Also along these lines, I hope that your team will reestablish the practice of regular meetings among the senior legal advisors for the purpose of discussing "big picture" policy matters, administrative issues, as well as to plan events and meetings that involve all of the offices. Given the numerous tasks we have before us, I trust you will agree that regular meetings among this group will improve our efficiencies, and go a long way toward lessening, if not eliminating, unpleasant surprises.

Just as important would be to hold regular meetings among the substantive advisors and relevant staff, including the Office of General Counsel. Having ample opportunity to review and discuss pending proceedings and the various options at the early stages of, and throughout the drafting process would allow us to capitalize on our in-house expertise early and often. Taking such precautions might also bolster the Commission's track record on appeal. Indeed, this type of close collaboration might lead to more logical, clear and concise policy outcomes that better serve the public interest.

Another idea is to update and rewrite our guide to the Commission's internal procedures, currently entitled *Commissioner's Guide to the Agenda Process.* For instance, just as Mike has done with respect to the distribution of our daily press clips, I propose that we undertake a thorough review of the physical circulation process, including identifying and making changes to reduce the amount of paper unnecessarily distributed throughout the agency. Current procedures require that each office receive about eight copies of every document on circulation when one or two would suffice. I also wonder why our procedures mandate delivery of 30 paper copies of released Commission documents to our press office. The overwhelming majority of reporters who cover our agency pull the materials they need from our website. Perhaps this is another area where we could save money and help the environment all at the same time.

Coordinate with other facets of government.

Finally, on a more "macro" level, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, I again extend my warmest congratulations on your new position as Chairman. You are to be commended for the steps you have taken thus far toward rebuilding this agency. I look forward to working together with you, Mike and our new colleagues upon their confirmation to do even more.

Sincerely,

Robert M. McDowell

cc: The Honorable Michael J. Copps

Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

January 27, 2009

The Honorable Michael J. Copps
Acting Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Mike:

Once again, congratulations on being named Acting Chairman. Additionally, thank you for your dedication and commitment to public service and the Commission. It goes without saying that I am looking forward to continuing to work with you.

I am greatly encouraged and energized to know that you, Commissioner Adelstein and I will be working together toward the goals of boosting employee morale, promoting greater transparency, as well as creating a more informed, collaborative and considerate decision-making process, all aimed toward advancing the timely and orderly resolution of Commission business. Thank you for addressing these and many other issues within minutes of becoming Acting Chairman. I certainly appreciate the new atmosphere you are creating at the Commission, and I know that the FCC's talented and dedicated career employees appreciate your efforts as well. Accordingly, with the utmost respect for you, the Commission staff and the new Obama Administration, I offer below several preliminary suggestions on achieving the important public interest objectives of reforming this agency. My letter is intended to continue a thoughtful dialogue on moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Our collaborative efforts to rebuild the agency should not be limited to the thoughts outlined in this brief letter. As you and I have discussed many of these ideas already, let this merely serve as a starting point for a more public discussion that should examine a larger constellation of ideas.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company and the Federal Advisory Committees. As with all FCC reform endeavors, I hope that all of the commissioners will be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with an opportunity to submit comments anonymously.

I would also suggest that we work to update and republish the Commission's strategic plan. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. I am not suggesting that we make change for the sake of change. After all, we agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, steps we likely would want to implement to increase our efficiency. For example, as you have already stated, delegating some authority back to upper and mid-level management, filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals come to mind.

As we have also discussed previously, we need to improve our external communications regarding FCC processes and actions. As an immediate first step, I suggest that we swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

Also, we agree that we need to overhaul our internal information flow, collaboration and processes. I am eager to continue to work with you and Commissioner Adelstein to identify and implement measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process.

As part of these communications improvements, I share your desire to update the Commission's IT and web systems. They are in dire need of an overhaul. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable.

Finally, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, Mike, I again extend my warmest congratulations on your designation as Acting Chairman. I look forward to working together with you and Commissioner Adelstein to improve our agency during the coming days and weeks.

Sincerely,

Robert M. McDowell

cc: The Honorable Jonathan S. Adelstein

Mr. STEARNS. I thank the gentleman.

Welcome, Chairman Wellinghoff, for your opening statement.

TESTIMONY OF JON WELLINGHOFF

Mr. WELLINGHOFF. Thank you, Chairman Stearns, Ranking Member DeGette and members of the subcommittee. I want to thank you all for having us here today, and my colleague, Commissioner Moeller, to discuss our views on regulatory reform in independent agencies. We have submitted full testimony here that I would like to have entered into the record, and I will summarize my testimony.

The commission continually seeks to streamline its regulations in order to foster competitive markets and facilitate enhanced competition to minimize consumer costs. Implementing the statutory authority provided by Congress, I am committed to assisting consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost for appropriate regulatory and market means. Fulfilling this mission involves pursuing two primary goals: ensuring that rates, terms and conditions are just and reasonable and not unduly discriminatory or preferential, and promoting the development of safe, reliable and efficient infrastructure that serves the public interest. The commission has taken and continues to take a number of steps to make certain that its regulations meet the fundamental objectives set forth by Congress without imposing undue burdens on regulated entities or unnecessary costs on those entities or their customers.

For example, the commission has taken several steps to remove barriers to entry of new businesses and technologies which facilitate competitive markets and can lower consumer costs. The commission also seeks out ways to help entities, particularly small ones, navigate the federal regulatory process. The commission has also recently reduced burdens on applicants, speeding up processes of filings and improved public access to documents.

In sum, I support the goals of Executive Order 13563. I have directed the commission staff to conduct review of the commission's regulations with the goals of the Executive order in mind. This direction is consistent with the commission's practice of engaging in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry and its consumers.

Thank you, and I look forward to answering any questions.

[The prepared statement of Mr. Wellinghoff follows:]

One Page Summary: Testimony of Chairman Jon Wellinghoff

The Commission continually seeks to streamline its regulations in order to foster competitive markets and facilitate enhanced competition to minimize consumer costs. In implementing the statutory authority provided by Congress, I am committed to assisting consumers in obtaining reliable, efficient, and sustainable energy services at a reasonable cost through appropriate regulatory and market means. Fulfilling this mission involves pursuing two primary goals: ensuring that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential, and promoting the development of safe, reliable and efficient infrastructure that serves the public interest. The Commission has taken, and continues to take, a number of steps to make certain that its regulations meet the fundamental objectives set by Congress without imposing undue burdens on regulated entities or unnecessary costs on those entities or their customers.

For example, the Commission has taken several recent steps to remove barriers to entry of new business and technologies, which facilitates competitive markets and can lower consumer costs. The Commission also seeks out ways to help entities, particularly small ones, navigate the federal regulatory process. The Commission has also recently reduced burden on applicants, sped up processing of filings and improved public access to documents.

In sum, I support the goals of Executive Order 13563. I have directed the Commission's staff to conduct a review of the Commission's regulations with the goals of the executive order in mind. This direction is consistent with the Commission's practice of engaging in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry and consumers.

Testimony of Chairman Jon Wellinghoff

Federal Energy Regulatory Commission

Before the House Subcommittee on Oversight and Investigations

Of the Committee on Energy and Commerce

United States House of Representatives

July 7, 2011

Mr. Chairman and members of the Subcommittee:

My name is Jon Wellinghoff, and I am the Chairman of the Federal Energy Regulatory Commission (FERC or Commission). Thank you for the opportunity to appear before you today to discuss my views on regulatory reform and independent agencies. It is my belief that the Commission continually seeks to streamline its regulations in order to foster competitive markets and facilitate enhanced competition to minimize consumer costs.

In implementing the statutory authority provided by Congress, the Commission is committed to assisting consumers in obtaining reliable, efficient, and sustainable energy services at a reasonable cost through appropriate regulatory and market means. Fulfilling this mission involves pursuing two primary goals: ensuring that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential, and promoting the development of safe, reliable and efficient infrastructure that serves the public interest. While independent agencies such as the Commission are not subject to Executive Order 13563, consistent with the goals of the executive order, the Commission

has taken, and continues to take, a number of steps to make certain that its regulations meet the fundamental objectives set by Congress without imposing undue burdens on regulated entities or unnecessary costs on those entities or their customers. I describe below some of the Commission's recent efforts toward these important goals.

Reducing Regulatory Burdens

The Commission regularly reviews its regulations to ensure that they achieve their intended purpose and do not impose undue burdens on regulated entities or unnecessary costs on those entities or their customers. For example, in the Energy Policy Act of 2005, Congress directed FERC to establish new rules under which the Commission would provide incentive rates to encourage development of electric transmission infrastructure. In July 2006, the Commission implemented that directive by issuing Order No. 679. Since then, the Commission has received more than 75 applications for transmission incentives. Given the significant changes in the electric industry and the Commission's experience in applying Order No. 679, the Commission issued a Notice of Inquiry in May of this year regarding the scope and implementation of its transmission incentives program. Through this Notice of Inquiry, the Commission is seeking public comment on whether its incentive regulations are encouraging the development of transmission infrastructure in a manner consistent with the intent of Congress. The development of transmission infrastructure will facilitate competition in regional electricity markets, which helps ensure just and reasonable rates without burdensome regulatory oversight.

The Commission also is responsive to industry requests to reevaluate its regulations. With respect to the natural gas industry, for example, the Commission

responded to requests to reduce the burden of certain annual natural gas reporting requirements. In Order No. 704-C, the Commission clarified the requirements for natural gas market participants to annually report information regarding physical natural gas transactions that use an index or contribute to the formation of a gas index. The Commission exempted certain transactions from natural gas index reporting requirements, particularly with reference to blanket sales certificates, finding that those transactions were burdensome to report and provided little market information. The Commission also exempted small entities that were obligated to report solely by virtue of possessing a blanket sales certificate. Thus, the Commission removed regulatory burdens on regulated entities, including small businesses.

Moreover, in 2007, the Commission undertook a ten-year review of its electric transmission open access regulations, including its landmark Order No. 888, which prohibited public utilities from using their monopoly power over transmission to restrain or prevent competition. In reviewing these regulations, the Commission conducted significant outreach to the regulated industry and other stakeholders. This effort culminated in the issuance of Order No. 890, which revisited the Commission's open access policies and amended its *pro forma* Open Access Transmission Tariff to further improve competition in wholesale markets by, among other things, increasing the ability of customers to access new generating resources and promoting efficient utilization of transmission by requiring an open, transparent, and coordinated transmission planning process.

Simplifying the Regulatory Process

The Commission also seeks out ways to help entities, particularly small ones, navigate the federal regulatory process. One example of these efforts is the Commission's encouragement of small hydropower development. In response to rising public interest in small hydropower and low-impact hydropower projects, the Commission has developed a publicly available website that provides detailed information on how to navigate the small hydropower regulatory process. Commission staff also has been hosting and will continue to host public tutorials and webinars tailored to the needs of entities intending to file applications to develop small hydropower projects. In addition, Commission staff conducted a study last year in coordination with the hydropower industry, government agencies, Native American tribes, non-governmental organizations, and the general public to evaluate the effectiveness of the Commission's integrated licensing process for hydroelectric facilities. Reflecting similar outreach, the Commission has entered into a number of memoranda of understanding with other federal agencies and state governments to reduce regulatory conflict and overlap.

The Commission and its staff also have coordinated seminars around the country on environmental review and compliance for natural gas facilities. In the past two years, over 1,000 people have attended these seminars. I believe that these seminars increase transparency, help stakeholders better understand the natural gas regulatory process, improve inter-agency coordination, and allow faster processing of applications.

The Commission recently revisited certain regulations to reduce burden on the applicants, speed up processing of the filings and improve public access to documents.

For example, in March of last year, the Commission issued a final rule to revise its Form 556, through which cogeneration and small power production facilities either self-certify qualifying facility (QF) status or apply for Commission certification of QF status. Among other changes, the final rule reduces the burden on small entities by exempting generating facilities that are 1 MW and smaller from the need to file a Form 556 in order to be certified as a QF. This change will facilitate the development of small generating facilities. The final rule also removed the contents of Form 556 from the Commission's regulations and, in their place, provided that an applicant seeking to certify QF status of a small power production or cogeneration facility must complete, and electronically file, the Form 556 that is in effect at the time of filing. The Commission stated that this change takes advantage of newer technologies that will reduce both the filing burden for applicants and the processing burden for the Commission.

The Commission also has taken various steps to simplify the regulatory process by moving from paper to electronic formats in a number of areas. Most notably, the Commission has developed and implemented a standard electronic tariff filing system known as eTariff. Electronic filing reduces the burden on those who make filings at the Commission -- and on those who use such filings, such as regulated entities, the public, and Commission staff -- by providing faster and easier access to tariffs. The eTariff filing process has greatly improved public access to tariff filing documents by posting such filings in near real-time into the public record, and increased ten-fold the number of FERC regulated tariffs that are now available through the Commission's web site.

Similarly, the Commission is moving to automate various forms to simplify the

regulatory process. For example, section 205(f) of the Federal Power Act requires respondents to submit certain information in Form 580 to ensure the economical purchase and use of fuel and electric energy, among other purposes. In 2010, the Commission established Form 580 in an electronic pdf-fillable form and streamlined the information required by the Form.

Removing Barriers to Entry for New Business and Technologies

In addition to reviewing its regulations to reduce undue burdens, the Commission has taken several recent steps to remove barriers for entry of new business and technologies, which in turn facilitates competitive markets and can lower consumer costs. In recent years, improvements in technology have led to an increasing variety of resources being capable of contributing to reliable, efficient, and sustainable energy services. The Commission has initiated a number of recent rulemaking proceedings to ensure that regulations it developed prior to those improvements do not prevent the use of emerging technologies to provide services subject to the Commission's jurisdiction. In general, increased competition among providers of these services will tend to place downward pressure on rates for those services. I also would note that in each of these rulemakings, the Commission seeks public comment to ensure that any changes the Commission proposes are appropriately tailored to their intended purpose.

One example of this effort is that the Commission also has taken steps to remove barriers to the use of emerging technologies that are capable of responding to certain transmission system needs more quickly than the generators that have traditionally provided those services. These types of emerging technologies include batteries,

flywheels and other electric storage devices. In February of this year, the Commission proposed to revise its regulations with respect to provision in organized wholesale electric markets of regulation service. Regulation is an ancillary transmission service that protects the grid by correcting deviations in grid frequency and imbalances on transmission lines with neighboring systems. The Commission's proposed changes are intended to ensure that resources that provide faster and more accurate regulation service are compensated appropriately for their performance. Again, this proposed rule has the potential to lower costs to consumers, as increased use of fast and accurate resources should allow system operators to purchase less regulating capacity.

A variety of resources are capable of providing regulation and other ancillary transmission services but may be discouraged from doing so by certain aspects of the Commission's market-based rate policies. They may also lack of access to the information necessarily to supply those services. Therefore, the Commission is now exploring whether changes are needed to allow more resources to provide ancillary services. Just last month, the Commission issued a Notice of Inquiry that sought public comment on ways in which the Commission can facilitate competition in the provision of ancillary services from all resource types, including electric storage. The Commission also sought comment in that Notice of Inquiry on whether the Commission's accounting requirements present a barrier to development of electric storage.

The Commission also has taken a number of recent steps to remove barriers to demand response participation in organized wholesale electric markets. Pursuant to a Congressional directive, Commission staff in 2009 developed a National Assessment of

Demand Response Potential, which found that the potential for peak electricity demand reductions across the country is between 38 gigawatts and 188 gigawatts, up to 20 percent of national peak demand, depending on the penetration of advanced metering and the applicable regulatory policies. Also pursuant to a Congressional directive, Commission staff in 2010 developed a National Action Plan on Demand Response. In addition, the Commission has amended its regulations to facilitate demand response participation in organized markets. In Order No. 719, for example, the Commission amended its regulations to facilitate provision of ancillary transmission services by demand response resources that are technically capable of providing those services.

Conclusion

In sum, I support the goals of Executive Order 13563. I have directed the Commission's staff to conduct a review of the Commission's regulations with the goals of the executive order in mind. This direction is consistent with the Commission's practice, which I have described, of engaging in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry. I look forward to working with you to ensure that this remains the case.

I appreciate this opportunity to share my thoughts on regulatory reform and independent agencies and would be happy to answer any questions you might have.

Mr. STEARNS. I thank the gentleman.
Commissioner Moeller, welcome.

TESTIMONY OF PHILIP D. MOELLER

Mr. MOELLER. Thank you, Mr. Chairman, Ranking Member DeGette, members of the committee. I appreciate the chance to be before you today to talk about these important issues. I welcome your oversight, and I will summarize my written comments with a brief history, I guess, of how our regulations have evolved at the commission and then give you three examples of where I think we kind of struggle with balancing the need to ensure that our services are provided safely at fair and just rates but also making sure that we are protecting and not unduly burdening the entities that we regulate.

The Federal Power Commission, our predecessor, really came into its own after the passage of the 1935 Federal Power Act and the 1938 Natural Gas Act, and as regulators then, the commission was highly relating these entities because they were monopoly providers of services that were deemed essential but over the decades and particularly in the last 25 years, regulation has evolved so that more competitive forces can provide consumers with frankly lower prices at better service. These came through two landmark orders on the natural gas side, 436 and 636, which restructured the pipelines, and then on the electric side, orders 888 and 2000 that set up regional markets and allowed for open access of the transmission systems. Again, these have had great benefits for consumers but our responsibilities as regulators in monitoring these markets have increased substantially since then.

Three areas where we particularly spend time, the first of which I will say is the reliability area of assuring the reliability of the bulk power system. Now, the origins of this issue came from the 1965 Northeast blackout a voluntary set of regulations came about after that, but as time went on, particularly in the late 1990s, it was clear that a mandatory system was going to be necessary, some kind of a cop on the interstate electric highway, and although there was legislation in the late 1990s, eventually it took the 2003 blackout and the 2005 Energy Policy Act before you as Congress directed us to create a national electric reliability organization with eight regional entities, and in the meantime, we have adopted 101 national standards, 11 regional standards, and we have had a very active enforcement process on those standards. In fact, we have had 7,000 violations to date since they became mandatory in June of 2007. And frankly, we are struggling with our role, the role of NERC, the role of the regional entities because we have a bit of a backlog on these violations. They are about to about 3,200.

I think the good news, though, is that through NERC, or through our direction to NERC, they are working to make sure that it is a better streamlined process so that we can eliminate the backlog and essentially share the best practices amongst the entities we regulate on the bulk power system.

A second area is related to that and that is with our new powers of enforcement that you gave us in the 2005 Energy Policy Act, partly emanating from the Western crisis in 2000 and 2001. You gave us the kind of major league enforcement authority that few

agencies have. We can fine entities up to $1 million per day per violation. And initially when we put out some of our rulings with some significant fines, there was some criticism from the industry that we lacked transparency in the process and lacked priorities, and I am happy to say that our office of enforcement under the urging of several of us on the commission has opened up that system so that we are a much more transparent system now. We adopted annual priorities in terms of enforcement, adopted guidelines based on the U.S. Sentencing Commission, and essentially have processes and policies in place that allow anyone under investigation to know at certain times that they are and give them the certain rights that other agencies give them. So we are making progress there.

The third area I would note, because I come from the Pacific Northwest, is the hydropower system. We regulate 2,500 hydropower dams throughout the Nation and some have complained that that processing of licensing or, more often, re-licensing, is both costly and time consuming, and that much is true, but I don't think much of that can be put on FERC. I think actually the laws itself that govern the process of re-licensing are worth looking at if this is something that inspires you because we actually I think do a good job under the current system of setting timetables but often the resource agencies don't have any consequence to missing the timetables involved.

In the meantime, though, I think we have tried as an agency to develop small hydropower systems through MOUs with various states that are interested. We have tried to open up the process to stakeholders and developers that are interested in small hydropower development and we have come up with a pilot licensing process for the new hydrokinetic technologies of in-stream power, ocean power and tidal power, again in a way through our regulations to try and encourage an industry to move forward.

And finally, I will send a compliment to our colleagues at the Federal Trade Commission. They have been active in some of our rulemakings, and their perspectives are always very valuable.

Thank you for the opportunity again to testify, and I look forward to answering any questions.

[The prepared statement of Mr. Moeller follows:]

Summary of Testimony of Commissioner Philip D. Moeller
Before the U.S. House of Representatives
Committee on Energy and Commerce,
Subcommittee on Oversight and Investigations

July 7, 2011

Highlighted are three areas where the Commission has specific regulatory challenges. In these three areas we have a difficult role in balancing the need to assure that the services provided are done safely and at just and reasonable rates --- while not imposing undue burdens on the entities we regulate.

In 2005, Congress gave the Commission significant new responsibilities including a new regulatory directive to increase the reliability of the Bulk Electric System through the creation of mandatory and enforceable reliability standards and certifying a new Electric Reliability Organization. It has truly been a paradigm shift for an entire industry to go from a set of voluntary standards to mandatory and enforceable standards with significant potential of financial penalties.

The Commission, through our Office of Enforcement, has established new measures to provide our regulated industry with a better understanding of our enforcement processes. Ultimately, our intent is not to assess penalties, but instead, to increase compliance with our regulations.

The licensing process of hydropower projects (and the re-licensing of existing projects) is an expensive and multi-year process. Most of the cost and time involved in this process can be traced to the requirements of the federal hydropower licensing law. An examination of related laws and specifically the roles and responsibilities of resource agencies could help streamline the licensing process and provide more certainty for those seeking to develop this abundant renewable resource.

Testimony of Commissioner Philip D. Moeller
Before the U.S. House of Representatives
Committee on Energy and Commerce,
Subcommittee on Oversight and Investigations

July 7, 2011

Chairman Stearns, Ranking Member DeGette, and members of the Subcommittee, thank you for the invitation to testify before you on the subject of streamlining regulation in an effort to increase the effectiveness of the federal government. This is a vital issue for the Congress to consider and I welcome your oversight of our agency and our efforts. Throughout my career in both the public sector and the private sector, my personal philosophy has always been to work toward increasing the effectiveness of regulation and legislation, with an emphasis on defining specific problems that need fixing and working toward specific solutions to those problems. I am a strong believer in effective oversight that periodically reviews government action to make sure that the solutions that are proposed and enacted through legislation or regulations were and continue to be effective, necessary and not counterproductive.

With enactment of the Federal Power Act and the Natural Gas Act in 1935 and 1938, respectively, the Federal Power Commission was required to regulate both the sales of electricity at wholesale and the transportation of natural gas along interstate pipelines, products that were often sold by monopolies. Given the monopoly power of numerous utilities, the Commission engaged in a comprehensive regulation of the costs and revenues of jurisdictional transactions. Of the many achievements of the Commission, we developed the Uniform System of Accounts, a comprehensive manner of ensuring consistency in the books and records of regulated utilities. Yet with technological improvements in the means of generating electric power and transporting natural gas, the

Commission recognized that competition among utilities could result in prices that were lower for consumers than traditional cost-based regulation.

In light of the emerging prospects for competition, the Commission began a series of initiatives, including several groundbreaking orders, which opened up wholesale markets to certain forms of competition. Thus, despite issuing more regulations comprising of more words on paper, this Commission was actually allowing the public more freedom to engage in transactions that would result in better outcomes than under traditional regulation.

Throughout the 1980s and 1990s, the Commission issued landmark rulings (*i.e.*, Order Nos. 436 and 636) which restructured natural gas pipeline services by unbundling sales of the commodity from transportation services, thereby transforming pipelines into solely transportation providers. Meanwhile, in the electric industry, the issuance of Order No. 2000 established the creation of regional markets administered by Regional Transmission Organizations and Independent System Operators, and Order No. 888 initiated changes to promote open-access transmission service that has allowed competitive forces to discipline the wholesale electric markets. Our responsibilities to monitor these markets have vastly increased after these regulations took effect.

Our economic regulation of the wholesale electric markets consumes most of the agency's time and resources, but that does not diminish our other regulatory duties: safety and environmental regulation of non-federal hydropower dams, limited safety and economic regulation of natural gas pipelines and onshore liquefied natural gas terminals, and economic regulation of interstate oil pipelines.

In my testimony today I highlight three areas where the Commission has specific regulatory challenges. In these three areas we have a difficult role in balancing the need to assure that the services provided are done safely and at just and reasonable rates --- while not imposing undue burdens on the entities we regulate. We have made a lot of progress but admittedly still have a lot of work to do on each of them.

In 2005, Congress enacted the Energy Policy Act. This wide-ranging legislation gave the Commission significant new responsibilities including a new regulatory directive to increase the reliability of the Bulk Electric System through the creation of mandatory and enforceable reliability standards and certifying a new Electric Reliability Organization (now known as the North American Electric Reliability Corporation or NERC.) Congress also tasked us with another major regulatory responsibility by enhancing our enforcement powers by requiring additional market oversight and giving us the ability to fine entities up to $1 million per day per violation for violations of our rules. Our regulatory responsibility for Bulk Electric System reliability provides an appropriate example of the tradeoffs involved in our role as regulators. The Commission has spent considerable time and effort since 2005 implementing this regulatory responsibility.

It has truly been a paradigm shift for an entire industry to go from a set of voluntary standards to mandatory and enforceable standards with significant potential of financial penalties as noted above. This has been a difficult transition for everyone involved, as we to date have adopted 101 national and 11 regional reliability standards that apply to the owners and operators of our Bulk Electric System. More than 7,000 possible violations both large and small have been reported since the first group of

standards approved by the Commission became mandatory on June 18, 2007. These violations are first reviewed by one of eight Regional Entities, are then reviewed by NERC, and then by the entire Commission. All of these violations are relevant to our efforts to prevent small or widespread outages in the Bulk Electric System. However, the entire system (consisting of the regional entities, NERC and FERC) currently has more than 3200 possible violations that are pending dismissal or filing with the Commission.

While some of these possible violations represent new cases, there is a significant backlog in processing these violations before NERC files them with the Commission. We have endeavored to create a more streamlined system of reviewing violations and at our direction NERC is working to develop a more efficient way to address minor violations and to develop a "lessons learned/best practices" informational resource for regulated entities. But clearly we have a lot of work ahead of us to reduce the backlog at the Regional Entities and at NERC in order to improve the effectiveness of this area of regulation.

Regarding our relatively new authority related to enforcement, I have made it a personal priority to increase the effectiveness and transparency of our Office of Enforcement. When the federal government wields the power of its sword, it should be firm and fair. In the first years of this new authority, many regulated entities contended that we lacked transparency in both our enforcement priorities and the results, with wide-ranging penalties that at times did not seem proportional to the violations that occurred. I wish to highlight that the Commission, through our Office of Enforcement, has established new measures to provide our regulated industry with a better understanding of our enforcement processes. Ultimately, our intent is not to assess penalties, but instead,

to increase compliance with our regulations. Maintaining a transparent enforcement process will provide jurisdictional utilities with a greater level of certainty that their actions will be evaluated fairly and objectively by us, their regulators.

Among the new measures that have been established since last year, the Commission is now announcing its annual enforcement priorities; we have enacted objective penalty guidelines based on the U.S. Sentencing Guidelines model; and we have formalized a process to disclose exculpatory material during the course of an investigation, similar to the due process afforded by some other Federal agencies. Moreover, to provide transparency to our investigative process, the Commission has begun issuing public notices that announce the initiation of an enforcement investigation. While the specific details of the matter remain confidential, we now make public basic facts surrounding the investigation. This information will help to inform the regulated community about the views of the Office of Enforcement and will likely contribute to a better understanding of the Commission's compliance obligations.

As someone who hails from the Pacific Northwest, I have always had a keen interest in promoting cost-effective and environmentally-friendly hydropower resources. It is a fact that the licensing process of hydropower projects (and the re-licensing of existing projects) is an expensive and multi-year process. However, most of the cost and time involved in this process can be traced to the requirements of the federal hydropower licensing law. This existing law emphasizes both extensive environmental reviews of a project's impacts and a role for federal and state resource agencies. There are no consequences to these agencies if they miss deadlines that are part of the Commission's licensing process or of the laws and regulations they must comply with before the

Commission can issue a license, such as the Endangered Species Act and the Clean Water Act. For those members interested in promoting hydropower development, an examination of this and related laws and specifically the roles and responsibilities of resource agencies could help streamline the licensing process and allow greater certainty for those seeking to develop this abundant renewable resource.

In the meantime, the Commission has worked to promote the development of both smaller hydropower resources and the newer hydrokinetic technologies that include harnessing in-stream power, tidal power, and ocean power. Specifically, the Commission has developed a pilot license process for hydrokinetic resources and focused on removing barriers to developing smaller hydropower resources by creating a small hydro initiative. This initiative includes adding new web-based resources to make it easier for applicants to understand and complete the licensing process, updating or creating Memoranda of Understanding (MOUs) with other agencies to improve coordination, and a new education and outreach program for developers and interested stakeholders.

Thank you again for the opportunity to testify before you today. I look forward to working with you in the future and to answering any questions.

Mr. STEARNS. I thank the gentleman.
Chairman Leibowitz, welcome.

TESTIMONY OF JON LEIBOWITZ AND WILLIAM E. KOVACIC

Mr. LEIBOWITZ. Thank you, Chairman Stearns, Ranking Member DeGette, Mr. Barton, Dr. Burgess, Mr. Terry, members of the subcommittee. Let me thank you for the opportunity to appear here today with my friend and my colleague, Bill Kovacic, to discuss the FTC's longstanding regulatory review program. It has been and it is a bipartisan priority for us as well as our plans for ensuring that this program continues to protect American consumers while minimizing burdens on American businesses.

Today, the FTC is announcing additional measures to strengthen our regulatory review process including an expedited schedule for reviewing rules and guides to meet the demands of the marketplace, a new streamlined form for pre-merger filings, a new page on our Web site to provide greater transparency and public participation in reviews and a sort of review of the reviews, that is, we are asking stakeholders how we can make our review process even better. In that same spirit, we are also seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the commission.

So let me give you a brief overview of the FTC before Commissioner Kovacic describes the history and nature of FTC regulatory reviews. After he is finished, I will tell you a little more about what the commission is doing today to enhance and improve our approach to regulations.

Simply put, we are building on our longstanding regulatory housecleaning efforts over the years under which we have eliminated outdated rules from the Mad Men era including those addressing extension ladders, fiberglass curtains and frosted cocktail glasses. That is true.

As you know, the Federal Trade Commission is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy, and our work touches the lives of virtually every American. We are primarily a law enforcement agency but we perform our mission using other tools as well including rulemakings from time to time, either when Congress asks us or when additional clarity is needed in the marketplace. Most of our rules, by the way, are a result of directives from Congress because you have recognized that they would be valuable to consumers and businesses alike by protecting all of us from unfair and deceptive acts or practices and by leveling the playing field so that legitimate businesses aren't at a competitive disadvantage from the bottom feeders who don't always play fair, and with that, I would like to turn it over to Commissioner Kovacic.

Mr. STEARNS. Mr. Kovacic, go ahead. Just for members' information, the two gentlemen from the Federal Trade Commission are going to split their 10 minutes so they will be going back and forth, as I understand. Welcome.

Mr. KOVACIC. Thank you, Mr. Chairman, Madam Ranking Member and your colleagues for the opportunity to speak here today. Although the Executive order that we have been focusing on doesn't bind independent agencies, the FTC does endorse its goals, and in

particular, we endorse the intuition that changing market conditions dictate ongoing efforts to determine whether existing rules have become outdated, unduly burdensome or simply ineffective.

To ensure that our work meets this objective, since 1992 we have had a voluntary program to review our rules and guides. We examine each regulation and rule in a 10-year cycle. Each year we publish a schedule of review and we begin the examination of each rule or guide by publishing a Federal Register notice, and this notice seeks comment on the continuing need for the regulation or the guide and an examination of its costs and benefits to consumers and businesses. We also ask whether consequent economic developments call for changes in the rule or its outright abolition. We also consider whether the measure conflicts with other intervening State, local or national legal commends.

We use these comments and we use the results of workshops that we conduct from time to time to decide whether there is a continuing need for the regulatory command or guideline and how needless burdens could be avoided, and if adjustments are warranted, we start proceedings to modify or appeal the rule or guide. As John mentioned, through this process, we have repealed 37 rules and guides. We haven't repealed one outright since 2004. I think we did look at the most serious cases first but we have undertaken modifications with respect to others since that time. We now have 12 reviews in place. In one proceeding, we are considering amendments to the labeling requirements for the alternative fuels and alternative-fueled vehicles, and here we are assessing how to eliminate the need for firms to apply redundant labels that are mandated by different agencies. In another instance, we have accelerated the review of our Hart-Scott-Rodino mechanism for mandating the notification and reporting of mergers, and we intend to initiate reviews of 11 more rules or guides by the year's end.

Comments provided in this process I think overwhelmingly show business support for not only the mechanism we have used but for the rules and guides themselves, and our guidelines in particular stand out as means to reduce business burdens by clarifying what we regard to be the line that separates appropriate from inappropriate behavior, and in doing so, we think we have significantly reduced the cost of complying with what you know to be the exceedingly broad general mandates that appear in our statutes.

My colleague will now explain recent measures that we have taken to enhance this review process, and I look forward to your questions and comments later. Thank you.

Mr. LEIBOWITZ. As Commissioner Kovacic has explained, we have long had a program for reviewing our guides and our regulations. You noted, Chairman Stearns, in your opening statement the importance of taking costs and benefits into account and we do do that. It is critically important to us. All of our work including the guides is done publicly with input from stakeholders.

But earlier this year, we began examining what more we could do to improve these rules and really relieve undue burdens on industry, so as part of this effort and very much in the spirit of the President's Executive order, here is what we are doing. First, as Commissioner Kovacic noted, we are undertaking a review of 23 rules and guides. That is more than a third of all the rules we ad-

minister, rules and guides we administer. As announced in our Federal Register notice today, six of the rules under review have been accelerated to take into account for rapid changes in the marketplace. Congresswoman DeGette, you mentioned the Do Not Call Rule, and we recently strengthened the Do Not Call Rule, the Telemarketing Sales Rule, which Do Not Call is part of. It has 200 million, actually now more than 200 million registered phone numbers, and Dave Barry has called it the most effective government program since the Elvis stamp.

Second, our Federal Register notice asked for the public to comment on the FTC's 20-year program of reviewing its rules. Businesses have generally been, as Commissioner Kovacic noted, supportive of our regulatory reviews but we nevertheless asked a number of questions. For example, how often should the commission review rules and guides, how can we modify programs to make them even more responsive to the needs of consumers of businesses.

Third, the FTC's new regulatory reform Web site just went live today because not everyone reads the Federal Register, although I know many of you do. It serves to provide—and many of us do. It serves to provide greater transparency for members of the public to understand our regulatory review efforts. It allows them to more easily comment on our ongoing rule reviews as well as on the FTC's process to review its rules. It also contains links to the 37 rules the commission has eliminated over the years as well as easy links to other resources like the new 10-year review schedule and the streamlined HSR, Hart-Scott-Rodino, pre-merger form.

Fourth, commission staff are seeking to identify statutes that might impose undue burdens on businesses or on the commission. Although a law's goals may be laudable, some statutes passed by Congress, as we know, can detract from other beneficial work, and I think Commissioner Moeller sort of alluded to this with respect to licensing issues. So one example is the FACT Act, which was passed in 2003, Fair and Accurate Credit Transactions Act, and it came out of the Financial Services Committee, and it required the FTC to conduct 30 separate rulemakings, studies and reports, 30. Some of those obligations of course make sense, but at one point around 2005, and this was shortly after I came to the commission, about a third to half of our financial practices staff, and these are the folks who go after mortgage fraud, were actually spending time writing reports because they were obligated, and we do what Congress tells us to do. Now, we have been writing reports since 1914, we are very good at it, but in fact our staff should have been spending more time going after the bad guys who were preying on American homeowners. So consistent with the goal of reducing unnecessary burdens, commission staff is now working to identify reports required by statute, and I think statutes themselves that divert businesses or commission resources from more pressing work, and the staff has identified sort of two such reports at least preliminarily. So year after year, the mandated ethanol industry report has shown that there is almost no concentration in the ethanol fuel market. The report doesn't appear to provide significant value to the public but it does impose burdens on small businesses because they have to respond to inquiries from the FTC, and so our staff

is proposing that the report be eliminated or at the very least that the frequency be reduced to every 3 years.

Additionally, while the FTC, the DOJ, the Department of Education are very involved in fighting scholarship scams, and for the FTC's part, we compile complaints, the annual report about scholarship scams, the annual report that the three agencies must jointly produce each year on the topic which is required by statute, doesn't appear to FTC staff to advance any real or significant goals.

So Mr. Chairman, through these four initiatives, we are working to improve the FTC's review program. We will do our best going forward and working with this committee to ensure that all of our regulations protect American consumers while minimizing burdens on businesses. Thank you. Of course, we are happy to answer questions.

[The prepared statement of Mr. Leibowitz and Mr. Kovacic follows:]

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION

on

The FTC's Regulatory Reform Program:

Twenty Years of Systematic Retrospective Rule Reviews
&
New Prospective Initiatives to Increase Public Participation and Reduce Burdens on Business

Before the

House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations

Washington, D.C.
July 7, 2011

I. Introduction

Chairman Stearns, Ranking Member DeGette, and Members of the Subcommittee, we are Chairman Jon Leibowitz and Commissioner William Kovacic of the Federal Trade Commission ("FTC" or "Commission").[1] As the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy, the FTC's work touches the economic life of every American. We appreciate the opportunity to appear before you today to testify about the FTC's ongoing and comprehensive regulatory review program. Since 1992, we systematically and rigorously have reviewed our rules to ensure that they enhance consumer welfare without imposing undue burdens on business. Going forward, the FTC will continue an aggressive schedule of regulatory reviews and is seeking public comment to improve our regulatory review program.

Through Executive Order 13563, the President recently directed all Executive Branch agencies to engage in a regulatory review process. While the FTC, as an independent agency, is not bound by this Order, it fully supports the Order's goals. In a rapidly changing marketplace, effective regulations and industry guidance can become outdated, ineffectual, and unduly burdensome. To ensure that the Commission's regulations and compliance advice remain cost-effective, the FTC has engaged in a systematic review program for the last two decades, scheduling all rules and industry guides for review on a ten-year cycle. Pursuant to that

[1] This written statement represents the views of the Commission. Our oral presentations and responses to questions are our own and do not necessarily reflect the views of the Commission or any other Commissioner.

program, the Commission has rescinded 37 rules and guides and updated dozens of others since the early 1990s.[2]

After 20 years, the Commission is taking a fresh look at our regulatory review program. The FTC currently is seeking public comments on ways it can improve its regulatory review process to better serve consumers and businesses. In addition, the FTC just announced an updated schedule of rule and guide reviews for the next decade, which included accelerating two rule reviews. To enhance these efforts, the Commission is launching a new web page on FTC.gov dedicated to our regulatory review program to increase transparency, foster public participation, and make it easier for the public to comment on ongoing reviews.[3]

The Commission currently has a robust regulatory review docket, with 13 rules and guides under review and 10 additional reviews scheduled to start this year. In other words, more than a third of the Commission's 66 rules and guides will be under review, or will have just been reviewed, by the end of 2011.[4]

As part of its commitment to regulatory review, the Commission does not wait ten years to review a rule or guide if there is reason to believe that changes may be appropriate. The

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[2] The Commission has rescinded 24 guides and 13 trade rules that had been promulgated under the FTC's general authority. The Commission began using a ten-year calendar in 1992, but rescinded two rules using a similar process in 1990. Although it has been many years since a rule has been fully rescinded using this review process (the Commission rescinded its Smokeless Tobacco Rule, 16 C.F.R. Part 307, pursuant to statute in 2010), the Commission has made significant updates and improvements to its rules and guides in recent years.

[3] Federal Trade Commission, Regulatory Review, http://www.ftc.gov/regreview.

[4] An additional nine rules that had previously been scheduled for review are being transferred to the Consumer Financial Protection Bureau ("CFPB") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, Sec. 1061(b)(5), 124 Stat. 2004 (July 21, 2010) ("Dodd-Frank Act").

Commission has recently accelerated the scheduled review of six rules and guides that require attention. For example, the Commission just completed review of its Hart-Scott-Rodino Transmittal Rule and promulgated a revised rule that reduces the filing burden on companies seeking to merge and streamlines the premerger notification form from 15 to 10 pages. Another example of the Commission's proactive approach to regulatory review is its accelerated review of its Alternative Fuels and Alternative Fueled Vehicles Rule, where it is working with a sister agency to harmonize our rules and ensure that automobile manufacturers need not apply redundant labels.

II. FTC Rules and Guides Protect Consumers and Level the Playing Field for Businesses

The Commission works to protect consumers from deceptive and unfair commercial practices, and to ensure a vibrant and competitive marketplace. The FTC performs these dual missions through a variety of tools, including law enforcement, research, studies of marketplace trends and legal developments, consumer and business education, as well as rules and guides.

Congress often delegates rulemaking authority to the Commission to use its expertise to implement statutes, and most of the FTC's rules have been promulgated pursuant to such specific delegations. The Commission's regulations and guides serve an important public interest, protecting consumers from deceptive and unfair business practices, and creating a level playing field for legitimate businesses.

The agency administers and enforces 15 "trade regulation rules" authorized by the FTC Act and 35 rules authorized by other statutes.[5] Further, the Commission currently publishes 16

[5] This excludes nine statutory rules that are being transferred to the CFPB pursuant to the Dodd-Frank Act. The FTC has not issued an entirely new trade regulation under its FTC Act Section 5 authority (using Magnuson-Moss procedures) since 1984.

industry guides. These guides set forth the Commission's interpretation of the prohibition on deceptive practices in Section 5 of the FTC Act.[6] In this way, they help clarify the line between deceptive and legitimate conduct, thereby giving marketers greater certainty when seeking to avoid running afoul of the law. The Commission understands the importance of avoiding undue burden on business, and seeks to promulgate rules and guides that improve the ability of legitimate businesses to compete in a marketplace free from deceptive and unfair practices.

To provide just two examples, the Children's Online Privacy Protection Rule ("COPPA Rule"),[7] which was promulgated pursuant to the Children's Online Privacy Protection Act of 1998, helps protect the privacy of children online. It requires operators of websites and online services directed to children under the age of 13, as well as operators of general audience sites and services having knowledge that they collect information from children, to provide notice to parents and obtain their consent before collecting, using, or disclosing children's personal information. In the past ten years, the Commission has brought 16 law enforcement actions alleging COPPA rule violations and has collected more than $6.2 million in civil penalties. The comments submitted during the Commission's ongoing regulatory review of the COPPA rule[8]

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[6] 15 U.S.C. § 45(a).

[7] 16 C.F.R. Part 312.

