May 1, 2015

Chairman Johnson,
Chairman Lankford,
Ranking Member Carper, and
Ranking Member Heitkamp
U.S. Senate Committee on Homeland Security & Governmental Affairs
Washington, DC

Re: March 18, 2015 Letter Requesting Views on Improving Federal Regulatory Process

Dear Honorable Johnson, Lankford, Carper, and Hietkamp:

We the undersigned are Member Scholars and Staff with the Center for Progressive Reform (CPR), a think tank and research institute that is composed of a network of sixty scholars across the nation and that is dedicated to protecting health, safety, and the environment through analysis and commentary. We appreciate this opportunity to provide the members of the U.S. Senate Committee on Homeland Security and Government Affairs with my views on the problems with the U.S. federal regulatory system and reforms that are needed to address those problems. Broadly speaking, the regulatory system has become heavily tilted in favor of powerful corporations so that it is now more attentive to their narrow interests, rather than the broad public interest in protecting people and the environment against unacceptable harms that the agencies were created to address. The result is that the Clean Air Act, the Federal Food, Drug, and Cosmetic Act, the Occupational Safety and Health Act, and other public interest laws that Congress has enacted over the past several decades are not being implemented as intended. Meanwhile, the public continues to bear the high costs of corporations' polluting and other harmful activities, and corporations continue to remain unaccountable for the harm their activities are causing.

Congress can and should take steps to address the many problems that are undermining the effective performance of the regulatory system. Below, we sketch out three major defects in regulatory process that, if addressed, would enable the regulatory system to once again work in the public interest. They include:

- The use of economic cost-benefit analysis;
- The role of centralized regulatory review at the White House Office of Information and Regulatory Affairs; and
- Interference by the Small Business Administration's (SBA) Office of Advocacy.

Center for Progressive Reform
455 Massachusetts Ave., NW #150-513
Washington, DC 20001
www.progressivereform.org
(202) 747-0698
phone/fax
info@progressivereform.org

Before turning to these issues, we will first provide background aimed at dispelling some common misconceptions about the regulatory system. Then, we will outline how weakened and delayed rules translate into real harms to people and the environment.

Background on the U.S. Regulatory System

On many occasions during congressional hearings and in congressional reports and press releases, harsh critics of regulation have claimed that agency rulemaking is tantamount to "going around Congress" or "making an end-run around Congress." Similarly, the idea has been expressed that agencies are conjuring the regulations they develop out of thin air—as if they were singly responsible for the items that appear on their regulatory agenda. These ideas are categorically false and should be dismissed without reservation.

The fact of the matter is all regulations share the same starting point: A provision in a statute passed by both Houses of Congress and signed by the President that authorizes or directs an agency to regulate. Whenever an executive or independent agency issues a rule, it is acting pursuant to authority provided in duly enacted legislation for achieving a specified policy goal, although that authority often leaves room for the exercise of at least some agency discretion. The legislation from which agencies derive their authority to regulate reflect a determination by a majority of both Houses of Congress and the President that there is social problem that merits the government's attention, and that regulation is an appropriate response to that problem because it will promote the public interest in some way, such as by protecting health and the environment.

It is a good thing that Congress has directed agencies to issue regulations to achieve important social goals because these regulations have produced enormous benefits for the American people.[1] Consider the following:

- In its most recent report to Congress, the Office of Management and Budget (OMB) estimates that the total benefits of significant regulations for the past ten years exceeded theirs costs by a ratio as high as 16 to 1. The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its costs by a ratio of 25 to 1. Similarly, a study of EPA rules issued during the Obama Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1.

- Several recent catastrophes illustrate the huge costs of failing to regulate when it is appropriate and necessary. The BP oil spill has imposed tens of billions of dollars in damages to the Gulf of Mexico and affected Gulf Coast communities—far more than the cost of complying with regulations that would have prevented this tragedy. A recent Government Accountability Office (GAO) study concluded that the 2008 Wall Street collapse, which might have been avoided through more extensive financial regulation, has cost the U.S. economy as much as $22 trillion.[2]

---

[1] *See* Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

[2] U.S. GOV'T ACCOUNTABILITY OFFICE, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF DODD-FRANK ACT 17, 21 (2013), *available at* http://www.gao.gov/assets/660/651322.pdf.

- Dozens of retrospective evaluations of regulations adopted by the EPA and the Occupational Safety and Health Administration (OSHA) pursuant to the Regulatory Flexibility Act have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.

A second myth that needs to be dispensed with is that agencies are "unaccountable" when developing regulations. This myth ignores the fact that agencies are already subject to a thick web of analytical and procedural requirements to prevent agencies from issuing unnecessary or excessively burdensome regulations and their final decision-making in most major rules is then subject to judicial review by federal appellate courts. If anything, there are already too many of these overlapping and duplicative requirements, resulting, as described below, in the need to conduct years of analysis before significant rules may be adopted. In addition, existing federal laws that govern the rulemaking process already provide many opportunities for stakeholders to participate to make their views known, inform the agency if its regulatory proposals reflect factual misunderstandings, and protect their interests.

The Administrative Procedure Act (APA) requires agencies to provide persons potentially affected by their regulations a fair opportunity to influence the rulemaking process, and several mechanisms exist for holding agencies accountable for their regulatory actions. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it. If an agency adopts a rule without taking into account relevant public comments, the court in a challenge to the validity of the rule has the power to send the rule back to the agency and preclude its implementation.

The APA has provided these protections during the rulemaking process for affected interests since 1946, but statutes and executive orders adopted beginning in the 1980s have added multiple layers of new rulemaking procedures and analytical requirements not required by the APA. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to as many as 110 separate procedure requirements in the rulemaking process.[3] Additional procedural requirements have been added since 2000.[4]

- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.[5]

[3] *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), *available at* http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf.
[4] *See, e.g.*, Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

Regulated businesses not only take full advantage of the many existing participatory opportunities; all of the available evidence demonstrates that corporate and business entities dominate the rulemaking process in doing so. For example, when Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the EPA, they found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule. [6] These included meetings, phone calls, and letters.

These data unequivocally confirm that interested parties—particularly regulated industries—have fair, and often excessive, opportunity to influence the outcome of proposed rules. Moreover, since agencies have to justify rules by responding to every comment they receive, it is simply not plausible to contend that they are not accountable for the decisions that they make. Finally, since agencies are subject to a host of analytical requirements, it is beyond dispute that they are required to think carefully about what they do before they do it.

The High Costs of a Hobbled U.S. Regulatory System

Experts on the rulemaking process have long recognized that protective statutes enacted over the opposition of regulated industries do not achieve their full protective potential. Rather, as the words of the law are translated into enforceable policy programs through the implementation process, the statutes are undermined through a slow process of "policy erosion." The crises that prompted the statutes in the first place often fade from the public's collective memory, and the public interest groups that fought to have the law enacted move on to other important issues. Meanwhile, the agency with the responsibility of implementing the statute's provisions is left alone to do so over the continuing opposition from the industries that would be subject of the regulation.