[8] Although the Commission generally reviews its rules approximately every ten years, the agency accelerated its COPPA review by five years (from 2015 to 2010) due to the rapid pace of technological developments, including a dramatic increase in children's use of mobile devices and changes in the way they use and access the internet.

indicate widespread agreement, including among industry members, that the regulation is an important part of an effective government program to address children's online privacy.[9]

Similarly, the Telemarketing Sales Rule ("TSR")[10] has been widely hailed both for its effective anti-fraud provisions and the important privacy protections provided by the Do Not Call provisions. Our 1999 regulatory review of the TSR revealed a broad consensus among consumers that the original Rule's provisions designed to decrease intrusive and unwanted telemarketing calls were ineffective in reducing those calls.[11] As a result, the Commission adopted a revised and strengthened TSR in January 2003 by establishing the National Do Not Call Registry. The amended Rule is widely-recognized as an important bulwark against fraud and an important privacy protection, empowering consumers, not telemarketers or government, to decide whether they want to receive telemarketing calls. Over 208 million numbers are on the Registry.

III. The Commission's Regulatory Review Program

This section discusses the FTC's program for scheduling periodic reviews of its rules and guides, the method the Commission uses to review rules and guides, and steps it is taking to improve this process.

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[9] *See* Prepared Statement of the Federal Trade Commission on Consumer Privacy and Protection in the Mobile Marketplace Before the Committee on Commerce, Science, and Transportation, 112th Cong. (May 19, 2011), *available at* http://www.ftc.gov/os/testimony/110519mobilemarketplace.pdf.

[10] 16 C.F.R. Part 310.

[11] Under the earlier rule, consumers had to ask each business that made a telemarketing call not to call again, and those businesses then had to put that consumer's telephone number on an internal do not call list.

A. Scheduling Regulatory Reviews

The Commission currently schedules its rules and guides for review on a ten-year cycle; *i.e.*, all rules and guides are scheduled to be reviewed ten years after implementation and ten years after completion of a regulatory review. The Commission publishes this schedule annually, with adjustments in response to public input, changes in the marketplace, and resource demands. As a result of this process, the Commission accelerated four reviews in recent years and just announced that it would accelerate the review of two others.

Because of recent increases in the use of environmental marketing claims, in 2007, the Commission accelerated its review of its Guides for the Use of Environmental Marketing Claims, also known as the Green Guides.[12] The Commission accelerated in 2010 its review of the Children's Online Privacy Protection Rule[13] to address rapid changes in technology and children's use of online media. The Commission accelerated from 2014 to 2010 possible amendments to the Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles[14] that would harmonize FTC rules with EPA rules and eliminate the need for automobile manufacturers to apply redundant labels from different agencies. The Commission also just completed review of the Hart-Scott-Rodino Antitrust Improvements Act ("HSR") Transmittal Rule to streamline the premerger notification form,[15] and is accelerating its review of

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[12] 16 C.F.R. Part 260.

[13] 16 C.F.R. Part 312.

[14] 16 C.F.R. Part 309.

[15] 16 C.F.R. Part 803.

the HSR Coverage Rule[16] from 2013 to 2011, to more rapidly alleviate any unnecessary burden on merger filers. Finally, the Commission is accelerating review of the Appliance Labeling Rule,[17] previously scheduled for 2018, to 2012 to address rapid changes in appliance technology and help ensure that consumers have the information about the energy efficiency and operating costs of appliances and electronic devices in the marketplace.

B. Current Regulatory Reviews

As part of its ongoing regulatory review program, the Commission has pending reviews relating to 13 of its rules and guides.[18] Of the 13 additional rules and guides originally scheduled to be reviewed in 2011, the Commission is postponing review of four of them due to resource constraints resulting from the acceleration of the reviews noted above, and because staff has determined that there is no pressing need for review this year.[19] As noted above, the

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[16] 16 C.F.R. Part 801.

[17] 16 C.F.R. Part 305.

[18] Guides for Private Vocational and Distance Education Schools, 16 C.F.R. Part 254; Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. Part 259; Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260; Automotive Fuel Ratings, Certification and Posting Rule, 16 C.F.R. Part 306; Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 [Pay Per Call Rule], 16 C.F.R. Part 308; Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles Rule, 16 C.F.R. Part 309; Children's Online Privacy Protection Rule, 16 C.F.R. Part 312; Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended Rule, 16 C.F.R. Part 423; Use of Prenotification Negative Option Plans Rule, 16 C.F.R. Part 425; Rule Concerning the Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. Part 429; Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435; Disclosure Requirements and Prohibitions Concerning Business Opportunities Rule, 16 C.F.R. Part 437; and Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455.

[19] Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements, 16 C.F.R. Part 14; Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. Part 23 (recently amended to keep pace with developments in the platinum market); Preservation of Consumers' Claims and Defenses Rule ("Holder in Due Course Rule"), 16

Commission is accelerating one rule review to 2011.[20] Thus, the Commission intends to initiate a review of, and solicit public comments on, 10 additional rules and guides during 2011, for a total of 23 rule reviews this calendar year.[21]

C. Process for Reviewing Rules and Guides

When the Commission reviews a rule or guide, it publishes a notice in the Federal Register seeking public comment.[22] This notice asks all interested parties to comment on the continuing need for the regulation or guide as well as its costs and benefits, both to consumers and businesses. Additionally, the Commission asks whether current or impending technological or economic changes affect the need for, or require modification of, the regulation or guide and whether the regulation or guide conflicts with state, local, or other federal law. The Commission

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C.F.R. Part 433; and Credit Practices Rule, 16 C.F.R. Part 444.

[20] HSR Coverage Rule, 16 C.F.R. Part 801.

[21] Guides for the Advertising of Warranties and Guaranties, 16 C.F.R. Part 239; Rules and Regulations under the Wool Products Labeling Act of 1939, 16 C.F.R. Part 300; Rules and Regulations under Fur Products Labeling Act, 16 C.F.R. Part 301; Rules and Regulations under the Textile Fiber Products Identification Act, 16 C.F.R. Part 303; Retail Food Store Advertising and Marketing Practices Rule, 16 C.F.R. Part 424; Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. Part 700; Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. Part 701; Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702; Informal Dispute Settlement Procedures, 16 C.F.R. Part 703; and HSR Coverage Rule, 16 C.F.R. Part 801.

[22] Rules and guides serve very different purposes; review of each is important for different reasons. The Commission periodically reviews rules to ensure they remain relevant in a changing marketplace and continue to serve their intended purpose without unduly burdening commerce. Guides, on the other hand, help clarify the line between deceptive and non-deceptive marketing in a particular context. As such, they help companies avoid incurring the risks and cost of determining how their claims may be interpreted. Because the meaning of advertising terms is established by what reasonable consumers understand in the real world, and not what the Commission believes they should mean, it is important to periodically update the Commission's guides to ensure they reflect evolving consumer understanding.

also asks specific questions about how the rule or guide can be improved and for data, studies, or other evidence to support the commenter's recommendation.[23] Typically, the Commission receives substantive comments from businesses, trade associations, consumer and other public interest groups, state law enforcement, individual consumers, and other interested stakeholders. It also often holds workshops at which interested parties can express their views to the Commission staff and respond to the views of others.

Using this feedback, the Commission determines whether there is continuing need for the rule or guide, and, if so, whether it still serves its intended purpose without unduly burdening commerce. After analyzing the comments, the Commission either initiates a proceeding to modify or repeal the regulation or guide in question, or determines no changes are warranted.[24]

If the Commission determines that a rule should be modified, it issues either an Advance Notice of Proposed Rulemaking or a Notice of Proposed Rulemaking, in which it summarizes the public comments, sets forth the proposed modifications, explains the costs and benefits of the proposed modifications and why they are justified, and seeks additional public comment.[25] At

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[23] *See, e.g.*, Review of Regulations under the Fur Product Labeling Act, 76 Fed. Reg. 13550 (Mar. 14, 2011); Review of Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended, *available at* http://www.ftc.gov/os/fedreg/2011/07/1107carelabelingfrn.pdf.

[24] As noted above, in the last two decades, the Commission has rescinded 37 rules and guides whose costs exceeded their benefits.

[25] The procedures the Commission follows when amending a rule depend on whether the regulation in question is a trade regulation rule. After the Commission gets to the stage of a Notice of Proposed Rulemaking, it will either follow the relatively streamlined notice-and-comment processes under the Administrative Procedure Act, 5 U.S.C. § 553, available for Commission rulemakings with respect to unfair methods of competition, 15 U.S.C. § 46(g), or when Congress directs the Commission to promulgate rules for a particular statute pursuant to APA notice-and-comment procedures, or it will take further steps to comply with the provisions for trade regulation rulemaking under Section 18 of the FTC Act, 15 U.S.C. § 57a.

the same time, it also publishes a burden estimate under the Paperwork Reduction Act and seeks comment on that estimate. The Commission actively looks for means to reduce burden while preserving the effectiveness of a rule. For example, as part of its ongoing review of the Business Opportunity Rule,[26] the Commission approved issuance of a Staff Report recommending changes designed to significantly decrease the disclosure burdens on covered sellers of business opportunities, reducing the categories of information they must provide from 23 to five.[27]

D. Improvements to Regulatory Review Process

As part of the Commission's commitment to robust and effective regulatory review, it recently asked for public comment on how the FTC can improve its regulatory review program to better serve consumers and businesses.[28] The Commission asked ten distinct questions, including questions about how often it should review rules and guides; how it can modify its regulatory review program to make it more responsive to the needs of consumers and businesses; how it should identify those rules and guides that can, and should, be modified, streamlined, expanded, or repealed; whether it should consider other federal or state models for regulatory review; and whether there are specific rules or guides that are ripe for review. By working to improve this long-standing, successful program, the Commission will ensure that all of its

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[26] 16 C.F.R. Part 437.

[27] *See* Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule, Disclosure Requirements and Prohibitions Concerning Business Opportunities, *available at* http://www.ftc.gov/os/fedreg/2010/october/101028businessopportunitiesstaffreport.pdf.

[28] Regulatory Review Schedule, Notice of Intent to Request Public Comments, and Request for Information and Comment, *available at* http://www.ftc.gov/os/fedreg/2011/07/1107regreviewfrn.pdf; *see also* Federal Trade Commission, Regulatory Review, http://www.ftc.gov/regreview.

regulations continue to protect American consumers while minimizing the burden on businesses that provide the products and services consumers want.

The FTC has also created a new web page on FTC.gov to help consumers, businesses, lawmakers, and other interested parties learn more about the FTC's regulatory review program and allow interested parties to comment on ongoing reviews and on the review process itself.[29] On the FTC Regulatory Review page, the public can find the ten-year schedule of regulatory reviews, links to comment on rules that are under review, a link to provide direct feedback on the FTC's regulatory review program, and a list of rules and guides that have been eliminated over the years. The web page will also provide direct and easy access to the new streamlined form for merger filings, which resulted from the FTC's recent review of the HSR rules.

Furthermore, consistent with the goal of reducing unnecessary burdens, within and outside the government, Commission staff are in the process of identifying reports required by statute as well as statutes themselves that appear to be of limited value, but that divert business or Commission resources from more pressing work. Thus far, staff preliminarily have identified two reports that do not appear to be useful. The first is a report, required annually, on concentration in the ethanol market. The Commission has found each year that the market is extremely unconcentrated, and that entry is easy and ongoing. Therefore, this report seems to provide little useful information.[30] The second report is prepared by the Commission together

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[29] Federal Trade Commission, Regulatory Review, http://www.ftc.gov/regreview.

[30] Under the FTC and DOJ Horizontal Merger Guidelines, market concentration is calculated using the Herfindahl-Hirschman Index ("HHI"). The HHI measures concentration by summing the squares of each participant in a market. An HHI can be no higher than 10,000, which is reached when a market is a monopoly. The Merger Guidelines regard an HHI below 1500 as unconcentrated. Mergers resulting in an HHI of up to 1500 are unlikely to have anticompetitive effects and generally require no additional analysis. *See* U.S. Department of Justice and the

with the Department of Justice and the Department of Education, and simply describes actions taken to address scholarship scams. Though stopping scholarship scams is an important priority, the report appears to provide little valuable information. Accordingly, the Commission will make appropriate recommendations to Congress at the conclusion of this review.

IV. Conclusion

Thank you for providing the Commission an opportunity to appear before the Committee to discuss our ongoing regulatory review program and new initiatives to help maximize effectiveness for American consumers while minimizing the burden for U.S. businesses.

Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, at 24-26, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf. The HHI in the ethanol industry is less than 700, which represents a highly unconcentrated market.

Mr. STEARNS. Mr. Kovacic, do you have anything briefly you would want to add since Chairman Leibowitz had most of the time?

Mr. KOVACIC. No, I don't. Thank you.

Mr. STEARNS. All right. With that, I will start with opening questions. I think before I start, I would like to put on the record Mr. Cass Sunstein's memorandum of February 2, 2011. Without objection, so ordered.

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

Mr. STEARNS. And I understand the ranking gentlelady has a document, "Evaluation of Consumer Product Safety Database," that she would like to put in.

Ms. DEGETTE. That is correct.

Mr. STEARNS. Without objection, so ordered.

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

Mr. STEARNS. Chairman Leibowitz, before I start my questions, I think myself and staff are a little struck that you have voluntarily stepped up to the plate and sort of followed the spirit of this Cass Sunstein letter right there, and I think it is interesting when you look at the letter I just put in the record, he said in particular such agencies, talking about the independent agencies, are encouraged to consider undertaking retrospective analysis of the existing rules. You have stepped up to the plate to do it. Not all the independent agencies have done it. You have actually identified some areas that you think you have to do where you don't think you should be doing it, so I guess the question from Members of Congress is, what would you like us to do to help you?

Mr. LEIBOWITZ. Well, I think having oversight hearings like this is useful. It sort of shines a public light on regulations that do work because of course regulations are very important and ones that need to be modified. You know, look, we are a very bipartisan consensus-driven agency. We work together. We try to do regulatory reviews because we know they are really, really——

Mr. STEARNS. Well, you have identified some things that I think you would like some legislation to——

Mr. LEIBOWITZ. And yes, and we have identified——

Mr. STEARNS. We will follow up on that.

Mr. LEIBOWITZ. That would be terrific, Mr. Chairman.

Mr. STEARNS. Commissioner McDowell, I couldn't help but take your comments "sober and clear manner" when you talked about over 50 years regulations have gone up 800 percent. Is that true? That is 16 percent a year in the law of 72. That means every 4½ years these regulations are doubling. That is really staggering to think that that is occurring. Is that an accurate explanation of what you said, that regulations could possibly be doubling every 4½ years based upon 800 percent increase for 50 years?

Mr. MCDOWELL. That would appear to be the case, yes.

Mr. STEARNS. Let me move, based upon what—I just put a letter in from Cass Sunstein where he said these independent agencies should step up and voluntarily—that is the spirit of what he is talking about. Obviously, President Obama has indicated he wants that done, and he didn't include the independent agencies but I would like, if you would, just to answer some questions yes or no just for the limited amount of time. So Commissioners Adler and

Northup, yes or no, did the CPSC submit a regulatory review plan to OMB? Just yes or no.

Mr. ADLER. No.

Mr. STEARNS. OK.

Ms. NORTHUP. No, it didn't.

Mr. STEARNS. Yes or no, has the CPSC publicly committed to conduct a review of all existing regulations in accordance with the Executive order? Yes or no.

Mr. ADLER. As far as I am concerned, yes.

Ms. NORTHUP. No, I have not been informed that we are having any review.

Mr. STEARNS. OK. Mr. Adler, if you answer yes, as you did, why hasn't there been a notice so that Commissioner Northup would know about it if you answered yes?

Mr. ADLER. Well, first of all, with respect to submitting a formal plan to Cass Sunstein, he is actually a hero of mine as a former academic, but in order to preserve independence——

Mr. STEARNS. You said you have issued a public notice?

Mr. ADLER. What I said was, we had begun a retrospective review beginning——

Mr. STEARNS. But you haven't issued a public notice?

Mr. ADLER [continuing]. In 2004 that was temporarily suspended in 2007, and as soon as Chairman Tenenbaum gets back, I anticipate we will resume that process.

Mr. STEARNS. So you personally believe the CPSC should conduct a review?

Mr. ADLER. Oh, yes, sir.

Mr. STEARNS. OK. CPSC used to conduct regulatory reviews but has stopped in recent years. Is that a fair statement?

Mr. ADLER. They stopped in 2007 under then-Acting Chairman Nord, and I believe it was because of passage of the Consumer Product Safety Improvement Act, and just competition for resources within a very tiny agency.

Mr. STEARNS. OK. Commissioner McDowell, do you believe the reviews the FCC conducts under the Telecommunications Act take the place of the kind of look-back the President and this committee has asked for?

Mr. MCDOWELL. No.

Mr. STEARNS. You also state in your testimony that net neutrality is the first rule you would discard upon the agency review of its regulation. Is that true?

Mr. MCDOWELL. Yes.

Mr. STEARNS. I agree with you. Chairman Genachowski hails the net neutrality rulemaking proceedings as a test case for openness. However, I believe there were some bad precedents set in this proceeding. Commissioner McDowell, do you believe you were able to review the record in the net neutrality docket or were there items placed late into the docket that made it very difficult to review before the vote?

Mr. MCDOWELL. There are about 3,000 pages of documentation placed into the record in the final 2 or 3 days or 4 days.

Mr. STEARNS. And you had no opportunity to review those?

Mr. MCDOWELL. Well, there was opportunity but there wasn't enough time.

Mr. STEARNS. As a commissioner, when was the first time you saw the net neutrality order that you voted against on December 21, 2010, and was it the same rules proposed in October 2009?

Mr. MCDOWELL. There were several drafts, of course, the first in October of 2009, but we got the final draft about quarter to midnight the night before the vote.

Mr. STEARNS. I understand although the agency passed its net neutrality rules in December, the docket to reclassify broadband services under Title II remains open. I think this is surprising, as Chairman Genachowski has made efforts to close other dockets opened at the FCC. Do you believe this docket should be closed?

Mr. MCDOWELL. Yes.

Mr. STEARNS. Are you aware of any reason why this docket remains open?

Mr. MCDOWELL. Only speculation. I have no firsthand knowledge.

Mr. STEARNS. Chairman Wellinghoff, in your testimony you say you support the goals of the Executive order and have directed commission staff to conduct a review of existing regulations with the goals of the Executive order in mind. Why didn't you submit a regulatory review plan to OMB?

Mr. WELLINGHOFF. Because I believe that we weren't subject to the Executive order under OMB.

Mr. STEARNS. Notwithstanding what Cass Sunstein had sort of directly, the spirit of the law was for you to comply?

Mr. WELLINGHOFF. I believe in fact we are complying with the spirit of the law by directing the regulatory review that I have directed staff to do.

Mr. STEARNS. Have you submitted a notice for public comment on this review?

Mr. WELLINGHOFF. My general counsel has indicated that is not necessary to staff review.

Mr. STEARNS. Well, let me ask you personally. Do you believe FERC should conduct a retrospective review in the spirit of the Executive order?

Mr. WELLINGHOFF. Yes, we are doing that. I have directed my staff to do that.

Mr. STEARNS. OK. My time is expired.

Ms. DEGETTE. Thank you, Mr. Chairman.

Mr. Chairman, my recollection of what Cass Sunstein said is that the independent agencies should comply with the spirit of the law, not the specific legal requirements, and I guess I will ask you, Chairman Leibowitz, since your agency is supposed to be the paragon of virtue today, have you submitted a plan to OMB? Has your agency submitted a plan to OMB?

Mr. LEIBOWITZ. We have not submitted a plan to OMB.

Ms. DEGETTE. And that is because you are not legally required to, right?

Mr. LEIBOWITZ. And that is because we are not legally required to, although as you know——

Ms. DEGETTE. But that doesn't mean you are not doing regulatory reform, correct?

Mr. LEIBOWITZ. No, no, no. I think as everyone knows, we are doing a lot of regulatory reform.

Ms. DEGETTE. And Commissioner Adler, also your agency, although it hasn't submitted a plan to OMB, you are doing regulatory reform too?

Mr. ADLER. That is correct.

Ms. DEGETTE. Thank you.

Now, Chairman Leibowitz, something you said was very interesting to me. You talked about how a lot of the regulations that you do is a result of statutes passed by Congress directing you to do regulations, correct?

Mr. LEIBOWITZ. That is correct.

Ms. DEGETTE. And you gave several examples of that, right?

Mr. LEIBOWITZ. Yes.

Ms. DEGETTE. Now, Commissioner Northup, you talked about a lot of the regulations that the CPSC is promulgating as a result of the statute that Congress passed, correct? Like the lead standards and other regulations.

Ms. NORTHUP. That is correct.

Ms. DEGETTE. So Mr. Chairman, one thing I am concerned about, you can't really talk about regulatory reform in a vacuum without looking at the statutes that Congress has passed but ask these agencies, and so I think there are two levels here. There is the regulations themselves, which may be overly burdensome, but there is also statutes that I think we should look at, and I know, Chairman Leibowitz, you had actually come up with a list of some statutes that you think could be streamlined so that the agencies, whether they are the independent agencies or not, could also streamline their regulations, correct?

Mr. LEIBOWITZ. That is correct.

Ms. DEGETTE. Would you be willing to submit a copy of those statutes to this committee so that we could then look at those statutes within the purview of this committee and think about ways to fix them so that we can reduce the burden of regulations?

Mr. LEIBOWITZ. It sounds like very much a bipartisan effort on this subcommittee, and we would be glad to do that.

Ms. DEGETTE. OK. For the rest of the commissioners who are here, I would just ask for a yes or no answer. Would you be willing to also submit a similar list of statutes that your agency deals with that you think could be streamlined so the regulatory process could be streamlined? Commissioner Adler?

Mr. ADLER. Yes.

Ms. DEGETTE. Commissioner Northup?

Ms. NORTHUP. I have.

Ms. DEGETTE. Oh, you have? Great. I would love to get a copy of that.

Mr. McDowell?

Mr. MCDOWELL. Yes.

Ms. DEGETTE. Chairman?

Mr. WELLINGHOFF. Yes.

Ms. DEGETTE. Commissioner?

Mr. MOELLER. Yes.

Ms. DEGETTE. Chairman?

Mr. LEIBOWITZ. Yes.

Ms. DEGETTE. And Commissioner Kovacic?

Mr. KOVACIC. My list is the same as Jon's.

Ms. DEGETTE. OK. Great. This is a good effort down here at the end of this table.

And I wanted to ask you, Commissioner McDowell, because you had listed off numbers of regulations. I don't think that you think that—first of all, are all those regulations that you listed—I don't know them by heart—are they all duplicative or unnecessary regulations, the ones you listed?

Mr. MCDOWELL. Are you talking about the number of pages I cited?

Ms. DEGETTE. Well, you listed some different sections. You just threw out a whole bunch of regulations.

Mr. MCDOWELL. The sections I cited were statutory sections that gave us the power to deregulate on our own, and I also listed——

Ms. DEGETTE. No, no, but——

Mr. MCDOWELL [continuing]. The forms——

Ms. DEGETTE [continuing]. You said there—oh, the forms. Just because there is a form, doesn't mean that it is per se unnecessary, correct?

Mr. MCDOWELL. No, and I didn't imply that.

Ms. DEGETTE. So the numbers of the forms that you listed, are those particular forms unnecessary in your view?

Mr. MCDOWELL. Not all of them necessarily.

Ms. DEGETTE. OK. So you were——

Mr. MCDOWELL. That is what I said in my testimony.

Ms. DEGETTE. That was kind of a figure of speech that you were talking about a lot of forms, right?

Mr. MCDOWELL. I think that my testimony speaks for itself. It is a lot of forms.

Ms. DEGETTE. Well, here is my question to you. Have you compiled a list of regulations for your agency that you think are duplicative or overly burdensome?

Mr. MCDOWELL. Yes, ma'am, it is in my testimony.

Ms. DEGETTE. OK. That is the comprehensive list. And has everybody else——

Mr. MCDOWELL. It is not the complete list but there is——

Ms. DEGETTE. Could you get us your complete list? That would be really helpful.

Mr. MCDOWELL. Sure.

Ms. DEGETTE. You know, along with our brand-new member from Colorado, Mr. Gardner, my neighbor to the north and others, we are trying to develop bipartisan legislation, and to be honest, as you see from these folks down here, regulatory reform is not a partisan issue. I mean, nobody wants to have overly burdensome regulations, and so I guess what I would ask everybody here from all of these agencies, as well as a list of statutes that you think lead to overly burdensome regulations, if you can give us a list of regulations that you think are overly burdensome, that would be helpful too.

Commissioner Adler, would you be willing to do that?

Mr. ADLER. I am speaking only for myself, but for myself, yes.

Ms. DEGETTE. OK. Commissioner Northup, I believe you have probably already done that.

Ms. NORTHUP. I have. It is part of my testimony but I have also previously sent to the Hill a list of——

Ms. DEGETTE. If you could get that to our staff too, that would be great.

And Commissioner McDowell?

Mr. MCDOWELL. Absolutely.

Ms. DEGETTE. Mr. Chairman?

Mr. WELLINGHOFF. Yes.

Ms. DEGETTE. And Commissioner Moeller?

Mr. MOELLER. Yes.

Ms. DEGETTE. And then——

Mr. LEIBOWITZ. We certainly will, although we have eliminated a lot of regulations. We do ongoing regulatory reviews pretty rigorously.

Ms. DEGETTE. OK. Thank you very much.

Mr. STEARNS. The gentleman from Texas, Mr. Barton, is recognized for 5 minutes.

Mr. BARTON. Well, thank you. I would stipulate that all the individuals before us are paragons of virtue today because they are subject to the Energy and Commerce Committee and that recognition makes you a paragon.

I think we need to repeat, this is kind of a hearing that is unusual in that this Executive order that we are asking you folks to comment on explicitly excludes you, and as we all know in Washington, not too many commissioners and chairmen voluntarily comply with things that they don't have to. Those of us that have been around a little bit understand that.

So my first question is, what should this committee do in the absence of statutory language that would force compliance with something similar to the Executive order? Should we pass some sort of a statutory requirement that you all do similar things that the President says in his Executive order or should we let the sleeping dog lie? Let us try Chairman Wellinghoff. He doesn't come before us too often.

Mr. WELLINGHOFF. Thank you, Mr. Barton. I don't have any specific recommendation for you, sir. I think in fact, as I have indicated in my testimony, we are going to comply with the spirit of it and in fact have a staff review, and I think our agency certainly as an economic regulatory agency, each and every regulation that we institute do in fact take into account whether rates are just and reasonable and services are, and we also provide the industry with an opportunity to fully comment on those regulations and determine ultimately whether the regulations are burdensome based upon those comments and information that we gather. So I don't have any specific recommendation for you.

Mr. BARTON. Mr. Leibowitz?

Mr. LEIBOWITZ. I would say this. You know, we comply with the spirit of the Executive order. I think it is a terrific Executive order. We go beyond it because I think only four of our rules would be sort of within reg flex, and we do reg reviews of all of rules and all of our guides, but I also think it is important to preserve the independence of agencies too, and as you can see, you know, agencies provide—by having members not of the President's party, agencies as a sort of institutionalized matter provide checks and balances, and they are independent voices. And so I understand

what you are saying because I think you believe that the Executive order has a lot of good things in it, and we agree.

Mr. BARTON. The Republicans think what the President says he is doing, we are not sure he is doing it, but what he says he wants to do, we think is a good thing. And so you folks say the right words, you are comply with the spirit and you agree in general, but the truth is, you are not going to do anything unless you absolutely have to. The question is, should I get with Ms. DeGette and Mr. Stearns and put together a bipartisan bill that would make it a requirement?

Mr. LEIBOWITZ. Let me defer to Commissioner Kovacic because I know he wants to add something here.

Mr. KOVACIC. Congressman Barton, I would like to quarrel with your suggestion that we only do what the gun at the head compels us to do. I was a junior case handler at the FTC for the first time in 1979, and I think it has been in the DNA of the agency internally, partly because of our structure, partly because we have a large team of economists to do this kind of introspective work as long as I have known the agency, and I would emphasize, I think that would be very constructive would be two things. First is for us to have perhaps a more frequent conversation in settings like this with your staff about we do. In 2008, 2009, we did a comprehensive self-study of our agency. We benchmarked ourselves with 40 of our counterparts overseas. We talked extensively with our counterparts at Federal, State government, and we did a substantial publicly available assessment of how we are doing. I think it would be helpful on one front to have a more extensive continuing conversation with the committee about the measures we do take that aren't obliged, and the second is, to go back to something that several of you have mentioned——

Mr. BARTON. You are going to have to be quick, because I have got 20 seconds and I have got one more question.

Mr. KOVACIC. The other thing is to think more in the design of legislation itself about what burdens it will impose.

Mr. BARTON. I want to ask Commissioner McDowell—I can't let him sit here and not ask him some question. The pending regulation regulating the Internet under Title II is still pending at the FCC. Do you have any information for us what Chairman Genachowski intends to do with that? Is he going to withdraw it or push forward with it? What is your view on that?

Mr. MCDOWELL. Sir, just to be clear, the open proceeding to regulate the Internet under Title II, I don't have any information as to whether or not he is going to withdraw it or what the reasoning might be for keeping it open.

Mr. BARTON. Don't you think he should withdraw it?

Mr. MCDOWELL. I do.

Mr. BARTON. That is the right answer. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

I think the next speaker on this side is Mr. Green. You are recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

First, I want to take the opportunity to thank all our commissioners for being here. Those of us who have been on this com-

mittee a number of years welcome back our colleague from Kentucky. What you do every day is very important in ensuring the health and safety of our citizens, particularly consumer protection, but everything. FERC, obviously from Texas, FERC is very important to what we do, and the FCC and of course FTC.

Mr. Leibowitz, in your testimony you discuss the children's online privacy protection rule or regulation your agency promulgated that helps protect privacy of children online. Can you please tell us more about this rule and does it ensure that children are protected while using the Internet?

Mr. LEIBOWITZ. Well, it was a bipartisan piece of legislation passed out of this committee, but we also understand that the Internet has changed and technology has changed the way children use the Internet dramatically in the last few years, and that is why we actually moved up our regulatory review of COPPA by 5 years, and so we are working with stakeholders. We put out a sort of notice of inquiry and we will have proposed COPPA improvements, draft legislation. We always put out—I am sorry, draft rule. We put that out. We take comments again, hopefully within the next few weeks by the end of the summer.

Mr. GREEN. And I know for all the agencies, and this is just an example, there is a lot of concern about agency regulation, but so much of what you do is in response to legislation, whether it is new legislation or previous legislation or may have been amended, and this is a good example of a rule that frankly as a father, or a grandfather now, I can't possibly monitor what my grandchildren may be doing on the Internet but we do need to have protection from an entity other than just the family.

Mr. LEIBOWITZ. Right, and the whole notion of COPPA, which is that if you are 12 years old or younger, you shouldn't be able to give consent to have your personal information go to companies on the Internet, you need to have parental consent, is a really good one, and that is the bedrock of COPPA, the law you passed.

Mr. GREEN. Some of us might move that age a little higher, but I appreciate it.

Mr. LEIBOWITZ. Some of us might encourage you to do that.

Mr. GREEN. And beyond issuing standards that require safety such as that, you have done children's cribs. Consumer protection safety works on manufacturers to organize recalls and remove dangerous products from the market.

Mr. Adler, a recall authority has the potential to save lives, doesn't it?

Mr. ADLER. It certainly does, sir, and I believe we have saved many lives.

Mr. GREEN. And other agencies have tools to help consumers too. For example, the FCC has taken steps against consumer fraud and deceptive practices through its enforcement powers.

Mr. ADLER. All the time.

Mr. GREEN. Mr. Leibowitz, in your understanding, in fiscal year 2010 your agency initiated 66 court cases to protect the rights of consumers. How valuable is that enforcement action?

Mr. LEIBOWITZ. Well, we think they are critically—we are principally an enforcement agency. We do rules, mostly when you tell us to, but what we really do on both the antitrust and the con-

sumer protection side is go to court to stop unfair or deceptive acts or practices and to stop people who engage in unfair methods of competition, and we have brought a variety of cases protecting privacy, stopping mortgage scams. That is what we do.

Mr. GREEN. The lawsuits you file can have real impact on individual lives. Is that correct?

Mr. LEIBOWITZ. Yes, I mean, often getting redress if we win a case or if we settle one for injured victims, yes.

Mr. GREEN. So there is a positive byproduct of agencies issuing regulations and enforcing regulations that are based on what Congress passes and the President signs?

Mr. LEIBOWITZ. Absolutely.

Mr. GREEN. Mr. McDowell, I was pleased that the chairman of the FCC announced that the commission would comply with the President's Executive order on regulatory review. It is important that that review is as comprehensive as possible, and I am looking forward to seeing the streamlining of the FCC, which I am sure as commissioners you would love to have. Given the constant change and the growing competition in the communications market, do you agree that the FCC should be diligent in reviewing and potentially eliminating regulations that no longer protect the public interest?

Mr. MCDOWELL. Absolutely, in a comprehensive way.

Mr. GREEN. The biannual review requirement is the commissioner's major tool to accomplish this. Is this correct?

Mr. MCDOWELL. It is, but only for telecom companies, not for media companies or information service providers, etc.

Mr. GREEN. Over the past 10 years, the commission has complied with its statutory duty to prepare and submit a biannual review?

Mr. MCDOWELL. Yes, sir.

Mr. GREEN. Do you believe the biannual review requirement should be amended to include other entities?

Mr. MCDOWELL. I do.

Mr. GREEN. And would you submit your recommendations for the record?

Mr. MCDOWELL. Yes, sir, and it is my testimony but I will reiterate it too.

Mr. GREEN. OK. I appreciate it.

Mr. Chairman, I will yield back my time.

Mr. STEARNS. The gentleman yields back his time, and the gentleman from Nebraska is recognized for 5 minutes.

Mr. TERRY. Thank you, Mr. Chairman. Let me first start by thanking Jon Leibowitz. First of all, I like the little play between the two of you because it kind of signals that you work with both sides and work together, and Mr. Kovacic, the way that you have answered questions, you are telegraphing or telling us that you two actually work together, and I really appreciate that. I think that is the way America expects our agencies to work. So I want to thank you for that. And Jon, you are doing a good job. I like that you are actually——

Mr. LEIBOWITZ. Is this a setup? Because——

Mr. TERRY. No, there is no "comma but" coming here. I like that you are already attacking the issue of finding the regulations that are not very useful anymore and don't serve the purpose. So good job. That is exactly what my bill that is in a different committee

wants every agency, independent agency to do, and it is to provide the flexibility.

Commissioner Northup, we can sit here and say good job on cribs but it is amazing to me that we are sitting here talking about bicycles and ATVs and large cars and trucks that, you know, 6- and 7-year-olds play with but don't eat but yet we are regulating them.

So you have to admit, Mr. Adler, there is some absurdity to the law. Do you agree with the rules and regulations——

Mr. ADLER. I think that Congress basically got the law right, and by the way, what you are talking about is a mandate that Congress imposed, not that the commission imposed, but there are always some portions of the law that need to be reexamined, and the issue you raised with bicycles and ATVs is one of those that we are actually taking a look at.

Mr. TERRY. And in regard to the absurdity of Congress's mandate—and by the way, I list this as one of those votes that I thought if I had to take back, we should have really fought harder on this one to make it a better law.

So Anne, do you have specific requests for us of where we should change the Consumer Product Safety Improvement Act?

Ms. NORTHUP. Well, let me just said if I had been there, I wasn't, but I can imagine that I would have voted for the law. I certainly would expect I would have. When I was being confirmed by the Senate, I read the law. It seemed like such a good law. I was supportive. So many of the Senators at the confirmation hearing said we want you to use all the flexibility we gave you to rationalize this law; we believe that bicycles and ATVs and scooters—I mean, it goes way beyond those two—carving them out may be some people happy, but like you say, trucks kids play with, the axles in those trucks, if they bend, what good are they, but the problem is, when you try to—when we have tried to find flexibility, there just hasn't been three out of five votes for that. So it is going to take a change in the law. The discouraging part is that even the commissioners can't seem to agree how sweeping a change they would support but we desperately need——

Mr. TERRY. Well, do you have flexibility on, for example, third-party testing? I think there was an incident when this bill was being developed by a toy manufacturer that manufactured in China that perhaps there was accusations that their data in-house was not correct, so if you are a large international company, mandating third-party testing when you found out your in-house testing was inaccurate, but do it on a 10-person company in Omaha, Nebraska, on tee shirts where on every size and every color doesn't make sense to me. Do you have the flexibility to——

Ms. NORTHUP. No, we don't have that flexibility.

Mr. TERRY. Is that an area that we should look at?

Ms. NORTHUP. It is an area. In fact, today there are vast new ways to enforce the law. We track things coming in from overseas, tools that we didn't have in 2008. And I would give the commission the ability, the flexibility to require third-party testing where they think there is risk and they think it will be effective to enforce it. It is one of the proposals I have made. It would make a huge difference in the cost of this because as you say, every small business

is telling us when they have to third-party test every single component individually for lead, when they have to then do random——

Mr. TERRY. Or phthalates.

Ms. NORTHUP [continuing]. When they have to do phthalates, when they have to do it to the toy standard, it is extremely expensive.

Mr. TERRY. Well, and one quick point on that. Do you guys try and obtain data, for example, when the third-party testers are telling a small company that prints motorcycles on tee shirts that asking that they test the cumulative effects of 10 tee shirts of the same color and size, do you ask, produce one piece of evidence that a child has eaten ten tee shirts?

Ms. NORTHUP. The problem here is that if there is, say, a dot of blue paint on that, they need enough blue paint to test to have a quantity of blue paint. I will tell you, I have pushed for a component part testing allowing somebody to—and I think we are going to pass this, and this is the flexibility that I think would be—is probably the most flexible regulation we have where you can take your blue paint and test it and then you can put it on every tee shirt and you don't have to tear up the tee shirt.

But when you talk about bikes, for example, that have 141 parts to them and every part, every time you change the shipment of spokes, the shipment of pedals, you have to have a new test for that, then you have to change the label so it reflects the component test that was used, it is very complicated.

Mr. STEARNS. The gentleman's time has expired, and Ms. Schakowsky, the gentlelady, is recognized for 5 minutes.

Ms. SCHAKOWSKY. Thank you.

You know, I think we all here agree that it is important for regulatory agencies to be efficient and mindful of the impact of regulations on businesses, and I think we all agree. I helped negotiate this bill. I am very proud of the legislation. But Henry Waxman introduced legislation that would deal with some of the unintended consequences. I think maybe we as a committee ought to take another look at that legislation, and I know that the commission would be willing, as I understand it. Is that not true, Mr. Adler, on behalf of Mr. Tenenbaum and Ms. Northup? I think we ought to look at that.

But let me just say, to go back to risk-based assessment, that is what we had before, and I think that what we have found is that why we regulate and that is because time and time again industry has shown that they aren't going to police themselves, and that we need to do it, and one of the issues is the industry standard for cribs, and we had a press conference with the attorney general in Illinois on June 28th when the crib standard went into effect, and I congratulate all of you on that, although I have to say, I was disappointed to see the press release that went out that, you know, we didn't give people enough time when of course you had said earlier that you wished it had gone into effect the next day so that parents could be sure when we put our kids to bed alone or grandchildren that they are going to be safe.

So let me ask you, Mr. Adler, do you consider the crib standard to be an example of a victory for the Consumer Product Safety Improvement Act?

Mr. ADLER. I think it is one of the finest things that has been done under the Consumer Product Safety Improvement Act. It is taking children who are our most vulnerable involuntary risk takers who are put in cribs that have to be the safest place in the home because they are there for long periods of time with no supervision, and it is saying that we have the most stringent safety standard in the world. I think it is really a magnificent achievement and I commend the Congress for directing us to——

Ms. SCHAKOWSKY. And in fact, in the regulation, you did give some places that might have cribs some time to comply. Is that not true?

Mr. ADLER. We did, and I am delighted to respond to the issue that Commissioner Northup and I disagree on with respect to the independent retailers. I think that we had a group that said we need more time but we had another group that said please, please, please do not give more time, we have compliant cribs and we are prepared to sell them right now.

Ms. SCHAKOWSKY. I ant to mention on the database, I have an op-ed from a gentleman in New Jersey whose daughter was injured by a crib in 2007. He called the manufacturer and asked if they had any other complaints about the crib and was told no, there weren't any, but actually found out that there were 84 reports to similar problems. Fortunately, his daughter was not hurt very bad.

So Mr. Adler, the public information database was created by the CPSIA because previously, manufacturers would not, and the CPSC could not share lifesaving information with consumers. Is that correct?

Mr. ADLER. That is correct. I think the database is one of the finest pieces of the Consumer Product Safety Improvement Act.

Ms. SCHAKOWSKY. So do you think that it actually is serving the function of making consumers more aware?

Mr. ADLER. It is, and I might just quickly point out that it is modeled after a similar database at the National Highway Traffic Safety Administration. Ours actually has more due-process rights for manufacturers than they do at NHTSA, and I think it is a very balanced piece that provides the proper attention to disclosure to protect consumers with the rights of manufacturers to make sure that the information is correct.

Ms. SCHAKOWSKY. Do you think that Congress should force the Consumer Product Safety Commission to do a full cost-benefit analysis every time it takes steps to protect children from harmful products no matter how dangerous those products are?

Mr. ADLER. I actually think Congress got it right. Congress didn't say regulate with no attention to the economic impact. Congress said that when we regulate with respect to children, that we need to follow the dictates of the Regulatory Flexibility Act, and one of the things I like about that is, it is focused on vulnerable small business. That is the group that we are supposed to make specific economic findings with respect to when we are trying to protect our most vulnerable consumers.

Ms. SCHAKOWSKY. I think I will yield back the 2 seconds I have. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentlelady. The gentleman from Texas, Dr. Burgess, is recognized for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman, and Commissioner Northup, it is good to see you here.

Ms. NORTHUP. Thank you.

Mr. BURGESS. It is amazing you got confirmed by the Senate, so congratulations on that. What an accomplishment.

And I apologize for being late. We had a Health Subcommittee hearing going on simultaneously. Can you give us an idea of the scope of the effect on the retail industry on this crib ban that has now gone into effect? I mean, I realize that the other commissioner said a cost-benefit analysis is not necessary but still, there has got to have been an impact.

Ms. NORTHUP. Let me just say, first of all, the regulatory flex analysis that we do is only—it is like checking a box. Sometimes it is a paragraph, sometimes it is a page. It says that small businesses are going to be affected, we are going to put some out of business, but we go right ahead and regulate. There is nothing, there is no requirement that it be cost-effective.

What happened with the crib standard was, is that we issued it and we considered at the request of manufacturers how long it would take for them to get the new qualifying cribs tested, third-party tested, and into the market. Six months was decided. We didn't really think about retailers. There was one sentence in our rule that said we think 3 to 6 months is enough for retailers too. Unfortunately, it took longer to get them developed, it took longer to get them tested, and by the time they got them to the retail stores, the retail stores, some of the orders they had placed last November arrived a week before the new standard took effect. They were not third-party tested, and so they were junk to them. How many? Well, we know that one group of retailers that did a survey had 17,000 of them. We know that we called five, not our biggest stores but five major retailers; they had 100,000 as of the 1st of June. That comes to about $32 million worth of materials that will have to be thrown away if they are not—and these are not drop-side cribs. These are not even cribs that are almost identical to the standard. They haven't been third-party tested or certified. But the new crib standard that went in in 2009 was the basis of our crib standard. And let me just say, if these are unsafe, then why we would have allowed daycare centers, the motel-hotel industry, leasers 2 years before they had to place them? It is because we did not believe they were unsafe.

Mr. BURGESS. That is a valid question.

In the winter of 2008, it was kind of a bleak time up here on the Hill, and with no thought to my personal safety, I took a trip to the CPSC and looked at the testing facility. It is remarkable in that it is very Spartan. There are certainly no——

Ms. NORTHUP. We have a new one now.

Mr. BURGESS. Oh, you do have a new one?

Ms. NORTHUP. Yes. We just moved 3 weeks ago.

Mr. BURGESS. This was an old missile base, as I recall, when I went out there, and I was struck that the folks there were working diligently and they were quite inventive and innovative, and I actually took a great deal of confidence away from that, but at the same time, I will never forget sitting in that press conference that the people on the youth motorcycle thing put together a couple of

years ago, a beautiful little blond-haired boy about 10 years old in full motocross regalia standing at the microphone and said Mr. Congressman, if you will let me ride my bike, I promise I won't eat the battery when I am finished. And you know, that is the level of absurdity to which we have sunk.

Ms. NORTHUP. This testimony today has been fascinating, hearing the agency talking about the DNA, the DNA of the CPSC is really fabulous, but that has all changed because of the Consumer Product Safety Improvement Act and the rulemaking that we have done in compliance with levels and requirements that are unrelated to risk. For years this agency was risk-based, it worked with the Voluntary Standards Committee, which is very important because products emerge, they evolve, and these voluntary standards keep up with these evolutions. Any time we didn't think they were strong enough, we had the right to intervene, and we did, as my colleague pointed out.

Mr. BURGESS. Let me just briefly, I do need to ask our friend from the Federal Trade Commission a question on the—familiar with the ACO—if you read the Federal Register, you may be aware that there was a health care law signed last year that has caused some of us some grief, and when this new accountable care organization reg came through, did you guys participate in the writing of that regulation?

Mr. LEIBOWITZ. Well, we participated. It is principally from CMS, as you know, and we participated——

Mr. BURGESS. Well, what I know is, when we had the briefing, they had one guy from CMS and two guys from the Federal Trade Commission.

Mr. LEIBOWITZ. One from the Federal Trade Commission and one from the Department of Justice because we wrote it with the Department of Justice, or maybe two from the Federal Trade Commission and one from the Department of Justice. So we did the antitrust component, and their draft guys were taking comments, we did a workshop. And can I just say one other thing? And I will turn it back over to you.

We believe that competition is critically important to health care, not regulation, and so what we are trying to do with the ACO implementation—you know, ACOs are a brave new world and very uncertain, but what we are trying to do is make sure that competition principles remain.

Mr. BURGESS. Look, you give the antitrust exemption to Major League Baseball, the National Football League, but here is the deal. The 21st century health care model, and this was started in the previous Administration with Secretary Leavitt, has been continued with Don Berwick at CMS, and now we have got an ACO rule that doesn't work in actuality. The rule is—you put something that was working in practice and rendered in invaluable in theory, and that is the problem that I see with what you have done.

Mr. LEIBOWITZ. Well, look, we have certainly—one of the reasons we put out draft guidance—and again, we have a small component of it. It is only the competition portion. One of the reasons why we put out draft guidance and why we are meeting feverishly with all stakeholders is, we want to make sure that, you know, to the extent that there is an uptake on ACOs, the notion, you pick up

vertical efficiencies by putting together, as you know, different doctor practices, lab testing facilities and a hospital, is not a bad one. We want to make sure that you don't have one dominant provider so that it soaks up all the efficiencies, and we also——

Mr. BURGESS. What about the Karen Ferguson? I mean, you give a dominant provider status to insurance companies.

Mr. STEARNS. The gentleman's time has expired.

Mr. LEIBOWITZ. We will just point out, we cannot review the insurance industry. We are exempted from that. But yes, I hear what you are saying. I don't think we are in disagreement. We are going to try and make it work better.

Mr. STEARNS. The gentlelady, Ms. Christensen, is recognized for 5 minutes.

Mr. CHRISTENSEN Thank you, Mr. Chairman, and I want to also add my thanks to all of the commissioners for being here, and as I listen to the testimony, it seems that all of the independent agencies that you represent have been undergoing some regulatory reform and even though you are not under the Executive order, that you have really gone beyond what you had been doing to keep in spirit with the Executive order, and I commend you for that.

I sat on the Small Business Committee for about 10 years, and each of you is governed by the Regulatory Flexibility Act, and so you are required to look at how the impact of your regulations on small business reviewed. I was going to ask Commissioner Northup, my classmate——

Ms. NORTHUP. Yes.

Mr. CHRISTENSEN [continuing]. About the effectiveness, but you have already kind of said that it is not effective. Is it the experience of the other commissioners that the Regulatory Flexibility Act does not do enough to protect small businesses?

Mr. ADLER. I don't agree with my colleague about that. I think that especially with respect to the impact of the Regulatory Flexibility Act on our agency, I think it has been a very good provision. I was just reviewing section 604 of the Regulatory Flexibility Act, and to me, it is a smaller but focused cost-benefit analysis and it is something I think the commission has done very conscientiously.

Mr. CHRISTENSEN Did I misinterpret what you said?

Ms. NORTHUP. No. It is often just a paragraph in a long rule, and even if we find that it will impact small businesses, it is not even—it doesn't require us to decide it is still worth going forward to make any changes to our rules. It has no impact on the rules that I—one or two maybe but very few that I can remember ever.

Mr. CHRISTENSEN Does anyone else have that experience that RFA——

Mr. MCDOWELL. I find it to be toothless, and if you look at it from an appellate perspective, the appellate courts agree, there is really nothing the courts can do to make agencies change their rules based on the RFA.

Mr. CHRISTENSEN That would be very disappointing, but it seems as though most agencies have had—most of the commissions have had good experience with the act.

Mr. KOVACIC. I think, Madam, that it has some limited effect in focusing our attention on things that are important but I think there are a number of other things we have done that have tended

to be more significant and have come from within, and we would be glad to share those with you at your pleasure.

Mr. CHRISTENSEN Thank you. And what I have been hearing is that most of the commissions have gone beyond what really has been required, and I appreciate that.

Commissioner McDowell, on June 20th, you wrote a letter to Chairman Genachowski offering several recommendations on how the FCC should be reformed. You suggested reforming it to be more transparent, efficient, accountable and fiscally responsible, and from prior testimony to date, we have learned that Chairman Genachowski has proactively implemented some of those changes to facilitate your suggested reforms. Through these reforms, the FCC has improved external communications by creating a more user-friendly Web site which includes providing live streams of all public workshops and meetings. Do you think this new Web site has enhanced public participation and access to FCC activities?

Mr. MCDOWELL. Well, the FCC's Web site right now is a bit controversial. It depends on which segment of the audience that uses it you ask.

Mr. CHRISTENSEN You don't think that it has enhanced public participation?

Mr. MCDOWELL. Certainly in general, I think, Chairman Genachowski has taken some discreet steps on an ad hoc basis but I would like to see more comprehensive reform done.

Mr. CHRISTENSEN But the FCC has also made effort to collect broader input from the public and industry, which included having more than 85 staff-led public forums and reinvigorating external advisory committees. Do you think these efforts have allowed for an increase in public participation?

Mr. MCDOWELL. Absolutely.

Mr. CHRISTENSEN In fact, you have had several workshops on the national broadband plan to discuss potential reforms to the Universal Service Fund. Do you think that those workshops have been helpful?

Mr. MCDOWELL. They have, certainly.

Mr. CHRISTENSEN OK. And although the FCC is not subject to President Obama's Executive order on regulatory reform, the FCC initiated their own look-back process which also is included in the statute. According to a letter Chairman Genachowski sent to Chairman Upton and Chairman Walden, this effort has resulted in the agency's eliminating and/or revising 49 regulations and identifying more than 20 sets of unnecessary data collection requirements for possible elimination. Is that correct?

Mr. MCDOWELL. I don't know. I haven't seen the list of the 49 or the 20, so I am not quite sure.

Mr. CHRISTENSEN Does it sound reasonable?

Mr. MCDOWELL. And I don't know if some are mainly data collection. I think the proceeding, as I understand, under section 11 that was initiated really was focused primarily on data collection, although it has general language in there, but the thrust of it was data collection and not just a comprehensive review of all of our rules that apply to all the entities regulated by the commissioner.

Mr. CHRISTENSEN Well, our information is that 49 regulations and identifying maybe 20 sets of unnecessary data. So it seems to

me that the FCC's current leadership has been really successful in implementing new ideas on how to improve current regulations, and I look forward to hearing more from the commission and their continued focus on ensuring public participation and open exchange of ideas that improve the work of our government.

My time is up. I yield back.

Mr. STEARNS. I thank the gentlelady, and the gentleman from California, Mr. Bilbray, is recognized for 5 minutes.

Mr. BILBRAY. Thank you.

Mr. Adler, you were bringing up this issue of trying to make sure that we have the safest cribs in the world, as we say. What percentage of the cribs that are on the market in the United States have elevated platforms or are made of a hard material—wood, plastic, steel?

Mr. ADLER. I don't know the answer to that. I would be delighted to——

Mr. BILBRAY. Would it be fair to say the overwhelming majority of them have elevated platforms or are made of hard material?

Mr. ADLER. I think that makes sense.

Mr. BILBRAY. And wouldn't you agree that any elevated platform or material when you have a child, you have a potential for injury because of dropping off of an elevated platform or injury because some activity that may end up meaning impact with the hard material, so there is a risk in both of those design features?

Mr. ADLER. That is an excellent point, and the commission standard is addressed to what we consider the unreasonable risks, but I don't think we could make that a fatality-free zone under all circumstances.

Mr. BILBRAY. OK, and that is the point, is what is a reasonable level. You know, you could sit there and say that because we do not require all cribs to be on the ground, we do not require all cribs to be made of inflated material or soft material, it is not the safest it could be. It is reasonableness, and I think that is a determining factor. Wouldn't you agree?

Mr. ADLER. I would absolutely agree with that, but what we have done is make the cribs that are produced in the United States the safest within the types of fatalities that we think that——

Mr. BILBRAY. I just think that—and I appreciate that, making sure that, you know, we make these claims and these statements and elected officials or as public officials but it is reasonableness that really is the determining fact, and that is where the judgment issue has to come down.

Let us talk reasonableness, Mr. McDowell. You recently discovered that the so-called Fairness Doctrine was still on your books, almost a quarter of a century after it was abandoned. Do you think it is reasonable that a federal agency has basically misinformation, if not, some people may say the lingering lie of the Fairness Doctrine on your books? Do you think it is reasonable that almost a quarter of a century after a regulation isn't there, it still is being stated as being part of the process?

Mr. MCDOWELL. I don't think it is reasonable that the language remains on the books, if that is your question.

Mr. BILBRAY. And what are we doing to make sure that this mistake isn't throughout your regulatory guidelines so the public and

the business community can read something and find out is it the gospel or isn't it?

Mr. MCDOWELL. Exactly. If the commission has opted not to enforce the rule, the rule should disappear from the books.

Mr. BILBRAY. OK. Let us get down to the fact that the FCC has taken nearly 12 months—and I will say this. I spent decades in regulatory agencies so I understand how tough it is when you are in a regulatory agency of trying to take the theory of legislation and make it a practical application. But when you have got decisionmaking that is delayed for over 12 months, you know, and there is nothing on the books that requires you to make a decision in what is a reasonable time period, don't you think—is there anything to make you make a decision in less than 12 months?

Mr. MCDOWELL. Certainly, statutory language helps. There is nothing like the force and effect of law. But even that sometimes is not observed. For instance, the video competition report we are required to produce every year, the last time I think I voted on one was in 2007.

Mr. BILBRAY. OK. So in other words, we need to basically tighten it up but also have some enforcement on that tightening. I will just tell you, somebody that built the light rail system in San Diego, we abandoned any federal funding just so we could avoid the regulatory oversight, and we built that system under budget and on time because we didn't take federal funding, and I think that is one of the things we don't talk enough about. People want transit, they want this, they want that. Sometimes the most important component to get the public the services that you claim you care about is getting the federal regulatory agencies out of the way so you can get the job done, and that is why I would just like to state down the line.

Mr. Moeller, you were talking about hydroelectric. When you are reviewing the hydroelectric and the relicensing, are you required to consider the no-project option and the environmental damage done if you don't approve it? Things like climate change, emissions, pollution, and that kind of thing, are you required to basically take a look at this and understand that if you do not approve it, it will have an adverse impact because the alternative-energy capabilities or generation is going to cause pollution where the hydroelectric is not.

Mr. MOELLER. Well, typically, I think of the no-action alternative as truly no action as opposed to perhaps modifying or taking out a dam and then the consequence being that it would be a result of more generation that would be less environmentally friendly than hydro. But typically I think it essentially doesn't get to that. It is a long settlement process where——

Mr. BILBRAY. But you don't have a specific requirement that you have to consider offsets for shutting down a plant?

Mr. MOELLER. Not that I am aware of.

Mr. BILBRAY. Well, that is one of those things that I think we need to talk about, Mr. Chairman, more, is that, you know, when you don't improve a road improvement, you should have to offset the pollution caused by the congestion rather than always we look at all of the emissions that happen for construction. But the no-project option and the environmental and economic and social im-

pact of that need to be considered but the environmental impact is one that if individual a real hypocrisy that you want to have offsets for the emissions caused for building the project but nobody who is stopping the project has to account for the environmental pollution by not finishing the project, and I yield back, Mr. Chairman.

Mr. STEARNS. I thank the gentleman, and the gentleman from Louisiana, Mr. Scalise, is recognized for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman. I appreciate you holding this hearing. I appreciate all of the commissioners who have come here to participate and talk about the costs of regulations, especially how it impacts people, and when you look at lot of the intent and what is usually said about regulations that come out, they all sound really good and, usually the name of a bill, you can tell how bad it is by how good the name sounds. It is usually an inverse proportion.

And so as I talk to people, our economy is still very sluggish right now, and of course, in many cases, when you talk to small business owners, when you talk to American job creators, as many of us do, the first thing they will tell you that is the biggest impediment to job creation in America are federal regulations. You know, all of the other things that get in their way, they can manage. It seems like the federal regulations have become the biggest burden to creating jobs in America today, and so when you look at some of these regulations, you definitely want to look and see what is the real impact, are they even achieving some of the results that they were intended to, and in many cases you find out they are not, and then you look at some of these agencies, and we have had a number of hearings and I appreciate the chairman having the hearings that we have had going through various agencies, even looking at the President's Executive order, and we have seen and it has been pointed out even by some of the people implementing it the shortcomings of the President's Executive order, how it doesn't really get at the cost of regulation, and I read, there was a report that was recently done by the Small Business Administration that is titled the Impact of Regulatory Costs on Small Firms, and this really looked at how it impacts our small businesses, the people that actually create the bulks of the jobs in our economy and, you know, I guess it is not surprising for those of us that have been in some of these hearings but they talk about the cost of federal regulations to small businesses is over $1.7 trillion, and how does that break down? I broke it down per family. Over $15,000 per family is the cost to small businesses of these regulations. And so when you look at the regulations and when you look at the impact and how it is not only affecting jobs, it is a major impacter that is costing us jobs but it also costs every American family over $15,000. You say where is the bang for the buck.

And I want to ask Commissioner Northup, you touched on this in your opening testimony. You talked about some of the things you have seen, and you have seen businesses go under, actually go bankrupt because of some of these regulations, and in many cases had actually no health impact, you know, bills that were sold and regulations that were sold as helping the health of children had actually nothing to do with health and it just had to do with some kind of radical policy somebody had that didn't help anybody's

health, it just made a company go bankrupt. Can you expand on some of the things you have seen in terms of how these regulations not only impact the businesses that you have talked about but also how in many cases there is not even a relationship between health and——

Ms. NORTHUP. Well, I will give you two quickly. One of them is the—in the bill that you passed, you had exclusions with the lead limit for electrical products, and we have a whole cutout for that. You had exclusion for inaccessible parts, and we have addressed that. You also had an exclusion for lead where not any lead could be absorbed. I assume you meant for some things to be included in that, perhaps screws, nuts and bolts that are holding a crib together, maybe the handlebars of a bike because lead in the handlebars, if you suck on it, unlike paint, it is trapped in that metal. You can't suck out the lead. But our agency, even though I proposed a de minimis standard where if you rub the handlebars and less than a molecule could be gotten off that, it couldn't possibly change your blood lead content, that absorbability exclusion that you wrote in the bill, I intended you meant for it to apply to something. And the rest of the commissioners decided no, and so basically they have found that even though you wrote in the non-absorbability exclusion, that it applies to nothing, that there is not one material that it applies to.

If we had nuts, screws, bolts, things that can't be swallowed, things that have small amounts in them that are in lead, trapped in—excuse me—trapped in steel, that those things would have been excluded from this law. It would have made a huge difference.

Mr. SCALISE. Let me ask, and I am running out of time. I want to ask just by a show of hands how many people have actually read this report that came out just a few months ago on the impact to small businesses of the regulations? Can I get a show of hands? Not one person on the panel read this. I think it should be required reading for all regulators. But if I can ask unanimous consent to submit this into the record?

A final question, if I can ask——

Mr. STEARNS. Before we put it in the record, the minority would like to look at it.

Mr. SCALISE. Sure. I will be happy to hand that over. It is a report that was published in September of 2010. It cites a number of sources but goes into very good detail on sector of breakdowns, also differential between large businesses and small, how they differentially fall higher even on our small businesses.

Commissioner McDowell, you gave an assessment on the things that the FCC did to take into consideration. It was looking at both net neutrality and data roaming rules. Did they look into and do proper market analysis, in your opinion, to look at the impact how that would be on our job creators?

Mr. MCDOWELL. There was no proper market analysis, no finding of market power. In fact, the order, the net neutrality order says as much, that there was no market analysis conducted.

Mr. SCALISE. See, that is the problem with a lot of these regulations that come down. They have dramatic impacts on job creators and they cost us jobs, run jobs to other countries, and yet it just seems like the regulators kind of go into their own shell and are

oblivious to the actual impact on our economy, so hopefully we can shift that course, and I appreciate the chairman for having this hearing and more like it to get our economy back on track.

Thanks. I yield back.

Mr. STEARNS. And the minority has looked at this, so by unanimous consent, this will be made part of the record, so I thank you for bringing this.

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

Mr. STEARNS. The gentlelady from Tennessee, Ms. Blackburn, is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you all for your patience in being here.

Commissioner McDowell, I want to stay with you. On that net neutrality order, no market analysis done, no look-ahead at what the cost-benefit analysis was going to be. If there had been that analysis done, do you believe the commission would have gone ahead and issued that order?

Mr. MCDOWELL. I think so. I think that whole proceeding was outcome based, outcome driven.

Mrs. BLACKBURN. Chairman Leibowitz, I want to come to you. I am concerned about the FTC's food guidelines, food marketing guidelines. I have two grandchildren. They are age 3 and age 2. And so things of this nature really I pay a lot of attention to. You know, you think about the unintended consequences that are going to come forward with this, and I think that you may see is that an unintended consequence could be seen as hampering free speech, harming our economy and not having a significant reduction in childhood obesity, and one of the things that I have found recently is that the food currently sold through the WIC program, which is designed by USDA experts to provide a healthy diet for young children, could no longer be marketed under this proposal. So you claim these proposed food marketing restrictions are voluntary but aren't these government standards going to form the basis for NGO attacks? And then also talk about what you think—I think that you could see there should be consider about shareholder actions, so if you will address that quickly, please?

Mr. LEIBOWITZ. Thank you, Congresswoman. Well, first, as you know, this was an obligated requirement. We are not the only agency. We do the marketing side. We don't do the science side. That is the agriculture department, the CDC and the FDA. But it was a Sam Brownback, Tom Harkin obligation in our appropriations bill. We are obligated to do what Congress tells us to do. It is voluntary. So in that sense, there is no enforcement mechanism. We are taking comments from stakeholders. And let me just say, and you recognize, as we all do, there is an obesity crisis and there are twice as many obese children as there were a generation ago, but speaking only for myself, you know, I try to take a sort of pragmatic approach here. If my kids eat Special K with yogurt in the morning, which actually wouldn't quite meet the nutrition guidelines, I am pretty happy, because you know what? I think that is better than what else they might eat or better than not eating anything at all. So my understanding is that within the next week—first of all, we will be getting comments and we will be reviewing those comments very seriously from stakeholders, but within the next week, my understanding is that the food marketing companies

are going to come up with some proposed standardized or uniform guidelines. If they come up with guidelines that are good, and I think they will, then we ought to take that into account going forward member of the working group, and we will.

Mrs. BLACKBURN. Let me shift gears with you. I want to go to the privacy issues that are out there, and we know that the Internet online advertising is really an economic engine in this country and the industry is beginning to voluntarily enter into some self-regulatory structures when it comes to privacy. Do you believe the FTC should impose a top-down technology mandate on the Internet governing the privacy issue?

Mr. LEIBOWITZ. It is the last thing we want to do, no.

Mrs. BLACKBURN. OK. Thank you for that. I appreciate that. I think that just as I said with Chairman McDowell, if you were to look at the net neutrality issue, if there had been a robust review of cost-benefit analysis, I think that it would have been determined that the net neutrality order, especially paragraph 84, was going to be detrimental to our economy, and I think that a heavy hand on the privacy issue would likewise.

I have got less than a minute. I want to ask each of you, just a show of hands, how many of you have read the Executive order that we are discussing and have been through the process of reviewing that? OK. So all of you have. All right. How many of you disagree with any part of that order? Is there any part of that order that you have disagreement with? Yes, sir, go ahead.

Mr. KOVACIC. I don't think—I think a number of the provisions aren't very well specified. I think it could have benefited from a much fuller discussion about how it intended specific tradeoffs that are implicit in the order were to be made. There has been subsequent guidance, subsequent commentary. It is a nice start.

Mrs. BLACKBURN. OK. Anyone else? Commissioner?

Mr. MCDOWELL. I would agree. I think it could be broader and more comprehensive and more aggressive.

Mrs. BLACKBURN. OK. Any other addition to that? Thank you all for your patience. Yield back.

Mr. STEARNS. The gentlelady's time is expired. The gentleman from Virginia, Mr. Griffith, is recognized for 5 minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman.

Commissioner McDowell, it is nice for me to be able to say that in a formal setting in my new role. When I look at the FCC's merger review process under Republican and Democrat Administrations, I see a process that appears to be broken. The XM and Sirius merger took way too long. The Comcast-NBC merger took way too long. There is simply too much discretion for the commission to halt the timeline for the review of the transfer of control of licenses in an expeditious manner. Is there something we can to provide applicants with certainty regarding the timing of the FCC review process?

Mr. MCDOWELL. And Congressman Griffith, it feels good to say that as well, my first time saying that publicly, so congratulations. Yes, the FCC has an 180-day shot clock that is honored more in the breach that in the rule to get mergers done. I read yesterday also that the Assistant Attorney General for Antitrust, Christine Varney, is stepping down and there is a big merger, the AT&T and

T-Mobile merger, that needs a fair, thorough and expeditious review, and I would hope that her stepping down doesn't delay that. I think we could get that done by the end of the year in a fair, thorough manner.

But I have been in a dialog with Chairman Genachowski about making sure that we move as quickly as we can on our merger review process. I think there are a lot of problems with how the commission under both Republicans and Democrats have conducted themselves in terms of taking too long or imposing conditions that have absolutely nothing to do with the substance of the merger itself. So Congress could look at that. There could be a statutory provision certainly, but the best thing to do would be for the FCC to honor its own 180-day shot clock.

Mr. LEIBOWITZ. So Congressman, may I just add something?

Mr. GRIFFITH. Yes, please.

Mr. LEIBOWITZ. We do from time to time work with the FCC on merger reviews, and I think from our perspective, you don't deserve a particular outcome but you do deserve sort of a speedy resolution. Sometimes it takes a little longer with documents, but that is what you deserve, so I think that is a reasonable point.

Mr. MCDOWELL. And I agree.

Mr. GRIFFITH. And I think most of us would agree with that as well.

Commissioner Northup, do you think Congressman Waxman's proposed legislation will actually ease any burdens under the Consumer Product Safety Improvement Act?

Ms. NORTHUP. No, I don't think it goes nearly far enough, and in fact, he has proposed previously a functional purpose exemption which I have to say is like picking winners and losers. If you think a part—first of all, it says it can't be harmful to children and then it says if it serves a function, for example, on a bicycle and is necessary, then we can exempt it. Well, if it doesn't harm a child, why do we have to then exempt it in part by part? It means that big companies that have lots of product or big expensive products can afford to get a functional exemption because it is a very complicated petition you would have to file with us. They can afford to file the petition and all the supporting work and everything and then we can exempt them but for small needs for these same exact materials that do not harm a child, I don't think that, you know, they probably would be able to afford either the wait for us to act on it or the cost to put the petition together. So that in particular to me is, you know, not a good way to go about easing this. Making the absorbability a useful exception would make a huge difference.

Mr. GRIFFITH. Did you want to add onto that?

Mr. ADLER. Well, I wanted to disagree.

Mr. GRIFFITH. Somebody else may give you time to do that but let me—I have got one more thing I want to say and if I could take back my time because I am running out of time. I did hear from several of you as I was listening to the testimony that you all, at least a couple of you, made mention that perhaps the legislation created more of the problem than the agency created and that we should be careful when we craft legislation that that may be costing jobs as well as the regulations costing jobs that are ultimately awarded, and while in some cases it may be an agency that is

pushing the envelope and some cases it is just the agency following exactly what Congress told them to do, and I do appreciate that. I yield back my time.

Mr. STEARNS. The gentleman yields back the balance of his time. The gentleman from Colorado, Mr. Gardner, is recognized for 5 minutes.

Mr. GARDNER. Thank you, Mr. Chairman, and thank you for your time and testimony today.

Chairman Wellinghoff, in developing energy policies such as policies to support the integration of renewables, demand response or the deployment of smart grid technologies, does FERC evaluate the impact that increased energy price, evaluate the impact that increased energy prices resulting from the implementation of these policies will have on jobs?

Mr. WELLINGHOFF. The policies that we implement aren't directed to specific technologies but rather directed to the integration of all technologies into competitive marketplace. We believe, and I think my colleague, Commissioner Moeller, I think would agree, we believe that competition is good for consumers and so to the extent that we can maximize competition, we can increase the types of resources that are available in the market, whether they be coal or nuclear or natural gas or solar, geothermal, hydroelectric or any of these resources, and also to the extent that we can do things like incorporate in demand response and energy efficiency which usually at the lowest cost resources, the whole mix of those resources in a competitive environment allowed to compete fairly in that competitive environment will in fact produce the lowest cost for consumers.

Mr. GARDNER. So do you do an analysis that these policies, the impact they will have on jobs?

Mr. WELLINGHOFF. We don't a specific impact on——

Mr. GARDNER. So you don't do an analysis then?

Mr. WELLINGHOFF. We don't do a specific analysis.

Mr. GARDNER. A specific analysis on jobs? You do not do a specific analysis on jobs?

Mr. WELLINGHOFF. We don't, but we do believe that——

Mr. GARDNER. So in terms of——

Mr. WELLINGHOFF. Excuse me, if I could finish. We do believe——

Mr. GARDNER. Actually, reclaiming my time. In terms of the Executive order, so you do not believe that the Executive order, which I think you said you believe in the spirit of, you do not believe that it requires you to look at jobs? I understand that you are exempted from it but you believe, you said you want to follow the spirit of it. Do you think you ought to be concerned about jobs and looking at the job impact?

Mr. WELLINGHOFF. I think we are always concerned about jobs to the extent that we can drive down prices in a competitive atmosphere and allow for the economy to have access to low-cost power. To the extent that we can provide low-cost competitive power within the economy, we are going to create jobs and we are going to maintain jobs.

Mr. GARDNER. But you don't do an analysis to know that or not?

Mr. WELLINGHOFF. My basic economics, what I know if basic economics, tells me that if we can lower costs for electricity, we are going to have the ability to increase jobs.

Mr. GARDNER. Would you commit today to start beginning a jobs analysis when you make decisions?

Mr. WELLINGHOFF. I certainly have no problem looking at jobs. I believe, for example——

Mr. GARDNER. But shouldn't that be our——

Mr. WELLINGHOFF [continuing]. Your colleague from Louisiana, for example, was talking about this issue with respect to jobs and regarding that, Entergy, which is one of the utilities in Louisiana, has chosen to join a competitive market, Myso. An analysis was done that showed by joining that competitive market, something over $700 million could be saved. I think there is a lot of money if you can take that money and save it for Louisiana consumers and others throughout the region. It wasn't just Louisiana but spread out the region. That additional money in the pockets of consumers is going to help them create jobs and invest back in the economy in ways that more jobs will be created. So I think that is a very valid example of the types of things that FERC is doing to the regulations and the competitive structures that we are putting in place to ensure that in fact we can create more jobs.

Mr. GARDNER. Well, and then so what you are telling the committee then, and I believe what you just said, though, when it comes to developing energy policies like integration of renewables, demand response or the deployment or smart grid technologies, then you are saying today that you will do a jobs analysis on these decisions?

Mr. WELLINGHOFF. I am saying that to the extent that it is possible to do so, we certainly will in fact look at the impact on jobs.

Mr. GARDNER. I think we ought to be looking at the impact on jobs no matter what we do so that we have an idea of——

Mr. WELLINGHOFF. I absolutely agree.

Mr. GARDNER. And so Commissioner Moeller, do you care to comment on this?

Mr. MOELLER. I generally want to associate my remarks with the chairman because we are believers in competitive wholesale markets and those ultimately are what benefit consumers the most and allow more resources. I think we should always be cognizant of the employment impact we have on rising energy prices because it can be substantial.

Mr. GARDNER. Thank you, Commissioner Moeller.

I see my time is expired and I yield back.

Mr. STEARNS. I thank the gentleman for his questions. I think we are completed with our first round. I think the ranking member and I have talked that we are going to ask a few more questions and then wrap up.

I don't think there has ever in my experience been such a distinguished group of people that could make an impact on deregulation in America as you folks today so we are here with a certain humility in asking you what is the best way for us to move forward. As Mr. Scalise pointed out with that Small Business Administration report, had every U.S. household paid an equal share of the federal regulatory burden, each household would pay $15,586. That was in

2008. And when you compare that with what we spent for health care costs in 2008, the federal regulatory burden exceeded by 50 percent the private spending on health care, which equaled $10,500. So it is within your power to deregulate and to get rid of burdensome regulations, which would spur the economy. So we are not talking about something insignificant.

So I guess the larger question is, we passed in 1980 the Regulatory Flexibility Act. Obviously that is not applicable today and it is not working, so the question is for you is sort of a wrap-up understanding, the President reached out with his Executive order that did not apply to the independent agencies in some of your opinions. We think Cass Sunstein's letter did imply but we don't seem to have you jumping to the forefront to try to deregulate. Should Congress should either statutes or legislation provide, one, either more flexibility to you or should we update the Regulatory Flexibility Act of 1980? So we are reaching out for you to tell us, one, should we do some of the things I mentioned, and secondly, would you be willing to help us in terms of providing us documentation on what we should do? I will start with Commissioner Adler.

Mr. ADLER. Mr. Chairman, the devil is always in the details. I would be delighted to look at anything you drafted and to respond to it.

Mr. STEARNS. So you think that we should take the Regulatory Flexibility Act of 1980 and update it in Congress?

Mr. ADLER. Actually, I am probably a bigger fan of the Regulatory Flexibility Act than some folks here. As I read it, I think it is a fairly useful tool, especially in terms of what we do when we are trying to regulate and we are looking particularly at the impact on small business. That is actually something that both Commissioner Northup and I agree on is that we do have to worry about the impact on small business.

Mr. STEARNS. Commissioner Northup?

Ms. NORTHUP. Yes, but unfortunately, it has no teeth in it. No matter what the regulatory analysis is, if you decide in our agency that you should go ahead and regulate, it almost has no impact on what we do. So unless we are required to justify the cost with the benefit, adding that to it, I think that would be an important improvement, but other than that, it is a box we check and it doesn't have an effect.

Mr. STEARNS. Just for your information, I checked the Consumer Product Safety Improvement Act. Everybody in Congress voted for it under the Bush Administration except one, and that was Ron Paul. So you probably would have been like most——

Ms. NORTHUP. I am sure I would have, and, like I said, when I first read it before my confirmation, I was really very excited about it.

Mr. STEARNS. Commissioner McDowell?

Mr. MCDOWELL. I think statutory action is the best way to sort of cut through this Gordian knot of regulation and statutory provisions that have built up over the years and so I would be happy to work with you on something like that.

Mr. STEARNS. Mr. Wellinghoff, Commissioner, Chairman?

Mr. WELLINGHOFF. Yes, Chairman Stearns. As I indicated to Congressman Barton, I don't have any specific recommendation for you. However, certainly anything that the committee decided to draft, we would be happy to work with you in any way.

Mr. STEARNS. Commissioner Moeller?

Mr. MOELLER. Mr. Chairman, I generally think a government of both legislative and regulatory bodies should periodically review legislation and regulations, so if that is in order, I would certainly endorse that. And as our chairman said, I had a specific example about hydropower re-licensing that I would be happy to provide to you. It would be quite complicated, given the number of federal laws involved, but any help that we can provide, we would be happy to do so.

Mr. STEARNS. Chairman Leibowitz?

Mr. LEIBOWITZ. I am also happy to work with you, although as my colleague, Commissioner Kovacic, pointed out, I think only four rules that we have actually are within reg flex but we do do, you know, reg reviews and rule reviews. In fact, we are in the middle of 23 of them now, so I will defer to my colleague, Mr. Kovacic.

Mr. KOVACIC. Mr. Chairman, if I could just underscore a couple of themes that have come up already today. One, the enormous value of having committees and the Congress all assess before the fact the likely impact in regulation writing of legislation adopted. Second, the custom you are developing in this hearing of making a regular question for all of us how much are you spending in each budget cycle to look at evaluation and the assessment of effects, not just to measure accomplishment by activity itself but looking at actual impacts and ask us how much are you setting aside in each budget cycle to do this. And last, we do an enormous amount of work as advocates for competition and better consumer protection techniques before the government agencies, before our State governments, and this perhaps provides specific suggestions that we would be happy to share with you about how adjustments in national and State legislation could improve productivity and improve economic performance.

Mr. STEARNS. I am going to yield to the ranking member, but I think each of you have indicated you will help us. You are saying something should be done. So I am going to presuppose that all of you will submit to us some specifics that we could incorporate and still working as the Energy and Commerce Committee towards this.

The gentlelady from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman, and I agree. I had asked them for that information earlier, and I really look forward to working with all of you because as we all said—no, actually it was one of you who said the devil is in the details of these regulations. You can say we are all for regulatory reform. We also probably need to streamline some of the statutes because a lot of the regulations flow from the statutes and so I think we need to look at all of those.

I have been sitting up here thinking about this lead standard with the CPSIA. I was on the conference committee with Chairman Barton and others, and Mr. Chairman, you are exactly right. There was only one no vote on that bill in the House, and Chairman Bar-

ton and Ranking Member Waxman and a bunch of us, and even the other body sat around for a long time trying to figure out what to do with this lead standard. I remember it so clearly, and when we drafted the new lead standards, what we decided was, was that determining total lead content was preferable to risk assessment because what happened with risk assessment is, it was dependent on a product-by-product determination which you couldn't do because of the large number of children's products in the marketplace, and so in addition, although with most chemicals a traditional risk-based model can work, if you have persistent bioaccumulative toxins like lead, science has demonstrated that traditional models are inappropriate and exposures inevitable, and we spent a lot of time in that conference committee talking about what we do about bikes and ATVs and things like that. So it is not like Congress never talked about these things.

I think what we need to do now that we have passed this—and it wasn't one of these provisions slipped in in the middle of the night either. We really, really hammered this out on a bipartisan, bicameral basis. So now I think what we need to do, given the experience that the CPSC has had in trying to draft the regulations, is sit down and figure out what about that new lead standard might work, what might not work, and this is what led to this effort by then-Chairman Waxman last year to develop this legislation everybody has been talking about. The staff undertook a consultative shareholder process with small business and others to try to figure out what we do about the ATVs, the bicycles, the tee shirts with the blue ink and things like that. He did release a consensus discussion draft of a document to try to figure out how to address these concerns because we need to do it but unfortunately your side of the aisle, Mr. Chairman, rejected that.

And so we can sit down and talk about it. We did do that. We did that when the Republicans were in the majority in the Congress and when we had President Bush in the White House, but we can't devolve to the stage where we say oK, we are the majority, we are just going to do it our way and to heck with you, and vice versa. We really need to work together on how to make this work for small businesses and most importantly for consumers. So as someone who has fortunately or unfortunately been in those trenches, sometimes these regulations actually came from scientific basis and it is going to take some really hard work to fix it. I think every witness here would agree with that on some of these harder regulations that might be more burdensome.

And just one last thing, Mr. Chairman. Ms. Christensen was asking a question about Chairman Genachowski's efforts to eliminate outdated and unnecessary regulations at the FCC, and he had sent a letter to the subcommittee, to you and to me, outlining the efforts which noted that they eliminated 50 outdated regulations and identified 25 sets of data collection that are no longer necessary. So Mr. Chairman, I would like to ask unanimous consent to put that letter into the record.

Mr. STEARNS. Will the gentlelady let us take a few moments to review it?

Ms. DEGETTE. Yes.

Mr. STEARNS. What is the date of this? I don't see the date on this.

Ms. DEGETTE. Today.

Mr. STEARNS. Oh, it is today's date? OK. I would say at this point there is some concern that is really perhaps some of it is applicable but there is others that is concern on this committee we talked about earlier, the fact that Chairman Genachowski was invited as chairman to come up. He said he could not come, and so it is customary if he doesn't come, we do not respectfully take his statement and make it part of the record since he didn't show, and we are a little concerned that this might in fact be part and parcel of his opening statement. So I think at this——

Ms. DEGETTE. Mr. Chairman, I would just point out, it is not an opening statement, it is a letter to us, and we generally——

Mr. STEARNS. I think the staff is interpreting it as an opening statement and so I am just saying at this point we are not able to rule in favor of that and so I think we are just going to hold off and not put it part of the record.

At any rate, I will close by saying that civilizations rise and fall because of burdensome regulation. It is in your hands, you people, to do as much as you can to make the small businessperson succeed so that we can have innovation in this country.

I thank you for your time, and the subcommittee is adjourned.

[Whereupon, at 1:07 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY
AFFAIRS

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 2, 2011

M-11-10

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND OF INDEPENDENT REGULATORY AGENCIES

FROM: Cass R. Sunstein
Administrator

SUBJECT: Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Order 13563 states that "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It sets out certain principles and requirements designed to promote public participation, improve integration and innovation, increase flexibility, ensure scientific integrity, and increase retrospective analysis of existing rules. The purpose of this Memorandum is to offer guidance on these principles and requirements.

Relationship between Executive Order 13563 and Executive Order 12866

Executive Order 13563 is designed to affirm and to supplement Executive Order 12866; it adds to and amplifies the provisions of Executive Order 12866, rather than displacing or qualifying them. After the issuance of Executive Order 13563, agencies should continue to follow the principles and requirements contained in Executive Order 12866.

Section 1 of Executive Order 13563 specifically reiterates five principles from Executive Order 12866. These principles generally involve consideration of benefits, costs, and burdens. Section 1 also asks agencies "to use the best available techniques to quantify anticipated present and future costs as accurately as possible," such as identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. The goal of this provision is to promote careful and accurate quantification. At the same time, Section 1 recognizes that agencies may consider and discuss certain values that "are difficult or impossible to quantify"; such values include "equity, human dignity, fairness, and distributive impacts."

Public Participation

Section 2 of Executive Order 13563 emphasizes the importance of public participation. It requires agencies to "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than

60 days." This section complements a corresponding provision in Executive Order 12866,[1] while also emphasizing the importance of public comment through the Internet. Section 2 aims to promote agencies' continuing efforts to use online technologies to facilitate greater participation in the rulemaking process, thus making that process simpler and more accessible—and less burdensome and costly—for all stakeholders.

Section 2 also requires an "open exchange" of information among government officials, experts, stakeholders, and the public. In this context, "open exchange" refers to a process in which the views and information provided by participants are made public to the extent feasible, and before decisions are actually made. Section 2 thus seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself. In this way, Section 2 is designed to foster better and more informed agency decisions.

This provision is not satisfied simply through the acceptance of electronic submission of rulemaking comments by interested parties who lack information about the arguments and information provided by other parties. A central goal of public participation is to improve the content of rules, and open exchanges of information by interested parties can be helpful in that endeavor.

Section 2 also directs agencies (to the extent feasible and permitted by law) to give the public timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings. For proposed rules, agencies are required to include an opportunity for public comment on the rulemaking docket, including comment on relevant scientific and technical findings.[2]

Finally, Section 2 directs agencies, where feasible and appropriate, to seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking. This provision emphasizes the importance of prior consultation with "those who are likely to benefit from and those who are potentially subject to such rulemaking." One goal is to solicit ideas about alternatives, relevant costs and benefits (both quantitative and qualitative), and potential flexibilities.

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[1] "Each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Executive Order 12866, Section 6(a)(1).

[2] This requirement is consistent with Office of Information and Regulatory Affairs, Memorandum for the President's Management Council, *Increasing Openness in the Rulemaking Process – Improving Electronic Dockets* (May 28, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf, which states, "To the extent feasible, and consistent with applicable laws, regulations, and policies, agencies should make their electronic regulatory dockets on Regulations.gov consistent with their paper-based dockets. Both dockets should provide the public with access to all relevant materials. To the extent that they are part of a rulemaking, supporting materials (such as notices, significant guidances, environmental impact statements, regulatory impact analyses, and information collections) should be made available by agencies during the notice-and-comment period by being uploaded and posted as part of the electronic docket."