As noted above, the regulatory process provides industry groups with ample opportunities to influence the outcome of pending regulations, and they often take full advantage of them. The public interest community is only able to participate in the processes sporadically, if at all. With weak or no countervailing pressure from the public interest community, the implementing agency is often pushed to water down or delay rulemakings. As a result, agencies might miss legal deadlines for completing rulemakings and those rules that emerge from the regulatory process gauntlet fall well short of what is needed to achieve the ambitious policy goal set out in the authorizing statute.[7]

Needless to say, the resulting weakened regulations leave people and the environment inadequately protected. The EPA's recently issued final rule to establish disposal standards for toxic coal ash waste illustrates this problem. Following the utility industry's wishes, the agency issued a rule that improperly treats the waste as if it were no less dangerous from household garbage. As a result, the toxic components of coal ash will continue to be able to leach through decades-old unlined pits into drinking water. The rule also sets up a weak enforcement system,

---

[5] *See* PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.

[6] Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

[7] *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1674-79 (2012).

which increases the possibility that another catastrophic coal ash spill similar to the one that occurred at the Tennessee Valley Authority's (TVA) Kingston Fossil Fuel Plant in December of 2008 may take place again very soon.[8]

As documented in a 2009 CPR white paper entitled *The Hidden Human and Environmental Costs of Regulatory Delay*,[9] just the delays of rulemakings impose a serious cost on the public interest as well. Each year dozens of workers are killed, thousands of children harmed, and millions of dollars wasted because of unjustifiable delays in federal regulatory action. The costs of regulatory delay accrue every time the federal protector agencies—those created by Congress to protect health, safety, and the environment—fail to take timely action to prevent the kind of serious and pressing threats Congress intended for them to address. Such delays in regulatory action have become commonplace, part of the wallpaper of Washington's regulatory process for the protector agencies—the Consumer Product Safety Commission (CPSC), EPA, the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and OSHA.

Such unacceptable delays in agency rulemakings have become commonplace in the U.S. regulatory system. To be sure, careful analysis of both the need for and consequences of regulation is important. But, the regulatory process has become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete. As Professor Richard Pierce of the George Washington University Law School has observed, "[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later."[10] The EPA told the Carnegie Commission that it takes about five years to complete an informal rulemaking.[11] A Congressional report found that it took the Federal Trade Commission five years and three months to complete a rule using more elaborate hybrid rulemaking procedures.[12] These reports do not take into account additional analytical requirements that have been imposed since their publication date.

The fact that it may take five years or more to complete the process for adopting important rules should be no surprise, as the following, entirely realistic time schedule for significant rules indicates:

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking

---

[8] Rena Steinzor et al., *Barack Obama's Path to Progress in 2015-16: Thirteen Essential Regulatory Actions - Coal Ash Waste Disposal Standards* (Ctr. for Progressive Reform, Issue Alert 1406, 2014), *available at* http://www.progressivereform.org/13RulesCoalAsh.cfm (last visited Apr. 30, 2015).

[9] A copy of the white paper has been attached to the end of this letter. It is also available online at http://www.progressivereform.org/articles/CostofDelay_907.pdf

[10] Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

[11] CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).

[12] FEDERAL TRADE COMM'N, 98th Cong., 2nd Sess., 155-66 (Comm. Print 98-cc 1984).

- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

TOTAL: 47-95 months (3.9-7.9 years)

This estimate of 4 to 8 years assumes the comment period only takes 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities have the potential to delay a rule by another 6-12 months.

With each passing year, the human and economic costs of these regulatory delays keep accruing. For those who care to examine them, the costs are sometimes easy to identify. A delay in regulating toxic pollution might cause death or disease in humans, damage to fragile ecosystems, or massive clean-up costs for future generations. Other human and economic costs may be less obvious, but are no less important. For example, unregulated power plant emissions of mercury will cause developmental delays for some American children. Not only will they and their families suffer as a result, but taxpayers will end up footing the bill for providing special education to children who suffer brain damage. Also less obvious are the social costs of regulatory delay. For example, each instance of delay feeds public disillusionment with the nation's democratic institutions, as voters conclude that they cannot rely on the federal government to prevent serious health, safety, and environmental threats.

Despite its significance, the problem of regulatory delay and the costs it generates has been virtually ignored in the debate over the general wisdom of the U.S. regulatory system over the last 30-plus years. Opponents of the regulatory system have deliberately framed this debate in terms of the "costs and benefits" of regulatory *action*, implying that regulatory *inaction* caused by regulatory delay is somehow cost-free. The problem with ignoring the costs of regulatory delay is that it provides an incomplete picture of the value of the U.S. regulatory system—one that is inevitably skewed against stronger regulatory protection.

Included in *The Hidden Human and Environmental Costs of Regulatory Delay* are three cases studies that illustrate the high costs of regulatory delay. Each tells the story of how regulatory delay has caused real harm to Americans and their environment:

- The first case study examines how EPA first delayed regulating power plant mercury emissions, despite detailed instructions in the 1990 Clean Air Act Amendments, and then actually attempted to adopt a regulatory program that was not only contrary to these detailed instructions but also intentionally postponed emissions reductions until after 2020. As a result of EPA's continuing failure to regulate these emissions, tens of thousands of American babies are born each year with unsafe levels of mercury in their blood—levels high enough to cause brain damage and other neurological problems. This regulatory delay also may contribute to hundreds of cases of preventable heart disease in adults every year and untold environmental harms.

- The second case study examines how EPA has for decades abdicated its clear duty under the Clean Water Act to control the spread of invasive species from ships' ballast water discharges. A federal court recently ordered EPA to begin regulating these discharges, but invasive species have already done considerable damage. For example, since it was first introduced in the 1980s, the zebra mussel—an invasive species carried to the United States in ships from Eastern Europe—has spread to hundreds of U.S. waterbodies, causing an estimated $1 billion in damages every year, by clogging water intake pipes at power plants and other industrial facilities. Zebra mussel infestations have also permanently altered the fragile ecosystems of lakes and rivers across the country.
- The third case study examines how a much-needed new rule updating regulatory standards for the use of cranes, derricks, and other heavy machinery at construction sites has remained stalled at OSHA for the last five years. The existing standards are now 40 years old and are in dire need of updating to account for changes in technology and construction practices. OSHA's failure to issue the new rule has been costly: The agency estimates that it would save dozens of lives and prevent well over 100 injuries every year.

These case studies are now a bit dated, but more current case studies could be found with the ongoing delays of EPA's pending rulemaking to update its ozone National Ambient Air Quality Standards (NAAQS) and the Department of Transportation's suite of regulatory actions to address the threat to public safety and the environment caused by the massive movement of highly flammable crude oil on U.S. railways. Nevertheless, the broader lessons that *The Hidden Human and Environmental Costs of Regulatory Delay* raises are still applicable and in need of careful consideration.