Integration and Innovation

Section 3 of Executive Order 13563 calls for "[g]reater coordination across agencies" to produce simplification and harmonization of rules. This provision complements related provisions of Executive Order 12866, such as the provision asking each agency to "tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."[3]

Section 3 of Executive Order 13563 instructs agencies (1) to consider the combined effects of their regulations (together with those of other agencies) on particular sectors and industries and (2) to promote coordination across agencies and harmonization of regulatory requirements. Section 3 thus emphasizes the crucial importance of simplifying and harmonizing regulations and acknowledges that, at times, regulated entities might be subject to requirements that, even if individually justified, may have cumulative effects imposing undue, unduly complex, or inconsistent burdens. Section 3 is designed to reduce burdens, redundancy, and conflict, and at the same time to promote predictability, certainty, and innovation.

Efforts at harmonization might occur within agencies, as efforts are made to coordinate various rules. Such efforts may also occur across agencies, as agencies work together to produce greater simplicity and predictability. Such interagency efforts may be promoted or assisted by OIRA.

Flexible Regulatory Tools

Section 4 of Executive Order 13563 states that ". . . each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." Such approaches include "warnings, appropriate default rules, and disclosure requirements, including provision of information to the public about risks in a form that is clear and intelligible." This provision complements, and does not displace, related provisions in Executive Order 12866 (such as the provision in Section 1(b)(3), asking each agency to "identify and assess available alternatives to direct regulation, including...providing information upon which choices can be made by the public").

Section 4 acknowledges the importance of considering flexible approaches and alternatives to mandates, prohibitions, and command-and-control regulation. It emphasizes the potential value of approaches that maintain freedom of choice and improve the operation of free markets (for example, by promoting informed decisions). It directs agencies to consider the use of tools that can promote regulatory goals through actions that are often less expensive and more effective than mandates and outright prohibitions. When properly used, these tools may also encourage innovation and growth as well as competition among regulated entities.

[3] Executive Order 12866, Section 1(b)(11).

Science

Section 5 of Executive Order 13563 refers to the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and implementing guidance. It emphasizes that each agency shall "ensure the objectivity of any scientific and technological information used to support the agency's regulatory actions."

In implementing guidance, the President's Science Adviser stated, "Science, and public trust in science, thrives in an environment that shields scientific data and analyses from inappropriate political influence; political officials should not suppress or alter scientific or technological findings."[4] Section 5 of Executive Order 13563 extends the President's Memorandum and implementing guidance to the context of regulatory actions.

Retrospective Analysis of Existing Rules

Section 6 of Executive Order 13563 emphasizes the importance of retrospective analysis of rules and contains a "look back" requirement: "Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, expanded, streamlined, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles set forth in Sections 1 through 5 remain fully applicable, and should help to orient agency thinking.

Agency plans should not, of course, call into question the value of longstanding agency rules simply because they are longstanding. Many important rules have been in place for some time. The aim is instead to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Agencies should explore how best to evaluate regulations in order to expand on those that work (and thus to fill possible gaps) and to modify, improve, or repeal those that do not. Candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken. Agency review processes should facilitate the identification of rules that warrant repeal or modification.

While systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking. Retrospective review may reveal that an existing rule is needed but has not operated

[4] John Holdren, Memorandum for the Heads of Agencies and Departments, *Scientific Integrity* (December 17, 2010), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.

as well as expected, and that a stronger, expanded, or somewhat different approach is justified. In formulating its preliminary plan for retrospective review, each agency should exercise its discretion to develop a plan tailored to its specific mission, resources, organizational structure, and rulemaking history and volume.

While each agency should set its own priorities, all plans are expected to address the following topics:

- **Public participation**. Consistent with the general commitment to public participation, agencies should solicit the views of the public on how best to promote retrospective analysis of rules. Even before preliminary plans are written, for example, the public might be asked to provide comments on how such plans might be devised and to help identify those rules that might be modified, streamlined, expanded, or repealed. Consistent with existing guidance on the Paperwork Reduction Act (PRA), agencies may consider general efforts to obtain public feedback, including town hall meetings and online equivalents, to be exempt from PRA requirements.[5] Agencies are encouraged to consider providing a period of public comment after drafts of preliminary plans are written and/or after such plans have been submitted to OIRA. Agencies may want to reach out to stakeholders with an interest in the rules mentioned in the preliminary plans to ensure that diverse views are considered. Because knowledge of the effects of rules is widely dispersed in society, and because members of the public are likely to have useful information and perspectives, agencies should consider developing mechanisms to promote public consultation about existing rules on a continuing basis.

- **Prioritization**. The preliminary plan should specify factors that the agency will consider and the process that the agency will use in setting priorities and in selecting rules for review. To the extent feasible, the preliminary plan should also include an initial list of candidate rules for review over the next two years.

- **Analysis of costs and benefits**. Agencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. Such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments, which can be used to enhance the agency's analytic capability.

- **Structure and staffing**. Responsibility for retrospective review should be vested with a high-level agency official who can secure cooperation across the agency. The preliminary plan should also consider how best to maintain sufficient independence from

[5] For further explanation of the applicability of the Paperwork Reduction Act, please see Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Information Collection under the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf and Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

the offices responsible for writing and implementing regulations. Finally, the plan should identify possible actions to strengthen internal review expertise (if necessary).

- **Coordination with other forms of retrospective analysis and review**. Under existing requirements and authorities, many agencies are already engaged in retrospective analysis and review. For example, the Regulatory Flexibility Act, 5 U.S.C. §610, requires agencies to "publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities." The same provision calls for review of all such agency rules every ten years. It is appropriate to use existing processes, and information now at hand, as significant inputs into preliminary plans.

Within 100 days, agencies should submit initial drafts of their preliminary plans to the appropriate desk officer at the Office of Information and Regulatory Affairs (OIRA). OIRA desk officers will review the plans and may provide suggestions to the agencies on possible improvements. OIRA desk officers are also prepared to work with agencies as they finalize their preliminary plans.

Independent Agencies

Executive Order 13563 does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority. In particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules.

July 2011

Evaluation of the Consumer Product Safety Database

Committee on Energy and Commerce, Democratic Staff

In August 2008, Congress passed and President Bush signed into law the Consumer Product Safety Improvement Act, strengthening the ability of the Consumer Product Safety Commission (CSPC) to identify product hazards and remove dangerous products from the marketplace. The law required that the CPSC create an online database for consumers, health care professionals, and public safety officials to report safety hazards and incidents involving consumer products.

The CPSC SaferProducts.gov database went live on March 11, 2011. For the first time, reports about dangerous products are now publicly available to parents and other concerned consumers. The database is also improving the commission's ability to identify trends in product hazards quickly and efficiently.

The Republican-controlled House of Representatives is expected to soon vote on the FY 2012 Financial Services and General Government Appropriations bill. This bill contains a provision that would shut down the new database by barring CPSC from using any funds "to carry out any of the activities" related to the database. Consumer organizations have described the possible elimination of the database as "a giant step backwards for consumer safety protections."[1]

To assess the new consumer safety database, Democratic Committee staff analyzed the most recent data available online, the consumer product incidents reported to the CPSC over a three-month period from the database's launch on March 11, 2011, to June 7, 2011. This report, the first analysis of the database since its creation, summarizes the staff's key findings.

The database contains more than 1,600 incident reports. During its first three months of operation, consumers, health care professionals, public safety officials, and others reported 1,624 incidents that CPSC then published in the online database. Almost one-third of these incidents involved reports of death or injury.

The database contains 11 reports of incidents that resulted in fatalities. These fatality reports include accounts of infants who died in cribs and playpens and teenagers and adults who were killed while riding ATVs. One report describes a death caused by carbon monoxide poisoning from a faulty furnace.

The database contains an additional 483 reports of incidents that resulted in an injury. The reports include incidents in which children suffered amputations or injuries to their fingers when their hands became trapped in the hinges of strollers. Numerous people reported ATV accidents resulting in serious injuries and hospitalization. Other consumers reported ankle and knee injuries from footwear. Most of these incidents required some level of medical attention.

Many other incident reports describe product defects that could cause injury. One consumer reported that the hinges on a safety gate broke, causing the gate to fall down the stairs. A mother reported that a hair dryer started sparking while she was using it to dry her daughter's hair. Another consumer reported that her front-loading washing machine had burned her clothes. Many consumers reported light fixtures, small appliances, and electronics that began over-heating and smoking with normal use.

Kitchen products account for one-third of the incident reports. Other product categories receiving the most reports include home maintenance, nursery equipment, furniture and furnishings, and toys. See Table 1.

Table 1. Incidents Reported in the SaferProducts.gov Database: By Category

Product Category	No. of Incident Reports
Kitchen	545
Home Maintenance and Structures	204
Baby - Nursery Equipment and Supplies	161
Furniture, Furnishings, and Decorations	141
Toys and Children	119
Clothing and Accessories	112
Yard and Garden	101
Sports and Recreation	75
Electronics	73
Drywall	27
Personal Care	26
Containers and Packaging	15
Hobby	13
Fuel, Lighters, and Fireworks	11
Products at Public Facilities	1

Consumers, public safety officials, and others have filed incident reports. Consumers reported the vast majority of product safety incidents to this database, accounting for 1,571 (97%) of the incident reports. State and local agencies (18 reports), public safety officials (15 reports), health care professionals (12 reports), medical examiners (4 reports), and even child service providers (4 reports) also have reported incidents to the database.

The information in the incident reports is accurate. Opponents of the CPSC database have claimed that the database allows "companies and their brands to be unfairly characterized"[2] and that "the database could be filled with bogus reports."[3] But this is not occurring. Product manufacturers are given the opportunity to review and dispute information in incident reports before the reports are published online in the database. They have challenged the accuracy of only 202 reports. The CPSC has accepted in whole or part 154 of the manufacturers' claims (over 75%) and took action by removing inaccurate information or not publishing the incident report in the database.

The information in the incident reports is detailed. Opponents of the database also have claimed that the database would be filled with reports by anonymous individuals that do not identify the specific products involved. This is also not occurring. More than 80% of the incident reports in the database include the product's model or serial number. In addition, 82% of the persons filing reports have given the CPSC permission to release their contact information to the manufacturers.

Hundreds of thousands of consumers are using the database to obtain important information about product safety. According to CPSC officials, there have been more than 305,000 visits to the new website. The individuals visiting the website have conducted almost 1.8 million product searches. More than half of all site visits and almost half of all searches occurred in June 2011, indicating that the database is rapidly becoming more popular among consumers and others searching for critical product safety information.

The new CPSC consumer safety database has been available to the public for only a few months. During this short time period, consumers, public health officials, and others have already reported more than 1,600 product safety incidents – including hundreds that caused death or serious injury – and almost 300,000 consumers have searched the database for important public safety information. Efforts by House Republicans to eliminate this database would deprive the public and government officials of critical information needed to improve consumer safety.

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[1] Consumer Federation of America and Consumers Union, Press Release, *House Appropriations Committee Votes to Gut Safety Database* (June 23, 2011).

[2] House Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, Testimony of Wayne Morris, Association of Home Appliance Manufacturers, *A Review of CPSIA and CPSC Resources* (Feb. 17, 2011).

[3] Letter from Rosario Palmieri, Vice President, National Association of Manufacturers, to Members of Congress (Feb. 17, 2011).

The Impact of Regulatory Costs on Small Firms

by

Nicole V. Crain and W. Mark Crain
Lafayette College
Easton, PA

for

under contract number SBAHQ-08-M-0466

Release Date: September 2010

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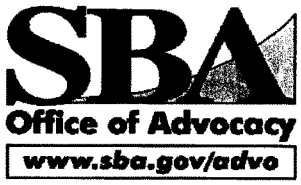

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Table of Contents

List of Tables

Tables in the Text

List of Tables (continued)

Tables in the Appendices

Executive Summary

The annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008. Had every U.S. household paid an equal share of the federal regulatory burden, each would have owed $15,586 in 2008. By comparison, the federal regulatory burden exceeds by 50 percent private spending on health care, which equaled $10,500 per household in 2008. While all citizens and businesses pay some portion of these costs, the distribution of the burden of regulations is quite uneven. The portion of regulatory costs that falls initially on businesses was $8,086 per employee in 2008. Small businesses, defined as firms employing fewer than 20 employees, bear the largest burden of federal regulations. As of 2008, small businesses face an annual regulatory cost of $10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms (defined as firms with 500 or more employees).

The regulatory landscape highlighted above and detailed in this report emerges from an updated analysis of the regulatory record explored in three previous studies for the Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration (Hopkins, 1995; Crain and Hopkins, 2001; and Crain, 2005). Direct comparisons to the results in these prior studies should be made with caution, however. The present study introduces some new methodological techniques, which may account for some of the differences in the cost estimates for 2008 versus those for prior years.

I. Purpose and Highlights

Government regulations pervade modern life in America and other nations with few exceptions. Regulations are needed to provide the rules and structure for societies to properly function. This research, while mindful of this fact, does not consider the benefits of federal regulations, but looks at the overall costs imposed by them. Little stock is taken of the cumulative effects.

Unlike most fiscal actions taken by government, the costs of regulatory actions are relatively hidden. For example, consider the activities, products, and services consumed by a typical household on a typical day. The costs of government regulations get stirred into the indistinct mixture of countless economic forces that determine prices, costs, designs, locations, profits, losses, wages, dividends, and so forth. Isolating the contribution of regulations to one's daily routine requires more than simply looking at the sales receipts, for example, as in the case of government sales taxes. A comprehensive list of regulatory influences that affect one's daily existence is indeed extensive and overwhelming to track or sum up. Yet, knowledge of the cumulative consequences of regulatory actions, and how these are changing, provides important information to assess and evaluate the performance of a political-economic social system.

This report seeks to fill some of these gaps in our knowledge by providing estimates of the costs of federal government regulations in the United States. An awareness of regulatory costs reveals much about the balance in public versus private sector responsibilities for and control over resources. Transparency about compliance costs can inform critical judgments about what society gives up in exchange for government responsibility exercised through the machinery of the regulatory process.

Policymakers long ago recognized the importance of information about U.S. taxing and spending programs; such fiscal information has been provided systematically

for nearly a century and is in fact mandated by the Constitution (Article 1, Section 9). The annual federal budget process and the *Budget of the United States* provide considerable detail regarding where the money comes from and how it is spent. The quest for transparency in the nation's fiscal affairs has increased through the online availability of and public access to detailed budget information.

Unfortunately, comparable information about the impact of federal regulatory programs is largely absent. Federal regulations escaped any rigorous scrutiny until limited tracking was mandated by Executive Order 11821 in 1974. The federal Regulatory Right-to-Know Act, enacted in 2000, was a major attempt to make information about the costs and benefits of regulations far more transparent and widely available than before. This act requires the U.S. Office of Management and Budget (OMB) to submit an accounting statement and report that includes an estimate of the total annual costs and benefits of federal rules and paperwork "to the extent feasible."[1]

In the 2009 Report from OMB, the estimated annual cost of major federal regulations ranges between $51 billion and $60 billion in 2001 dollars. Denominated in 2009 dollars (that is, adjusting for inflation), this annual cost is between $62 billion and $73 billion. The estimated cost range provided in OMB's report differs markedly from estimates in three prior studies commissioned by the Office of Advocacy of the U.S. Small Business Administration (hereafter referred to as "Advocacy").[2] Thomas Hopkins

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[1] Section 624 of the Treasury and General Government Appropriations Act of 2001, Pub. L. 106-554, 31 U.S.C. § 1105 note.

[2] Thomas D. Hopkins, *Profiles of Regulatory Costs. Report to the U.S. Small Business Administration*, U.S. Department of Commerce, National Technical Information Service #PB96 128038, November 1995 (http://www.sba.gov/advo/). W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, U.S. Small Business Administration, 2001 (http://www.sba.gov/advo/). Hopkins (1995) began to fill the information vacuum regarding the federal regulatory burden, presenting a profile of the level and distribution of federal regulatory compliance costs using data through 1992, and made cost projections through 2000. The Hopkins study was updated and extended in Crain and Hopkins (2001); that study examined the actual, as distinct from projected, regulatory burden in 2000. Crain (2005) updated and provided methodological revisions to the 2001 study and estimated compliance costs for 2004.

(1995) estimated annual federal regulatory costs to be $777 billion. Mark Crain and Thomas Hopkins (2001) estimated the annual costs to be $876 billion (both numbers are converted here to 2001 dollars, the base year normally used by OMB in its reports). More recently, Crain (2005) estimated the annual costs to be in excess of $1 trillion (again in 2001 dollars). According to these three studies for Advocacy, the costs of federal regulations are larger than the costs reported by OMB by a factor of 13 to 17. What accounts for this large discrepancy?

OMB discusses this issue openly and candidly, stating in its 2009 *Report*: "because these estimates exclude non major rules and rules adopted more than ten years ago, the total benefits and costs of all Federal rules now in effect are likely to be significantly larger than the sum of the benefits and costs reported."[3]

It is worth emphasizing at the beginning of this report the main factors that cause OMB's estimates to differ so greatly from those in the studies for Advocacy, including the new estimates presented here for 2008. If OMB or other government-provided estimates were complete and comprehensive, further study would add little value. First, in compiling its accounting statement, OMB includes only those regulations that it cleared during the previous 10 years, which in the 2009 report included October 1, 1998, to September 30, 2008. Limiting the analysis to this time period omits some of the most costly federal regulations, such as the regulations stemming from the parts of the Clean Air Act and its amendments that were enacted before 1998.

Second, the annual OMB accounting statements are based solely on cost-benefit analyses that were performed by the separate federal agencies.[4] In other words, the

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[3] U.S. Office of Management and Budget, Office of Information and Regulatory Affairs (2005), *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, p. 9.

[4] In some cases, the cost estimates are based on OMB's transparent modifications of agency-provided cost-benefit estimates. Agencies are not required to perform cost-benefit analyses on

sources for the cost and benefit estimates that OMB uses to compile its accounting statement are the federal agencies that promulgate and enforce regulations, and those agencies frequently declare many costs to be "inestimable." This means that while the annual OMB accounting statements offer a trove of relevant information, the coverage in these annual statements is limited; federal agencies have not assessed the costs (or the benefits) for a host of regulatory activities — past and present. This is particularly problematic in the case of economic regulations, which have not been analyzed by federal agencies and therefore have not been included in OMB's annual accounting total. Burdensome economic regulations such as import restrictions, antitrust policies, telecommunications policies, product safety laws, and many other restraints on business activities are implemented outside of the OMB regulatory review process.[5] None of these regulatory costs are therefore included in OMB's annual estimates of total costs.

Third, the OMB annual reports to Congress include "major" regulations reviewed by OMB. This methodological decision is understandable given the massive volume of "non major" regulations. Nonetheless, thousands of non major regulations in the aggregate may amount to substantial costs. Fourth, and finally, a host of regulations are issued by independent regulatory agencies — federal government entities that fall outside the executive branch — and, therefore, are not subject to the reporting

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regulations that are expected to have an economic impact of less than $100 million, and thus these are omitted from OMB's cost estimate.

[5] For example, regulations implemented directly through the legislative process are outside the OMB review process. Furthermore, the totality of rules, both existing and new, with anticipated impacts below $100 million, and not subject to the Paperwork Reduction Act, are also outside the OMB review process.

requirements in Executive Order 12866.[6] The costs and benefits of such regulations are not included in the aggregate costs and benefits reported by OMB.[7]

These and other differences between OMB's cost calculations and those used in this study will be described in further detail in the sections that follow. This preliminary discussion anticipates the natural question about the large difference between OMB's cost estimates and the cost estimates in Hopkins (1995), Crain and Hopkins (2001), Crain (2005), and those presented in this study. An appreciation of the limitations of OMB's regulatory accounting procedures also motivates one of the purposes of this study, which is an inclusive accounting of all federal regulations and their estimated cost. The cost estimates provided by OMB — in general, calculated by the specific executive branch agency that promulgated the regulation — are used whenever possible in this report, in particular for environmental regulations, occupational safety and health, and homeland security regulations. In the case of regulatory activities for which OMB does not offer cost estimates, the report performs independent analysis to approximate the costs and relies on other secondary sources. For example, the report specifies and estimates an econometric model and then uses the parameters to estimate the cost of economic regulations.

This report seeks to update and improve the 1995, 2001, and 2005 studies for Advocacy and advance the understanding of who bears what burdens from regulation. In particular, the report seeks to identify the federal regulatory burden on small U.S. firms, and to assess whether and to what extent this burden disadvantages small businesses

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[6] Exec. Order No. 12,866 §1(a), 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[7] On this subject, OMB (2009, p. 23) states that "...it would be highly desirable to obtain better information on the costs and benefits of these rules." The OMB reports provide in tabular form information that is available from the Government Accountability Office (GAO) about the costs and benefits of regulations issued by independent regulatory agencies. As OMB (2009) notes, monetized costs were reported for only two rules issued by independent regulatory agencies for the period 2007-2008.

relative to their larger competitors. Underlying the significance of this assessment for the U.S. economy is the fact that 89 percent of all firms in the United States employ fewer than 20 workers. By comparison, large firms (defined as those with 500 or more employees) account for only 0.3 percent of all U.S. firms.[8] If federal regulations place a differentially large cost on small business, this potentially causes inefficiencies in the structure of American enterprises, and the relocation of production facilities to less regulated countries, and adversely affects the international competitiveness of domestically produced American products and services. All of these effects, of course, would have negative consequences for the U.S. labor market and national income.

Some Key Findings: The Cost of Federal Regulations in 2008

The findings in this report indicate that in 2008, U.S. federal government regulations cost an estimated $1.75 trillion, an amount equal to 14 percent of U.S. national income. When combined with U.S. federal tax receipts, which equaled 21 percent of national income in 2008, these two costs of federal government programs in 2008 consumed 35 percent of national income. This obviously represents a substantial burden on U.S. citizens and businesses.

It is important to stress that direct comparisons between 2008 and prior years must be made cautiously because new estimation methodologies introduced in this study were not possible previously. This means that some of the cost differences are attributable to different estimation techniques. Given this cautionary caveat, the

[8] Tables 7 and 8 provide snapshots of the size distribution of American businesses. It should be pointed out that large firms employ 50 percent of all workers, whereas small firms employ 18 percent of all workers in the United States. These snapshots are computed from data compiled by the U.S. Census Bureau for Advocacy (source: U.S. Small Business Administration website, http://www.sba.gov/advo/research/data.html). For general information about the relevance of small business to the US economy, see Frequently Asked Questions on the U.S. SBA website, http://web.sba.gov/faqs/faqindex.cfm?areaID=24.

comparable cost in 2004 was an estimated $1.26 trillion (in 2009 dollars), or 11 percent of national income (Crain, 2005).[9] If regulatory costs in 2004 are recomputed using the methodologies introduced in this study, those costs rise by $445 billion to an estimated $1.7 trillion (again, converted into 2009 dollars). This apples-to-apples comparison — that is, using the same estimation methods —suggests that the cost of federal regulations increased by $43 billion (or three percent) between 2004 and 2008 after adjusting for inflation.

What is the distribution of federal regulatory costs among firms of different sizes? The findings in this report indicate that compliance costs fall disproportionately on small businesses. Table 1 summarizes the incidence of costs by firm size based on aggregate data for all sectors of the U.S. economy.

Table 1. Distribution of Regulatory Compliance Costs by Firm Size in 2008 *

	Cost per Employee			
Type of Regulation	**All Firms**	**Firms with <20 Employees**	**Firms with 20-499 Employees**	**Firms with 500+ Employees**
All Federal Regulations	$8,086	$10,585	$7,454	$7,755
Economic	$5,153	$4,120	$4,750	$5,835
Environmental	$1,523	$4,101	$1,294	$883
Tax Compliance	$800	$1,584	$760	$517
Occupational Safety and Health, and Homeland Security	$610	$781	$650	$520

*** Notes to Table 1:**

[9] Milton Friedman put the estimated burden of government mandates and regulations at roughly 10 percent of U.S. national income in 2003. See Milton Friedman, "What Every American Wants," *Wall Street Journal*, January 15, 2003, p. A10.

Costs are denominated in 2009 dollars. The cost per employee for each firm size category uses employment shares for the respective business sectors to compute the weighted averages.

Considering all federal regulations, all sectors of the U.S. economy, and all firm sizes, federal regulations cost $8,086 per employee per year in 2008. For firms with fewer than 20 employees, the cost is $10,585 per employee per year. The cost is $7,454 in medium-sized firms, and $7,755 in large firms. Costs per employee thus appear to be at least 36 percent higher in small firms than in medium-sized and large firms. These results are roughly consistent with the findings in Hopkins (1995), Crain and Hopkins (2001), Crain (2005), as well as other studies completed during the past 25 years.[10]

The underlying force driving this differential cost burden is easy to understand. Many of the costs associated with regulatory compliance are "fixed costs," that is, a firm with five employees incurs roughly the same expense as a firm with 500 employees. In large firms, these fixed costs of compliance are spread over a large revenue, output, and employee base, which results in lower costs per unit of output as firm size increases. This is the familiar empirical phenomenon known as economies of scale, and its impact is to provide a comparative cost advantage to large firms over small firms.

[10] Studies on the incidence of regulatory costs among firms of different sizes include Henry B. R. Beale and King Lin, *Impacts of Federal Regulations, Paperwork, and Tax Requirements on Small Business*, SBAHQ-95-C-0023; Microeconomic Applications, Inc., prepared for the Office of Advocacy, U.S. Small Business Administration, September 1998; Roland J. Cole and Paul Sommers, *Costs of Compliance in Small and Moderate-sized Businesses*, SBA-79-2668, Battelle Human Affairs Research Centers, Seattle, WA, February 1980; *Improving Economic Analysis of Government Regulations on Small Business*, SBA-2648-OA-79, JACA Corporation, Fort Washington, PA, January 1981; Robert J. Gaston and Sidney L. Carroll, *State and Local Regulatory Restrictions as Fixed Cost Barriers to Small Business Enterprise*, SBA-7167-AER-83, Applied Economics Group, Inc., Knoxville, TN, April 1984; and, *Economies of Scale in Regulatory Compliance: Evidence of the Differential Impacts of Regulation by Firm Size*, SBA-7188-OA-83, Jack Faucett Associates, Chevy Chase, MD, December 1984. For a theoretical discussion, see William A. Brock and David S. Evans, *The Economics of Small Businesses: Their Role and Regulation in the U.S. Economy*, Holmes & Meier, New York, NY, 1986, especially chapters 4 and 5. A recent survey and extension of this literature is provided by Steven C. Bradford, "Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation," *The Journal of Small and Emerging Business Law*, 8 (1), 2004, pp. 1-37.

The findings in Table 1 illustrate that the compliance cost disadvantage faced by small businesses is driven by environmental regulations, tax compliance, occupational safety and health, and homeland security regulations. The cost per employee of environmental regulations is more than four times higher in small firms than in large firms. With respect to tax compliance, the cost per employee is three times higher in small firms than in large firms. The particular drivers of the distribution of compliance costs among firm sizes differ across sectors of the U.S. economy. Later sections of the report lay out these patterns in further detail. It is worth highlighting the finding that not all regulations fall more heavily on small businesses than on larger firms. For example, the cost per employee of economic regulations falls most heavily on large firms. In part, this likely reflects the fact some industrial structures do not lend themselves to small firm participation (*e.g.*, utilities, telecoms, or mining) because large scale operations are a precondition to remain competitive. This simply reduces the number of small enterprises that would be affected. Another factor impacting the distribution of economic regulations is the Regulatory Flexibility Act (RFA). Under the RFA agencies are required to assess the effect of regulations on small businesses, and to mitigate undue burdens, including exemptions and relaxed phase-in schedules.[11]

This report details the distribution of regulatory costs for five major sectors of the U.S. economy: manufacturing, trade (wholesale and retail), services, health care (including social assistance), and "other" (a residual category containing all businesses not included in the other four).[12] This is the same five-sector grouping that was used in

[11] This may be especially relevant in the cost of complying with Section 404 of the Sarbanes-Oxley Act of 2002. The impact of the exemption of small business entities has resulted in cost savings in the billions. See U.S. Small Business Administration, Office of Advocacy (annual editions), *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272,*

[12] The "other" category includes the following industries: forestry, fishing, hunting & agriculture; mining; utilities; construction; and transportation and warehousing.

the prior report for SBA. The sector-specific findings reveal that the disproportionate cost burden on small firms is most dramatic in the manufacturing sector; the compliance cost per employee for small manufacturers is more than double the compliance cost for medium-sized and large firms. In the health care sector and the "other" sector categories, the compliance costs also appear starkly higher in small firms compared with medium-sized and large firms. In the service and trade sectors, the distribution of regulatory costs among firm sizes is much more even overall, yet varies depending on the type of regulation.

The remainder of the report is organized into three sections and four appendices. Section II gives an overview of the regulatory accounting methodology and describes the primary sources for the cost estimates used in the report. Section III begins with a snapshot of American enterprise, showing the distribution of firms, employees, and payroll expenditures for the major sectors of the U.S. economy. It then presents the underlying assumptions and maps the methods used to allocate: (i) the regulatory burden that falls on business, (ii) the regulatory costs across business sectors, and (iii) the regulatory costs by firm size within each business sector. Section IV provides the detailed findings for the distribution of the costs across the sectors and firm sizes, and by type of regulation. The appendices contain details for the various analytical procedures used in the report, and supplemental information about the "on-budget" expenditures on federal regulatory agencies.

This report does not address the benefits of regulation, an important challenge that would be a logical next step toward achieving a rational regulatory system. The annual accounting statements compiled by OMB move toward such a system by presenting partial estimates of benefits as well as costs. This report, thus, should be seen as a building block toward a broader understanding of the costs of regulation, much of which creates important and substantial benefits. Like data on federal budgetary

outcomes, the regulatory cost estimates inform the discussion about the balance between public and private sector control over resources.

II. Scope of Regulatory Costs

Perspective on Regulatory Accounting

The imbalance between what is known about the costs and benefits of government regulations versus government fiscal programs is hardly surprising. Regulatory accounting requires the discovery of relevant costs and benefits not reflected in any governmental cash flow, which is inherently a difficult task. Fiscal accounting is simpler in two respects: it has the luxury of using well documented monetary flows tied to tax receipts and agency expenditures, and it tracks costs but not the associated benefits. Notwithstanding the practical difficulties associated with regulatory accounting, the impact of government regulations on business and citizen activities is no less real than the impact of fiscal programs.

The total direct cost of federal regulations consists of resources employed by government agencies to promulgate, monitor, and enforce regulations, as well as the compliance activities by citizens and enterprises. This report follows the practice in the three predecessor studies for Advocacy by focusing on the latter: the resource costs over and above those that show up in the federal budget and agency personnel charts. The report provides an accounting of the nonbudgeted costs imposed on individuals and businesses to comply with regulations. A simple example illustrates this perspective on regulatory accounting. The total direct cost to the nation of, say, a pollution control regulation consists of spending by the U.S. Environmental Protection Agency for monitoring and enforcement activities, plus spending by businesses to install abatement equipment, hire environmental engineers, attorneys, accountants, and so on to comply with the regulatory rules. EPA spending shows up in the federal budget, and therefore would not be included in this report's cost accounting. Rather, this report includes estimates of the impact on those who are regulated: the spending by businesses to

install abatement equipment, hire engineers, and so forth. In this sense, the estimates presented understate the full cost of federal regulations.

Regulatory agency spending — the cost component this report excludes — amounts to less than 3 percent of the nonbudgeted regulatory compliance costs on which this report focuses. Nonetheless, spending by federal regulatory agencies on regulatory activity reached $47 billion in fiscal year 2008, so it is not trivial. Appendix 4 provides the on-budget costs of federal regulations, and shows how these budgets have grown over time. Between 1990 and 2008 regulatory agency budgets grew by 129 percent in inflation-adjusted dollars, an average annual rate of about 7 percent.[13] Total staffing of federal regulatory activity in fiscal year 2008 equaled 249,471 full-time equivalent employees. These staffing levels grew by 63 percent between 1990 and 2008, or 4 percent on an annualized basis. While these on-budget indicators of federal regulatory costs are large and growing, they represent only a tiny fraction of the nonbudgeted compliance costs on which this report focuses. To reiterate, on-budget spending on federal regulatory activity equals only 2.7 percent of the estimated compliance costs borne by U.S. citizens and businesses.

Other important regulatory costs are not captured in this report's estimates, most notably activities by state and local governments, indirect burdens, and general equilibrium effects. Regulatory agencies in the 50 American states have promulgated hundreds of thousands of regulations that are superimposed on federal regulations. Consider state-level environmental regulations as just one example. The sections of the

[13] These data are from Veronique de Rugy and Melinda Warren (2009), *Expansion of Regulatory' Budgets and Staffing Continues to Rise: An Analysis of the U.S. Budget for Fiscal Years 2009 and 2010,* Regulatory Report 31, Arlington, VA: Mercatus Center, George Mason University. Appendix 4 in this report presents additional data from their study of regulatory budgets and staffing.

State Administrative Codes that regulate the environment consist of 18 million words.[14] The costs of complying with hundreds of thousands of state regulations are not explicitly considered here, but clearly add to the nation's total regulatory compliance burden.[15]

The report uses various methods to determine how the costs of regulations are distributed: between businesses and individuals, among sectors of the U.S. economy, and among businesses of different sizes. These tend to reflect the initial or statutory burden of the regulations, that is, based on who bears the initial compliance costs. It needs to be acknowledged that this initial compliance burden can be shifted, and the final incidence of regulations may differ from this initial or statutory assignment of the regulatory costs. The difference between the initial incidence and how costs are ultimately divided depends on the demand and supply elasticities in the respective product and input markets. The final incidence of the federal regulatory burden is likely to differ from the initial incidence of costs. Of course, this is exactly analogous to the distinction between how a government collects a tax versus who ultimately pays for the tax. Collecting 100 percent of gasoline taxes from the service station owner does not necessarily mean that the owner bears the full burden of the gas tax. Rather, the gas tax is passed on to consumers to the extent they are willing to pay a higher price at the pump. While acknowledging that shifting in the cost burdens will occur, this report does

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[14] See W.M. Crain, "18 Millions Words Can Hurt You: The Cost of State Environmental Regulations," Policy Studies Working Paper, Lafayette College, 2010.

[15] A recent study of California state regulations estimated the costs of that state's regulation to be $493 billion in 2007; see Sanjay B. Varshney, and Daniel H. Tootelian, *Cost of State Regulations on California Small Businesses Study,* California State University, Sacramento, September 2009. Other researchers have ranked states in terms of their relative regulatory burden, for examples: John D. Byars, Robert E. McCormick, and T. Bruce Yandle, *Economic Freedom in America's 50 States: A 1999 Analysis,* State Policy Network, 1999; Ying Huang, Robert E. McCormick, and Lawrence McQuillen, *U.S. Economic Freedom Index: 2004 Report,* Pacific Research Institute, 2004; and Lawrence J. McQuillan, Michael T. Maloney, Eric Daniels, and Brent M. Eastwood, *U.S. Economic Freedom Index: 2008 Report,* Pacific Research Institute, 2008. A different methodology is used by Amela Karabegovic and Fred McMahon (with Christy G. Black) to rank American States and Canadian Provinces. See *Economic Freedom of North* America, The Fraser Institute, annual editions since 2002. No estimates seem to be available for the aggregate costs of state regulations for the 50 states.

not attempt to model these changes because the estimates of the relevant supply and demand elasticities for different sectors of the U.S. economy are not sufficiently consistent or reliable. This methodological issue is addressed again in Section III.

Similarly, the report does not account for a number of indirect or second-order costs of regulations. For example, environmental regulations directly affect the cost of producing electricity, and these show up as a direct cost for electric utilities. The report's cost estimates include these types of direct costs. Yet increases in the cost of electricity have ripple effects throughout the American economy in the form of higher energy costs, thus indirectly raising costs in virtually every sector. Some of these costs will be shifted even further onto consumers in the form of higher prices (directly for energy consumption, and, indirectly, for the other products purchased that now cost more because of higher energy costs). For another example, regulations that raise costs on health care providers will be shifted forward, at least partially depending on market elasticities, in the form of higher rates businesses must pay for health insurance premiums and other health care-related outlays. In turn, businesses will attempt to shift the burden of these higher health care-related outlays by increasing consumer prices or requiring employees to pay a larger share of health care costs. Some attempt is made to examine the more general impact of economic regulations, yet the distribution of these costs among sectors necessarily relies on the initial incidence.

Other general equilibrium effects include a reduction in dynamic efficiency, such as slowing innovations that would lead to productivity gains and therefore general economic expansions over time.[16] Again, the study does not measure the dynamic

[16] The effect of regulations on dynamic efficiency is not without opposing viewpoints. Perhaps the most famous is Professor Porter's theory that environmental progress and economic competitiveness are not inconsistent but complementary, See Michael Porter, "America's Green Strategy," *Scientific American* (1991), For a critique of the Porter theory, see for examples, Oats, Wallace, "Environmental Federalism," Washington, DC: Resources for the Future, Sept. 21, 2009;

effects; omission of the indirect and general equilibrium effects means that the estimates in the report probably understate the full burden of federal regulations.[17]

As a rule, the approach used in this report to approximate the costs of regulations follows the methods used by Hopkins (1995), OMB annual reports (2000 through 2009), Crain and Hopkins (2001), and Crain (2005). This consistency helps to make the results comparable over time. As in past studies, new estimation techniques are adopted when these offer obvious improvements in the reliability and quality of the cost estimates. The introduction of new methodologies obviously means that comparisons to regulatory costs in prior years must be qualified.

Major Categories of Federal Regulations: Sources and Methods

The report divides federal regulations into four categories: economic; environmental; tax compliance; and occupational safety and health, and homeland security.[18] A description of each category follows, along with an explanation of the primary sources and methods used to derive the compliance cost estimates.

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and John List and Mitch Kunce, "Environmental Protection and Economic Growth: What Do the Residuals Tell Us?, *Land Economics*, 2000, 76(2), pp. 267-82.

[17] The effects of regulations on economic growth are recognized and discussed by OMB in its annual reports to Congress, but are not included in its cost estimates. The study by Hazilla and Kopp estimates of the indirect effects of environmental regulations as well as the dynamic consequences. Their evidence suggests that both of these costs are substantial. See Michael Hazilla and Raymond Kopp, "The Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis," *Journal of Political Economy*, Vol. 98 (4), 1990. It is important to emphasize that the benefits of regulations might also be greater in a general equilibrium analysis than in partial equilibrium, and thus social welfare (benefits net of costs) might be higher in a general equilibrium than in a partial equilibrium analysis.

[18] These four categories differ slightly from those used in Crain (2005) and Crain and Hopkins (2001). They continue to conform reasonably well with the categories used by the U.S. Office of Management and Budget in its annual reports to Congress. Hopkins (1995) used slightly different categories: environmental, other social, economic, and process. Occupational health and safety regulations and homeland security regulations are combined on the rationale that both deal broadly with public safety issues.

1. Economic Regulations

Economic regulations include a wide range of restrictions and incentives that affect the way businesses operate — what products and services they produce, how and where they produce them, and how products and services are priced and marketed to consumers. Economic regulations affect both domestic and international business operations. For example, laws that impose quotas and tariffs on foreign imports limit competition from outside the United States, restrict production and employment, raise prices, and generally curtail U.S. economic activity.

One of the major differences between the cost estimates in this study and the estimates reported by OMB in its Annual Reports to Congress is that OMB does not include regulations issued by agencies not subject to Executive Order 12866 — the independent regulatory agencies.[19] In its 2009 report, OMB discusses and recognizes the potentially large impact of such regulatory activity (OMB, 2009, pp. 29-34). Nonetheless, OMB has not implemented estimates for a host of economic regulations, beyond those for which it has reviewed regulatory impact statements submitted by federal agencies during the past 10 years. As noted in the introduction to this report, OMB recognizes the potentially large costs associated with regulatory activities not included in its annual estimates of total regulatory costs.

A methodology was introduced in the prior report for Advocacy (Crain 2005) to expand the coverage by providing a method to assess the costs of broad-based economic regulations. Obviously, the goal is to incorporate into the analysis the impact

[19] Under Executive Order 12866, OMB requires and reviews regulations issued by executive branch agencies. This means, for example, that the costs are not included for rules issued by such agencies as: the Securities and Exchange Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Trade Commission, and the Nuclear Regulatory Commission. The U.S. Government Accountability Office (GAO) is required by statute to report to Congress on major regulatory rules, including those issued by agencies not subject to Executive Order 12866. This GAO report, however, still does not include cost estimates for most federal regulations.

of the widest possible range of economic regulations, including those that are promulgated by independent regulatory agencies. The method employs cross-country regression analysis to examine the impact of a broad index of economic regulations on the national economic output (GDP).[20] The 2005 study used an index of economic regulations developed by the Organization for Economic Cooperation and Development (OECD). The cost estimate derived from this approach was referred to as the "baseline" estimate in the 2005 study, simply because the regression procedure accounted for most of the costs of economic regulations. That baseline estimate was then supplemented in two ways: (i) by a separate estimate of the cost of international trade regulations using data from the International Trade Commission, and (ii) with estimates for specific domestic economic regulations that were either not covered by the OECD index, or were promulgated in years after that index was computed. In other words, several different approaches were used in the 2005 study to compile an inclusive measure of the cost of economic regulations.

This study again uses the comparative, cross-country regression approach, in this case adopting an alternative index of economic regulations that is more comprehensive than the OECD index. This new index of economic regulations, labeled the Regulatory Quality Index, is computed by researchers at the World Bank as part of its Worldwide Governance Indicators (WGI) research project. The WGI project has estimated various measures of governance and institutional quality, including the

[20] It is interesting to note that in its 2000 Report to Congress, OMB used a comparable methodology and OECD data to include a more expansive estimate of the costs of economic regulations than it used in subsequent Reports to Congress. A similar regression methodology is employed by Varshney and Tootelian, *op. cit.*, to estimate the cost of state-level regulations in California. They use indices that gauge the extent of state government regulations and analyze the impact on gross state product, controlling for various factors that influence state economic performance.

Regulatory Quality Index used in this report. These indices are available from 1996 through 2008.

The Regulatory Quality Index measures perceptions of the ability of governments to formulate and implement sound policies and regulations that permit and promote private sector development. For example, the index values for 2008 are derived from 1,751 data points, representing four types of data: commercial business information providers (46 percent); public sector organizations (24 percent); nongovernmental organizations (17 percent); and surveys of firms or households (13 percent). The data from these four sources are aggregated using a statistical procedure known as the unobserved components model.[21] The elements included in the Regulatory Quality Index are listed in Appendix 1.