Economic Cost-Benefit Analysis

Economic cost-benefit analysis—as enshrined in Executive Order 12866—has long been leveraged by regulated industry and other antiregulatory forces to weaken and delay rulemakings. In other words, the institution of economic cost-benefit analysis as both an analytical tool and a methodology for informing agency rulemaking has long played a key role in undermining the effectiveness of the U.S. regulatory system.

The use of economic cost-benefit analysis in the regulatory process should be discontinued for two major reasons: (1) It is inconsistent with the law in most cases and (2) it has failed as a tool of regulatory analysis. In the vast majority of public health, safety, and environmental statutes, Congress has not chosen to incorporate cost-benefit analysis. It has instead directed agencies to use a variety of well-established alternative methods for setting standards. These include technology-based standard-setting, effects-based standard setting, and multi-factor balancing.

Moreover, economic cost-benefit analysis is a failed approach to regulatory analysis, producing reliably unreliable results. To be clear, economic cost-benefit analysis is not in need of mere tweaking. It is inherently flawed. Over a quarter century of use by administrations of both parties, it has failed to accurately or adequately capture the benefits of proposed regulations, and it has even ignored some benefits altogether because they defied monetization. At the same time, it has frequently overstated the costs to industry of compliance. As a result, cost-benefit

analysis is a truly distorted approach to regulatory decision-making that is tilted heavily against new regulations.

Congress Directed Health, Safety, and Environmental Agencies to use a Multi-Factorial Analysis That Extends Far Beyond the Crabbed and Myopic Considerations Involved in Economic Cost-Benefit Analysis.

Only two of the 31 statutory mandates that apply to health, safety, and environmental agencies specifically call for a balancing of costs against benefits as part of the judgments agencies must make in formulating regulations. Instead, as illustrated by the table on the next page, in 29 out of 31 of these provisions, Congress directed agencies to use one of several, well-established alternatives to economic cost-benefits analysis including the formulation of technology-based or effects-based standards, phased bans, or the balancing of multiple factors.

Technology-Based Standards

The most common of the standard setting methods employed by Congress is technology-based standards, sometimes also referred to as feasibility standards. Technology-based standards are called for extensively throughout the Clean Air Act and the Clean Water Act, among many others. These standards set pollution limits at the lowest level technologically and economically feasible, assuming that such pollution reductions will deliver sufficient health and environmental benefits to be worth the costs. This approach requires the agency to evaluate the likely costs of a proposed standard in order to determine whether it is economically feasible (*i.e.*, "available"). But it does not require agencies to delve into the far more problematic task of attempting to quantify and monetize the environmental benefits of regulation in order to compare them to costs.

Congress' rejection of economic cost-benefit analysis was grounded in experience with the kind of regulatory paralysis that can result when decision-making standards impose unrealistic information burdens on agencies. Congress' adoption of technology-based standards in the Clean Water Act, for example, was in response to just such a failure. Previous versions of the Act had required standard-setting and enforcement to be based on an evaluation of the benefits of regulation—*i.e.*, on assessments of the quality of the receiving waters. This approach proved to be entirely unworkable—in the words of the Senate Committee on Public Works—"inadequate in every vital aspect."[13] Evaluating the benefits of water pollution reduction required tedious and costly site-specific measurements, as well as assessments of complicated and inadequately understood ecological chains of causation. Technology-based standard-setting, on the other hand, allows the EPA to set uniform national standards for each industry based on the maximum technologically achievable level of pollution reduction.[14] This approach only requires the agency to evaluate technologies and costs, without delving into the problematic realm of precisely quantifying environmental benefits.

[13] 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972,* Ser. No. 93-1, at 1423 (1973); S. Rep. No. 92-414, at 7 (1971).
[14] Weyerhaeuser v. Costle, 590 F.2d 1011, 1042 (D.C.Cir. 1978).

Only Two Statutory Provisions Protecting Health, Safety, and the Environment Call for Cost-Benefit Analysis

Reliance on Cost-Benefit Analysis?	Statutory Standard	Provisions in Environmental, Health and Safety Statutes	Number of Provisions
Prohibited by statute: 23	*Technology-Based*	• Clean Water Act (existing sources standard) • Clean Water Act (new sources standard) • Clean Air Act (non-attainment areas standard) • Clean Air Act (prevention of significant deterioration standard) • Clean Air Act (national emissions standards for hazardous air pollutants) • Clean Air Act (mobile sources standard) • Clean Air Act (new sources standard) • Occupational Safety and Health Act • Resource Conservation and Recovery Act (land disposal restrictions) • National Traffic and Motor Vehicle Safety Act • Surface Mining Control and Reclamation Act	**11**
	Effects-Based	• Clean Water Act (ambient water quality standards and anti-degradation policy) • Clean Air Act (national ambient air quality standards) • Food, Drug, and Cosmetic Act (Delaney Clause) • Food, Drug, and Cosmetic Act (pesticide residues standard) • National Forest Management Act (diversity protection provision) • Endangered Species Act (species listing, take, and jeopardy standards) • Wilderness Act • Wild and Scenic Rivers Act • National Wildlife Refuge Administration Act • National Park System Organic Act	**10**
	Phased Ban	• Clean Air Act (ozone depleting materials standard) • Toxic Substances Control Act (polychlorinated biphenyl standard)	**2**
Permitted but not required by statute: 6	*Multi-factor Balancing*	• Comprehensive Environmental Response, Compensation, and Liability Act • Federal Insecticide, Fungicide, and Rodenticide Act • Toxic Substances Control Act • National Forest Management Act (multiple use and sustained yield standard) • Federal Land Policy and Management Act (multiple use and sustained yield standard)	**5**
	Tech-Based / C-B Hybrid	• Safe Drinking Water Act*	**1**
Required by statute: 2	*Cost-Benefit*	• Consumer Product Safety Act • Accountable Pipeline Safety and Partnership Act	**2**

*Under SDWA Amendments of 1996, EPA is authorized but not required to deviate from the technology-based standards on the basis of cost-benefit analysis.

Effects-Based Standards

In a number of statutes, Congress has directed agencies to use effects-based standards that consider only the human health or environmental effects of a regulation without regard to economic costs. The most prominent examples of these are the NAAQS under the Clean Air Act and the stringent standards for the protection of imperiled species under the Endangered Species Act. In the case of the Clean Air Act, these effects-based standards reflect Congress' concern with the paramount importance of protecting human life as well as its desire to challenge industry to develop the next generation of more effective pollution control technologies rather than accepting the limits of existing technologies. The cost-blind nature of the NAAQS is tempered by the fact that they are implemented through technology-based standards that do allow for the consideration of costs.