Three important aspects of the WGI Regulatory Quality Index — how it differs from the OECD economic regulation index used in Crain (2005) and why it enhances the accuracy of the estimated costs of economic regulation — should be described. First, a larger data series is available for the Regulatory Quality Index, covering a longer time period and more countries, and this helps to overcome the small sample size used to

[21] A detailed description of the methodology used in its construction is provided in Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, "Governance Matters VIII: Aggregate and Individual Governance Indicators 1996–2008," World Bank Development Research Group, Macroeconomics and Growth Team, Policy Research Working Paper 4978, June 2009. See especially Appendix D. For further discussion of applications of the governance metrics see Kaufmann, Daniel and Aart Kraay (2008). "Governance Indicators: Where Are We and Where Should We Be Going?" *World Bank Research Observer*, Spring 2008. As noted in the text, the prior study (Crain, 2005) introduced this methodological approach as a baseline estimate for economic regulations, except that it used an index of regulations compiled by researchers at the Organization for Economic Cooperation and Development. (See G. Nicoletti, Scarpetta and O. Boylaud (2000), "Summary Indicators of Product Market Regulation and Employment Protection Legislation for the Purpose of International Comparisons," *OECD Economics Department Working Paper*, No. 226.) It is noteworthy that the OECD and WGI indices are correlated over the time periods for which both indices are available. The WGI index is employed in this report because it is available annually for a longer and more recent time period, while the OECD index is only available at five-year intervals: 1998, 2003, and 2008. Prior studies by Crain and Hopkins (2001) and OMB (2000) used an estimate based on the OECD findings in *Regulatory Reform in the United States*, OECD Reviews of Regulatory Reform, Paris, 1999. One criticism of the earlier method is that it fails to account adequately for major deregulation activities in various industries in the 1980s and 1990s.

estimate the parameters in the Crain (2005) study.[22] Second, the Regulatory Quality Index covers international as well as domestic economic regulations. This means that unlike the 2005 study, a separate estimate of the international economic regulation component is unnecessary. Third, the WGI Regulatory Quality Index includes rules and mandates that affect factors markets — which obviously include the labor market — as well as product markets. This means that the impact of economic regulations that affect the workplace is encompassed in this measure. For this reason the four categories of regulations are redefined from the 2005 study. In that report, "workplace regulations" were a separate category and estimated using a different methodology. In this report, the estimated costs of workplace regulations, such as laws affecting collective bargaining, employee drug-testing, and the American with Disabilities Act, are now included in the Regulatory Quality Index and merged into the general economic regulation category. Fifth, the OECD index used in the Crain (2005) estimate of economic regulations did not cover all business sectors.

In summary, the methodology for estimating the cost of economic regulations is the main difference between this report and prior reports. This improvement is made possible because of new research at the World Bank to measure economic regulations. This Regulatory Quality Index is available for a larger number of countries and for a longer sample period than anything available for prior studies. More important, the Regulatory Quality Index embodies extensive stakeholder knowledge about the countries' regulatory practices that affect domestic and international practices that are related to product markets and labor markets.

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[22] The OECD Index used in Crain (2005) was based on the OECD Survey for 1998. Criticism of the short time period is raised in Winston Harrington, "Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews," RFF Discussion Paper 06-39, Washington, DC: Resources for the Future. September 2006. See especially pages 14-16. Of course, a larger sample size generally improves the reliability of statistical estimation.

Cross-Country Regression Model. The cost of economic regulations is derived from regression analysis using a panel of OECD member countries, which includes the United States. The basic idea is to estimate empirically the impact of regulations on aggregate economic output, or GDP. The approach uses the Regulatory Quality Index as the main variable of interest, while controlling for other variables that affect national economic performance. The form of the regression model is specified in Equation 1.

(Eq. 1) $\text{GDP per Capita}_{it} = \beta\,(\text{World Bank Index of Regulatory Quality})_{it} + \phi\,(X)_{it} + \alpha_i + \varepsilon_{it}$

The sample used to estimate Equation (1) consists of 25 OECD countries for which data on all of the relevant variables are available. The variable subscript *i* in Equation (1) denotes an observation in a particular country *i* (= 1, ..,25). The variable subscript *t* denotes an observation in a particular year, where *t* = 2002 through 2008.[23]

The dependent variable, GDP per capita, is real GDP divided by population, denominated in constant U.S. dollars (source: World Bank, 2010). The main explanatory variable of interest in Equation (1) is the *World Bank Regulatory Quality Index* (source: World Bank, 2009). This *Regulatory Quality Index* is scaled to have values that range from -2.5 to 2.5. Note that increases correspond to improvements in regulatory quality — that is, reductions in the regulatory burden imposed on the operation of product and factor markets.

The model also includes several economic and demographic control variables, represented by the vector X in Equation (1). These control variables are drawn from the empirical literature that examines differences in economic levels across countries and

[23] Values for the Regulatory Quality Index are available for many OECD countries starting in 1996. The sample in the regression model includes seven years, 2002 through 2008. This is because data for some of the control variables used to estimate Equation (1) are missing for various countries before 2002. Thus, the sample of countries that may be used in the analysis increases to 25 by beginning the sample in 2002.

over time. (For useful surveys of this literature, see Hall and Jones, 1997, Barro and Sala-i-Martin, 1995, and Barro, 1997.) The set of controls included in X are: foreign trade as a share of GDP, country population, primary school enrollment as a share of the eligible population, and fixed broadband subscribers per 100 people (data source: World Bank, World Development Indicators, online database). The variables are entered into the regression model as natural logarithmic transformations.

Because the dataset is organized as a panel — that is, it includes observations over time for the same set of countries — the model also includes country fixed-effects variables. Fixed-effects variables are simply country-specific indicator variables that control for time-invariant factors that affect economic performance. For example, a landlocked country may be disadvantaged relative to a country with ocean access. Geographic location obviously does not change over time, and including the fixed-effects variables helps to control for the impact of such factors. Appendix Table A-2 provides summary statistics for the variables used in the analysis.

The results of estimating Equation 1 are shown in Table 2, and these parameters are used to calibrate the cost of economic regulations.

Table 2. Impact of Economic Regulations on GDP in OECD Countries, 2002 through 2008

Independent Variable	ln (GDP per Capita) [a]
World Bank Regulatory Quality Index	0.094
	(2.77)**
ln (Country Population)	0.089
	(0.39)
ln (Foreign Trade as a Share of GDP)	0.242
	(4.95)**
ln (Primary Education as a Share of the Eligible Population)	-0.243
	(-2.37)*
ln (Fixed broadband subscribers per 100 people)	0.032
	(8.89)**
Constant	8.31
	(2.19)*
Observations	118
Number of Countries	25
R-square Within	0.85
R-square Between	0.03
F-stat (6,87)	85.4**

Notes to Table 2:

t-statistics in parentheses where:
* indicates significance at the 5 percent confidence level.
** indicates significance at the 1 percent confidence level.
The variables are denominated in 2009 U.S. dollars. The model includes fixed-country effects and fixed-year effects when significant.

As reported in Table 2, the coefficient on the World Bank *Regulatory Quality Index* is positive and significant at the one-percent confidence level. This indicates that less stringent restrictions systematically enhance a country's aggregate economic activity, as reflected by the level of its GDP per capita. The estimated coefficient is 0.094. This means that a one-unit change in the *Regulatory Quality Index* corresponds to a 9.4 percent change in real GDP per capita (recall that the dependent variable is entered into the regression model as a logarithmic transformation and thus percentage changes).[24] The Regulatory Quality Index value for the United States is equal to 1.579 in 2008, and, as noted, the index is calibrated to range between -2.5 and 2.5. The difference between 1.579 and 2.5 (the minimal amount of regulation) would require a change equal to 0.92, which would correspond to an increase in U.S. GDP per capita of 8.7 percent (=0.094 x 0.92). The estimated cost of economic regulations as reflected in lost GDP in 2008 is thus $1.236 trillion (denominated in 2009 dollars).

This estimated cost represents a very large increase over the estimated cost of economic regulations in 2004, which equaled $671 billion after converting the estimate in Crain (2005) into 2009 dollars. As noted, some of this difference is attributable to the change in the cost accounting methodology, one that is more complete than methodologies used in the prior studies for SBA. The 2008 estimate includes labor market economic regulations that were included under the "workplace regulations" category in the 2004 estimate. The approximate value of the "economic" component of the workplace regulations category in 2004 is $56 billion (again adjusting for inflation). This means that the comparable economic regulations cost (one that includes product and labor market regulations) in 2004 is $727 billion (=$671+$56). Even after

[24] For comparison, when Equation (1) is estimated without the country fixed-effects variables, the estimated coefficient on the *World Bank Regulatory Quality Index* equals 0.142, which is significant at the 1 percent confidence level. In other words, the parameter estimate used in the report for the cost of economic regulations is on the low end of the range of estimates using this regression analysis.

readjustment to account for the redefined categories, this still suggests that economic regulations increased by 70 percent from 2004 to 2008, or roughly $500 billion.

How much of this large increase comes from "real" regulatory changes and how much comes from methodological changes? If the cost of economic regulations in 2004 is re-estimated using the new methodology, that value rises by $445 billion to $1.172 trillion. This recalibration of the 2004 estimate suggests that the "real" cost of economic regulations increased by $63 billion between 2004 and 2008, after adjusting for inflation and estimation methods.

2. Environmental Regulations

Cost estimates for environmental regulations are derived from two sources: OMB's annual reports to Congress and Hahn and Hird (1991). The report assumes that OMB's coverage of environmental regulations has been relatively complete. OMB has reviewed the regulatory impact analyses for the most costly regulations promulgated by the Environmental Protection Agency back through the late 1980s. In its reports, OMB has relied on the cost estimates in Hahn and Hird (1991) to gauge the costs of environmental regulations prior to 1988, and this study follows that procedure.[25]

Table 3 lists the sources and estimated annual costs for environmental regulations that were enacted during various time periods. It is important to stress that the costs of environmental regulations shown in Table 3 are denominated in 2001 dollars, the same base year used in the original OMB sources of these estimates. This facilitates comparisons to the OMB reports, and these costs are converted into 2009 dollars in Section IV below.

[25] It is worth reiterating that OMB includes only the costs of "economically significant" regulations subject to E.O. 12866 review. These are less than 1 percent of EPA's rulemaking. Moreover, as noted earlier, the OMB annual reports now encompass only regulations issued in the prior 10 years. This was not always the case, and data on the earlier environmental regulations are summarized in OMB's past annual reports.

Table 3. Sources and Estimated Annual Costs of Environmental Regulations

Years Regulations Were Issued *	Cost Estimates (Millions of 2001 $)		Source for Estimate
	Low	High	
Through 2000, Q1	108,359	191,887	OMB 2001, Table 2
Apr 1999 to Sep 2001	11,380	12,812	OMB 2002, Table 7
Oct 2001 to Sep 2002	192	192	OMB 2003, Table 1
Oct 2002 to Sep 2003	335	335	OMB 2004, Table 1
Oct 2003 to Oct 2004	3,840	4,073	OMB 2005, Table 1-1
Oct 2004 to Sep 2005	2,609	3,373	OMB 2006, Table 1-3
Oct 2005 to Sep 2006	2,720	2,965	OMB 2007, Table 1-3
Oct 2006 to Sep 2007	7,475	7,584	OMB 2008, Table 1-3
Oct 2007 to Sep 2008	7,591	8,780	OMB 2009, Table 1-3
Total	144,501	232,001	

Note to Table 3:

These dates follow OMB's practice by reporting the costs by fiscal years, which begin October 1 and end September 30.

OMB discusses the shortcomings in these estimates, including the basic fact that cost estimates do not exist for all environmental regulations, and the inherent difficulties in performing the regulatory impact analyses (RIAs). For example, OMB does not include an estimate for the cost of the Superfund program, which is likely to be quite large. To account for some of these shortcomings, OMB provides a range of cost estimates for most regulations, and these are reported in Table 3.

Beginning in its 2003 report, OMB began the practice of limiting its cost summaries to regulations promulgated over the preceding 10 years, which in that report covered 1992 through mid-2002.[26] For this reason, this report begins with the OMB report for 2001, which includes its earliest cost accounting and takes Hahn and Hird

[26] U.S. Office of Management and Budget, Office of Information and Regulatory Affairs (2003), *Informing Regulatory Decisions: Report to Congress on the Costs and Benefits of Federal Regulations*, Table 2. OMB's cost estimates rely on regulatory impact analyses (RIAs) issued mainly by the U.S. Environmental Protection Agency.

(1991) as its beginning estimate of the costs prior to 1988. To account for environmental regulations promulgated since then, the costs of newly reviewed regulations are taken from OMB's annual reports for 2002 through 2009.

As shown in Table 3, this puts the cost of environmental regulations in a range between $144 billion and $232 billion (in 2001 dollars) or between $175 billion and $280 billion when converted into 2009 dollars. This report uses the high end of the cost range provided in the OMB reports and Hahn and Hird (1991). This reflects a judgment that cost estimates are absent for important environmental regulations and that government agencies tend to be conservative in estimating regulatory costs.[27] For comparison, if the midpoint of the high and low estimates were used, the cost of environmental regulations in this report would decline by roughly $50 billion, or 19 percent.

3. Tax Compliance

Prior studies of federal regulations stress the substantial burden of paperwork costs on the American public and businesses. In the modern era in which electronic

[27] Several regulatory experts draw a similar conclusion about the OMB environmental cost estimates, but considerable debate continues. For example, Johnson concludes that "the costs of water quality regulation totaled $93.1 billion in 2001. While this figure is based on conservative estimates of regulatory costs, it is significantly larger than the cost and benefit estimates produced by EPA." (Joseph Johnson, *The Cost of Regulations Implementing the Clean Water Act,* Arlington, VA: Mercatus Center, Regulatory Studies Program Working Paper, April 2004.) In contrast, in 1999, EPA estimated the costs of the 1972 Clean Water Act at $15.8 billion per year. ("A Retrospective Assessment of the Costs of the Clean Water Act: 1972 to 1997," U.S. Environmental Protection Agency, October 2000.) The discussion in Robert W. Hahn, "Regulatory Reform: What Do the Government's Numbers Tell Us?" in Robert W. Hahn (ed.) *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, New York: Oxford University Press and AEI Press, 1996, pp. 208-253, is also informative. Hahn makes a strong case that government agencies overestimate benefits and underestimate costs systematically. In addition, the review article by Jaffe, *et al.*, "Environmental Regulation and the Competitiveness of U.S. Manufacturing," *Journal of Economic Literature*, Vol. 33 (1), 1995, suggests that environmental costs in the long run have exceeded compliance cost estimates. Finally, the study by Winston Harrington, *et al.* "On the Accuracy of Regulatory Cost Estimates," *Journal of Policy Analysis and Management*, vol. 19 (2), 2000, examines the estimates for 28 particular rules promulgated by EPA and OSHA and finds, in contrast, that overestimation of unit costs occurs about as often as underestimation.

submissions are displacing paper, the term *"paperwork burden"* has become merely a metaphor for the time and resources required for monitoring, recordkeeping, reporting, and compliance with statutes and regulations. Of this burden, the time required to comply with the federal tax code accounts for the lion's share. Of course, the federal government requires a host of additional forms that also impose recordkeeping and reporting burdens. However, these non-tax-related reporting and compliance requirements are largely tied to specific economic, environmental, or occupational safety and health and homeland security regulations. This means that the cost estimates for the other regulations will account for most of the non-tax-related compliance and reporting burden. In that sense, a separate estimate would be double-counting recordkeeping and form filing costs.

The estimates of the cost of federal tax compliance in prior studies for Advocacy relied mostly on annual studies of tax compliance produced by the Tax Foundation. These studies provided extensive details about the time required to file federal income tax forms and the number of specific forms filed. The estimates in this report rely mostly on data directly available from the U.S. Internal Revenue Service, simply because the Tax Foundation's latest report was for 2005. For certain forms, the Tax Foundation's estimates of the time required to file in 2005 are used.

The estimate of tax compliance costs in 2008 is consistent with past reports for Advocacy and is easy to describe. The first step compiles data from the Internal Revenue Service and in some cases from the Tax Foundation on the amount of time required to complete each type of tax form, and the number of filings for each type of form. The number of compliance hours is shown in the first row of Table 4 broken down by businesses and by individual and nonprofits, with a total for these two categories. The total number of hours required for compliance is nearly 4.3 billion per year, with

businesses devoting about 2.3 billion hours and individuals and nonprofits devoting about 2.0 billion hours.

Table 4. Sources and Estimated Costs of Compliance with the Federal Tax Code

	Businesses	Individuals & Nonprofits	Total
# Hours Required to Comply	2,280,966,382	2,018,119,637	4,299,086,018
Compliance Cost per Hour (in 2009 $)	$ 49.77	$ 31.53	
Total Compliance Cost (in 2009 $)	$95,984,291,402	$ 63,635,262,186	$ 159,619,553,588
Share of Total Compliance Cost	60%	40%	

The second step is to multiply the hours spent on compliance by an hourly wage rate that reflects either the value of the preparer's time (the average hourly wage rate for accountant and auditors in the case of individuals and nonprofits) or the hourly compensation rate for Human Resources professionals (in the case of businesses).[28] The estimated cost of federal tax compliance is nearly $160 billion (in 2009 dollars). To be clear, this $160 billion estimate includes the combined costs on individual filers, nonprofit organizations, and business filers. The estimated cost of compliance for businesses is about $96 billion, accounting for 60 percent of the total cost.

4. Occupational Safety and Health and Homeland Security Regulations

Prior studies for Advocacy used "workplace regulations" as one of the four categories for analysis. This category covered a wide array of regulations dealing with

[28] The source of the hourly rate data is the U.S. Bureau of Labor Statistics website.

wages, benefits, safety and health, and civil rights, among other things.[29] Because the economic cost component of workplace regulations is now reclassified and scored under the "economic" regulations category, this report modifies the workplace category to include only workplace regulations that deal with safety and health. These are primarily issued by the Occupational Safety and Health Administration, a division of the U.S. Department of Labor. It is noteworthy that occupational safety and health regulations alone accounted for 53 percent of the compliance costs of all workplace regulations in the 2005 study (Crain 2005). These were by far the largest element within the workplace regulations category.

This report relies on three sources to estimate the costs of occupational safety and health and homeland security regulations. These costs and sources are summarized in Table 5.

Table 5. Sources and Estimated Costs of Occupational Safety and Health and Homeland Security Regulations

Type of Workplace Regulation	Cost Estimate (Millions of 2009 $)	Source
Occupational Safety and Health (for those issued pre-2001)	64,313	Johnson (2005)
Occupational Safety and Health (for those issued 2001-2008)	471	OMB (2009), Table 1-2
Homeland Security (all through 2008)	10,416	OMB (2009), p. 18
Total	75,200	

[29] The source for the cost estimate for workplace regulations is the 2005 study by Joseph Johnson. The Johnson study offers a synthesis and evaluation of available estimates of the cost of regulations directed at the workplace, and from these different studies, generates an estimate of the total cost of workplace regulation. It provides the most comprehensive analysis to date, covering the 25 statutory acts and executive orders that encompass all significant workplace regulations promulgated by the federal government through 2001. Joseph M. Johnson, "A Review and Synthesis of the Cost of Workplace Regulations," in *Cross-Border Human Resources, Labor and Employment Issues*. Andrew P. Morriss and Samuel Estreicher (eds.), Kluwer Law International: Netherlands, 2005, pp. 433-67.

The cost calculations from the Johnson (2005) study are used where possible, that is, until 2001, and adjusted for inflation as shown in Table 5. The costs provided by OMB on OSHA regulations are used for those regulations issued subsequent to the Johnson study. All 17 of the homeland security regulations included in this report have been implemented since the 2005 report for Advocacy, and these cost estimates are all taken from OMB (2009). As examples, these are regulations concerned with transportation facilities security, chemical plant security, electronic availability of passenger manifest lists, cargo security, notice of imported food and registration of food facilities that might be vulnerable to bioterrorism, and air cargo security. The cost of these 17 homeland security regulations is $10.4 billion, and the total cost for this category — Occupational Safety and Health plus Homeland Security — is $75.2 billion.

Summary of Total Regulatory Costs

Table 6 summarizes the cost estimates described in this section by regulatory category, and notes the basic sources and procedures behind the estimates.

Table 6. Summary of Regulatory Compliance Costs in 2008
(Billions of 2009 dollars)

Type of Regulation	Cost Estimate	Sources
All Federal Regulations	1,752	Summation of Costs by Type
Economic	1,236	Original regression analysis using World Bank Regulatory Quality Index
Environmental	281	Hahn and Hird (1991); Crain (2005); OMB (2004, 2005, 2006, 2007, 2008, 2009)
Tax Compliance	160	IRS website, Bureau of Labor Statistics; Tax Foundation (2005)
Occupational Safety and Health, and Homeland Security	75	Johnson (2005); OMB (2009)

III. Incidence of Regulatory Costs

This section describes how the burden of federal regulations is distributed among major business sectors of the American economy, and, within sectors, how this burden is distributed among firms of different sizes. It begins with a brief quantitative summary of the composition of American enterprise: how the number of firms and the work force are distributed among firms of different sizes and among the major categories of business activities. This underlying composition of economic activity in America is a key element in the study, because it provides the basis for determining the incidence of regulatory costs.

A Snapshot of American Enterprise

The report uses a three-part firm size classification, relying on data available from Advocacy on employees per firm:

- Small firms — fewer than 20 employees
- Medium-sized firms — 20 to 499 employees
- Large firms — 500 or more employees.

The North American Industry Classification System (NAICS) devised by the U.S. Census Bureau divides American businesses into 2,000 distinct industry types. In order to make the results tractable, this report distills these classifications down to five broad categories:

- Manufacturing,
- Trade (wholesale and retail trade),
- Services,
- Health care, and
- Other (a residual containing almost all other nonfarm employers).[30]

[30] The U.S. Census Bureau provides Advocacy with these data. The Statistics of U.S. Business covers almost all nonfarm employer businesses. It omits farms, railroads, and most government-owned establishments, the U.S. Postal Service, and large pension, health, and welfare funds

Four of these five categories are adopted from the original Hopkins (1995) study for Advocacy. The health care category was added in the Crain (2005) study for Advocacy to reflect the growing scale and importance of this sector within the U.S. economy. The rationale for a small number of large categories, here and in previous reports for Advocacy, is to gain insight into the distribution of the regulatory burden across various types of economic activity — "manufacturing" versus "services" provides an obvious and distinct boundary. The "other" category includes: forestry, fishing, hunting & agriculture, mining, utilities, construction, and transportation and warehousing. To be sure, "other" bundles a diverse set of economic activities into a single category. However, in creating additional sector categories the analysis becomes less tractable.

Table 7 shows the distribution of American industry by sector and firm size using the most recently available data (for 2006) from Advocacy.[31] Table 7 presents three relevant size indicators: the number of firms, the number of employees, and payroll expenditures.[32] For example, the data indicate some six million firms in the United States and roughly 5.4 million of these are small businesses (less than 20 employees).

(100 + employees) and nonincorporated firms with no paid employees. According to the Census Bureau, nonemployers account for roughly 3 percent of all business activity (see U.S. Census Bureau, "Nonemployer Statistics," http://www.census.gov/epcd/nonemployer).

[31] American industry is obviously not static and these 2006 data on the distribution of business activity do not match up exactly with the years for the regulatory cost data. However, changes in the basic structure of American industry generally occur only incrementally. These data provide a reasonable approximation for the relevant years of the proportions of firms, employees, and payroll across the three firm size categories and the five sector classifications.

[32] The Office of Advocacy of the U.S. Small Business Administration contracts with the U.S. Census Bureau to collect the employer firm size data (see http://www.sba.gov/advo/stats/data.html). When the Census Bureau compiles its *Statistics of U.S. Businesses*, it relies on survey questionnaires filled out by firms. Occasionally, firms classify themselves under more than one industry type (or NAICS classification). This means that when summed by sector, the number of firms is greater than the actual number of firms. The data used in this report are corrected for this over count using a technique explained in Appendix 4. In brief, the correction relies on the fact that the number of employees in each industry is accurately reported to the Census Bureau, and the share of employees by sector is used to eliminate the redundancy and scale back over counts of firms.

Table 7. Size Distribution of American Business in 2006*

Sector	Size Measure	All Firms [a]	Firm Size:		
			<20 Employees	20-499 Employees	500+ Employees
All Sectors [a]	Firms	6,022,127	5,377,631	626,425	18,071
	Employment	119,917,165	21,609,520	38,614,220	59,693,425
	Payroll ($000)	5,099,088,373	772,519,440	1,492,491,072	2,834,077,860
Manufacturing	Firms	278,703	210,220	66,890	1,593
	Employment	13,631,683	1,180,832	4,875,389	7,575,462
	Payroll ($000)	659,910,538	44,023,629	205,977,710	409,909,200
Trade	Firms	1,048,443	941,506	105,527	1,410
	Employment	21,798,513	4,060,460	5,939,480	11,798,573
	Payroll ($000)	35,798,406	128,105,755	238,874,376	368,818,276
Services	Firms	3,064,433	2,755,361	296,335	12,738
	Employment	55,026,464	10,386,251	17,413,803	27,346,941
	Payroll ($000)	2,420,355,343	354,457,788	627,515,860	1,427,510,876
Health Care	Firms	596,992	526,261	69,895	835
	Employment	16,451,361	2,544,976	5,401,418	8,504,967
	Payroll ($000)	666,681,058	112,830,630	186,810,745	367,039,682
Other	Firms	1,033,556	944,284	87,778	1,494
	Employment	13,009,144	3,430,737	4,982,216	4,634,181
	Payroll ($000)	616,343,027	132,247,939	231,835,480	250,237,452

Notes to Table 7:

* Source: U.S. Small Business Administration, Office of Advocacy, "Statistics of U.S. Businesses: Firm Size Data," website: http://www.sba.gov/advo/stats/data.html. Payroll data are converted into 2009 dollars. The Office of Advocacy contracts with the U.S. Census Bureau to provide employer firm size data. These data for 2006 are the most recently available from the SBA.

[a] These Statistics of U.S. Businesses data cover almost all nonfarm employer businesses. Omitted are farms, railroads, and most government-owned establishments, the U.S. Postal Service, and large pension, health, and welfare funds (100 + employees) and nonincorporated firms with no paid employees.

Table 8 reports these business size indicators in a slightly different format, as shares of all U.S. industry, which are used to allocate compliance costs. Table 8 simply converts the raw data shown in Table 7 into percentage terms. For example, consider

the data in Table 8 that describe the manufacturing sector. Manufacturing accounts for 5 percent of all U.S. firms, 11 percent of all U.S. employment, and 13 percent of all U.S. business payroll expenditures. Within the manufacturing sector, 75 percent of the firms are classified as small businesses (fewer than 20 employees), 24 percent have between 20 and 499 employees, and only one percent has 500 or more employees. Nine percent of manufacturing employees work in small firms, 36 percent in mid-sized firms, and 56 percent in large firms. Finally, regarding the distribution of payroll expenditures, small firms account for 7 percent, mid-sized firms account for 31 percent, and large firms account for 62 percent.

Table 8. Size Distribution of American Business (As a Percentage of Private Industry Employment)

	Sector Share of All U.S. Industry					
Size Measure	Manufacturing	Trade	Services	Health Care	Other	
No. of Firms	5	17	51	10	17	
Employees	11	18	46	14	11	
Annual Payroll	13	14	47	13	12	
	Percent of Firms, by Sector					
	Manufacturing	Trade	Services	Health Care	Other	All Sectors
<20 employees	75	90	90	88	91	89
20-499 employees	24	10	10	12	9	10
500+ employees	1	0.1	0.4	0.1	0.1	0.3
	Percent of Employees, by Sector					
	Manufacturing	Trade	Services	Health Care	Other	All Sectors
<20 employees	9	19	19	15	26	18
20-499 employees	36	27	32	33	38	32
500+ employees	56	54	50	52	36	50
	Percent of Payroll, by Sector					
	Manufacturing	Trade	Services	Health Care	Other	All Sectors
<20 employees	7	17	15	17	21	15
20-499 employees	31	32	26	28	38	29
500+ employees	62	50	59	55	41	56

Source: See Table 7.

The percentages displayed in Table 8 provide a snapshot of the distribution of productive activity and resources among broad sectors of American industry. It is against this descriptive backdrop that the report charts the incidence of regulatory compliance costs. These costs are allocated across the sectors and firm sizes shown in Table 8 using the procedures described in the remainder of this section.

Assumptions and Procedures Underlying the Cost Allocations

Business Portion of the Regulatory Burden

Before costs can be allocated across these five business sectors, a more general cost allocation is necessary, specifically how much of the regulatory burden falls in the aggregate on businesses. This task requires a delineation of the regulatory burden that falls initially on business from the burden that falls initially on individuals and state and local governments. As discussed in Section II, the report does not attempt to map out the subsequent shifting of this burden from businesses to individuals (*e.g.*, in the form of higher retail prices) or from one business sector to another (*e.g.*, in the form of higher energy prices or health insurance premiums). It is worth emphasizing that all regulatory costs are — and can only be — borne by individuals, as consumers, as workers, as stockholders, as owners, or as taxpayers. In other words, the distinction between "business" and "individual" is one that focuses on the compliance responsibility, fully recognizing that ultimately all costs must fall on individuals. Moreover, the degree to which businesses are able to shift compliance costs forward onto consumers can only be determined with highly specific information about the market elasticities. For example, without the price elasticity of demand, we cannot determine with any level of certainty

what percentage of the regulatory cost will be shifted forward beyond the statutory incidence.

A second rationale for attempting to apportion costs between businesses and individuals is that the incidence of costs across different sectors of the economy is potentially quite important from a policy perspective, and the consumer costs cannot be allocated to the different classes of businesses. As a final introductory comment, some of the costs of federal regulations fall on state and local governments. Homeland security regulations are a good example of such costs. These costs borne by state and local governments are bundled with those borne by individuals to keep a relatively tractable division in business versus non business costs.

The cost allocations for each type of regulation are shown in Table 9.

Table 9. Allocation of Compliance Cost Incidence to Business

Type of Regulation	Business Incidence (% of Category Costs)	Other Incidence (% of Category Costs)
Economic	50	50
Environmental	65	35
Tax Compliance	60	40
Occupational Safety and Health, and Homeland Security	97	3

The allocations shown in Table 9 generally employ the same methodology used in Hopkins (1995), and Crain and Hopkins (2001), and Crain (2005). The allocation of environmental regulations is based on the compliance data reported by the

Environmental Protection Agency.[33] In the absence of allocation data for economic regulation, a default judgment of 50-50 is applied. The allocation for federal tax compliance uses the apportionment data from the IRS as shown in Table 4. Occupational Safety and Health, and Homeland Security are allocated 97 percent to businesses and 3 percent to other. This assumption is consistent with the empirical evidence that the labor supply function is relatively inelastic, and therefore safety and health costs are not immediately shifted onto consumers.[34] The assumption is that a small share (3 percent) of estimated homeland security costs is borne by state and local governments and individuals.

Allocation of Regulatory Costs Across Business Sectors

The second task is to allocate the business portion of regulatory costs among the five major sectors. These five sectors generally follow those in Hopkins (1995), Crain and Hopkins (2001), and Crain (2005) to facilitate comparisons over time. The sectors are based on the Census Bureau's North American Industry Classification System (NAICS), in some cases aggregating categories.[35] For example, the NAICS separates wholesale trade and retail trade, and these are combined in this report. Table 10 lists these allocations by sector and the sources and methods used. A more complete description of the allocation basis for each type of regulation is described in turn.

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[33] Environmental Protection Agency, "Environmental Investments: The Cost of a Clean Environment," EPA 230-11-90-083, November 1990, pp. 2-5.

[34] Moreover, this assumption is similar to that used by the Congressional Budget Office that payroll taxes are borne fully by workers (and therefore not shifted forward onto consumers through price increases). See the discussion in Jonathon Gruber, *Public Finance and Public Policy*, New York: Worth Publishers, 2004, pp. 539-540.

[35] The NAICS data are from the U.S. Census Bureau website: http://www.census.gov/epcd/naics02/naicod02.htm

Table 10. Allocation of Business Regulatory Costs to Sectors (Percentages)

Type of Regulation	Sectoral Allocations					Sources and Summary of Methods
	Manufacturing	Trade	Services	Health Care	Other	
Economic	12	18	46	13	11	BEA (Value added share of private GDP); SBA (Employment share of private workforce)
Environmental	54	0	0.3	1	45	Hazilla and Kopp, 1991 (Compliance Costs by Sector)
Tax Compliance	3	14	58	7	17	IRS, Statistics of Income (Sector share of total returns filed, weighted by cost of filings)
Occupational Safety and Health, and Homeland Security	14	18	49	12	8	SBA (Employment share of private workforce); BEA (Value added share of private GDP)

Economic Regulations. Regarding economic regulations, the cost allocations are based on a weighted average of two components: (i) the sector's value added to GDP divided by total private sector GDP, and (ii) the number of employees on the sector divided by total private sector employment.[36] The average for each sector is weighted by

[36] The source of the value added to GDP by sector and the private sector GDP data is the Industry Economics Division, Bureau of Economic Analysis (BEA), U.S. Department of Commerce. The data used were released on April 28, 2009. The source for the employment data is U.S. Small Business Administration, Office of Advocacy, "Statistics of U.S. Businesses: Firm Size Data," website: http://www.sba.gov/advo/stats/data.html.

the share of non-OSHA workplace regulations on the sector. That is, a sector's employment share gets a slightly higher weight where regulations such as "labor standards" or "labor management relations" are likely to have a larger impact.

Environmental Regulations. The sector allocations for environmental regulations are taken from Hazilla and Kopp.[37] Almost all of these costs fall on the manufacturing sector (54 percent) and the "other" sector (45 percent). The "other" sector includes such businesses as coal mining, ore mining, oil and gas extraction, coal gasification, and electric utilities, all of which are heavily affected by regulations promulgated under the Clean Air Act and the Clean Water Act. The remaining one percent of environmental costs falls on the health care and service sectors.

Federal Tax Compliance. The allocation of federal tax compliance costs is derived from IRS Statistics of Income data that indicate the number of returns and forms filed by each type of business by sector, sole proprietorships, partnerships, and corporations. These data are summarized in Table 11.

[37] Michael Hazilla and Raymond Kopp (1990), "The Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis," *Journal of Political Economy*, Vol. 98 (4), p. 858.

Table 11. Cost Allocation for Federal Tax Compliance

	Sole Proprietorships	Partnerships	Corporations	All Businesses	
Total Number of Returns / Forms Filed	39,503,733	3,445,433	6,922,433	49,871,600	
Share of Forms:					
Manufacturing	2%	2%	5%		
Trade	12%	8%	18%		
Services	56%	80%	52%		
Health Care	9%	2%	8%		
Other	22%	9%	18%		
Compliance Costs (in Millions of 2009 $):					**Cost Share**
Manufacturing	475	289	2,417	3,181	3%
Trade	3,642	1,335	8,451	13,429	14%
Services	16,943	13,991	24,871	55,805	58%
Health Care	2,645	409	3,819	6,874	7%
Other	6,626	1,520	8,549	16,695	17%

Occupational Safety and Health, and Homeland Security Regulations. The costs of homeland security regulations are allocated based on each sector's share of value added to private sector GDP. The costs of occupational safety and health regulations are allocated based on each sector's share of private sector employment. The sum of these two sector costs then determines the overall sector share.

Allocation of Regulatory Costs by Firm Size

The third task of this study involves allocating the costs of regulations by firm size. As noted above, this study adopts a three-division scheme: firms with fewer than 20 employees ("small"), firms with 20 to 499 employees ("medium," or "mid-sized"), and firms with 500 or more employees ("large"). The specific allocation procedure differs for each type of regulation, and the procedures are described below.

Starting with economic regulations, the cost allocation among the three firm size groups uses a two-step procedure. Step one seeks to separate the total regulatory costs for the sector into two components, those that apply to all firms and those that explicitly exempt small firms (those with fewer than 20 employees). In step two, for the nonexempt regulations, the procedure follows Crain and Hopkins (2001) and Crain (2005) and allocates these costs based on the share of payroll expenditure within each firm size category (shown in Table 8 above). For example, in the manufacturing sector, small firms generate 7 percent of payroll within the sector, medium-sized firms generate 31 percent, and large firms generate 62 percent. This procedure is used because payroll expenditures are the best available proxy for the economic activity by firm size. The portion of economic regulations from which small firms are exempt is approximated using the share of costs that were exempt in the Johnson 2005 study. This historical share is then multiplied by the currently estimated cost of economic regulations to estimate exempted costs. These exempted costs are then reallocated to the medium-sized and large firms based on their respective employment shares. In other words, the aggregate costs of economic regulations include some regulations that exempt small firms and these exempted costs are reapportioned to mid-sized and large firms. The costs reapportioned to mid-sized and large firms are sector-specific, and based on the relative employment shares by firm size in each sector.

The methodology used to allocate the cost of environmental regulations by firm size is described in detail in Appendix 5 and is relatively easy to summarize. The procedure uses multiple regression analysis to estimate the relationship between pollution abatement costs (PAC) per employee and firm size, measured by the number of employees per firm. The model regresses firm compliance costs per employee against the number of employees, controlling for other factors. The regression results indicate that a 1 percent increase in firm size (measured in terms of the number of employees) corresponds to a 0.43 percent decrease in pollution abatement costs per employee. In essence, this parameter estimates the degree of economies of scale in compliance costs.

This "economies of scale" parameter value is used to solve for the median cost per employee within each firm size category for each business sector. To state the problem differently, given the economies of scale parameter and the share of employees within each size class, what per-employee cost for the three firm size classes would yield the overall sector average cost? Other studies are consistent with this finding of economies of scale in environmental regulatory compliance, although Becker (2005) finds that economies of scale differ depending on the type of pollutant.[38]

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[38] See, for examples, Thomas J. Dean, Pollution Regulations as a Barrier to the Formation of Small Manufacturing Establishments: A Longitudinal Analysis, Office of Advocacy, U.S. Small Business Administration: Washington, D.C., 1994; and Thomas J. Dean, *et al.*, "Environmental Regulation as a Barrier to the Formation of Small Manufacturing Establishments: A Longitudinal Analysis," *Journal of Environmental Economics and Management* 40, 2000, pp. 56-75. These two studies suggest that regulatory costs lower the startup rate for new firms, especially in the manufacturing sector, because of its higher capital requirements from environmental and other types of regulations. They also indicate that environmental regulations increase the minimum efficient scale of production. See also the related study by Samuel Staley, *et al.*, *Giving A Leg Up to Bootstrap Entrepreneurship: Expanding Economic Opportunity in America's Urban Centers*, Los Angeles: Reason Public Policy Institute, 2001. As noted in the text, a recent student finds that relative costs of pollution abatement by firm size vary depending on the type of regulated pollutant. See Randy A. Becker, "Air Pollution Abatement Costs under the Clean Air Act: Evidence from the PACE Survey," *Journal of Environmental Economics and Management*, (5) 2005, pp. 144-169.

The allocation of tax compliance costs across the firm sizes starts with the information reported in Table 11, the compliance costs by sector and by type on business (sole proprietorships, partnerships, and corporations). Within each sector, the following apportionment strategy is used. All of the costs for sole proprietorships are allocated to small businesses. The costs for partnerships are distributed between small and mid-sized businesses based on their shares of payroll expenditures. For example, consider the manufacturing sector. Of total payroll spending by small firms and mid-sized firms, small firms account for 17 percent and mid-sized firms account for 83 percent. Thus, 17 percent of the compliance costs for manufacturing partnerships are allocated to small businesses and 83 percent to mid-sized businesses. Similarly, the compliance costs for corporations are distributed between mid-sized and large businesses based on their shares of payroll expenditures. Again using the example of the manufacturing sector, of total payroll spending by mid-sized firms and large firms, mid-sized firms account for 31 percent and large firms account for 69 percent. Thus, 31 percent of the compliance costs for manufacturing corporations are allocated to mid-sized businesses and 69 percent to large businesses.

The costs of occupational safety and health, and homeland security regulations are distributed among the three firm size categories such that the cost per employee in small firms is 20 percent higher than in medium-sized firms, and the cost per employee in large firms is 20 percent lower than in medium-sized firms. For the regulations that exempt small firms, the costs are allocated solely between the medium-sized and large firms using the same ratio as above (20 percent lower per employee in large firms than in medium-sized firms). The final allocation then sums the nonexempt and exempt cost components for each firm size category.[39]

[39] The category of workplace regulations is the one area that applies this judgmental cost allocation used in Hopkins (1995), Crain and Hopkins (2001), and Crain (2005). That is, the 20

IV. Principal Findings

This section presents the report's principal findings regarding the total cost of federal regulations and the distribution of this cost across major sectors of the economy, and across firms of different sizes.

A Preliminary Benchmark: Total Federal Regulatory Costs per Household

One way to illustrate the magnitude of the total cost of federal regulations is in relation to the number of U.S. households. Table 12 presents this cost per household data as a benchmark for comparing how the regulatory burden has changed over time based on the previous studies for Advocacy. However, it is important to caution the reader that this particular benchmark includes the total cost of regulations and makes no effort to distinguish between how much of this cost falls on individuals compared with businesses. It simply assumes that households (as consumers, workers, small business owners, shareholders, and so on) ultimately bear the entire burden of regulations. Further, as noted throughout this report, the estimation methodologies have evolved since the initial study in 1995, and, obviously, this accounts for some of the differences in costs. Table 12 also shows the total federal government burden, encompassing federal tax receipts, and how this total burden per household changed during this time period. The data in Table 12 are adjusted for inflation and expressed in 2009 dollars.

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percent assumption is applied solely to a relatively small segment of all regulations, and therefore the overall results are not very sensitive to this assumption.

Table 12. Federal Regulatory Costs and Federal Receipts per Household (HH), Compared to Prior Studies for the Office of Advocacy [a]

Year	Households (Millions)	Total Regulatory Costs per HH	Federal Receipts per HH [b]	Combined Federal Burden per HH
2008	112	$ 15,586	$ 22,375	$ 37,962
2004	109	$ 11,550 [c]	$ 19,516	$ 27,359
2000	106	$ 10,362 [d]	$ 23,903	$ 30,176
1995	98	$ 9,580 [e]	$ 19,309	$ 25,441
Avg. Annual Growth Rate: 1995 to 2008	1.1%	4.8%	1.2%	2.4%

Notes to Table 12:

[a] All dollar amounts are adjusted for inflation and denominated in 2009 dollars.

[b] Federal receipts by fiscal years, including Social Security. Source: CBO Web Site: http://www.cbo.gov/showdoc.cfm?index=1821&sequence=0

[c] Source: Crain (2005).

[d] Source: Crain and Hopkins (2001). As described in Crain (2005) this estimate for 2000 adjusts the cost originally reported in Crain and Hopkins (2001) upward by $37 billion to be consistent and comparable with the calculation methods and sources introduced in the Crain (2005) report.