The Endangered Species Act, on the other hand, with only a couple of rarely employed exceptions,[15] allows no consideration of costs whatsoever in setting standards for the protection of species facing extinction. This prohibition reflects Congress' judgment that endangered species implicate such "immeasurable" and "incalculable" values we should "halt and reverse the trend toward species extinction, whatever the cost."[16] In other words, certain values are simply too important to be balanced against economic costs and therefore stand outside the economic calculus.[17]

Phased Bans

In a limited number of instances, Congress has ordered a phased ban of a particular risk-creating substance. In some ways, this standard might be seen as special case of an effects-based standard in which Congress has made a determination that no level of the particular risk to be regulated is safe. A phased ban also reflects Congress' judgment that an immediate ban would impose excessive regulatory costs (*e.g.*, because there is no viable alternative to the banned substance) and that a ban should therefore be phased in to minimize the most disruptive aspects of the regulation.

Multi-Factor Balancing

Even in those instances in which Congress has instructed agencies to compare costs and benefits, it almost never requires them to perform a full-fledged quantified and monetized economic cost-benefit analysis. Instead, statutes with a multi-factor balancing standard require an agency to consider a variety of factors, and to weigh them in qualitative terms. Thus, these statutes do not require the agency to attempt to quantify these factors or convert them into monetary units. Moreover, they do not indicate what weight an agency is to give to each factor.[18] The EPA, for example, is authorized under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to place conditions on the licensing of pesticides to the extent necessary to avoid "unreasonable

---

[15] *See* 16 U.S.C. § 1539 (2000).
[16] Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978).
[17] CASS R. SUNSTEIN, RISK AND REASON 213-14 (2002) (suggesting that ESA may be "rooted in a theory of rights, one that rebuts the presumption in favor of cost-benefit balancing"). *See also* Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405 (2005).
[18] SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 39 (2003).

adverse effects on the environment."[19] Congress defined unreasonable adverse effects on the environment as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits" of the pesticides' use."[20]

Congress Rejected Economic Cost-Benefit Analysis for Good Reason; It Produces Irrational and Unreliable Results

Congress has good reason to be skeptical of economic cost-benefit analysis. Put simply, when applied to environmental health and safety regulation, economic cost-benefit analysis rests on the untenable assumption that complex ecological and human health processes can be quantified and expressed in dollar terms. In practice, scientific understandings are rarely fine-grained enough to predict impacts in quantifiable terms. Even where they are, data are inevitably vastly incomplete. And even for those quantifiable data that do exist, the process of converting such data into dollar terms raises intractable practical and theoretical difficulties that make most monetized estimates of impacts endlessly contestable. As a result, economic cost-benefit analysis fails miserably at its appointed task. Rather than providing a common sense tool for insuring reasonable regulation, economic cost-benefit analysis as practiced today produces Alice-in-Wonderland results that most of the time are so incomplete and unreliable, they provide endless opportunity for interest groups to manipulate and contest the results.[21]

There is a litany of theoretical conundrums that plague efforts to apply cost-benefit analysis to environmental health and safety regulation. Economic cost-benefit analysis attempts to assign value to things based on people's willingness-to-pay, but this is a notoriously problematic measure of value. A person's willingness to pay, for example, is tied in part to her wealth. This leads to ethically questionable practices like valuing the lives of people in the U.S. 30 times higher than the lives of people in India.[22] The practice of discounting the benefits of regulation that will accrue in the future also creates unending controversy. After decades of debate, there has been no agreement on what discount rate is appropriate for valuing future benefits, particularly those that accrue to future generations. Some argue that no discount rate at all should be used. The White House Office of Management and Budget suggests a rate of seven percent. Yet final benefits estimates can vary enormously—by orders of magnitude—depending on the discount rate used. Not incidentally, the discount rate results in reducing to zero any benefit of protecting the environment for the benefit of our children and their children.

In the end, the intractable practical and theoretical difficulties that plague any attempt to apply economic cost-benefit analysis to environmental health and safety regulation inevitably produce irrational and unreliable results. This indeterminacy only undercuts the justifications for its use—namely, that by providing a rational standard for decision-making, economic cost-benefit analysis increases transparency and reduces the undue influence of interest groups. In fact, its

[19] 7 U.S.C. § 136a(d)(1)(C) (2000).
[20] 7 U.S.C. § 136(bb) (2000).
[21] For a collection of critiques of cost-benefit analysis from a wide variety of accomplished academics, many of whom are CPR scholars, see THOMAS O. MCGARITY, SIDNEY A. SHAPIRO, & DAVID BOLLIER, SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION (2004).
[22] *See* David W. Pearce, W.R. Cline, A.N. Achanta, Samuel Fankhauser, R.K Pachauri, Richard S.J. Tol, & P. Vellinga, *The Social Costs of Climate Change: Greenhouse Damage and the Benefits of Control*, *in* CLIMATE CHANGE 1995: ECONOMIC AND SOCIAL DIMENSIONS OF CLIMATE CHANGE 179, 197 (J.P. Bruce, H. Lee, & E.F. Haites eds. , 1995).

indeterminacy invites manipulation that leads to litigation and, accordingly, to increased transaction costs for the promulgation of new regulations. The end result is that the agencies have less time and fewer resources to develop new regulations to protect people and the environment or to improve old regulations.

The Improper Role of OIRA's Centralized Review of Regulations

The institution of centralized regulatory review by OIRA has greatly contributed to the current inability of regulatory agencies to fulfill their regulatory missions. The institution of centralized review in effect allows the personnel of OIRA to substitute their judgment about the substantive content of regulations for that of the agencies trying to promulgate the regulations. This phenomenon is inconsistent with the specific provisions of the public health, safety, and environmental statutes. Moreover, OIRA lacks the institutional capacity to carry out this function.

The practical effect of centralized review is that it gives OIRA substantial power to influence the substantive content of the regulations. Thus, under the current system of regulatory review established by Executive Order 12,866, OIRA has the authority to review all "significant" rules (*i.e.*, rules with some specified large impact on the economy or that otherwise involve novel or controversial policy matters) to determine whether the rules are economically efficient—that is, whether the rule has passed a strict economic cost-benefit test. Until OIRA has approved the agency's economic cost-benefit study for a particular rule, that agency is prohibited from finalizing the rule. Through this centralized review process, OIRA retains substantial authority to reject or change agency rules that fail to achieve its conception of economic efficiency.

The influence that centralized regulatory review gives OIRA over the substance of regulations, however, is inconsistent with the provisions of public health, safety, and environmental statutes, which expressly delegate the function of determining the substantive content of implementing regulations to regulatory agencies. In passing these statutes, Congress had good reason to delegate rulemaking functions to executive agencies. With large staffs of scientists, policy analysts, attorneys, economists, and other professionals, executive agencies are able to leverage a unique and multidisciplinary expertise in resolving the complex substantive issues that are at the core of regulatory decision-making.

In contrast, OIRA has a surprisingly small staff at its disposal. In recent years, OIRA has had only about 30 to 40 professionals conducting its regulatory reviews. This small staff has to review hundreds of regulations in any given year. This large number of regulatory reviews does not even represent the full scope of work performed by OIRA's professional staff, which also includes approving thousands of paperwork requests as well as other tasks. This large workload suggests that OIRA's professional staff is not able to undertake a thorough review of each individual rule. To the extent that OIRA does attempt to conduct a thorough review of a particular rule, this process inevitably entails severe delays of perhaps a year or longer. Needless to say, these delays greatly inhibit the ability of regulatory agencies to take necessary regulatory action to protect the public health, safety, and the environment. Moreover, because OIRA's professional staff is composed almost entirely of economists, it is not able to offer the same broad, multidisciplinary expertise to regulatory decision-making that the regulatory agencies can.

Congress also chose to delegate rulemaking authority to the executive agencies with the knowledge that a number of existing procedures and institutions ensure that such agencies can be held accountable for the substantive decisions they make. For example, through the oversight process, the democratically elected Congress is able to keep tabs on each agency's regulatory actions, and to encourage agencies to act in accordance with the provisions of the statutes it has enacted. In addition, either through the APA or through the provisions of some public health, safety, and environmental statutes, individuals and organizations have the ability to challenge the substance of an agency's regulatory decision-making as well. Through these accountability measures, regulatory agencies have a very strong incentive to abide closely to the provisions of the statutes they are implementing when they promulgate new regulations.

In contrast, there is no effective means for holding OIRA politically accountable. Congressional oversight of OIRA has been largely ineffective and sporadic. No statutory provisions, including those in the APA, authorize individuals and organizations to challenge the substance of any decisions that OIRA makes. And because OIRA operates so far below the radar of the general public and the media, presidential elections can hardly be viewed as an effective check on OIRA's exercise of its regulatory review authority.

Given its high degree of influence, its institutionally antiregulatory bent, and its relative freedom from effective accountability measures, OIRA has become a powerful refuge for corporate interests seeking to weaken and delay rulemakings they find inconvenient to their bottom line. For example, data available on the OIRA website indicate that regulated industry participates far more frequently in meeting concerning rules undergoing OIRA review than do public interest groups. A 2011 CPR white paper entitled *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment*[23] analyzed these data and found that special interest representatives' meetings with OIRA's economists and White House political appointees vastly outnumber OIRA's meetings with public interest organizations, and that these meetings with special interests resulted in agency rules being weakened and delayed. The white paper's specific findings include the following:

- **Industry dominates the OIRA meetings process**. OIRA makes no effort to balance its meeting schedule by hearing from even a rough equivalence of organizations supporting protective regulations. In the roughly 10 years studied in the white paper, OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants. Sixty-five percent of the participants represented regulated industry interests; 12 percent of participants appeared on behalf of public interest groups.

- **OIRA meetings correlate with changes to rules**. Rules that were the subject of meetings were 29 percent more likely to be changed than those that were not. OIRA does not disclose its changes, but the evidence is that OIRA functions as a one-way ratchet, exclusively weakening agency rules.

- **The EPA is OIRA's favorite punching bag**. While EPA rules made up only 11 percent of all reviews by OIRA, 41 percent of all OIRA meetings targeted EPA rules. EPA rules

[23] A copy of the white paper's Executive Summary has been attached to the end of this letter. The full report is available online at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

were changed at a significantly higher rate—84 percent—than those of other agencies—65 percent—over the whole ten-year period.

- **OIRA routinely misses deadlines, stalling public health and safety protections**. According to Executive Order 12866, OIRA has 90 days to review a rule, plus a possible 30-day extension. Of the 501 completed reviews in which outside parties lobbied OIRA, 59 (12 percent) lasted longer than 120 days.

- **OIRA ignores public disclosure requirements**. OIRA is also required by Executive Order 12866 to make available "all documents exchanged between OIRA and the agency during the review by OIRA," and agencies are required to "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." Such requirements are routinely ignored.

Based on the findings, the white paper recommends that OIRA's centralized review role be abolished or fundamentally reoriented to one in which it affirmatively helps agencies such as the EPA and OSHA to accomplish their statutory missions of protecting people and the environment. Short of that, the white paper also offers more modest reforms aimed at increasing the transparency of OIRA's review process and steps that can be taken to "level the playing field" for public interest group participation in OIRA meetings. I highly recommend a thorough review of the white paper's detailed findings and reform proposals, which are outlined in the attached Executive Summary.

Improper Interference by the SBA Office of Advocacy

Since the SBA Office of Advocacy's creation in 1976, the tiny and largely unaccountable office has quietly become a highly influential player in the federal regulatory system, wielding extraordinary authority over the workplace safety standards employers must follow, the quantity of air pollution factories can emit, and the steps that food manufacturers must take to prevent contamination of the products that end up on the nation's dinner tables.

The SBA Office of Advocacy exercises this authority by superintending agency compliance with an expanding universe of analytical and procedural requirements—imposed by a steady stream of statutes and executive orders issued during the past three decades—that purportedly seek to ensure that agencies account for small business interests in their regulatory decision-making. Controversial rules can quickly become mired in this procedural muck, and an agency's failure to carry out every last required analysis with sufficient detail and documentation can spell doom for even the most important safeguards. This system provides the SBA Office of Advocacy with a powerful lever for slowing down rules or dictating their substance.

The Office of Advocacy's role in the regulatory system bears a striking resemblance to that played by OIRA. Both operate to similar effect, functioning as an anti-regulatory force from within the regulatory structure, blocking, delaying, and diluting agency efforts to protect public health and safety. Moreover, both offices have entry into the regulatory process on the strength of seemingly neutral principles and policy goals—promotion of economic efficiency and protection of small business, respectively. But in actual practice, both offices serve to politicize

the process, funneling special interest pressure into agency rulemakings, even though such interests have already had ample opportunity to comment on proposed regulations.

A 2013 CPR white paper entitled *Distorting the Interests of Small Business: How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety*[24] shines light on the SBA Office of Advocacy's anti-regulatory work, examining how its participation in the rulemaking process further degrades an already weakened regulatory system. As a preliminary matter, the nominal objective of the SBA Office of Advocacy—subsidizing small businesses through preferential regulatory treatment—is based on a needless and destructive tradeoff; the government has several policy options for promoting small businesses without sacrificing public health and safety. The SBA Office of Advocacy nevertheless devotes much of its time and resources to blocking, delaying, or diluting regulatory safeguards or to supporting general anti-regulatory attacks from industry and its allies in Congress. In short, blocking regulations has become the SBA Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the SBA Office of Advocacy to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

More specifically, the white paper finds that the SBA Office of Advocacy:

- Pursues an inherently flawed mission that needlessly sacrifices public health and safety;
- Adds several unnecessary roadblocks to the rulemaking process, preventing agencies from achieving their respective missions of helping people and the environment in an effective and timely manner;
- Sponsors anti-regulatory research designed to bolster politicized attacks against the U.S. regulatory system;
- Testifies at congressional hearings aimed at advancing politicized attacks against regulations that are inconvenient to well-connected corporate interests;
- Takes advantage of overly broad small business size standards to weaken regulations for large firms;
- Enables trade association lobbyists to subvert its small business outreach efforts;
- Interferes with agency scientific determinations despite lacking both the legal authority and relevant expertise to do so; and
- Pushes for rule changes that would benefit large firms instead of narrowly tailoring its recommendations so that they help only truly small businesses.