[e] Source: Hopkins (1995)

As shown in Table 12, the total cost of federal regulations per household reached $15,586 in 2008, an increase of more than $4,000 per household since 2004 after adjusting for inflation. (A substantial portion of the 2004-2008 increase shown in Table 12 is the result of the change in methodology in the calculation of the costs estimate for economic regulation). The combined federal burden — federal receipts plus regulatory costs — reached $37,962 per household in 2008, an increase since 2004 of nearly $6,900 per household. The combined federal burden is growing at a real annual rate of 5.5 percent. An interesting observation in Table 12 is the sharp increase in growth rates

in comparison to the 2000 to 2004 period. In that four-year period, the combined federal burden per household fell at annual rate of 2.3 percent.

Distribution of Federal Regulatory Costs: Businesses and Others

Table 13 shows the estimated costs of all federal regulations, broken down by type, and the distribution of the burden between businesses and others (*i.e.*, individuals and state and local governments).

Table 13. Total Cost of Federal Regulations in 2008 by Type and Business Share (Billions of 2009 Dollars)

		Business Portion		Others	
	Total Costs (Billions of $)	Share (Percent)	Amount (Billions of $)	Share (Percent)	Amount (Billions of $)
All Federal Regulations	1,752	55%	970	45%	782
Economic	1,236	50%	618	50%	618
Environmental	281	65%	183	35%	98
Tax Compliance	160	60%	96	40%	64
Occupational Safety and Health, and Homeland Security	75	97%	73	3%	2

These estimates in Table 13 indicate that the annual total cost of all federal regulations in 2008 was $1.752 trillion. Of this amount, the annual direct burden on business is $970 billion. Economic regulations represent the most costly category, with a total cost of $1.236 trillion, and with $618 billion falling initially on business. Environmental regulations represent the second most costly category in terms of total cost ($281 billion), and the cost apportioned to business is $183 billion. Compliance with the federal tax code is the third most costly category ($160 billion), and the cost of occupational safety and health, and homeland security regulations ranks last ($75 billion).

Distribution of the Regulatory Burden across Business Sectors: Three Metrics

Table 14 further deconstructs the business portion of regulatory costs by sector and by the four categories of regulations. Three measures of the regulatory burden are

employed to assess the cost distribution among business sectors: cost per firm, cost per employee, and cost as a share of payroll expenses.

Table 14. Average Sectoral Regulatory Costs, 2008 (In 2009 Dollars)

	Total Costs (Billions of Dollars)	Cost per Firm (Dollars)	Cost per Employee (Dollars)	Cost as a Share of Payroll (Percent)
Manufacturing				
Total	193	688,194	14,070	29
Economic	82	293,660	6,004	12
Environmental	98	352,689	7,211	15
Tax Compliance	3	11,415	233	0.5
OSHHS *	8	30,431	622	2
Trade				
Total	115	109,970	5,289	16
Economic	89	84,811	4,079	12
Environmental	-	-	-	-
Tax Compliance	13	12,808	616	2
OSHHS *	13	12,351	594	2
Services				
Total	400	129,912	7,235	15
Economic	308	100,460	5,595	13
Environmental	1	177	10	0
Tax Compliance	56	18,211	1,014	2
OSHHS *	35	11,065	616	1
Health Care				
Total	69	116,326	4,221	10
Economic	52	86,760	3,148	8
Environmental	1	2,056	75	0.2
Tax Compliance	7	11,514	418	1
OSHHS *	9	15,995	580	1
Other				
Total	191	188,704	14,992	31
Economic	88	84,687	6,728	14
Environmental	83	79,900	6,348	13
Tax Compliance	17	16,153	1,283	3
OSHHS *	6	7,964	633	1
U.S. Totals (All U.S. Businesses)				
Total	907	161,021	8,086	19
Economic	618	102,612	5,153	12
Environmental	183	30,329	1,523	4
Tax Compliance	96	15,939	800	2
OSHHS *	73	12,141	610	1

Note to Table 14:

* OSHHS stands for Occupational Safety and Health, and Homeland Security Regulations

As shown in Table 14, considering all U.S. businesses and all federal regulations, the cost burden on the typical U.S. firm is about $161,000. The cost per employee for the typical U.S. firm tops $8,000. This cost of federal regulation in the typical U.S. firm equals 19 percent of payroll expenditures. To place this amount in perspective, it exceeds the employer contribution to the payroll tax for Social Security (OASDHI) and Medicare, which is 7.65 percent of wages. Indeed, 19 percent of payroll expenditures exceeds the combined payroll taxes for OASHDI and Medicare paid by employers and employees, or self-employed individuals, which equals 15.3 percent.

The three cost metrics described and shown in Table 14 reveal several noteworthy patterns in how the cost burden of regulations is distributed among the business sectors. Table 15 shows these patterns a bit more clearly by ranking the five sectors in terms of the relative cost burden.

Table 15. Sector Rankings Based on Three Metrics of the Regulatory Burden (In 2009 Dollars. 1=highest burden; 5=lowest burden)

Business Sector	Cost Per Firm (Dollars)	Cost Per Firm (Rank)	Cost Per Employee (Dollars)	Cost Per Employee (Rank)	Cost / Payroll (Percent)	Cost / Payroll (Rank)
Manufacturing	688,944	1	14,070	2	29	2
Other	188,704	2	14,992	1	31	1
Services	129,912	3	7,235	3	15	4
Health Care	116,326	4	4,221	5	10	5
Trade	109,970	5	5,289	4	16	3

As illustrated by the rankings in Table 15, the manufacturing sector and the "other" sector bear the largest regulatory burden by all three metrics. For example, using the "cost per firm" metric as a gauge, the distribution of the regulatory burden is heavily skewed toward these two sectors. The manufacturing sector in particular bears the

highest total regulatory burden in terms of the average cost per firm. The burden on the manufacturing sector ($688,944 per manufacturing firm) exceeds the burden on the second most costly sector (the "other" category at $188,704 per firm) by a factor of 3.6. However, by the other two metrics — cost per employee and cost as a percent of payroll — the "other" category bears the highest burden. The cost per employee for firms in the "other" category is $14,992 as compared with the second highest sector (manufacturing), where the cost per employee is $14,070.

The difference between the rankings based on "cost per firm" versus "cost per employee" is likely explained by the fact that enterprises within these two sectors operate with different mixes of capital and labor. For example, predominant among the "other" category are utilities, mining (including coal and oil and gas extraction), and transportation and warehousing concerns, all of which require huge capital investments relative to the number of employees. This means that the regulatory cost per worker rises in this sector relative to manufacturing establishments that typically have more employees per unit of capital investment than establishments such as public utilities, airlines, and railroads. It is worth emphasis, however, that costs per employee in both of these sectors are double the cost per employee in the next highest-cost sector, services, where costs equal $7,235 per employee.

The second conclusion from the metrics in Table 15 is that regulatory costs are distributed much more evenly among the three remaining sectors: health care, services, and trade. For example, in terms of the cost per firm, the burden on the services sector is 12 percent higher than the health care sector and 18 percent higher than the trade sector. As a final observation, when the regulatory burden is gauged by "cost as a percent of payroll," the health care sector fares far better than any of the other sectors (equal to 10 percent). For example, the difference is large even compared to the second

lowest cost industry, services, which equals 15 percent of payroll expenditures. Health care compliance costs as a share of payroll is one-third the level in the "other" sector.

In summary, some conclusions about the distribution of the regulatory burden among sectors depend on which metric one favors. However, the metrics uniformly indicate that the manufacturing sector and the "other" sector bear substantially higher regulatory costs compared with the services, health care, and trade sectors of the economy.

The Distribution of Regulatory Costs by Firm Size

The distribution of regulatory costs among different firm size categories is presented in Table 16.

Table 16. Regulatory Costs in Small, Medium-sized and Large Firms, 2008 (Cost per Employee in 2009 Dollars)

Type of Regulation	All Firms	Firm Size <20	20-499	500+
Manufacturing				
Total	14,070	28,316	13,504	12,586
Economic	6,004	4,454	5,481	6,952
Environmental	7,211	22,594	7,131	4,865
Tax Compliance	233	444	205	219
OSHHS *	622	824	687	550
Trade				
Total	5,289	5,453	6,242	4,753
Economic	4,079	3,673	4,866	3,823
Environmental	-	-	-	-
Tax Compliance	616	1,013	737	418
OSHHS *	594	767	639	511
Services				
Total	7,235	7,106	6,274	7,815
Economic	5,595	4,181	4,668	6,648
Environmental	10	25	8	5
Tax Compliance	1,014	2,113	944	637
OSHHS *	616	786	655	524
Health Care				
Total	4,221	5,375	3,707	4,204
Economic	3,148	3,318	2,725	3,366
Environmental	75	203	64	44
Tax Compliance	418	1,103	292	293
OSHHS *	633	772	643	514
Other				
Total	14,992	21,906	12,878	11,964
Economic	6,728	5,273	6,700	7,721
Environmental	6,348	13,760	4,343	2,963
Tax Compliance	1,283	2,101	1,192	765
OSHHS *	633	772	643	514
Total, All U.S. Businesses **				
Total	8,086	10,585	7,454	7,755
Economic	5,153	4,120	4,750	5,835
Environmental	1,523	4,101	1,294	883
Tax Compliance	800	1,584	760	517
OSHHS *	610	781	650	520

Notes for Table 16:

* OSHHS stands for Occupational Safety and Health, and Homeland Security Regulations

** The costs per employee for all U.S. Businesses are computed using the employment shares to weight the costs in each of the five respective sectors.

Considering first the aggregate costs for all federal regulations and all business sectors (displayed as the last category in Table 16), regulations cost small firms an estimated $10,585 per employee.[40] Regulations cost medium-sized firms $7,454 per employee, and large firms $7,755 per employee. Overall, the cost per employee is 42 percent higher in small compared with mid-sized firms, and 36 percent higher in small firms than in large firms. It is noteworthy that the distribution of costs across the three categories of firms in 2008 is similar to the findings in the prior study for Advocacy (Crain, 2005). In 2004 the cost differential between small and mid-sized firms was 41 percent; thus, the cost disadvantage to small businesses has remained nearly constant. In 2004 the cost differential between small and large firms was 45 percent, which is even greater than the gap estimated in 2008. This suggests that since 2004, costs per employee have increased for large businesses relative to small and mid-sized businesses.[41] Indeed, considering the costs of all regulations and all business sectors, mid-sized firms appear to have a slight advantage over large firms, and a wide advantage over small firm.

This pattern, however, is not uniform across sectors or types of regulations. As the results in Table 16 reveal, the distribution of compliance costs with respect to firm size classes differs across the five major business sectors. Indeed, even within sectors, the distribution of the burden varies with the type of regulation. Table 17 reports the percentage difference in the cost per employee in small firms versus larger firms by

[40] The U.S. total figures are based on a weighted average of the costs in the five business categories. The weights for each average use the share for the respective category. For example, for the "cost per firm" value, the cost per firm in each sector is weighted by the share of all U.S. firms in that sector. For the "cost as a percent of payroll" value, the sector values are weighted by the share of all U.S. payroll expenditures in that sector, and so on.

[41] The caution about comparing the 2008 estimates with prior years again should be noted because of the newly introduced methodology for estimating economic regulations.

sector. That is, Table 17 restates the numbers in Table 16 in terms of the cost burden on small firms relative to mid-sized and large firms.

Table 17. Regulatory Costs in Small Firms Relative to Medium-sized and Large Firms in 2008 *

Business Sector	Small Firms Relative to Medium-Sized Firms	Small Firms Relative to Large Firms
Manufacturing	110	125
Trade	-13	15
Services	13	-9
Health Care	45	28
Other	70	83
All Sectors	42	36

*** Note to Table 17:**

The numbers reflect the percentage difference between regulatory costs per employee in a small firm versus a medium-sized firm or large firm using the data reported in Table 16.

The disproportionate cost burden on small firms is dramatic for the manufacturing sector. In that sector the estimated cost per employee for small firms is 110 percent higher than in medium-sized firms ($28,316 versus $13,504), and 125 percent higher than in large firms ($28,316 versus $12,586). To drive home the importance of this result, in the U.S. manufacturing sector, small firms face a regulation burden that is more than double the burden faced by their larger rivals. This cost disadvantage faced by small manufacturing firms appears in three of the four types of regulations (see the detailed breakdown by type of regulation in Table 16). The burden falls disproportionately on large manufacturing firms only in the case of economic

regulations.[42] However, while some types of regulations disadvantage large firms relative to small, the combined impact of all regulations in the manufacturing sector puts small firms at a substantial competitive disadvantage.

The distribution of the regulatory burden among firms of different sizes in the "other" category is similar to that in the manufacturing sector, although the overall cost differentials are less extreme than in the manufacturing sector. The cost per employee is 70 percent higher in small firms than in medium-sized firms, and 83 percent higher in small firms than in large firms. The health care sector exhibits a similar disproportionate distribution. In that sector, the cost per employee is 45 percent higher in small firms than in medium-sized firms, and 28 percent higher in small firms than in large firms.

The regulatory burden is distributed most evenly with respect to firm size in the services sector, as summarized in Table 17 and displayed in detail in Table 16. In the services sector the total cost per employee for small firms is only 13 percent larger than the cost in medium-sized firms, and 9 percent less than the cost in large firms. In the trade sector, small firms face a 15 percent heavier cost burden than large firms, but have a 13 percent cost advantage over medium-sized firms. In other words, within the trade sector, the heaviest cost burden falls on mid-sized firms.

Summary Comments

Overall and on almost every regulatory frontier, compliance costs place small businesses at a competitive disadvantage. The cost disadvantage confronting small business is driven by environmental regulations, tax compliance, and occupational safety and health and homeland security regulations. The particular cost drivers differ

[42] The relatively large impact of economic regulations on large firms has been noted by a number of scholars. See the literature review in Steven C. Bradford, "Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation," *The Journal of Small and Emerging Business Law*, 8 (1), 2004, pp. 1-37.

somewhat across the five business sectors, as the details of this report point out. Moreover, not all regulations fall more heavily on small firms than on their larger counterparts. For example, the cost of economic regulations falls most heavily on large firms in every sector except health care. The most disadvantaged of all by federal regulations are small manufacturing firms.

This study provides a broad sense of the costs of federal government regulations in the United States and how they affect the balance in public versus private sector responsibilities. In 2008 federal regulatory compliance absorbed about 14 percent of U.S. national income, a clear indication of what citizens give up in exchange for this government function.

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Appendix 1. Elements Included in the World Bank Index of Regulatory Quality and Data Summary for Estimating the Costs of Domestic Economic Regulations

Table A-1: List of Concepts Included in the Regulatory Quality Index

Export and Import Regulations
Restrictions on ownership of business by non-residents
Restrictions on ownership of equity by non-residents
Unfair competitive practices
Price controls
Discriminatory tariffs
Excessive protections
Stock Exchange / Capital Markets
Foreign investment restrictions
Administrative regulations
Tax system is distortionary
Competition in local market is limited
Anti-monopoly policy is lax and ineffective
Complexity of tax system
Easy to start a company
Banking / finance restrictions
Wage and prices controls
Administrative business start-up formalities
Ease of market entry for new firms
Tax Effectiveness (How efficient the country's tax collection system is.)
An assessment of whether the necessary business laws are in place.
Labor Market Policies
Enabling Environment for Private Sector Development
How problematic are labor regulations for the growth of your business?
How problematic are tax regulations for the growth of your business?
How problematic are custom and trade regulations for the growth of your business?
Trade & foreign exchange system
Enabling conditions for rural financial services development
Investment climate for rural businesses
Access to agricultural input and produce markets
Banking regulation does not hinder competitiveness
Competition legislation in your country does not prevent unfair competition
Customs' authorities do not facilitate the efficient transit of goods
Financial institutions' transparency is not widely developed in your country
Labor regulations hinder business activities
Subsidies impair economic development

Source for Table A-1: Kaufmann, Daniel, Aart Kraay, and Massimo Mastruzzi (2009), Table B-4

Table A-2. Summary Statistics for OECD Cross-Country Data Set

	mean	median	sd
GDP per Capita (in 2009 US $)	22,654	24,306	12,201
World Bank Index of Regulatory Quality	1.317	1.441	0.441
Population (in 1000s)	38,900	10,800	57,900
Fixed Broadband Subscribers per 100 people	14.2	13.3	10.1
Primary Education as a Share of the Eligible Population (times 100)	98	99	5
Foreign Trade as a Share of GDP (times 100)	98	81	57

Appendix 2. Methodology Used to Correct Overcount of Firms in the SBA Data

When the Census Bureau compiles its Statistics of U.S. Businesses, it relies on survey questionnaires filled out by firms. Occasionally the firms classify themselves under more than one industry. Because some firms are redundantly classified, the sum of the firms within each category is actually greater than the entire number of firms.

To correct for this over count, the number of redundantly counted firms is calculated by summing the number of firms by industry and subtracting the total number of firms from this across-industry sum.

The next task is to assign a certain fraction of over counted firms to each industry to be used as a reduction factor. This is accomplished using the fact that the number of employees within each industry is accurately measured. Each industry's share of the total work force is calculated; these shares are then used to allocate the over counted firms to each industry. From there, it is a simple matter of subtracting the over count within each industry from the reported count in each industry. This ensures that the total number of firms is equal to the number of firms summed across the five industry categories.

Appendix 3. Methodology for Estimating Economies of Scale in Environmental Compliance Costs

Introduction

In 2008, environmental regulations cost an estimated $281 billion (16 percent of total federal regulatory costs), and the cost falling on businesses was an estimated $183 billion (19 percent of total business regulatory costs). This appendix describes the methodology used to estimate the relationship between firm size and compliance costs for environmental regulations. This methodology is adopted from Crain and Hopkins (2001) and Crain (2005), and the objective is to provide a basis for allocating the cost of environmental regulations among the three firm size categories.

The relationship between compliance costs and firm size is estimated using pollution abatement expenditures by manufacturing firms. For reasons described below the data used in the analysis are for 1992. Among environmental regulations, pollution abatement expenditures account for about one-fourth of the costs. Thus, a reliable estimate of scale economies in pollution abatement provides a reasonable approximation for the general distribution of all environmental regulatory costs.

Estimation Procedure and Results

The general approach is to estimate the relationship between pollution abatement cost (PAC) per employee and firm size, here measured by the number of employees per firm. Equation (2) specifies the estimation equation, which is estimated in log form:

$$\text{(Eq. 2)}\quad \ln(\text{PAC / employee})_{i,s} = \beta \ln(\text{Firm Size}_{i,s}) + \phi \ln(\text{Value of Sales}_{i,s}) + \gamma_i + \varepsilon_{i,s},$$

where subscript *i* stands for a specific industry type and subscript *s* stands for a specific American state. Industry types are defined by two-digit SIC codes covering all industries in the manufacturing sector; see Table A-8 below for a description of the 20 industries included. Each continuous variable is entered into Equation (2) as a natural logarithmic transformation (ln).

In Equation (2) the dependent variable, (PAC / employee) $_{i,s}$, measures the average pollution abatement expenditure per employee in industry *i* in state *s* in 1994 (source: Bureau of the Census, 1996). These are the most recently available data, as Census no longer collects this series. These expenditure data include capital expenses and operating expenditures. The main independent variable of interest, firm size $_{i,s}$, measures the average number of employees per firm in industry *i* in state *s* (source: Bureau of the Census, *1992 Economic Census*). The estimated coefficient on firm size, β, thus provides the measure of economies of scale. Specifically, how does pollution abatement expenditure per employee respond to changes in firm size? Equation (2) also includes a control variable for the average value of sales, and a fixed-effects variable, γ_i, which seeks to control for other factors that cause pollution abatement costs to differ among the 20 industries. For example, the chemical industry may simply be subject to different environmental standards than, say, the leather products industry. Including the fixed-effects dummy variables in the model allows the cost function to shift for each specific industry. $\varepsilon_{i,s}$ is the regression error term, which is assumed to be normally distributed.

Equation (2) is estimated across states using data for 1992. While the Census Bureau continued to survey pollution abatement expenditures through 1994, 1992 is used because the Census of Manufacturing (the source of the state-level data on firm

sizes, employment, and sales) also occurred in that year (the Census of Manufacturing is conducted only every five years).

Results

Table A-3 presents the regression results. Overall, the regression model demonstrates considerable explanatory power. The F-statistic is significant at the one-percent confidence level, and the model explains 83 percent of the variation in pollution abatement expenditures per employee. The estimate of β, –0.431, is significant at the 0.07 confidence level. This parameter value indicates that a 1 percent increase in firm size (the number of employees) corresponds to a 0.431 percent decrease in abatement costs per employee. (Recall that the variables are entered as log transformations, so the estimated coefficient indicates the elasticity.) The control variable for the value of sales is significant at the 0.01 level. Finally, the F-statistic allows us to reject the hypothesis that the coefficients on the industry-specific dummy variables are jointly equal to zero. In other words, not surprisingly, the fixed-effects variables pick up significant differences in costs among the various industries.

Table A-3. Regression Results: Economies of Scale in Compliance Costs: Environmental Regulations

Dependent variable: Pollution Abatement Expenditure per Employee

Independent Variable	Coefficient	Std. Err.	t-stat	P>|t|
ln (Number of Employees)	-0.431	0.243	-1.78	0.07
ln (Value of Shipments)	0.698	0.186	3.75	0.00
Constant	-2.494	2.28	-1.10	0.28

Notes to Table A-3:

Number of observations = 208
Adjusted R-squared = 0.83
Regression F-stat (2, 188) = 10.84
Fixed Industry Effects, F-stat (17, 188) = 18.43

Following the firm classification scheme used throughout this study, the predicted costs per employee are computed for three broad categories of firm sizes: firms with fewer than 20 employees ("small firms"), firms with 20 to 499 employees ("medium-sized firms"), and firms with 500 or more employees ("large firms"). These costs are also shown in Table A-4, converted into 2009 dollars. The relative costs across these three firm size categories for the earlier time period establish the basis for allocating the cost of environmental regulations in 2008.

Table A-4. Results on Environmental Compliance Costs by Firm Size
(2009 Dollars)

	Cost per Employee, Manufacturing Sector Firms with:		
	<20 Employees	20 to 499 Employees	500+ Employees
Values Using Eq. 2	22,594	7,131	4,865

Concluding Comments

The earliest studies for Advocacy (Hopkins, 1995) provided the most comprehensive assessment to date on the incidence of regulatory costs by sector and firm size. However, Hopkins pointed out, he was forced to rely on a judgmental approach to the cost allocations across firm sizes in the absence of specific empirical estimates. This appendix provides the basis used in this report (and two prior reports for Advocacy) to allocate the costs of environmental regulations among the different firm size classes.

Table A-5. Sectors Included in the Regression Analysis of Environmental Compliance Costs

SIC Code	Industry Description
20	Food and kindred products
21	Tobacco products
22	Textile mill products
23	Apparel and other textile products
24	Lumber and wood Products
25	Furniture and fixtures
26	Paper and allied products
27	Printing and publishing
28	Chemicals and allied products
29	Petroleum and coal products
30	Rubber and miscellaneous plastic products
31	Leather and leather products
32	Stone, clay and glass products
33	Primary metal industries
34	Fabricated metal products
35	Industrial machinery and equipment
36	Electronic and other electric equipment
37	Transportation equipment
38	Instruments and related products
39	Miscellaneous manufacturing industries

Appendix 4. Spending and Staffing by Federal Regulatory Agencies

Table A-6. Total Spending by Federal Regulatory Agencies on Regulatory Activity, Fiscal Years (Millions of 2009 Dollars)

Fiscal Year	Social Regulations	Economic Regulations	Total
1990	17,020	3,883	20,903
1991	18,588	3,736	22,323
1992	20,320	4,098	24,418
1993	20,442	4,687	25,130
1994	20,745	4,366	25,111
1995	21,243	5,076	26,319
1996	21,041	4,685	25,726
1997	22,103	5,057	27,160
1998	24,123	4,948	29,071
1999	25,034	5,197	30,231
2000	26,247	5,460	31,707
2001	27,305	5,588	32,892
2002	32,296	6,002	38,297
2003	41,683	5,926	47,609
2004	36,658	6,418	43,076
2005	36,778	6,508	43,286
2006	37,888	6,751	44,639
2007	38,267	6,988	45,256
2008	40,518	7,352	47,870

Notes to Table A-6:

Source: de Rugy and Warren (2009), Table A-5, p. 28. Their figures were derived from the *Budget of the United States Government* and related documents, various fiscal years.

Table A-7. Total Staffing of Federal Regulatory Activity, Fiscal Years, Full-Time Equivalent Employment

Fiscal Year	Social Regulations	Economic Regulations	Total
1990	119,459	33,155	152,614
1991	123,247	34,284	157,531
1992	130,747	36,971	167,718
1993	135,804	37,957	173,761
1994	133,487	37,499	170,986
1995	136,016	37,594	173,610
1996	136,926	33,611	170,537
1997	133,153	32,313	165,466
1998	139,794	31,848	171,642
1999	139,799	32,384	172,183
2000	143,052	32,548	175,600
2001	140,523	32,270	172,793
2002	152,585	32,436	185,021
2003	210,316	31,981	242,297
2004	202,195	32,559	234,754
2005	203,417	32,312	235,729
2006	201,961	32,567	234,528
2007	204,893	33,440	238,333
2008	215,147	34,324	249,471

Notes to Table A-7:

Source: de Rugy and Warren (2009), Table A-6, p. 29. Their figures were derived from the *Budget of the United States Government* and related documents, various fiscal years.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

August 15, 2011

The Honorable Cliff Stearns
Chairman
House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Stearns:

Attached please find responses to the written questions for the record submitted by you in connection with the Thursday, July 7, 2011, hearing entitled: "The Views of the Independent Agencies on Regulatory Reform."

Thank you again for the opportunity to testify before the Subcommittee. Should you have any questions or require additional information, please do not hesitate to contact me or Christopher Day, Director, Office of Legislative Affairs, at (301) 504-7660 or by e-mail at cday@cpsc.gov.

Sincerely,

Robert Adler

Robert S. Adler

cc: The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

Attachment

The Honorable Cliff Stearns

1. In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all of the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at CPSC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.

Response: The U.S. Consumer Product Safety Commission (CPSC) enforces seven laws: (1) Consumer Product Safety Act, as amended (15 U.S.C. §§ 2051-2089); (2) Federal Hazardous Substances Act (15 U.S.C. §§ 1261-1278); (3) Flammable Fabrics Act (15 U.S.C. §§ 1191-1204); (4) Poison Prevention Packaging Act (15 U.S.C. §§ 1471-1477); (5) Children's Gasoline Burn Prevention Act (P.L. 110- 278); (6) Virginia Graeme Baker Pool and Spa Safety Act (P.L. 110-140); and (7) Refrigerator Safety Act (15 U.S.C. §§ 1211-1214). Over time, various provisions of these laws have been amended. The most recent example of this is the passage of H.R. 2715 (now P.L. 112-28), which, among other things, clarifies application of the lead limits in section 101 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) to certain products, and provides additional flexibility and relief to small manufacturers from the third party testing and certification requirements in section 102 of the CPSIA.

In the wake of H.R. 2715's enactment, which cleared the House 421-2 and unanimously in the Senate, I believe there is now broad, bipartisan agreement that our laws are well balanced. Taken collectively, the CPSC's enabling statutes do not, in my opinion, impose burdensome requirements because they generally give the agency the authority to act against dangerous products through multiple avenues including standards setting, bans, recalls and education campaigns. The CPSC is required to determine whether products are sufficiently dangerous to warrant agency action, so it is within the agency's discretion to decide when action is appropriate. I believe these laws have allowed the agency to do so in a measured and reasonable manner.

Speaking as one Commissioner, I believe the most burdensome features of our laws are the elaborate cost-benefit analyses required when promulgating mandatory safety standards or regulations. The cost-benefit analysis provisions in section 9 of the CPSA, (15 U.S.C. 2058(f)(2)), section 3 in the Federal Hazardous Substances Act (15 U.S.C. 1262(h) and (i)(1)), and section 4 in the Flammable Fabrics Act (15 U.S.C. 1193(i) and (j)(1)) are prescribed in such a way that unreasonable delay is inevitable. As I mentioned in my testimony before the Committee, because of this burdensome requirement, by my count, the agency has only promulgated nine rules in thirty years – or about one rule every three and a third years.

I believe that such rigidity in the law is what led Congress to enact the CPSIA, which allowed the agency to use more streamlined procedures. These procedures were untouched by H.R. 2715, which I believe represents a clear indication that they are working – and ensures that the Commission is able to effectively carry out its mandate in the areas touched by the CPSIA.

Accordingly, I would recommend removing the cost-benefit requirements from section 9 of the CPSA, section 3 in the Federal Hazardous Substances Act, and section 4 in the Flammable Fabrics Act and replacing them with language consistent with the CPSIA and the President's executive orders regarding cost-benefit analyses.

2. Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.

Response: Speaking as one Commissioner, I have not conducted a review of CPSC regulations to identify those which are unnecessarily burdensome or duplicative. Before I could give a meaningful response, I would feel it necessary to consult with my fellow Commissioners, CPSC staff, the industries we regulate and consumers who benefit from our regulations. As stated in my testimony before the Committee, it is my understanding that the agency is in the process of undertaking such a review, and I look forward to reviewing the results of this process in the near future.

Commissioner Anne M. Northup
Consumer Product Safety Commission

Questions for the Record
House Energy and Commerce – Subcommittee on Oversight and Investigations
"The Views of the Independent Agencies on Regulatory Reform"

The Honorable Cliff Stearns

1) **In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at CPSC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

Since 2009, the Consumer Product Safety Commission has focused its time and resources principally on implementing the Consumer Product Safety Improvement Act of 2008 (CPSIA). Of our governing statutes, the CPSIA is by far the most burdensome on Commission resources and on thousands of consumer product manufacturers (both large and small)—and its requirements are largely not based on risk. Traditionally, the CPSC had been a risk-based agency, as seen through our other governing statutes – the Federal Hazardous Substances Act, Consumer Product Safety Act (prior to being amended by CPSIA), Flammable Fabrics Act, and Poison Prevention Packaging Act. However, with the passage of the CPSIA, the agency's expertise and resources have been diverted to implementing and enforcing mandates on all manufacturers that do not make products safer and burden American manufacturers disproportionately.

On August 1st, both the House and Senate passed HR 2715, a bill to amend the CPSIA. I am pleased that bipartisan agreement could be reached to ameliorate at least some of the unnecessary harm the CPSIA has and will continue to inflict on businesses, consumers, the economy, and individuals employed in the children's product industry. For instance, I support exempting ATVs and most used products from the lead limits of CPSIA § 101(a); capping the lead limit for the metal parts of bicycles at 300 ppm; and exempting from third-party testing most children's books and printed materials, and the metal components of bicycles. I am also pleased that the CPSIA's .01% lead limit, due to go into effect August 14, 2011, will no longer be applied retrospectively. While the lead limit of newly manufactured products will still be reduced below the level supported by scientific evidence, at least retailers will avoid the needless economic waste of throwing out noncompliant products already in inventory. Other provisions of HR 2715 appear to fall short of providing adequate relief, and will require the expenditure of significant private and public resources for businesses to obtain the modest relief it provides. I have proposed more straightforward and effective alternatives. Below, I discuss my

recommendations to further amend the CPSIA in order to permit the lawful and economically viable manufacture and sale of **all** safe children's products.

Additionally, in response to Ranking Member DeGette's request at the July 7 hearing, I will offer general recommendations for regulatory reform, including suggested amendments to statutes that govern the regulatory activities of both Executive and Independent Federal Agencies. I hope that these solutions will address the common obstacles all federal agencies face to achieving balanced, economically sound, risk-based regulation.

Recommended Changes to the CPSIA:

Adopt a Solubility Based Standard for Lead

The CPSIA contained a provision that permitted the Commission to exclude from the lead limits any specific product or material whose lead content did not "result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product." CPSIA § 101(b)(1)(A). The Commission did not except a single material or product under this exclusion, and HR 2715 removes it and replaces it with a "Functional Purpose Exception."

The sticking point for the Commission was the inclusion of the phrase "the absorption of *any* lead." The Commission was unable to conclude that there was any product for which the absorption of *no* lead could be deemed a certainty. My view that Congress must have intended for this exception to apply to something, and that, therefore, a *de minimis* standard rather than an absolute standard should have been adopted, was overruled by the Majority.

Clearly, Congress attempted through both the CPSIA and HR 2715 to provide an exclusion that incorporates the concept that a product containing lead is only harmful if the lead it contains can be absorbed by a child in harmful amounts. The Functional Purpose Exception of HR 2715 includes this idea in part. It grants an exception to products that cannot practicably be manufactured at the lead limit, but only upon the condition that the exception will result in no measurable increase in blood lead levels or otherwise have a measurable adverse impact on health.

However, this provision of the Functional Purpose Exception is a classic case of the tail wagging the dog. A product that will result in no measurable adverse impact on health should not be subject to expensive reengineering, third part testing and certification costs, irrespective of whether the lead it contains *could* practicably be removed. Therefore, I support a lead standard based on the quantity of absorbable lead, rather than on an absolute measure of the total quantity of lead. Alternatively, there should at least be an exception for **any** product whose lead content does not have a

measurable adverse impact on health, and such an exception should be included as a standalone provision.

Focusing on whether a product can result in a measurable increase in blood lead levels is one proxy for measuring adverse health impacts generally. But it may lead to unnecessarily over-inclusive regulation, if this Commission chooses to interpret the term "measurable" to mean that a one part per billion increase in blood lead level is sufficient. The science of measuring lead in blood can detect lead at a level below amounts that are considered harmful. A better methodology would take into account the solubility and bioavailability of lead contained in a product. Other jurisdictions follow this approach. For instance, the European Union bases its laws limiting the lead content of certain toys on the amount of *soluble* lead (lead migration/leachable lead) a product contains.

Drawing the line at the level of soluble lead that is harmful to a child's health is consistent with the findings of our leading scientific agencies, the National Institutes of Health, the CDC and the EPA. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt near old gas stations are the main source of environmental lead presenting a danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead in dirt that is tracked into a home or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the EPA standard for lead in soil is 400 ppm (http://www.epa.gov/lead/). This standard for safety is less strict even than the former 300ppm lead content standard (which was reduced to 100 ppm as of August 14, 2011) provided in the CPSIA for children's products, including furniture or bicycle handlebars where lead is embedded in the metal substrate and cannot be absorbed.

Regulations promulgated under the CPSIA, as interpreted by the Majority, have led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, everyday products such as school lockers, child-sized brass musical instruments, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed, due to the brass found on the tip, if they have a toy or game attached to them and are marketed to children. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a ball point pen or a child's dresser, the CPSIA treats these items in exactly the same way it treats products that truly could hurt a child by increasing her blood lead level.

HR 2715 will exempt a few products from the CPSIA's overreach. Most used children's products and children's ATV's are excluded from the statutory lead limits. The metal components of children's bicycles are permitted to contain 300 ppm, rather than the 100 ppm standard applicable to other children's products. These changes signal Congress's recognition that the lead in most children's products does not present an absorbability risk, but the bill fails to provide this relief to all products that are just as harmless. A standard or exclusion based on the bioavailability of harmful amounts of lead, such as the

EU solubility standard, would go a long way toward rationalizing the country's approach to protecting children from lead, while not unnecessarily destroying businesses and jobs.

Define "Children's Product" as Intended for Children Age Six or Younger

Under the CPSIA, a "children's product" is any product designed or intended primarily for children twelve years old or younger. The CPSIA thus treats the same all products intended primarily for use by children under thirteen, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented to different age groups by the same products, CPSC staff have suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be one of the most efficient ways to amend the law in order to exclude those products that many believe should not be impacted.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that certain products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced when applied to products for older children, who no longer mouth objects or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children age six and under, while giving the agency discretion to raise that age limit for particular materials or categories of products that it determines pose a risk to older children. In any event, the CPSC always retains the authority to issue a stop-sale order or to recall any product determined to pose "substantial product hazard" under the Federal Hazardous Substances Act.

Eliminate Third-Party Testing and Certification Requirements

Given the tools available to manufacturers to determine compliance, and our own improved enforcement methods, the complex, third-party testing and certification requirements of the CPSIA are unnecessary and/or unhelpful in ensuring compliance with the law's new requirements. In fact, relief from the law's testing requirements is the number one request of small businesses, many of whom are able to comply with the law's lead, phthalates and toy standards but still cannot afford the mandatory third-party testing and the subsequent certification and tracking label requirements of the law that are a paperwork nightmare.

By requiring all children's products to be tested at a third-party lab, regardless of risk, the law disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation, but who nonetheless must pay the most for third-party testing. The CPSIA's micromanagement of a company's testing,

certification and tracking of each and every component of a product is entirely unnecessary—and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a "bad actor" with a casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

There are entire industries that have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. For example, the American Apparel and Footwear Association wrote in its public comments on the Commission's Notice of Proposed Rulemaking on Component Parts:

> As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.[1]

Today, the Commission also has enforcement tools vastly improved over those available even a few years ago. I believe these are a more effective use of taxpayer dollars to ensure compliance with safety standards than is policing all children's product manufacturers for certifications to mandatory third-party tests. Since the advent of our agency's Import Surveillance Division in 2008, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with Customs and Border Patrol to maximize the number of products screened at all U.S. ports. Today, the Commission intercepts non-compliant toys through more extensive border control efforts, application of x-ray technology (currently used to identify heavy metals) and computer databases that flag previous offenders for greater scrutiny. The CPSIA also increased the incentive for compliance by authorizing the CPSC to confiscate and destroy at the border products that violate federal safety standards, to impose higher penalties of up to fifteen million dollars, and to more easily seek criminal penalties.

Testing and certification to the law's widest reaching mandates -- lead and phthalates limits and the toy standard -- are stayed until December 31, 2011. Thereafter, the full weight of these costly requirements will fall on children's product manufacturers. Congress could eliminate these third-party testing and certification requirements before next year, allowing manufacturers to ensure compliance through less costly in-house tests and other manufacturing programs and processes. The Commission would retain the

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[1] American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

discretion to impose third-party testing requirements on products whose risk justifies the cost.

HR 2715 opens the door to potential third-party testing reforms, by calling for public comment and possible rulemaking to reduce the costs of third-party testing. I am hopeful the Commission's Majority will embrace this opportunity in the spirit in which Congress provided it. That is, with the intent of meaningfully reducing the number and scope of third-party tests mandated by the CPSIA, in order to permit businesses to focus their limited resources on growth and job creation. And I will work with my colleagues on the Commission to encourage the broadest possible relief consistent with the statutory language. But it is also clear that the provision falls far short of eliminating all third-party testing for any product or material, and in that regard, further Congressional action is necessary. And to be frank, I am fearful that any possible rulemaking to implement cost saving measures will be too little, too late, because the Majority is likely to push ahead to finalize the Commission's proposed rule on third-party testing in the near future, rather than reproposing to permit public comment consistent with the Congressional intent underlying HR 2715.

HR 2715 also provides a mechanism for excluding from the third party testing requirement very low production products (7,500 units), provided they are manufactured by a business meeting a very narrow definition of "small" ($1,000,000 annual revenue). Relatively few businesses are likely to obtain relief under this provision, perhaps including only those who fashion by hand unique or very small batches of products. It also appears that no businesses will be excluded under the provision until the Commission has promulgated guidelines under which businesses may register their status. I hope that the Commission's Majority recognizes the importance of prioritizing the drafting of guidelines, so that small businesses can register before the crushing costs of third-party testing drive them out of business, when the stays are lifted on January 1, 2012. In this respect, to paraphrase our Chairman, relief delayed is relief denied.

Require Reforms to the Database Rule to Ensure That Incident Reports are Verifiable and Useful

The Commission's Database Rule should be revised to ensure that incident reports posted to the public database are verifiable. Potentially inaccurate and unverifiable information is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information. The revisions contained in HR 2715 do not come close to addressing this problem.

Several features of the database and the Commission's policies governing the posting of reports make it likely that inaccurate information will be published on the database.

First Hand Information Is Not Required

The database requires that submitters of reports include their own contact information, but does not require that a report submitter have any firsthand knowledge of the product,

harm or risk of harm. Nor does it require submitters to provide the contact information of an individual with firsthand knowledge, such as the product owner or the person who used the product. As a result, requiring the contact information of only the submitter is not much different from permitting the submission of an anonymous report. In fact, the Commission is receiving incidents from people who are merely repeating information they find while surfing the internet. In these cases, the Commission has no means to verify the alleged circumstances of the incident or to obtain supplemental information relevant to determining the existence and scope of an alleged product hazard. Without access to a direct witness to an alleged incident, the Commission may also be unable to determine whether a report contains a material inaccuracy. Where a lack of information and inability to contact the product owner or a witness prevents the Commission from determining the existence of a material inaccuracy, a dubious report will remain on the database.

Moreover, these concerns are not diminished by the requirement that submitters of reports verify "to the best of their knowledge" the accuracy of the report submitted. The honest, best knowledge of someone with no personal connection to an incident or product is of little value.

This problem is not addressed by HR 2715. It could be solved by requiring that reports to the database include the identity and contact information of someone with firsthand knowledge of the product or incident.

The Rules Governing Material Inaccuracy Claims Do Not Prevent the Posting of Inaccurate Information

The rules governing the posting of reports that are subject to a manufacturer's claim of material inaccuracy also make it likely that inaccurate reports will be posted. Under the CPSIA as amended by HR 2715, manufacturers have ten business days after a report of harm is sent to them to claim that the report contains a material inaccuracy. If they fail to do so, the report is posted on the 11th day. If a material inaccuracy claim is made within the ten day period, the posting of the report is stayed for *no more than* an additional five days. The initial ten-day window to make a claim of material inaccuracy was not changed by HR 2715, and it remains insufficient time in many cases for a manufacturer to determine whether a report identifying its product contains a material inaccuracy.

This is partly because the rule passed by the majority did not require reports to contain sufficient detail about the product and incident to guide a manufacturer's investigation. Information essential to this purpose that is not required to be contained in the report, includes: the model number of the product; the date it was purchased; the UPC code; and/or, any other unique identifying information that would distinguish one product of a particular type from the potentially dozens of others that are of the same general type but are materially different. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a

report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would not permit the manufacturer even to identify the specific product, let alone to gauge the accuracy of a report about the product.

HR 2715 requires that the Commission *seek to obtain* the model, serial number or a photograph of a product when the information is not included with a report. But there is no consequence to the Commission's failure to obtain any of them, or even to a submitter's refusal to cooperate. The limited available information without the model, serial number, photograph or other essential identifying information is still transmitted to the manufacture, the manufacture is subject to the same time limits, and the report is posted to the public database.