The white paper concludes by identifying several reforms that would enable the SBA Office of Advocacy to work constructively with regulatory agencies during the rulemaking process to advance small business interests without undermining those agencies' mission of protecting public health and safety.

[24] A copy of the white paper has been attached to the end of this letter. It is also available online at http://www.progressivereform.org/articles/SBA_Office_of_Advocacy_1302.pdf.

Suggestions for Regulatory Reform

As described above, this regulatory system is not protecting the public interest as well as it should be. Several defects in the rulemaking process prevent agencies such as the EPA, FDA, and OSHA from carrying out their statutory missions of protecting people and the environment as quickly and effectively as possible. In many cases, these failures mean that the explicit will of Congress is not being fulfilled.

Approaches to Regulatory Reform That Should be Rejected

Many of the "regulatory reform" bills introduced in recent sessions of congress would only worsen the problem. All of these bills would have added still new layers of analytical and procedural requirements to an already excessively convoluted rulemaking process. Although these bills differed in their particulars, the end result, and the apparent aim, of such bills remained the same: to dilute or block outright the ability of agencies to put in place critical safeguards necessary for protecting people and the environment. If these bills had been law in the 1970s, many of the most critical health, safety, and environmental protections which Americans have long enjoyed would likely never have become a reality.

The REINS Act

The REINS Act would change the rulemaking process by requiring that "economically significant" regulations—generally, those with annual economic impact of $100 million or more—receive Congress's affirmative approval—by means of a joint congressional resolution of approval signed by the President—before they can go into effect. This bill would effectively bar agencies from relying on existing statutory authority, often enacted by overwhelming congressional majorities, to implement almost any large regulation—no matter how beneficial they would be for the public.
By design, the REINS Act would make Congress the final arbiter of all significant regulatory decisions. While superficially this may seem like a good idea—after all, Members of Congress are elected and regulators are not—the REINS Act would replace what is good about agency rulemaking with what is bad about the legislative process.

Neither most Members of Congress nor their staffs are likely to have sufficient expertise regarding complex regulatory matters to make a considered decision whether to adopt a regulation, and if so, what kind, particularly within the limited time frame legislators would have to act. Congress has scaled back staffing levels and, unlike agencies, Congressional offices do not employ doctors, epidemiologists, botanists, or statisticians. The result would likely be mistaken judgments about the need for regulation and the potential benefits it would provide, even assuming good faith efforts by legislators to assess the merits of agency regulatory proposals. In fact, it is not hard to imagine the approval process becoming a nakedly political exercise, reflecting the political power of special interests rather than a fair and informed evaluation of the costs and benefits of regulation. Rulemaking needs to become less politicized, not more.

Even if Congress did have the necessary expertise to review regulations, the type of careful and time-consuming review that would be required would impose significant analytical burdens on it, diverting members and their staffs from other business. Because this review would have to occur

within a short time frame, the REINS Act has the potential to stop (or at least slow down) important other business, assuming that legislators and their staffs actually spent the time necessary to understand complex regulations.

The Regulatory Accountability Act

The Regulatory Accountability Act would drastically overhaul the Administrative Procedure Act (APA), by amending the statute to add 74 new procedural and analytical requirements to the agency rulemaking process. The bill would make more than 30 pages worth of changes to the current, relatively simple structure of the APA. All of these additional analytical and procedural requirements would add significant delays to the rulemaking process. In fact, for bigger rules, the Regulatory Accountability Act would likely add at least 21-33 months to the already bloated rulemaking process under current law:

- 6-12 months to complete the additional analytical requirements
- 3 months for the Advanced Notice of Proposed Rulemaking (ANPRM) process
- 6-12 months to respond to comments received after the ANPRM
- 6-12 months to complete the formal rulemaking procedures

  Total: 21-39 months (1.75-3.25 years) extra

As noted above, it already takes four to eight years for an agency to promulgate and enforce many significant rules, and the proposed procedures could potentially add another 21 to 39 months to that process. Under the Regulatory Accountability Act, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete.

Approaches to Regulatory Reform That Should be Pursued

To fix the regulatory system, we should instead focus on finding ways to help agencies effectively achieve their statutory missions, such as protecting people and the environment. Here are some places to start:

Provide agencies with the resources they need. One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, forcing these agencies to effectively do more with less. Many agencies' budgets have stagnated for decades, while the job at hand – more food and imported toys to inspect, for instance – has grown. And the situation is getting worse, not better. For example, past rounds of sequestration hundreds of millions of dollars from the EPA's already historically low budget. Among other things, these cuts have forced the agency to scrap several air pollution monitoring sites and scale back its program for assessing the human health impacts of several potentially harmful chemicals.

Provide agencies with enhanced legal authority. For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental

issues that were not initially addressed by the original statutes have emerged. In some cases, agencies lack the authority they need to tackle these issues. It is time to end the political gridlock that has prevented the adoption of legislative changes to accommodate shifting social needs.

Free agencies from unnecessary analytical requirements. Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making. Regulatory process legislation of the kind introduced in Congress during the last few years would exacerbate this situation, creating a rulemaking process so laden with unnecessary and unhelpful requirements that the process would become completely dysfunctional. Perhaps that is the true aim of those who advocate an overhaul of regulatory process requirements – to construct a system that is so burdensome for agencies to navigate that they become incapable of adopting even urgently needed regulatory protections whose social benefits greatly exceed their costs. Even taking the reformers' aims at face value, they have misdiagnosed the problems with existing regulatory processes and proposed solutions that are ill-equipped to achieve the socially optimal levels of regulation they seek.

Conclusion

Thank you for attention to these views on the problems with the U.S. federal regulatory system and reforms that are needed to address those problems. At your request, I would be happy to discuss these views with you further.

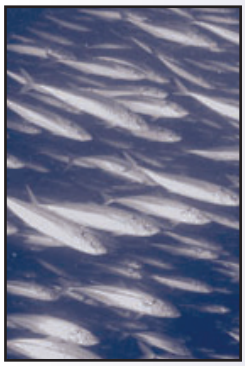
Sincerely,

Rena Steinzor
Professor of Law
University of Maryland Francis King Carey
School of Law*

Robert R.M. Verchick
Gauthier ~ St. Martin Eminent Scholar Chair in
Environmental Law
Loyola University, New Orleans*

James Goodwin
Senior Policy Analyst
Center for Progressive Reform

* University affiliations are for identification purposes only



The Hidden Human and Environmental Costs of Regulatory Delay

By Catherine O'Neill, Amy Sinden, Rena Steinzor, James Goodwin, and Ling-Yee Huang

CPR CENTER FOR PROGRESSIVE REFORM

CENTER FOR
PROGRESSIVE REFORM
WHITE PAPER #907

October 2009

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information. The Center for Progressive Reform is grateful to the Public Welfare Foundation for funding this report, as well as to the Bauman Foundation, the Deer Creek Foundation, and the Open Society Institute for their generous support of its work in general.

This report is a collaborative effort of the following member scholars and staff of the Center for Progressive Reform: **Catherine A. O'Neill**, Seattle University School of Law; **Amy Sinden**, Temple University Beasley School of Law; **Rena Steinzor**, University of Maryland School of Law; **James Goodwin**, CPR Policy Analyst; and **Ling-Yee Huang,** CPR Policy Analyst

For more information about the authors, see page 21.

www.progressivereform.org

For media inquiries contact Matthew Freeman at mfreeman@progressivereform.org

or Ben Somberg at bsomberg@progressivereform.org.

For general information, email info@progressivereform.org

Acknowledgments

The Center for Progressive Reform is grateful to the Public Welfare Foundation for its generous support of this project.

Printed in the U.S.A.

Introduction

Each year dozens of workers are killed, thousands of children harmed, and millions of dollars wasted because of unjustifiable delays in federal regulatory action. The costs of regulatory delay accrue every time the federal protector agencies—those created by Congress to protect health, safety, and the environment—fail to take timely action to prevent the kind of serious and pressing threats Congress intended for them to address. Thus, when the Occupational Safety and Health Administration (OSHA) vacillates over a new rule to regulate the use of cranes and derricks, the costs come in the form of construction workers killed or injured when their equipment collapses or is improperly used. Similarly, when the Environmental Protection Agency (EPA) issues a regulation that postpones reductions of mercury emissions from U.S. power plants, the inevitable cost is the tens of thousands of children born every year with elevated mercury in their blood, at levels high enough to leave them with irreversible brain damage.

Such delays in regulatory action have become commonplace, part of the wallpaper of Washington's regulatory process for the protector agencies—the Consumer Product Safety Commission (CPSC), EPA, the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and OSHA. Outside a small circle of advocates, it has gone largely unnoticed that over the last 10 years OSHA has issued comprehensive workplace regulations for only two chemicals. This small regulatory output from OSHA is astounding, considering that literally hundreds of industrial chemicals in commerce today have either no regulatory standards at all or are sold and used under standards that have not been updated in 40 years, and thus do not reflect anything learned about the chemicals and their impact on human health during that time. Meanwhile at EPA, after years of deliberate delay, the agency is only now starting to make some progress on addressing the greatest environmental challenge of our time: global climate change.

For those who care to examine them, the human and economic costs of regulatory delay are sometimes easy to identify. A delay in regulating toxic pollution might cause death or disease in humans, damage to fragile ecosystems, or massive clean-up costs for future generations. Other human and economic costs may be less obvious, but are no less important. For example, unregulated power plant emissions of mercury will cause developmental delays for some American children. Not only will they and their families suffer as a result, but taxpayers will end up footing the bill for providing special education to children who suffer brain damage. Also less obvious are the social costs of regulatory delay. For example, each instance of delay feeds public disillusionment with the nation's democratic institutions, as voters conclude that they cannot rely on the federal government to prevent serious health, safety, and environmental threats.

Regardless of how the costs of regulatory delay are measured, they represent real harms to real people and the environment—harms that are by definition completely preventable.

Moreover, these costs affect everyone from vulnerable subpopulations, such as children and the poor, to mighty industries, such as coal-fired power plants.

Despite its significance, the problem of regulatory delay and the costs it generates has been virtually ignored in the debate over the general wisdom of the U.S. regulatory system over the last 30-plus years. Opponents of the regulatory system have deliberately framed this debate in terms of the "costs and benefits" of regulatory *action*, implying that regulatory *inaction* caused by regulatory delay is somehow cost-free. The one-sided nature of this debate is perhaps best exemplified by the White House Office of Management and Budget's annual *Report to Congress on the Benefits and Costs of Federal Regulations*, as required by the 2001 Regulatory Right-to-Know Act. These annual reports document in painstaking detail the quantified and monetized costs and benefits of regulatory action, providing aggregate estimates of these costs and benefits for many of the regulations that federal agencies have issued over the previous year as well as over the previous ten years. Not once, however, have these reports ever sought to document the costs of regulatory delay.

Ignoring the costs of regulatory delay distorts the value of the U.S. regulatory system, skewing it against stronger regulatory protection.

The problem with ignoring the costs of regulatory delay is that it provides an incomplete picture of the value of the U.S. regulatory system—one that is inevitably skewed against stronger regulatory protection. Broadly speaking, the purpose of this white paper is to begin the process of filling in the rest of this picture, so that in the future the debate over the general wisdom of the U.S. regulatory system can continue on more robust and balanced terms. To this end, this white paper presents three case studies. Each tells the story of a recent or ongoing example of regulatory delay that has caused real harm to Americans and their environment:

- The first case study examines how EPA first delayed regulating power plant mercury emissions, despite detailed instructions in the 1990 Clean Air Act Amendments, and then actually attempted to adopt a regulatory program that was not only contrary to these detailed instructions but also intentionally postponed emissions reductions until after 2020. As a result of EPA's continuing failure to regulate these emissions, tens of thousands of American babies are born each year with unsafe levels of mercury in their blood—levels high enough to cause brain damage and other neurological problems. This regulatory delay also may contribute to hundreds of cases of preventable heart disease in adults every year and untold environmental harms.

- The second case study examines how EPA has for decades abdicated its clear duty under the Clean Water Act to control the spread of invasive species from ships' ballast water discharges. A federal court recently ordered EPA to begin regulating these discharges, but invasive species have already done considerable damage. For example, since it was first introduced in the 1980s, the zebra mussel—an invasive species carried to the United States in ships from Eastern Europe—has spread to hundreds of U.S. waterbodies, causing an estimated $1 billion in damages every year, by clogging water intake pipes at power plants and other industrial facilities. Zebra

mussel infestations have also permanently altered the fragile ecosystems of lakes and rivers across the country.

- The third case study examines how a much-needed new rule updating regulatory standards for the use of cranes, derricks, and other heavy machinery at construction sites has remained stalled at OSHA for the last five years. The existing standards are now 40 years old and are in dire need of updating to account for changes in technology and construction practices. OSHA's failure to issue the new rule has been costly: The agency estimates that it would save dozens of lives and prevent well over 100 injuries every year.

From these case studies, it is clear that costs of regulatory delay are diverse, extensive, and can be quite severe. These case studies also make it clear that regulatory delay is a systemic problem—not one that is peculiar to any one regulatory agency or to any one presidential administration—and thus will require a systematic solution to correct.