Our Chairman and Ranking Member Henry Waxman are fond of citing the statistic that 80% of submitted reports contain "model or serial number information." But this is misleading. Here are the facts: about 80% of reports contain *some text in the model or serial number field*. That includes characters such as "?", "I don't know", "unknown" and "unsure." The more relevant statistic is the percentages that actually contain a model or serial *number*. For the model number field, that figure is closer to 60%. For the serial number field it is less than half.

Even a manufacturer provided with sufficient information to identify a specific product may not receive enough detail about an incident to understand the role its product played in causing an alleged injury. Moreover, there may be no way to ascertain the truth in those cases where the manufacturer is certain that its product could not have caused an injury in the manner alleged. This is because a third-person reporter is not required to identify the victim or product owner, and access to a firsthand observer of the incident is necessary to resolve issues of fact.

A manufacturer forwarded a vague report has few options. Even where a firsthand observer is identified in the report, the manufacturer is not entitled to the individual's contact information. Without the ability to follow-up with a witness, the manufacturer must base its assertion of material inaccuracy upon the content of the report. In many cases, the report may not contain sufficient information for the manufacturer to ascertain whether it contains a material inaccuracy.

Even with adequate information, 10-days will often be too little time. Obvious cases of manufacturer misidentification may be discernable within the available window of time. But many products of a more generic nature will be very difficult to distinguish without a much more extensive investigation. I have spoken with manufacturers who have needed over 30-days after receiving a consumer complaint to conclude that the subject product was not their own. And those were cases where the company had access to the product. Ten days will clearly be insufficient in many cases, and as a result, materially inaccurate information will remain on the public database well beyond that point.

Even where a manufacturer meets the 10-day deadline to submit an adequately supported claim that a report is materially inaccurate, under the CPSIA as amended by HR 2715, the Commission only has 15 days from when the report was transmitted to the alleged manufacturer to complete its investigation of the claim. If the Commission fails to complete its investigation within the 15 day time period, the report is published on the 16th day. This policy continues to guarantee that inaccurate reports will sometimes be posted. Moreover, the materially inaccurate information will remain on the site until the Commission completes its investigation and makes a determination. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely. Meanwhile, the Commission's efforts to investigate claims of material inaccuracy are hamstrung by its failure to require the identification of victims of harm or firsthand witnesses of incidents raising a risk of harm. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Further, the manufacturer has no right to inspect the product. In those cases where contact information for the product owner is neither provided nor obtainable from the third-party submitter, it would be impossible even for the Commission to inspect the product. Similarly, there would be no opportunity for the Commission to follow up with the consumer under those circumstances. The manufacturer is not entitled to the contact information of a product owner who chooses to remain anonymous.

All of these factors make it inevitable that inaccurate reports will be posted on the database, and that many will remain searchable by the public forever.

A recent example demonstrates that these are not idle concerns. A report was published on the public database in which a parent identified a particular company as the manufacturer of a toy kaleidoscope that injured her child. The report had been forwarded to the named manufacturer as required by the rule, but the report contained insufficient information for the named manufacturer to determine whether it had actually manufactured the product. The company therefore made no claim of material inaccuracy, but posted a comment explaining that it was uncertain whether it had manufactured the product. Subsequently, a CPSC compliance officer obtained the kaleidoscope from the parent as part of its investigation of the product's safety, and discovered that the parent had misidentified the manufacturer. The incident report was then removed from the database, the correct manufacturer was notified, and the report was reposted with the correct information. However, this outcome resulted from happenstance and not any protections built into the database. If the incident had not been one of the approximately 10% that lead to a follow-up investigation, the error would never have been discovered. In addition, the investigation would not have uncovered the mistake if, as the database rule permits, contact information for an individual with firsthand knowledge of the

product and who retained it, was not provided. The fact that an error of this kind has already been discovered, given the short period that the database has been "live" and the small percentage of incidents that are investigated, suggests that this situation is probably not unique. Rather, it indicates that there are likely already a significant number of published incident reports that misidentify a manufacturer and that will never be corrected or removed.

Regulatory Reform: Other Statutory Changes

Two fundamental changes in the law governing federal agency regulatory action would go a long way toward avoiding the sort of economically burdensome unintended consequences that resulted from the CPSIA. First, there must be a mechanism for increasing accountability for the potential adverse impacts of regulatory actions. Second, economically significant regulatory action should not be taken until a thorough cost-benefit analysis demonstrates that the burdens imposed are outweighed by the societal benefits obtained.

Regulatory Reform Must Address All Significant Regulatory Actions, Not Just Formal "Legislative Rules"

Since becoming a Commissioner at the CPSC in 2009, I have seen that immense power is delegated to regulatory agencies—often with little accountability. An agency's interpretation of one word of a statute can make the difference between the statute's being implemented reasonably, or with massive economic consequences.[2] Even more challenging, much of the Commission's regulatory activity under the CPSIA has not been through "legislative rules". As a result, neither full cost-benefit analyses nor other forms of economic review have been required. In fact, some of the most costly (and unnecessary) decisions made by the agency have come through party-line votes on interpretive rules, Notices of Requirements[3], and petition decisions. None of these are "legislative rules," but they each had wide ranging impact. Thus, when considering proposals for regulatory reform, I would strongly recommend that Congress take into account the full scope of regulatory decisions that an agency makes –not simply the most obvious regulatory vehicle, legislative rules.

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[2] By a vote of 4-1, the Commission voted to interpret the word "any" in CPSIA § 101(b)(1)(A) to mean "zero," rendering the absorbability exclusion of the original statute meaningless, and resulting in the rejection of a petition from a manufacturer to exclude the brass axle of a toy car that had *less absorbable lead* than the FDA permits in a piece of candy.

[3] Notices of Requirements (NOR) are ostensibly procedural regulations that provide notice to testing laboratories on how to become CPSC-recognized labs for the purposes of third-party testing under the CPSIA. However, their issuance triggers the underlying statutory requirement that all children's products be third-party tested to the particular standard listed in the NOR—a huge, new, non-risk-based requirement of the statute with sweeping economic impacts. The Majority has used them to require manufacturers to third-party test to many general consumer product safety standards that I believe should not have been construed as "children's products safety rules" subject to third-party testing under the CPSIA.

Passage of the "Regulations from the Executive In Need of Scrutiny Act" (REINS) Would Ensure Accountability

The discipline of accountability could be brought to regulatory action by amending the Congressional Review Act to require Congressional pre-approval of all "economically significant" rules or regulatory decisions. This idea is embodied in the bill titled the "Regulations from the Executive In Need of Scrutiny Act" (REINS), which provides for expedited review and approval of final rules by the full House and Senate. Under the REINS proposal, Congress would be required to approve any final rules that are "economically significant" or have at least $100 million per year impact. This added step would alert Members of Congress to the most burdensome regulations put forth by federal agencies. It would also prevent unelected agency staff and leadership from continuing to regulate without considering the economic impact of their actions. Moreover, agencies often take years to implement laws passed by earlier Congresses, as illustrated by the CPSIA. Requiring the current Congress to consider significant implementing regulations would help to avoid the unintended adverse consequences of a law and permit changed circumstances to be taken into account.[4]

REINS as currently offered only applies to legislative rules. But given the many other regulatory actions an agency may take to implement a statute, I recommend expanding the scope of this type of proposal to include any rule *or other type of regulatory action* with at least a $100 million impact. The objective would be to include not just high impact legislative rules, but also such interpretive rules, petition decisions, guidance documents, Notices of Requirements, or other types of Commission decisions. I recognize that this may expand the amount of legislative work for Congress and the number of cost-benefit analyses required. However, the scope and impact of these agency decisions more than justifies the added oversight.

REINS could also be expanded by asking Congress to exercise oversight of regulatory actions that result in *less than* a $100 million per year impact. In that case, the process could be streamlined by requiring such regulatory actions to be approved solely by the relevant authorizing Committee(s), and not by the full House and Senate.

Greater Accountability Could Also Be Achieved Through A Mandate for Formal Rulemaking

Greater accountability could also be achieved by imposing more widely on economically significant rules the procedures currently applicable only to formal "on the record" rulemaking. This idea is well articulated by Susan Dudley, Director of George Washington University's Regulatory Studies Center. [5] Agencies normally go through

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[4] Since the CPSIA's passage in 2008, the Commission has received letters from Members of Congress requesting that the Commission provide relief for small businesses and certain industries, numerous bills have been introduced to reform the statute, petitions for relief have been denied, and a CPSIA reform bill was recently signed into law. But more could have been accomplished along the way, and quicker, had there been a "REINS"-like process of congressional approval for all major rules and other regulatory actions.

[5] http://www.regulatorystudies.gwu.edu/images/pdf/regreform_dudley_workingpaper_20110405.pdf

informal rulemaking processes, including notice and comment, when promulgating rules. More formal rulemaking under 5 U.S.C. §§ 556 and 557 require a full trial like hearing, where pre-hearing discovery is permitted, the rules of evidence apply and parties may both subpoena and cross examine witnesses. The agency decision must be made exclusively based on the oral and written hearing record and must be supported by "substantial evidence." These procedures are often used by agencies responsible for economic regulation of industries, and some variation on them may therefore be particularly appropriate for CPSC regulatory action. In those cases where the full scope of formal rulemaking procedures seemed excessive, imposition of the "substantial evidence" requirement would still be particularly effective. It would ensure more judicial oversight then can be obtained under the current "arbitrary and capricious" standard of review that governs agency informal rulemaking.

Cost-Benefit Analyses of Regulatory Actions are Essential and Should Be Performed by an Independent Entity

Economically significant regulatory actions should not be taken until a cost-benefit analysis has been performed that demonstrates a reasonable relationship between the action's costs and benefits. This should apply to all economically significant regulatory actions, not only legislative rules.[6]

In the absence of a statutory mandate, regulatory agencies are unlikely to perform cost-benefit analyses. For instance, the CPSIA did not require cost-benefit analyses to be performed in connection with the legislative rulemaking that it mandated, and the CPSC Majority therefore objected to doing so. In addition, the vast majority of the Commission's actions implementing the law were taken through procedural rules and other vehicles that never require full, quantitative economic analyses. The Commission's Majority refused to exercise its discretion to undertake cost-benefit analyses even of the CPSIA's most costly and controversial regulations, notwithstanding that Members of Congress[7] as well as the President (EO 13579) have called for such analyses.

A federal agency that is required or willing to undertake a cost-benefit analysis of a significant regulatory action is not always equipped to do so. The CPSC, for instance, lacks the expertise and resources to perform thorough economic analyses of all of its rules. Indeed, to my knowledge, the CPSC has only performed one full cost-benefit analysis in its history.[8] If the CPSC had been required to perform a cost-benefit analysis

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[6] For certain rules, such as "Notices of Requirements" under the CPSIA, where the "Notice" itself may not have costs associated with it, but the act of issuing the "Notice" triggers an underlying statutory requirement to test and certify (imposing huge costs), I would recommend requiring that the agency perform a cost-benefit analysis of ***both*** the rule itself and the underlying statutory requirement that is associated with it/triggered by it.

[7] In June 2010, then Ranking Member Jo Ann Emerson (R-MO) of the House Financial Services Appropriations Subcommittee wrote a letter to Chairman Tenenbaum urging the Commission to use available extra funding to begin immediately a cost-benefit analysis of the Commission's testing and certification rule, including all other underlying costs of Section 102 of the CPSIA.

[8] The Commission's 2006 final mattress rule on flammability (16 CFR Part 1633) contained a cost-benefit analysis.

of CPSIA's main testing and certification rule, it would have had to outsource the study, given the sheer scope of the rule and number of different industries impacted.

Even if Commission staff had the knowledge, experience and resources to perform cost-benefit analyses of all the CPSC's major regulatory actions, our Economics department is constrained by its lack of independence. The Economics staff must report to the Chairman of the Commission, who may in some cases favor expedition over the performance of a thorough analysis. Fundamentally, regulatory agencies do not view their primary job to be assessing the economics of decisions. Rather, regulatory agencies focus on ***regulating***—with the natural tendency ***to regulate more***. In other words, the more "tweaks" or requirements that can be added in the name of safety, the better—and the costs of such decisions, even when considered, are always ***secondary***.

An effective way to address agencies' lack of expertise, resources and independence, is to create an independent federal office charged with reviewing or performing cost-benefit analyses of all economically significant rules *or other types of regulatory actions* taken by any federal regulatory agency. Offsetting the cost of such an independent office is the fact that "regulatory flexibility analyses" performed under the Regulatory Flexibility Act (RFA) would no longer be needed. RFA analyses are extremely limited compared to a full cost-benefit analysis that qualifies and quantifies in detail the effects of a regulation. The RFA requires an analysis to be performed only if there is a "significant impact" on a "substantial number of small entities." RFA analyses do not necessarily consider a regulation's impact on consumer choice, prices, or more indirect costs to the broader economy, such as job losses. Most importantly, since I have been a Commissioner, few if any analyses under the RFA have lead to changes in rulemakings the agency has promulgated—and there is no mechanism under which agencies are forced to change what they are doing based on an economic analysis under the RFA.

The Independent Body Charged With Analyzing Agency Action Could Also Analyze Congressional Actions Not Otherwise Subject to Review

The independent office charged with performing cost-benefit analyses of agency action could also be tasked with analyzing those federal statutes that are not subject to a full private sector impact analysis by the Congressional Budget Office. CPSIA was such a statute, and its unintended economic consequences attest to the need for a more thorough examination of economic impact before passage. In addition, analyzing statutes would ensure that statutory provisions that are self-implementing without agency action would also be subject to a cost-benefit analysis. Using the CPSC as an example, such provisions might include those making a voluntary industry standard mandatory,[9] or banning a product or substance. Such information would be beneficial both to the Commission implementing the statute and to Congress, which must normally depend entirely on the regulatory agency (and whatever industry comments the agency receives) for information on the law's total costs and economic impact after its enactment.

[9] For example the Toy Standard was made law by the statute, not by implementing regulation. CPSIA § 106.

President Obama's Executive Orders No. 13563 and 13579 Should be Made Law

Congress could also ensure that adequate analysis is undertaken before burdensome regulatory action is taken, by passing as law President Obama's Executive Orders No. 13563 and 13579. This would require all agencies, including independent agencies, to "take into account benefits and costs, both quantitative and qualitative" of the rules it promulgates. If the CPSC is any indication, independent regulatory agencies are unlikely to take action beyond the law's minimum requirements, and will ignore or construe very narrowly the nonbinding exhortations of executive orders. Codifying such orders would require agencies to take these necessary steps. Additionally, codifying these requirements for cost-benefit analyses, public participation and other regulatory reform objectives, would subject them to judicial review.

Congress Should Not Except Regulations from Existing Cost-Benefit Analysis Requirements

Congress can sometimes be an obstacle to the performance of economic impact analyses by regulatory agencies. For instance, the CPSIA expressly excepted the CPSC from its existing statutory mandate to perform cost-benefit analyses of its legislative rulemaking under the statute. As a result, no cost-benefit analysis was performed of the CPSC's Testing and Certification rule, or the law's new mandatory standards requirements. Admittedly, the CPSIA did not prohibit the agency from undertaking the analyses, but removing the requirement allowed a Majority of Commissioners disinclined to confront the law's costs to argue that Congress did not wish them to be considered. This situation could be avoided through a new law requiring a separate vote to specifically exempt authorized agency action from cost-benefit or other economic analysis requirements. ***For example, Congress could prohibit the consideration of any bill exempting cost-benefit analysis, public participation, or other necessary regulatory accountability procedures without a separate, stand-alone vote requiring a 2/3 majority to pass the exemption***. This requirement would permit Congress to ensure expeditious regulatory action where absolutely necessary, but to do so only with added visibility and accountability.

2) **Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.**

Chairman Tenenbaum recently announced that the Commission may conduct a retrospective review of its regulations. She indicated that it would be similar to a review that was undertaken annually for several years prior to the passage of the CPSIA. Such a review could reduce unnecessary regulatory burdens on manufacturers, but only if the Majority prioritizes the review of CPSIA regulations and other agency action taken pursuant to the CPSIA. If not, it is doubtful that such a review will yield many significant changes. After all, the CPSIA's impact across the greatest scope of industries dwarfs that of all other CPSC statutes and regulations since the agency's inception. I

hope the Chairman will be open to my views on how the Commission can most effectively use this opportunity to meaningfully reduce the unnecessary burdens the Commission's implementation of the CPSIA has imposed on American businesses. But I fear that the Majority will proceed with a regulatory review that avoids addressing the major CPSIA regulatory actions that have had the most significant impact.

In particular, the following are Commission actions that should be revisited so that the Commission's safety goals can continue to be met without unnecessary collateral damage to the economy:

- ***Civil Penalties Factors*** – In the Commission's interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that, while the overall civil penalty ceiling was raised, "technical" violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.[10]

- ***Definition of Children's Product*** – The CPSIA applies to all "children's products", statutorily defined as products "designed or intended primarily for children 12 years of age or younger." To assist manufacturers to identify which of their products are subject to CPSIA requirements, the Commission published a Notice of Proposed Rulemaking defining "children's products." The comments the Commission received in response made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended either for ages 10-12 or for an age range falling both inside and outside the upper age limit of 12. They therefore asked for clarification and more specific direction. After receiving these comments, the Commission had a chance to put a much narrower "fence" around the scope of covered products—or to at least define clearer boundaries. Instead, the Majority voted for a Final Rule that left in place a vague definition that has led to confusion among the regulated community[11] and provided insufficient guidance to CPSC staff[12] in their efforts to enforce children's product safety standards.

- ***"Children's product safety rules"*** – The CPSIA requires third-party testing for compliance with all "*children's* product safety rules." Prior to the CPSIA, the Commission promulgated numerous "*consumer* product safety rules", such as those governing carpets and rugs, vinyl, clothing textiles and mattresses. Over my objection, the Commission's Majority has required any such products intended for use in a children's room to be third party tested to those general consumer product safety rules. For instance, a rug with the image of a Disney character and intended

[10] http://www.cpsc.gov/pr/northup03102010.pdf
[11] http://www.cpsc.gov/pr/northup09292010.pdf
[12] Justin Pritchard, "Feds dismiss need to recall lead drinking glasses,"*Associated Press*. December 11, 2010. http://news.yahoo.com/s/ap/20101211/ap_on_he_me/us_cadmium_lead_glassware

for a child's room that the CPSIA clearly required to be third-party tested to lead and phthalates limits must, because of this interpretation, now also be third party tested to the rug flammability standard; but a blue rug in the living room does not. I believe a clear distinction can and should be made between "children's product safety rules" and more general "consumer product safety rules." Fundamentally, no safety improvement is attained by requiring the third-party testing of a lamp or rug based on its design, when there is a greater risk that a rug will encounter a fire hazard in a kitchen or adjacent to the living room fireplace than in a child's room. And children play throughout the house. The CPSIA defined children's products as those primarily designed or intended for children under 13. "Children's product safety rules" should be consistently construed to mean safety rules that relate exclusively to children's products, and not to products intended for general use and governed by a longstanding consumer product safety rule. The Commission did not have to adopt a contrary view—and there is no risk associated with these products that necessitates *new* third-party testing requirements.[13]

- ***Public Database***: I proposed an alternative database rule that addresses the concerns I raised above and would have made the database a more accurate source of information for consumers. The Commission's Majority instead passed a rule that went well beyond the statute's requirements, allowing "anyone" to submit reports of harm—even advocacy groups, attorneys, random bystanders, and, as has actually occurred, people perusing the internet that may not have firsthand knowledge of the incident. In total, the Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers--particularly small businesses.

- ***Reduction to 100 ppm of Lead***: The CPSIA banned as a hazardous substance children's products containing over 300 ppm of lead. It also provides that children's products containing over 100 ppm of lead shall be treated as a banned hazardous substance beginning on August 14, 2011, "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category." On July 13, 2011, the Commission voted 3-2 that there is no product or product category for which 100 ppm is not technologically feasible. The Majority reached this decision despite substantial evidence to the contrary. Commission staff advised that the economic impact of reducing the limit to 100 ppm is a factor in determining the technological feasibility of doing so. In addition, staff identified significant "economic impacts that are likely to occur", including: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility of products due to the

[13] http://www.cpsc.gov/pr/northup07122010.pdf

substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard. With respect to any potential counterweight to this economic harm, Commission staff concluded that the "overall contribution of" products with lead content between 100 ppm and 300 ppm "to lead exposure in children is minimal." Notwithstanding staff's acknowledgment that reducing the lead limit to 100 ppm will cause substantial economic harm with no offsetting improvement in product safety, the Commission's majority voted to reduce the standard.

In addition to these past regulatory actions with which I disagreed, I also believe the Commission's ongoing approach to regulating is fundamentally flawed. The President's Executive Order No. 13579 encourages independent agencies to perform cost-benefit analyses before imposing new regulatory burdens that could undermine the nation's economic recovery without sufficient justification. This Commission had steadfastly refused to do so, yet some of my colleagues routinely rely on the absence of "data" to justify their refusal to consider the adverse economic consequences of the Commission's regulatory actions. Requiring the Commission to obtain the necessary data and to limit its rulemaking to decisions whose benefits justify their costs would go a long way toward avoiding future regulatory overreach.

Questions for the Record

Subcommittee on Oversight and Investigations
Committee on Energy & Commerce
United States House of Representatives
"The Views of the Independent Agencies on Regulatory Reform"
July 7, 2011

Answers from
The Honorable Robert M. McDowell
Commissioner
Federal Communications Commission
August 15, 2011

1. In Chairman Leibowitz's testimony he said that the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all of the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at the FCC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them?

I operate under the philosophy that Congress should tell us what to do, and not the other way around. Given your solicitation of suggestions, however, I will start by raising several possible statutory changes to improve the FCC before moving on to possible procedural reforms.

Twenty-first century consumers want to have the freedom to enjoy their favorite applications and content when and where they choose. Whether such material arrives over coaxial cable, copper wires, fiber or radio waves is of little consequence to most consumers so long as the market's supply of products and services satisfies demand. Legacy statutory constructs, however, have created market distorting legal stovepipes based on the regulatory history of particular delivery platforms. While consumers demand that functionalities and technologies converge, regulators and business people alike are forced to make decisions based on whether a business model fits into Titles I, II, III, VI, or none of the above. As Congress contemplates FCC reform, it may want to take the current marketplace into account and consider adopting an approach that is more focused on preventing concentrations and abuses of market power that result in consumer harm.

Other statutory changes could include modernizing the Sunshine in Government Act to increase our efficiency and spirit of collaboration while preserving openness and transparency.

Additional suggestions for statutory amendments are listed below:

Reform of the Regulatory Flexibility Act (RFA) (5 U.S.C. § 601 et seq.)

- The RFA requires an agency to perform an analysis of the effect of proposed and final rules on small entities, including what steps have been taken to minimize the burden on small businesses.

- The RFA has been ineffective in reducing the implementation of burdensome or overly-regulatory rules.

- Without a cost-benefit standard or mandate to prevent rules that are burdensome, compliance entails creating a report that merely reiterates the boilerplate analysis in the notice of proposed rulemaking or order.

- The RFA should be either eliminated or modified to prevent costly and unnecessary rules.

Forbearance Authority (47 U.S.C. § 160) (Section 10)

- Section 10 of the Telecommunications Act of 1996 mandates that the Commission "shall forbear" from applying any regulation or statutory provision to "a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services" if the agency determines enforcement of such requirement "is not necessary" to ensure that charges and practices are reasonable and "not necessary for the protection of consumers," and that forbearance is consistent with the public interest.

- Given the convergence in the communications industry, it makes more sense for the FCC to review regulations applying to all providers under its jurisdiction, not just carriers and providers of telecommunications services. Congress could consider amending the Act to require a broader and more comprehensive approach.

Section 11 Biennial Review (47 U.S.C. § 161)

- Section 11 of the Telecommunications Act requires the FCC to review every two years those regulations that apply to providers of telecommunications services to determine "whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition,"[1] and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[2]

- Unfortunately, these reviews have not resulted in much action to actually eliminate rules. As such, the reviews are burdensome and unnecessary. I recommend that Congress amend this section so that following each biennial review, the FCC is compelled to move forward within a specific timeline to repeal various rules or to justify why repeal is not necessary.

- Furthermore, the section only requires the FCC to review regulations that apply to providers of telecommunications services. Given the convergence in the communications industry, it makes more sense for the FCC to review regulations

[1] 47 U.S.C. §161(a)(2).

[2] 47 U.S.C. §161(b).

applying to all providers under its jurisdiction. Congress could consider amending the Act to require a broader and more comprehensive approach.

- Additionally, Congress could amend the statute to require the FCC to conduct the review under the presumption that a rule is not necessary unless the FCC finds compelling evidence to the contrary.

Set-Top Boxes (47 U.S.C. § 629)

- Section 629 requires the Commission, in consultation with standards-setting organizations, to adopt regulations designed to assure the competitive availability of video navigation devices, such as set top boxes.

- Section 629 should be modified to promote competitiveness and innovation, and to ensure our rules do not hinder the marketplace.

- The government does not have a great track record in fashioning detailed technical mandates. For instance, in the case of CableCARD technology, the industry continues to innovate; however, the industry's work on many enhancements, such as downloadable security, has largely stalled as a result of the FCC's regulations.

Statutory Requirements for Various Reports

- Various statutory provisions require the FCC to file annual reports on various topics; such as, the Wireless Competition Report,[3] Satellite Competition Report,[4] Section 706 Report,[5] and Video Competition Report.[6] Preparation of each is a monumental and costly undertaking.

- Rather than requiring that the Commission submit these reports annually, Congress might consider amending the Act to require biennial submissions. For

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[3] *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332(c).

[4] *See* Pub. L. No. 109-34, 119 Stat. 377 (2005), which amended the Communications Satellite Act of 1962 and is codified at 47 U.S.C. § 703.

[5] *See* 47 U.S.C. § 1302(b) (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (the Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 *et seq.*

[6] *See* Pub. L. No. 102-385, 106 Stat 1460 (1992). Congress imposed an annual reporting requirement on the Commission in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") as a means of obtaining information on "the status of competition in the market for the delivery of video programming." *See also* 47 U.S.C. § 548(g).

example, filing each sometime within the first quarter of odd-numbered years would allow each incoming Congress to have fresh data at hand for any possible legislative considerations. Moreover, this amendment would remove the Commission from what sometimes seems like perpetual reporting mode.

The 70/70 Benchmark (47 USC § 612(g))

- Provides the Commission with the authority to promulgate additional cable rules to provide diversity of information sources when cable systems are available to 70 percent of U.S. households and are subscribed to by 70 percent of the households to which such systems are available.

- Should be reconsidered in light of the modern competitive marketplace.

- Concerns of a cable monopoly hindering the delivery of diverse programming has been eliminated as a result of deregulatory policies that have encouraged investment and new entry by wireline and satellite providers, in addition to Internet-supplied content.

2. Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.

"Net Neutrality" Rules

- For the first time ever, the FCC imposed network management rules on the Internet.

- The rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. There has been no evidence of systemic market failure that justifies these overly burdensome regulations.

- Language in the "net neutrality" order itself concedes that the Commission did not conduct a market power analysis or make a market power finding.[7]

- Even though the FCC adopted the "net neutrality" rules last December, they have yet to become effective. In the interim, America's Internet remains open and freedom-enhancing, as it *always* has been.

[7] *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, n. 49 (2010) ("Open Internet Order").

Equal Access Scripting Requirement

- A number of phone companies are still required to inform a customer seeking a new local exchange service provider that the customer can receive long distance phone service from another carrier and, upon request, must read aloud to the customer a list of available independent long-distance companies.

- This requirement is an old vestige from the break-up of the AT&T long-distance monopoly. Ma Bell's long-distance arm was declared "non-dominant" way back in 1995, and the long distance market has been competitive for almost 16 years, yet some of our antiquated rules live on.

- While the larger Bell companies and their successors were granted relief from this requirement years ago, it is *smaller* phone companies that must continue to bear the burden of living under them.

Cost Allocation Requirements and Automatic Reporting Management Information System Mandates

- Only the smaller non-Bell companies are still required to follow the cost allocation requirements and ARMIS (Automatic Reporting Management Information System) reporting mandates.

- For carriers living under flexible price cap rules, rates are not dependent on costs and therefore such rules do not make sense. Also, considering that these carriers operate in an environment that is more competitive than a few years ago, these rules are not necessary.

Affiliate Transaction Rules (47 CFR § 32.27)

- These rules require only the smaller non-Bell companies to track the valuation of assets that are transferred between regulated and nonregulated affiliates. The larger Bells are no longer required to follow these requirements.

- For carriers living under flexible price cap rules, rates are not dependent on costs and therefore such rules do not make sense. Also, considering that these carriers operate in an environment that is more competitive than a few years ago, these rules are not necessary.

Continuing Property Record Requirements (47 CFR §§ 32.2000(e),(f))

- Requires incumbent LECs to maintain detailed recordkeeping of their plant accounts such as descriptions of property, and location of property and original cost data.

- These rules have primarily served for states in state ratemaking proceedings, not for FCC purposes. Furthermore, each incumbent LEC has a vested interest in maintaining accurate property inventory, absent these detailed requirements.

- Additionally, over a decade ago, the Commission tentatively concluded that these requirements should be eliminated.[8]

CMRS Spectrum Aggregation Limit (47 CFR § 20.6)

- When in effect, limits the amount of spectrum a given carrier was able to hold in a given market area.

- Rule sunset as of 2003, yet still remains in the CFR.

Rules Applicable to the Provision of CMRS Service by ILECs (47 CFR § 20.20)

- Unique regulatory requirements established for ILECs providing wireless services.

- Rule sunset as of 2002, yet still remains in the CFR.

Mutually Exclusive Applications (47 CFR § 22.131)

- Procedures for resolving mutually exclusive license applications.

- Provisions are moot because the FCC uses auctions to assign licenses based on the submission of mutually exclusive applications.

Competitive Bidding Procedures (47 CFR §§ 22.201, 22.213, 22.225, 22.227, 22.228)

- Procedures for auctioning private mobile services spectrum.

- Duplicates competitive bidding procedures set forth in Part 1 of the Commission's rules.

Antenna Structures (47 CFR § 22.365)

- Requirements for installing and maintaining antenna structures.

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[8] *See 2000 Biennial Regulatory Review – Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19911, ¶212 (2001) ("[W]e tentatively conclude that we should eliminate our detailed [continuing property records] rules in three years.").

- Duplicates antenna structure requirements set forth in Part 17 of the Commission's rules.

Mutually Exclusive Applications in the Paging and Radiotelephone Service (47 CFR § 22.509)

- Procedures for resolving mutually exclusive license applications.
- Provisions are moot because the FCC uses auctions to assign licenses based on the submission of mutually exclusive applications.

Responsibility for Mobile Stations (47 CFR § 22.571):

- Requires base station licensees to maintain responsibility for mobile stations.
- Duplicates a general provision in Section 1.903(c) of the Commission's rules.

Comparative Renewal Proceedings (47 CFR § 24.16)

- Provides preference in comparative renewal proceedings for licensees who have demonstrated substantial service.
- Licensees are no longer subject to the comparative renewal process. FCC assigns licenses by auction.

Cost Sharing Requirements for Broadband PCS (47 CFR §§ 24.239-253)

- Rules applicable to cost apportionment associated with post-auction clearing of incumbents from PCS band.
- The cost-sharing plan sunset for all PCS entities in 2005, yet these rules remain in the CFR.

Oppositions to Narrowband PCS Applications (47 CFR § 24.430)

- Procedures for submitting oppositions to applications submitted as part of the competitive bidding process.
- Duplicates Section 1.2108 of the Commission's rules.

Mutually Exclusive Narrowband PCS Applications (47 CFR § 24.431)

- Procedures for resolving mutually exclusive applications.
- Provisions are moot because the FCC assigns licenses by auction.

Responsibility for SMR Mobile Stations (47 CFR § Section 90.656)

- Requires base station licensees to maintain responsibility for mobile stations.
- Duplicates a general provision in Section 1.903(c) of the Commission's rules.

Media Ownership Rules (47 CFR § 73.3555)

- These rules – including the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, the local television ownership rule, the local radio ownership rule, and the dual network rule – prohibit the ownership of multiple broadcast/newspaper entities.
- Should be modernized to reflect the current competitive marketplace and economic and technological realities.
- Should consider eliminating the newspaper-broadcast cross-ownership rule.

Leased Commercial Access (47 CFR § 76.970)

- Requires cable operators to lease channels to programmers not otherwise carried on a cable system. In January 2008, the Commission released an order, to which I dissented, that changed the rate structure. These rules are not yet effective due to a stay issued by the Sixth Circuit Court of Appeals and Paperwork Reduction Act delays.
- Should re-evaluate the rate structure, which causes cable operators to subsidize commercial leased access users and determines rates based on the content delivered.
- The rates adopted will result in a loss in the diversity of programming as cable operators are forced to drop lesser-rated channels in favor of leased access requests seeking distribution distorted below cost and market rates.
- The majority also adopted customer service standards, complaint procedures, and reporting requirements, which are all aimed at propping up a regime that is past its prime.

Fairness Doctrine

- Despite the fact that the FCC stopped enforcing the Fairness Doctrine in the late 1980's because the doctrine regulated political speech and is therefore patently unconstitutional, the Fairness Doctrine is literally still codified in the CFR.[9]

- Fortunately, Chairman Genachowski recently informed your committee that he supports removing references to the Fairness Doctrine (and its corollaries) from the CFR and intends to move forward on this effort in August. I look forward to helping him achieve that goal.

Form Requirements

- The FCC has too many forms. For example, there is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others.

- To the Chairman's credit, he has launched an initiative which seeks to reform the FCC's data collection processes. I support these efforts and hope that this exercise results in comprehensive reform of the FCC's burdensome data collection procedures as opposed to simply shaving them around the edges.

- While a few forms may be necessary, many could be eliminated or simplified. Several forms require companies to submit data that is no longer needed or is supplied elsewhere.

Enhanced Disclosure Form (Form 355)

- The Enhanced Disclosure Form is a specific example of a form that should be eliminated entirely. The form was previously adopted by the Commission for the purpose of obtaining detailed information from broadcasters about community-focused programming on a quarterly basis.

- Has not become effective due to Paperwork Reduction Act delays.

- Should be eliminated as suggested in the Information Needs of Communities Report. Risk remains that a replacement might simply resurrect the Enhanced Disclosure form's pointless and burdensome mandates.

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[9] 47 CFR § 73.1910 ("broadcasting"); 47 CFR § 76.209 ("origination cablecasting"). *See also* 47 CFR §§ 76.1612-13 (Fairness Doctrine corollaries applied to origination cablecasting).

- Costly, burdensome, and unnecessary in today's highly competitive video market, which motivates broadcasters to respond to the interests of their local communities.

Pending Regulations

Finally, Chairman Genachowski has initiated some proceedings that will help clear away some of the regulatory underbrush, and he should be commended for those efforts. I look forward to continuing to work with him and all of my colleagues on these matters. In the meantime, however, Chairman Genachowski has also initiated many proceedings, through notices of inquiry, notices of rulemaking, or staff-prepared public notices, which seek comment on proposed new regulations.

Although I have supported opening these dockets, I have likewise expressed concern about the seeming rush to regulate. I have urged that the FCC develop a solid record, including a thorough cost-benefit analysis, and allow meaningful public comment prior to forming conclusions and implementing any regulations. While it may be tempting to shrug off regulatory costs, the reality is that businesses pass on their costs to consumers. We all pay for the cost of government mandates. As such, it is important to proceed carefully.

Some examples of pending proceedings are:

Subject	Docket No.
Broadband Speed Survey and "Need for Speed" Information. FCC seeks comment on speed survey results and measurement of broadband speed, and also seeks comment on what kinds of "need for speed" information will be most helpful to consumers in choosing their broadband service.	CG 09-158 CC 98-170 WC 04-36
Network Survivability. FCC seeks comment on current efforts in the industry to ensure continuity during major disasters, existing reliability standards, and the FCC's role and legal authority as to these issues.	PS 11-60; 10-92 EB 06-119
Uniform License Renewal, Discontinuance of Operations, and Partitioning/Disaggregation. FCC seeks comment on creating new requirements for license renewals, to establish uniform consequences for service discontinuance, and to clarify construction obligations for spectrum licensees.	WT 10-112

Subject	Docket No.
Broadband Data Collection. In the April 2010 order, the FCC adopted rules addressing the provision of aggregate data collected from broadband service providers on Form 477. Current rulemaking proceedings propose possibly expanding data collection requirements.	WC 07-38; 09-190; 10-132; 11-10; 11-3 GN 09-51; 09-47
Deploying Aerial Communications Architecture to Disaster Areas. FCC seeks comment on deploying aerial communication architecture to disaster areas.	PS 11-15
Advanced Broadband for First Responders. FCC seeks comment on proposed rules for deployment and operation of a nationwide interoperable public safety broadband network.	WP 07-100 WT 06-150 PS 06-229
Framework for Next Generation 911 Deployment. FCC seeks comment on how Next Generation 911 ("NG911") would enable the public to obtain emergency assistance by means of advanced communications technologies' beyond traditional voice-centric devices.	PS 10-255
E911 Location Accuracy Requirements. FCC requires wireless licenses to satisfy E911 Phase II location accuracy and reliability standards on a county or PSAP-based geographic level basis. FCC also seeks comment on further improvements to the location capability of 911 and E911 services (including indoors and vertically) for existing and new voice communications technologies and new broadband technologies associated with deployment of NG911 networks.	PS 07-114 WC 05-196
"*Bill Shock*." FCC proposes to require mobile service providers to provide new usage notifications and additional disclosures so that consumers would not receive unexpected charges on their bill; *i.e.*, "bill shock."	CG 10-207; 09-158
International Broadband Comparison. FCC seeks comment on improving the International Comparison required by Broadband Data Improvement Act.	IB 10-171
Roadmap for Cybersecurity. FCC seeks comment on creation of cybersecurity roadmap to identify vulnerabilities to communications networks in preparation for potential cyberthreats.	PS 10-146 GN 09-51
Robocalls/TCPA. FCC proposes restricting automated telephone calls ("robocalls") by requiring sellers and telemarketers to obtain written consent from recipient – even where the consumer has established a business relationship – before making these calls.	CG 02-278
Special Access. FCC seeks comment on pricing for access to high-capacity facilities.	CC 05-25
Cramming. FCC seeks comment on proposed rules that could alert consumers to unauthorized charges being "crammed" on their bills; could potentially lead to regulation of billing services.	CG 11-116
Outage Reporting for Interconnected VoIP and Broadband ISPs. FCC seeks comment on new requirements for these providers in the event of a service outage.	PS 11-82

Subject	Docket No.
Lifeline and LinkUp Reform and Modernization. FCC seeks comment on ways to reform the Lifeline and Linkup programs to reduce waste, fraud and abuse; including a proposal for a federal standard as a minimum threshold for verifying continued eligibility in the program and proposals to extend the subsidy to support broadband.	WC 11-42
Video Device Competition/AllVid. FCC seeks comment on rules to provide competition in the retail market for set-top video devices that are compatible with all multichannel video programming distributor ("MVPD") services.	MB 10-91 CS 97-80 PP 00-67
Program Carriage. FCC seeks comment on various revisions and clarifications to the program carriage rules, which prohibit, amongst other things, MVPDs from discriminating against unaffiliated programming vendors when determining carriage or negotiating program carriage agreements.	MB 11-131
Media Ownership. As part of the 2010 quadrennial review, the FCC seeks comment on the state of the media industry and the multiple ownership and cross ownership rules affecting radio, TV and newspapers.	MB 09-182
Broadcast Localism. FCC seeks comment on various proposals – including permanent community advisory boards, renewal guidelines, and a requirement to have a 24 hour physical presence in a station – to ensure that broadcasters are addressing the needs of their local communities.	MB 04-233
Retransmission Consent. FCC seeks comment on modifications to the rules governing good faith negotiations when broadcast television stations elect retransmission consent negotiations as opposed to exercising their must-carry rights.	MB 10-71
Program Access and Tying Arrangements. FCC seeks comment on revisions to the program access rules, which pertain to the ability of an MVPD to access video programming, and retransmission consent rules in light of program tying arrangements.	MB 07-198
Digital Audio Broadcasting Systems. FCC seeks comment on the appropriate treatment of subscription-based radio services and whether digital radio stations should be subject to additional public interest obligations beyond those that apply to analog stations.	MM 99-325
Sponsorship Identification. FCC seeks comment on its sponsorship identification rules and the incorporation of commercial messages into programming; *i.e.*, "embedded advertising."	MB 08-90

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF THE CHAIRMAN

August 17, 2011

The Honorable Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Stearns:

Thank you for the opportunity to testify before the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce on July 7, 2011 on the views of the independent agencies on regulatory reform. Enclosed are the responses to the post-hearing questions that Representatives Stearns, Barton, Myrick and Gardner have submitted. Commissioner Moeller has informed me that he concurs in my responses to the questions that were posed by the Honorable Cliff Stearns and the Honorable Joe Barton, as those questions were also directed to Commissioner Moeller.

Should you need additional information, please do not hesitate to contact me.

Sincerely,

Jon Wellinghoff
Chairman

Cc: Diana DeGette, Ranking Member

The Honorable Cliff Stearns

1. **In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all of the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at FERC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

Answer: Below are several parts of the Federal Power Act (FPA) that I believe could be eliminated or modified to reduce burden.

FPA section 305(c)

- Section 305 of the FPA concerns officials dealing in securities and interlocking directorates. FPA 305(c) has two reporting requirements. The first is to report a broad range of interlocking officer positions and directorships. The only apparent use for this provision is to serve as a check to ensure that those required to file interlock applications under the much more narrow section 305(b) did so. The second is a related requirement to report each public utility's 20 largest purchasers of its power. I also do not see that this provision of the Federal Power Act serves much purpose. I believe that these provisions could be eliminated, as they are not typically used by this Commission to carry out its functions, and they do not appear to be useful to the general public.
- In addition, Part 46 of our regulations is devoted to the implementation of these two statutory reporting requirements. If FPA section 305(c) is repealed, then the Commission could eliminate Part 46 in its entirety.

Modification to the Commission's hydropower certification statutes

Congress could modify the Commission's authority for licensing hydropower projects in the following ways:

- Exempt all conduit projects from Commission jurisdiction (modeled after H.R. 5922, which intended to exempt 1.5 MW or less).

- Remove projects currently holding a conduit exemption from Commission jurisdiction. In the alternative, allow projects on federal lands, if they would otherwise qualify, to be eligible for a conduit exemption.

- Clarify that 5-MW exemptions may be located at government dams.

- Extend the term of preliminary permits for 2 years if activities under the original permit were conducted with due diligence.

2. Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.

Answer: As I stated in my testimony, the Commission's practice is to engage in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry. Below are several actions the Commission has taken to reduce unnecessarily burdensome or duplicative regulations. In addition, I welcome the President's new executive order asking independent agencies to engage in a public effort to reassess and streamline their federal regulations and have announced that the Commission will implement the President's executive order. When that review is completed, I would be happy to share our results with you.

Revisions to Form 552

- Under the Commission's Form No. 552, natural gas market participants must annually report information regarding physical natural gas transactions that use an index or that contribute to or may contribute to the formation of a gas index. Order No. 704 required market participants to file these reports in order to provide greater transparency concerning the use of indices to price natural gas and how well index prices reflect market forces. In Order No. 704-C the Commission reduced burden on the industry by revising Form No. 552 so as to (1) exempt from reporting any unexercised options to take gas under a take-or-release contract; (2) exempt from reporting cash-out imbalance and percentage of proceeds transactions, since they were burdensome to report and provided little market information; and, (3) strike the form's references to the blanket sales certificates issued under § 284.402 or § 284.284, since they were burdensome to report and provided little market information, so as to also exempt small entities who were obligated to report solely by virtue of possessing a blanket sales certificate.

Elimination of Form 11

- Form 11 was a quarterly filing made by natural gas companies whose gas transported or stored for a fee exceeded 50 million Dth in each of the three previous years. In 2008, in revising the Commission's financial forms to carry out its responsibilities under the NGA to ensure that rates are just and reasonable, the Commission eliminated a separate filing, Form 11, to streamline the filing process, mitigating the filing burden.

Electric Quarterly Report (EQR) requirements

- All public utilities are required to electronically file EQRs summarizing the contractual terms and conditions in their agreements for all jurisdictional services (including market-based power sales, cost-based power sales, and transmission service) and transaction information for short-term and long-term market-based power sales and cost-based power sales during the most recent calendar quarter. As indicated in a notice issued June 24, 2011, the Commission will be switching the filing mechanics from an outdated, difficult-to-support software platform to a more flexibly implemented process using the current business standard of XML. In this way, the Commission will allow EQR filers to develop their own methods for

submitting this vital part of its market based rate program rather than forcing them to use a system developed almost 10 years ago.

- In order to reduce the burden on companies making corrections to previously filed EQRs, the Commission has adopted a policy of limiting those corrections to the most recent 12 reports (three years) rather than requiring corrections back to the original filed EQRs which could be as early as 2001.

Semi-Annual Natural Gas Reporting Requirements

- Sections 284.13(e) and 284.126(c) of the Commission's regulations require certain pipelines to file semi-annual storage reports at the end of each complete storage injection and withdrawal season. On December 16, 2010, the Commission in Docket No. RM11-4-000 issued a Notice of Inquiry (NOI) regarding whether and how the semi-annual storage reports required of both interstate and intrastate pipelines should be modified in light of (1) changes in the natural gas market since the Commission originally adopted the semi-annual storage reporting requirements and (2) recent improvements in the Commission's other reporting requirements. As part of this NOI, the Commission sought comment on whether to retain a revenue reporting requirement and whether certain semi-annual storage reports should be folded into another form No. 549D. The Commission is still considering comments submitted in this proceeding.

The Honorable Joe Barton

1. **I am aware of a planned hydro project at an existing dam on Lake Livingston in Texas and the license application has been pending with FERC staff for over two years. Can you check on the Livingston application and let us know when the license might be issued?**

Answer: I cannot give you an exact date for when the Commission will act on the application, because the matter is still under consideration. However, I can tell you that Commission staff issued an environmental analysis of the proposed project on February 2, 2011. Staff has all of the information necessary to complete its analysis of the proposal and is working diligently on the matter.

The Honorable Sue Myrick

1. Due to the significant delay by the National Marine Fisheries Service in issuing a Biological Opinion for the Catawba-Wateree Hydro Relicensing process, what is stopping FERC from issuing the license for the project that reserves the right to reopen the license if/when short nose sturgeon are detected in the river basin?

Answer: A reopener would not protect the Commission against allegations that it had violated the Endangered Species Act (ESA) by issuing a license without completing consultation as required by section 7 of that Act. Also, in the absence of an incidental take permit – which is issued in conjunction with a biological opinion -- if project

operations resulted in the taking of listed species, the Commission as well as the licensee (and possibly certain individuals) could be subject civil and criminal penalties for violating section 10 of the ESA. In addition the license cannot be issued without action on the water quality certification from South Carolina.

The Honorable Cory Gardner

1. FERC is mandated, under the Federal Power Act, to provide rates that are "just and reasonable and not unduly discriminatory," but has instead allowed these rates in RTO markets to rise virtually unchecked.

What is FERC's view of its mandate under the Federal Power Act to ensure that wholesale electric rates are "just and reasonable and not unduly discriminatory?"

Answer: The premise of your question suggests several conclusions which are erroneous. It is suggested that FERC "...allowed...rates in RTO markets to rise..." and that FERC did so such that that rise was "...virtually unchecked." First, where competition is adequate, FERC generally does not control the rise or fall of electric rates in RTO markets. Rates in those wholesale markets are controlled by competitive market forces that are directly responsible for the level of those rates.

Next as to the "checks" on the RTO markets by FERC, the FERC oversees those markets and establishes the market rules and tariff conditions that all market participants must comply with or be subject to enforcement action and penalties. The FERC Office of Enforcement monitors the RTO markets on a daily basis and reviews market activity for signs of fraud and manipulation. Enforcement actions are brought if a market participant is not complying with the established market rules. In addition each RTO has an independent market monitor who also oversees market operations, reviews activity for instances of fraud and abuse, determines if the markets are operating competitively, and reports to the FERC Office of Enforcement. These market monitors in their annual reports to FERC for the past four years have reported that each of the RTO energy markets is competitive. So there are substantial "checks" on the RTO markets. But the purpose of those checks is to ensure that they are competitive and to prevent fraud and manipulation. There is no command and control of rates as you suggest in the wholesale energy markets. And historical data has demonstrated that such an uncompetitive system fails to provide optimum benefits for consumers.

Finally, your question seems to assume that rates have risen in the RTO markets. This is in fact not the case. Wholesale energy rates have fallen significantly across all RTOs since 2009. In particular, the chart below contrasts RTO prices for the past three years.

RTO	2008	2009	2010
ISO-NE	$97/MWh	$59/MWh	$66/MWh
PJM	$85/MWh	$56/MWh	$67/MWh
MISO	$53/MWh	$31/MWh	$35/MWh
SPP	$53/MWh	$27/MWh	$31/MWh
CAISO	$53/MWh	$38/MWh	$40/MWh
NYISO:			
Western Zone	$67/MWh	$44/MWh	$50/MWh
N.Y. City	$120/MWh	$66/MWh	$83/MWh

This reduction in rates is due to competitive forces and market fundamentals dictating rate levels. Wholesale prices dropped in recent years due in large part to a reduction in demand for electricity reflecting the economic recession. Electricity markets quickly adjusted to the fundamental reduction in demand by clearing at lower prices for consumers who were in the market, rather than requiring the time and expense of multi-month rate proceedings to adjust wholesale rates through a traditional rate case.

So in summary rates in RTO markets are controlled by competitive market forces that will cause wholesale rates to rise and in the case of the last two years fall depending on market fundamentals. Such market fundamentals work efficiently in properly designed and monitored markets. That market design and monitoring requires effective regulation such as that provided by FERC. By FERC establishing the regulatory framework enabling a fair, open and efficient competitive energy markets in the RTOs consumers will be provided the opportunity to take advantage of wholesale electric rates that are truly "just and reasonable and not unduly discriminatory." This is how competition works for the benefit of consumers.

2. A provision in the 2005 Energy Policy Act allowed for voluntary participation in RTOs by federal utilities (TVA, BPA, WAPA). However, RTO participation seems hardly voluntary when it comes to wholesale market customers. If a distribution utility or an industrial customer, for example, is in an RTO region and the transmission and generation owners in its region have decided to participate, it has no other choice but to take part in the market.

Are small utilities and industrial customers able to "opt-out" of RTO markets if they are located within the RTO's geographic footprint?

Answer: There is no requirement that any entity join (or "opt-into") an RTO or ISO. Membership in any RTO or ISO is voluntary. An entity must apply to become a member, agree to comply with the terms of the appropriate agreements, and pay any applicable

membership fee. For example, the voluntary nature of RTO and ISO membership is reflected in the Operating Agreement of PJM Interconnection, L.L.C. (PJM), which specifies that nothing in the PJM membership provisions "is intended to remove, in any respect, the choice of participation by other utility companies or organizations in the operation of the PJM Region through inclusion in the System of a Member." An entity may join an RTO or ISO and later decide to leave that RTO or ISO under terms specified in the provisions of the RTO's or ISO's tariff. For example, the NEPOOL Agreement in ISO-New England (ISO-NE) allows entities to withdraw from the RTO upon 60 days' notice.

A small utility or industrial customer that is a participant in an RTO or ISO is not obligated to purchase its electricity from the RTO- or ISO-administered markets. All participants may (and many do) purchase their power under bilateral contracts and schedule delivery of their bilateral purchases through the RTO or ISO. Bilateral contracts are fully supported within the market and a market participant does not need to opt out of an RTO or ISO to take advantage of such transactions.

In some RTOs and ISOs with capacity markets, a market participant may secure future capacity outside of the RTO or ISO market. For example, PJM administers a forward capacity market that secures a variable resource capacity requirement for the regional participants for a three-year forward delivery year. Entities may opt out of the variable resource capacity requirement in favor of a fixed-resource capacity requirement and remain participants in the RTO/ISO energy and operating reserves markets.

3. Since their creation by FERC, the RTOs themselves have become regional authorities subject to federal approval that tend to favor transmission owners and remote generators, potentially at the expense of ratepayers. Further, the stakeholder process that is supposed to guide decisions at the RTO is dominated by those entities that own the assets – namely, the power generators.

What recourse does a retail customer in an RTO region have if wholesale power and transmission rates increase without sufficient justification? What recourse does a state public service commission have?

Answer: RTOs and their decision-making processes, by FERC requirement, must be independent of control by any market participant or class of market participants. Commission policy, as detailed in Order No. 719, also requires RTOs and ISOs to be responsive to customers and other stakeholders, and to ensure that customers and other stakeholders have access to the RTO board of directors. The Commission has assessed the responsiveness of each RTO using four criteria: inclusiveness; fairness in balancing interests; representation of minority positions; and ongoing responsiveness.

Each RTO is responsible for developing its own stakeholder process, and those processes vary from region to region. The Commission encourages interested parties to act through the RTO stakeholder process to ensure that their concerns are heard and addressed. By participating in the stakeholder process, interested parties are able to assist

in shaping RTO policy on the ground floor. Many state commissions (and in four regions, associations of state commissions) participate in RTO stakeholder processes.

Any party, including retail customers and state public service commissions, may file comments on RTO rate and tariff proposals pending before the Commission, or file a complaint if they believe that wholesale power and transmission rates are unjust and unreasonable.

4. Over the past four years there have been several cases where the behaviors of certain market participants caused prices to skyrocket. Such cases included the circuitous scheduling of power flows to the NY ISO around Lake Erie that resulted in at least $100 million in excess transmission costs, non-competitive bids of three New York state generators costing an additional $2.7 million, and the Edison Mission Corporation use of a "high-offer" pricing strategy to withhold generation from the market and drive up prices.

Why has FERC chosen not to use its authority under the Federal Power Act to order disgorgement of such dollars or refunds to electric customers who were harmed by such behaviors of market participants?

Answer: The Commission uses its statutory authority to order disgorgement when it determines that: (1) the conduct of a market participant violates the Federal Power Act or other governing statute, or a rule, regulation, or order issued pursuant thereto; and (2) the violation resulted in unjust profits. Since the Commission received its enhanced civil penalty authority in the Energy Policy Act of 2005, it has ordered the payment of over $150 million in civil penalties and the disgorgement of another $35 million in unjust profits. However, in cases where the Commission determines that no violation occurred, or where the facts are insufficient to prove such a violation at trial, the Commission does not have the authority to order disgorgement. The Commission also requires the payment of refunds to electric customers when it is appropriate to do so.

With regard to the three matters mentioned above, the Commission determined either that the conduct of the market participants did not constitute a violation of the Federal Power Act, or a rule, regulation, or order issued pursuant thereto, or that the facts were insufficient to prove such a violation; and therefore, the Commission did not have the authority to order disgorgement. However, the Commission approved a settlement requiring Edison Mission to pay a civil penalty of $7 million and to spend at least $2 million on a compliance plan.

5. How does FERC expect to deter such future behaviors without ordering restitution to electric customers for the excess costs they have paid?

Answer: The Commission will aggressively seek disgorgement in any case for which it is appropriate. In those cases where a market participant's conduct does not constitute a violation and disgorgement is therefore inappropriate, the Commission will seek

alternative, prospective remedies, such as market rule changes to prohibit conduct that caused electric customers to incur excessive costs.

6. If electric customers do not receive refunds or restitution for transactions undertaken without a legitimate commercial purpose that raises prices for customers, how can the rates still meet the just and reasonable standard under the Federal Power Act?

Answer: The Commission is required to ensure that the rates under its jurisdiction meet the just and reasonable standard under the Federal Power Act through ratemaking proceedings, tariff filings, and careful review procedures. When the Commission becomes aware that a filed rate is unjust or unreasonable, the Federal Power Act only authorizes the Commission to order refunds from the point at which the relevant proceeding was initiated by a complaint or Commission order. 16 U.S.C. § 824e (2006). Likewise, when the Commission becomes aware that an existing market rule results in unjust or unreasonable rates, the Commission is authorized to amend that market rule, but it is not authorized to order market participants that have not committed violations to disgorge profits earned through legitimate business activities.

7. In recent hearings held by the Maryland Public Service Commission in October 2010, several independent builders of new generation stated that capacity markets do not provide needed long-term price stability to attract investors in new power plants.

Given that this market pays almost all revenues to owners of existing facilities and discourages new market entrants, how does FERC demonstrate that this market is encouraging competition, improving the reliability of supply, and that the rates produced meet the just and reasonable standard set out in the Federal Power Act?

Answer: PJM, which is the RTO serving Maryland, meets its reliability needs at least cost by securing capacity resources in a three-year forward auction. The PJM auction is designed to encourage competition among all capacity resources on a non-discriminatory basis, and to ensure that PJM acquires adequate capacity resources in a competitive, non-discriminatory auction, so that rates produced meet the just and reasonable standard set out in the Federal Power Act. In the annual auctions, existing and new generation resources, upgrades to existing resources, transmission enhancements, demand response, and energy efficiency compete to provide reliability of supply to consumers. To date, PJM has secured more than enough capacity to meet its needs in each delivery year at a market-clearing price that is lower than the projected cost of new entry. Capacity clearing prices have varied among different regions for some delivery years, but the actual market-clearing prices generally have been less than the projected cost of new entry in even the highest cost regions.

PJM's Reliability Pricing Model (RPM) is designed to provide the appropriate price signals when new resources are needed to meet PJM's reliability requirements. PJM is discussing with its stakeholders additional capacity auction mechanisms and changes to its open access transmission tariff that governs new entry pricing alternatives. Such changes, if adopted, would expand the role of longer-term commitments that might facilitate the building of new generation by providing more long-term price certainty for new generation to enter the capacity market.

8. **The changes to the capacity market rules in both PJM and ISO-NE that FERC has ordered will undo language in the tariffs that was negotiated through a multi-party settlement process. This will be done without a hearing or the opportunity to negotiate replacement protections.**

What is the potential impact of this action on participation by market participants, especially customer and load (demand) representatives, in future settlement processes?

Answer: On April 12 and 13, 2011, the Commission issued orders on proposed alterations to the capacity markets in these regions to address concerns over the exercise of market power in capacity auctions. Parties have filed requests for rehearing of these orders, which the Commission is currently considering. Because both of these proceedings are still pending, I cannot comment further on the specifics of these matters at this time.

Generally, the Commission encourages interested parties to participate in settlement processes starting at the beginning of the process, as this can often be the best way of ensuring that their interests are fully considered. The Commission gives a great deal of consideration to the results of settlement processes as representative of the collective views of the parties involved; however, it is ultimately the Commission's responsibility to ensure that rates are just and reasonable and not unduly discriminatory. When making our rulings, the Commission solicits and review comments from interested parties, including from customer and load representatives.

9. **EIA data shows greater levels of construction of generation capacity in non-RTO markets. A number of studies also project high levels of coal plant closures following implementation of pending EPA regulations – with greater levels of closures in RTO regions.**

Has FERC investigated this disparity, and if so, what steps is it taking to promote the construction of new baseload generation capacity in RTO markets?

Answer: No, the Commission has not conducted such an investigation. As noted in the response to question 7, RTO capacity markets are designed to secure a competition-based combination of capacity resources to meet reliability needs on a non-discriminatory basis. The various competitive market approaches to obtaining capacity are not designed to promote any particular capacity type, such as new baseload generating capacity, over any

other type of new or existing generating capacity resource, demand response, energy efficiency, or transmission capacity resource.

10. If not, is FERC concerned about the low levels of new generation construction in RTO regions given pending coal plant closures?

Answer: The Commission expects that competitive markets will provide appropriate incentives for construction of new generation. It is important to note that available data indicates that the electric utility industry has added significant amounts of generating facilities when circumstances warranted.

Federal Trade Commission

House of Representatives Committee on Energy and Commerce "The Views of the Independent Agencies on Regulatory Reform"

July 7, 2011

Responses to Questions for the Record to Chairman Jon D. Leibowitz From Chairman Cliff Stearns

1. **In your testimony you said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." Can you please give us a list of such statutes you have identified so far, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

Commission staff are continuing to try to identify statutes that appear to be of limited value, but that divert business or Commission resources from more pressing work. Thus far, staff have identified two statutorily mandated reports, the benefits of which do not appear to be justified by the cost required to research and produce them.

The first is a statutory requirement to issue reports on concentration in the ethanol market. Section 1501(a)(2) of the Energy Policy Act of 2005 imposes an annual requirement on the Commission to "perform a market concentration analysis of the ethanol production industry... to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior."[1] The Commission has found each year that the market is extremely unconcentrated, and that entry is easy and ongoing.[2] Therefore, these reports seems to provide little useful information.

The second is a statutory requirement for reports on college scholarship scams. The College Scholarship Fraud Prevention Act of 2000[3] requires that the Attorney General, the Secretary of Education, and the FTC jointly submit to Congress each year a report on that year's incidence of fraud by businesses or individuals marketing financial aid assistance services to consumers. Though stopping scholarship scams is an important priority, the report simply describes actions taken to address scholarship scams. Thus, the report appears to provide little valuable information.

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[1] Energy Policy Act of 2005 § 1501(a)(2), 42 U.S.C. § 7545(o)(10) (2009).

[2] Under the FTC and DOJ Horizontal Merger Guidelines, market concentration is calculated using the Herfindahl-Hirschman Index ("HHI"). The HHI measures concentration by summing the squares of each participant in a market. An HHI can be no higher than 10,000, which is reached when a market is a monopoly. The Merger Guidelines regard an HHI below 1500 as unconcentrated. Mergers resulting in an HHI of up to 1500 are unlikely to have anticompetitive effects and generally require no additional analysis. *See* U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, at 24-26, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf. The HHI in the ethanol industry is less than 700, which represents a highly unconcentrated market.

[3] Pub. L. No. 106-420, 114 Stat. 1867

The ethanol report requirement imposes some burden on business, as Commission staff must interview market participants to verify company-specific information gleaned from public sources and reformulated fuels association publications. The scholarship report requirement does not impose any burden on business. However, both reports use FTC staff resources that could be used to address other problems, and neither appears to produce much of value for Congress, businesses, or the Commission.

We would recommend Congress strike the requirements that the Commissions produce these reports.

2. **Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.**

To ensure that the Commission's regulations and compliance advice remain cost-effective, the FTC has engaged in a voluntary, systematic review program for the last two decades, scheduling all rules and industry guides for review on a ten-year cycle. Pursuant to that program, the Commission has rescinded 37 rules and guides, and made significant updates and improvements to dozens of others, since the early 1990s. Please see Attachment A the enclosed document for a complete list of rescinded and revised guides and rules.

Questions for the Record to Chairman Jon D. Leibowitz from the Honorable Brian Bilbray

1. **In a May 2011 interview, Chairman Leibowitz stated that "one of the commission's priorities is to find a pure section five case under unfair methods of competition. Everyone acknowledges that Congress gave us much more jurisdiction than just antitrust." In contrast, in 2009, the U.S. Chamber of Commerce published a 2009 article (attached) that casts doubt on the FTC's authority to expand its jurisdiction under Section 5. The Chamber stated, "The character of many of these proposals, as well as their scope and diversity, highlights key disadvantages of extending Section 5 beyond the range of the existing antitrust laws." Please comment on the Chamber's views that we should look with skepticism at the expansion of Section 5?**

Reasonable people can disagree about when the Commission should use Section 5, but no one debates that Congress intended to give the FTC broader jurisdiction than the antitrust laws. One of the advantages of using Section 5 is that since, by its nature, it is not an antitrust statute, it is much harder (if at all possible) to bring a follow-on private treble damage suit. For that reason, I strongly believe that, once it thinks these issues through, the Chamber will be more supportive of the Commission's judicious use of its Section 5 authority.

Congress established the Commission as a bi-partisan independent agency with a mandate to protect the public from unfair methods of competition. Congress intended that the Commission play a unique role in the economic life of the nation. As the Supreme Court explained in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972), in which it thoroughly

examined the legislative history of the FTC Act, Congress intended for the Commission to proscribe unfair business practices that are not condemned under the letter of the antitrust laws. Senator Cummins, one of the bill's main proponents, squarely stated on the Senate floor: "[t]hat is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law." 51 Cong. Rec. 12,454 (1914). While the vast majority of our antitrust enforcement actions involve conduct that falls within the prohibitions of the Sherman or Clayton Acts, the Commission has a broader mandate, which it discharges by challenging under Section 5 conduct that is likely to result in demonstrated harm to consumers or to the competitive process.

Indeed, Section 5 may be the only practicable means to stop some conduct that harms consumers but that cannot be reached under the antitrust laws. The Commission's recent use of Section 5 demonstrates that the Commission is committed to using that authority in predictable ways that enhance consumer welfare. For instance, the Commission has used Section 5 to prevent "invitations to collude" by fixing prices. A competitor's invitation to its nominal rival to fix prices does not violate the Sherman Act, but it serves no lawful purpose and creates an intolerable risk that price fixing will result. And even if an invitation to collude is rejected by rivals, it can undermine the process by which prices are set by independent competitors and lead to tacit coordination. The Chamber of Commerce already agrees with this as they note in their article that "there are certain, limited forms of anticompetitive conduct that may not be covered by the antitrust laws," including invitations to collude.[4]

Congress chose to give the Commission its broad mandate rather than handing the Commission a list of specific acts to be condemned as unfair because it knew that no such list could be, or long remain, sufficiently complete to protect competition and consumers. To address concerns about the fairness of not doing so, Congress limited the remedies available for violations of Section 5, and Section 5 does not provide for a private right of action. Because of the limited consequences of Section 5 enforcement, the Commission uses its Section 5 authority not to punish the wrongdoer, but to fairly eliminate the conduct that is likely to injure competition and consumers, allowing honest and competitive markets to further consumer welfare.

2. **The Association for Competitive Technology (ACT) represents a number of tech companies including Microsoft, Oracle, and VeriSign. ACT has blogged about Chairman Leibowitz's desire to expand the FTC's Section 5 authority. It wrote that Chairman Leibowitz "is arguing that requiring actual economic analysis of alleged 'harms to competition' is too high a bar for his agency. They need to be able to prevent business practices they believe are harmful to competition and consumers, even if the economic analysis suggests otherwise. And in this new regime, companies will have little guidance as to what the FTC will consider legal vs. illegal." This doesn't seem to be the right policy for the agency to be pursuing. Why is the FTC doing so?**

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[4] U.S. Chamber of Commerce, *Unfair Methods of Competition Under Section 5 of the FTC Act: Does the U.S. Need Rules "Above and Beyond Antitrust"?* Competition Pol'y Int'l, Sept. 2009, at 2.

The Commission will not bring a case where the evidence shows no actual or likely harm to competition or consumers. As I explained in testimony[5] before the Senate Judiciary Committee last summer, "Of course, in using our Section 5 authority the Commission will focus on bringing cases where there is clear harm to the competitive process and to consumers." That means that any case the Commission brings under Section 5 will be based on demonstrable harm to consumers or competition. For instance, in the Intel case,[6] a unanimous and bipartisan Commission alleged that Intel's behavior harmed consumers and the competitive process in a number of ways, such as raising the price of computers; limiting consumer choice; inhibiting competition from non-Intel chip makers; reducing innovation by computer makers; and reducing the quality of industry benchmarking. Commission staff was prepared to offer proof of these harmful effects to establish that Intel violated Section 5, as well as Section 2 of the Sherman Act. As you know, Intel offered to settle the case, resulting in a Commission order eliminating the harmful conduct.

I realize that Intel is one of ACT's largest members, but for the reasons stated in Question 1, I am confident that it, like the Chamber, and even Intel in time, will be more supportive of our Section 5 enforcement mission.

3. **Following Sherman Act jurisprudence, traditionally the FTC has interpreted Section Five of the Federal Trade Commission Act to require demonstrable consumer harm to apply. But more recently the commission has been pursuing an interpretation of Section Five of the FTC Act that would give the agency unprecedented and largely-unchecked authority. In particular, the definition of "unfair" competition wouldn't be confined to the traditional measures – reduction in output or increase in price – but could expand to, as one commentator put it "just about whatever the agency deems improper." Why is the FTC pursuing what this commentator called "largely-unchecked" authority?**

Congress created the FTC and gave it authority under Section 5 to combat unfair methods of competition. The Supreme Court has on more than one occasion upheld the FTC's authority to use Section 5 to protect competition and consumers.[7] We use this authority to challenge anticompetitive conduct that harms or is likely to harm the competitive process, thereby harming consumers through higher prices, reduced quality and service, and fewer choices. The Commission will not bring a case where the evidence shows no actual or likely harm to competition or consumers. Its authority is not "unchecked," as federal courts review appeals of FTC cases and ultimately decide the reach of Section 5.

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[5] Prepared Statement of the Federal Trade Commission, "*How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy*," before the Subcommittee on Antitrust, Competition and Consumer Rights of the Senate Judiciary Committee (June 9, 2011), *available at* http://www.ftc.gov/os/testimony/100609dynamiceconomy.pdf

[6] *In the Matter of Intel Corporation*, Docket No. 9341, Administrative Complaint dated December 16, 2009 *available at* www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

[7] FTC v. Sperry & Hutchinson, 405 U.S. 233, 240 (1972). Also, the Supreme Court observed in Indiana Federation of Dentists that the "standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons." FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986).

The Commission uses this authority when conduct and consumer harm cannot be addressed through the antitrust laws. We have an obligation to use this authority judiciously – and I think we have. On this point, our actions speak for us. For example, recently in N-Data, we used Section 5 to stop a "patent troll" from holding the computer industry hostage after that firm reneged on a commitment to a standard setting body. Because the industry relied on the commitment made by a previous owner of the patent and used the patented technology in the standard, the misconduct did not cause the firm's monopoly power and could not have been subject to the Sherman Act. The Commission stopped the conduct using section 5 because the conduct threatened to harm consumers by impeding the standard-setting process and the adoption of the standard in question. As industry participants Cisco, Oracle, IBM and Sun noted in their comment to the Commission in response to the N-Data order: "We welcome the Commission's use of its broad authority under Section 5 of the FTC Act against abusive conduct with regard to patents implicated in standards development processes. The circumstances alleged in the N-Data complaint and accompanying documents exemplify how there may well be abuse of this kind that threatens serious injury to [standards development organizations] participants and to the consuming public but that may be difficult to reach under established Sherman Act standards."[8]

We also used our Section 5 authority in the Intel case,[9] specifically to deal with alleged deception on Intel's part that skewed competition in its favor. In my opinion, this is a great example of how Section 5 allows the Commission to address both deceptive and unfair methods of competition. We also used our Section 5 authority in our recent case against U-Haul.[10] U-Haul is an important case because it shows precisely why Section 5 authority is necessary. We alleged that U-Haul's parent company had attempted to collude with its competitor, Budget, to raise prices in the truck rental market. This is clearly conduct that ought to be prohibited – but the Sherman Act addresses actual collusion, and not mere "invitations to collude." Section 5 provided the right means to stop U-Haul's unilateral anticompetitive conduct before it resulted in a completed Section 1 violation. Commission votes on Intel and U-Haul were unanimous and bipartisan.

4. **Gary Shapiro, the CEO of the Consumer Electronics Association (CEA), recently made the following statement regarding a high profile announcement from the FTC: "The fact that any given company is big or successful does not inherently make it bad. Unfortunately, in America it seems that our most successful and innovative firms attract the most intrusive regulatory scrutiny. These expensive, drawn-out investigations deter innovation, siphon money from productive uses, and place additional burdens on those trying to grow our economy. We urge the FTC to conduct its investigation narrowly and swiftly, and let Google get back to the critical business of innovation and job creation." Please respond to that quote? Whether in Google's case or any other, are successful**

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[8] Comment of Cisco Systems, Inc., International Business Machines Corporation, Oracle Corporation and Sun Microsystems, Inc., In the Matter of Negotiated Data Solutions, File No. 051 0094, *available at* http://www.ftc.gov/os/comments/negotiateddatasol/534241-00012.pdf at 3.

[9] In the Matter of Intel Corporation, Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/index.shtm.

[10] In the Matter of U-Haul International, Inc., File No. 081 0157, *available at* http://www.ftc.gov/os/caselist/0810157/index.shtm.

companies attracting "the most intrusive regulatory scrutiny" and is that a good thing for the U.S. – especially given current economic conditions? What message does that send to foreign antitrust authorities about how they should conduct investigations?

I cannot comment directly on any particular matter, but I can say that we take our responsibilities to enforce the antitrust laws without placing undue burdens on businesses very seriously. Moreover, Mr. Shapiro is of course right: the fact that a company is big or successful or acquisitive does not inherently make it "bad" – nor should it.

But an investigation is a dynamic process. Our staff works closely with parties subject to investigation to gather information quickly and efficiently. Staff negotiates the scope of information required, and modifies and limits information requests as it learns facts that enable it to refine the focus of our investigations. And we have an internal appeals process so that parties may appeal to the Commission any compulsory process requests that they feel are overbroad. Our staff makes itself readily available to meet with parties subject to investigation. To provide transparency to our investigations, staff explains its theories of competitive harm. This gives the parties opportunities to make presentations and provide evidence to explain why they think staff may be wrong.

At the same time, we must investigate credible complaints of anticompetitive conduct and gather evidence needed to enforce the antitrust laws to their full extent to protect competition and consumers from undue harm. We protect competitive markets so that companies of all sizes have the opportunity to be successful and innovative. But antitrust law is concerned with the wrongful acquisition or maintenance of substantial market power, and so it is not surprising that large and successful enterprises may be subject to scrutiny at times. We incorporate sound economic theories into our analyses and assessments of business practices, and we strive not to interfere unduly in the competitive process and to carefully consider economic justifications for business conduct. Even when a business practice may on its face appear to be anticompetitive, the business may have a sound economic justification for the practice which may create efficiencies and allow it to compete more aggressively to provide value to consumers. If we do not have evidence that conduct is likely to create harm to competition or consumers, we will not bring an enforcement action.

We promote these same principles in our international relations. We work with our foreign counterparts to promote convergence and cooperation through organizations such as the ICN and OECD. These programs have promoted more efficient and economically sound antitrust enforcement worldwide.

5. **Prior to Google's announcement of an FTC investigation into its competitive practices there were a lot of news stories about the battle between the FTC and the DoJ over which agency would get to investigate the company. In fact, Assistant Attorney General for Antitrust Christine Varney questioned whether two agencies should have antitrust review powers. She stated "I would leave to Congress how they would like to resolve the overlapping and sometimes inconsistent jurisdiction between the agencies... I think what business does need is clarity, certainty and understanding of the legal**

framework within which their deals will be evaluated." Do you think that the overlapping jurisdictions of the FTC and Department of Justice – and the fights that they produce – are a good thing for American businesses and consumers? If not, how would you propose to fix it?

I believe the FTC and the Department of Justice generally work well together to promote and protect competition and the interests of American consumers and businesses. Both agencies have areas of expertise, and the differences in their organizational structures are deliberate decisions by Congress and provide certain benefits. For example, the FTC was created by Congress as an independent agency with expertise in both consumer protection and antitrust. One of the principal benefits of the FTC is that it is bi-partisan and our decisions require consultation and consensus. That means that our enforcement efforts do not change much as we go from administration to administration. Further, because Congress wisely charged the Commission with competition and consumer protection enforcement, we have a broad perspective that enhances our work. The FTC also was chartered by Congress to use non-litigation activities, such as issuing reports, performing empirical studies, and advocating for pro-competition reforms with other government agencies, to support and strengthen the agency's competition and consumer protection missions.

This year, the agencies worked closely together on several joint policy projects to provide transparency and predictability for businesses subject to the antitrust laws. Last August, FTC and DOJ issued revised Horizontal Merger Guidelines, a core document that provides businesses with a clear view into how the agencies conduct antitrust merger reviews. This year, the agencies also jointly developed a Proposed Antitrust Enforcement Policy relating to cooperation among health care providers organizing Accountable Care Organizations under the Affordable Care Act. These joint statements reflect a high level of consensus and cooperation, and serve as models for competition agencies throughout the world.

To be certain, there are occasional clearance disputes over which agency is in the better position to investigate a matter. In most instances, one or the other agency has greater expertise in the industry of potential concern due to a previous investigation, and clearance is given to that agency right away. But in grey areas, such as where neither agency has conducted an investigation in the past or where both have, both agencies can make a claim that a related investigation gives them a head start on the facts and issues that are likely to arise. The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly, so that one agency can get started on the investigation and minimize any burden on the parties. Recently, as most all observers of the antitrust agencies have acknowledged, clearance disputes have been rare and are handled quickly.

6. **Some people have criticized the FTC's administrative adjudication process as unfair. In fact, the Commission has told Congress that the last time the Commissioners ruled against their own lawyers was in 1995. 1995 – Clinton's first term and the year Yahoo! Was incorporated. Does the fact that neither the ALJ nor the Commission has ruled against its own attorneys in over 16 years cause you any concern about the process being fair and open?**

I believe the Commission's administrative process is open and fair, mainly because Congress built in several fail-safe features when it created the agency. As an independent, bi-partisan agency with law enforcement authority, the Commission, through its career staff, investigates potential law violations and issues a complaint only if a majority of the Commission itself finds that there is reason to believe that a law within its authority has been violated. Depending on the violation, the Commission then initiates a case in federal court or in its own administrative process where the Commission's allegations are tested by an independent administrative law judge and the defendants have the opportunity to present contrary evidence and cross-examine witnesses. Final Commission decisions can be appealed to the federal courts.

Of course, we are always working to improve our adjudicative process. For instance last year, in response to objections that the administrative process took too long, the Commission revised its rules to streamline and improve the agency's "Part 3" adjudicative proceedings. The new rules expedite the prehearing, hearing, and appeal phases; streamline discovery and motion practice; and ensure that the Commission can apply its substantive expertise, as appropriate, earlier in the process.[11]

Questions for the Record to Commissioner William E. Kovacic from Chairman Cliff Stearns

1. **In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." Please provide us with a list of such statutes you have identified so far, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

I endorse the answer provided by Chairman Leibowitz to this question.

2. **Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.**

I endorse the answer provided by Chairman Leibowitz to this question.

Questions for the Record to Commissioner William E. Kovacic from the Honorable Brian Bilbray

1. **In a May 2011 interview, Chairman Leibowitz stated that "one of the commission's priorities is to find a pure section five case under unfair methods of competition. Everyone acknowledges that Congress gave us much more jurisdiction than just antitrust." In contrast, the U.S. Chamber of Commerce published a 2009 article (attached) that casts**

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[11] *FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice,* news release dated April 27, 2009, *available at* http://www.ftc.gov/opa/2009/04/part3.shtm.

doubt on the FTC's authority to expand its jurisdiction under Section 5. The Chamber stated, "The character of many of these proposals, as well as their scope and diversity, highlights key disadvantages of extending Section 5 beyond the range of the existing antitrust laws." Please comment on the Chamber's views that we should look with skepticism at the expansion of Section 5?

In adopting Section 5 of the Federal Trade Commission Act in 1914, Congress intended the FTC to use Section 5's mandate to play a central role in creating norms of business behavior. This role contemplated that the Commission in some instances would prohibit behavior not previously banned by judicial interpretations of the other antitrust laws. Congress expected that Section 5's elastic mandate would provide valuable flexibility to adapt federal competition policy to respond to new commercial phenomena and to incorporate new learning in economics and law. This intuition remains sound today. For a fuller treatment of this point, I refer the members of the Subcommittee to William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust Law Journal 929 (2010) (hereinafter "*Competition Policy*").

2. **The Association for Competitive Technology (ACT) represents a number of tech companies including Microsoft, Oracle, and VeriSign. ACT has blogged about Chairman Leibowitz's desire to expand the FTC's Section 5 authority. It wrote that Chairman Leibowitz "is arguing that requiring actual economic analysis of alleged 'harms to competition' is too high a bar for his agency. They need to be able to prevent business practices they believe are harmful to competition and consumers, even if the economic analysis suggests otherwise. And in this new regime, companies will have little guidance as to what the FTC will consider legal vs. illegal." This doesn't seem to be the right policy for the agency to be pursuing. Why is the FTC doing so?**

The Commission should and does rely upon economic analysis when it uses its norms creation function under Section 5 to prohibit conduct. Modern judicial decisions have indicated that the courts will sustain the FTC's use of Section 5 only upon a showing that the behavior at issue poses actual or likely harm to competition. This is fundamentally an economic inquiry.

At the same time, I believe it is appropriate for the Commission to issue a policy statement that describes when the agency will apply Section 5 and states the limiting principles that will inform the exercise of this authority. *See* Kovacic & Winerman, *Competition Policy*, at 944.

3. **Following Sherman Act jurisprudence, traditionally the FTC has interpreted Section Five of the Federal Trade Commission Act to require demonstrable consumer harm to apply. But more recently the commission has been pursuing an interpretation of Section Five of the FTC Act that would give the agency unprecedented and largely-unchecked authority. In particular, the definition of "unfair" competition wouldn't be confined to the traditional measures–reduction in output or increase in price–but could**

expand to, as one commentator put it, "just about whatever the agency deems improper." Why is the FTC pursuing what this commentator called "largely-unchecked" authority?

FTC decisions applying Section 5 are subject to review in the courts of appeals. I am unaware of any trend in the history of Section 5 jurisprudence for courts to endorse the view that Section 5 permits the Commission to condemn "just about whatever the agency deems improper." Not since the 1960s has the FTC prevailed in the courts on a competition claim premised solely upon Section 5. Instead, it has suffered a number of defeats in such endeavors, including a famous trilogy of setbacks in the courts of appeals between 1979 and 1984. See Kovacic & Winerman, *Competition Policy,* at 942. This experience does not suggest that the FTC's Section 5 authority is "largely unchecked."

4. **Gary Shapiro, the CEO of the Consumer Electronics Association (CEA), recently made the following statement regarding a high profile announcement from the FTC: "The fact that any given company is big or successful does not inherently make it bad. Unfortunately, in America it seems that our most successful and innovative firms attract the most intrusive regulatory scrutiny. These expensive, drawn-out investigations deter innovation, siphon money from productive uses, and place additional burdens on those trying to grow our economy. We urge the FTC to conduct its investigation narrowly and swiftly, and let Google get back to the critical business of innovation and job creation." Please respond to that quote? Whether in Google's case or any other, are successful companies attracting "the most intrusive regulatory scrutiny" and is that a good thing for the U.S. -- especially given current economic conditions? What message does that send to foreign antitrust authorities about how they should conduct investigations?**

I have nothing to say about the Google matter or any other law enforcement investigation pending before the FTC.

I am aware of no evidence that supports the statement that the "most successful and innovative firms attract the most intrusive regulatory scrutiny."

5. **Prior to Google's announcement of an FTC investigation into its competitive practices there were a lot of news stories about the battle between the FTC and the DoJ over which agency would get to investigate the company. In fact, Assistant Attorney General for Antitrust Christine Varney questioned whether two agencies should have antitrust review powers. She stated, "I would leave to Congress how they would like to resolve the overlapping and sometimes inconsistent jurisdiction between the agencies... I think what business does need is clarity, certainty and understanding of the legal framework within which their deals will be evaluated." Do you think that the overlapping jurisdictions of the FTC and Department of Justice - and the fights that they produce - are a good thing for American businesses and consumers? If not, how would you propose to fix it?**

Dual, concurrent jurisdiction has created tension between the two federal antitrust agencies since the adoption of the Clayton Act and the FTC Act in 1914. This is an inevitable result of placing two public institutions within the same policy domain. One way to reduce this tension and improve the performance of the U.S. antitrust system is to permit the two agencies to make an agreement that clarifies and rationalizes the allocation of responsibilities between the two bodies. The two agencies reached such an agreement early in 2002, but the threat of congressional retribution caused these reforms to collapse. Reconsideration of such an initiative, with congressional support, would be a useful first step to place the U.S. system on a better institutional footing.

6. **Some people have criticized the FTC's administrative adjudication process as unfair. In fact, the Commission has told Congress that the last time the Commissioners ruled against their own lawyers was in 1995. 1995 -- Clinton's first term and the year Yahoo! was incorporated. Does the fact that neither the ALJ nor the Commission has ruled against its own attorneys in over 16 years cause you any concern about the process being fair and open?**

I see no unwillingness on the part of the courts of appeals to review Commission decisions carefully and reverse decisions that they believe to be improvident in substance or process. The certainty of this scrutiny has provided abundant incentives for the agency to decide its cases in a fair and open manner.

FTC Rules and Guides Previously Eliminated
in the Regulatory Review Process

PART	TITLE
19	Guides for the metallic watch band industry
21	Guides for the mirror industry
22	Guides for the hosiery industry
24	Guides for the luggage and related products industry
228	Tire advertising and labeling guides
229	Guides for advertising fallout shelters
230	Guides for advertising shell homes
231	Guides for shoe content labeling and advertising
232	Guides for advertising radiation monitoring instruments
234	Guides for the mail order insurance industry
235	Guides against deceptive labeling and advertising of adhesive composition
236	Guide for avoiding deceptive use of word "mill" in the textile industry
237	Guides against debt collection deception
241	Guides for the dog and cat food industry
242	Guides against the deceptive use of the word "free" in connection with the sale of photographic film and film processing service
243	Guides for the decorative wall paneling industry
244	Guides for the greeting card industry relating to discriminatory practices
245	Guides for the watch industry
247	Guides for the ladies' handbag industry
248	Guides for the beauty and barber equipment and supplies industry