CASE STUDY: Mercury Emissions from Power Plants

The 1990 Clean Air Act instructed EPA to determine whether mercury emissions from coal-fired power plants posed a threat to public health by November 1994, and if it found such a threat, to adopt regulations controlling those emissions. Now, more than a decade and a half later, there is still no rule. Meanwhile, some 637,000 American babies are born each year with unsafe levels of mercury in their blood as a result of exposure to human-based sources. An estimated 10 percent of American women of childbearing age have similar, unsafe blood mercury levels. This number nearly triples for women who designate their ethnicity as "other" (*i.e.,* who are Native American, Asian American, or from the Pacific or Caribbean Islands). A full 27.4 percent of these women have unsafe blood mercury levels. Every year as many as 94,000 babies are born in the United States with elevated blood mercury levels—levels high enough to leave them with irreversible brain damage—and as many as 231 children develop mental retardation, all as a direct result of exposure to mercury emissions from U.S. power plants.

The Issue

Mercury pollution has long been recognized as extremely harmful to humans and the environment. For example, fetal exposure to environmental mercury can impair human brain development, resulting in an array of negative consequences such as IQ loss ranging from 0.2 to 24 points, cerebral palsy, and mental retardation (*i.e.*, an IQ below 70).[1]

Coal-fired power plants are the single largest emitters of mercury pollution in the United States, releasing roughly 48 tons every year.[2] Coal naturally contains trace amounts of

mercury, and the process of combustion causes this mercury to be released into the air. These mercury particles fall into lakes and streams, where they are converted to methylmercury before being consumed by the fish that humans and other animal species eat. An estimated 10 percent of American women of childbearing age have unsafe blood mercury levels, putting many children at risk of fetal exposure to environmental mercury. About 27.4 percent of women who designate their ethnicity as "other" (*i.e.*, who are Native American, Asian American, or from the Pacific or Caribbean Islands) have unsafe blood mercury levels—nearly triple the national average.[3]

Mercury pollution from power plants is taking a devastating toll on childhood brain development. According to data from two studies,[4] strict regulation of mercury emissions from U.S. power plants could prevent around 94,000 American babies every year from being born with elevated blood mercury levels—levels high enough to leave them with irreversible brain damage. It could also prevent as many as 231 children from developing mental retardation every year.

The Regulatory Delay

Mercury poses a *clear problem*: Hundreds of thousands of children are born in the United States every year with elevated blood mercury levels because of mercury air pollution. Congress has provided a *clear solution*: Given the finding that mercury from power plants posed a threat to human health, the 1990 Clean Air Act Amendments required the EPA to drastically reduce mercury emissions from coal-fired power plants. By any reasonable estimate, this regulation should have been issued by 2000 at the latest. It's now 2009, and EPA has yet to act.

Below, we recount the disappointing sequence of events that has prevented EPA from regulating mercury in accordance with Congress' clear instructions. From this narrative, certain themes emerge—a lack of resources, industry pressure, and, most pernicious, rules with built-in delay.

Congress Cocks the Hammer . . .

Frustrated by EPA's lack of progress in addressing toxic air pollutants under the original Clean Air Act of 1970, Congress put regulation of these pollutants on the fast track when it amended the Clean Air Act in 1990. The Amendments gave special attention to the problem of mercury pollution from power plants.

These Amendments directed EPA to submit to Congress by November 1994 a series of preliminary reports on mercury pollution and alternative control strategies. If, after reviewing these reports and other relevant evidence, EPA determined that regulating power plant mercury emissions was "appropriate and necessary," the Amendments required the agency to adopt very strict technology-based regulations (a maximum achievable control technology or MACT standard).

Working with reasonable diligence, EPA should have been able to complete a final MACT standard for mercury within a few years after 1994, when the last of the required reports should have been completed. At the very least, EPA should have been able to finish the MACT standard by November 2000, which was the catch-all deadline set by the Amendments for EPA to issue regulations for all toxic air pollutants.

. . . But EPA Can't Pull the Trigger on MACT

EPA has always been plagued with inadequate resources, but the problem was especially acute during the Clinton Administration. The 1990 Clean Air Act Amendments directed EPA to implement an array of new programs, yet Congress never increased the agency's budget to reflect its increased workload.[5] To make matters worse, the coal and power plant industries worked hard from the beginning to prevent EPA from regulating mercury emissions. One favored tactic was to attack EPA's science. By simply raising the question of whether we "know enough" about mercury's health effects, industry was able to put EPA on the defensive. Of course, it is always the case that more can be learned, and even those scientific conclusions about which we are most certain are always open to question—that is the nature of scientific inquiry. Nonetheless, EPA felt compelled to go to great lengths to answer these attacks. As a result, the agency fell further and further behind the timeline set up by the 1990 Amendments.

Industry began its attacks by criticizing the science in EPA's preliminary reports. EPA responded by holding back one report until new scientific studies became available[6] and by putting some of the reports through a lengthy review process.[7] Even after numerous independent reviews confirmed that the reports were supported by the "best available science," industry continued to pressure EPA to delay submitting them to Congress until better scientific evidence emerged. As a result, EPA did not submit the last of the reports until March 1998—almost four years after they were all due.

Even once the reports were finally done, EPA declined to make the "appropriate and necessary" finding, asserting that it needed to conduct more studies on emissions control technology. Six months later, industry allies in Congress managed to insert a rider into an appropriations bill ordering EPA to delay its "appropriate and necessary" finding even further—until after the National Research Council approved the science underlying one of EPA's reports. Another 21 months went by while EPA waited for approval from the Council, which was ultimately granted in July 2000.[8] Finally, in December 2000, as President Clinton was packing up to leave the White House, EPA made the "appropriate and necessary" finding, six years after all the studies were supposed to have been completed.

The Bush Administration Stomps on the Brake Pedal

Soon after making the "appropriate and necessary" determination, EPA convened a high-level, multi-stakeholder group of advisors to work with agency staff on the MACT

standard. A court order required EPA to issue the standard by December 2003, and by the beginning of that year, the agency seemed poised to meet the deadline. Even manufacturers of emissions control technology began ramping up their production in anticipation of heightened demand.[9]

Although ultimately unsuccessful, industry's campaign for a cap-and-trade program delayed implementation of a meaningful mercury-control program by several years.

In spring 2003 though, EPA's progress came to a screeching halt, when the Assistant Administrator in charge of the Office of Air and Radiation, an EPA political appointee, gathered the relevant staff in his office and told them to abandon the work they had completed to date and adopt an entirely different approach to the issue. Under a creative interpretation of the statute—one that would later be struck down by a federal appeals court—EPA ignored the statute's directive to develop a MACT standard. Instead, EPA began developing a cap-and-trade program for mercury.

EPA managed to issue a proposed rule incorporating the new cap-and-trade approach in December 2003, just in time to meet the court-ordered deadline. Industry favored the cap-and-trade rule, in part because it imposed substantially weaker controls than a MACT standard would have. But the cap-and-trade rule was also highly favorable to industry in another, more subtle way: It had *built-in* delay provisions. The initial 38-ton cap would actually have no impact on mercury emissions at all, since power plants were slated to achieve that level of emissions reduction anyway as an ancillary benefit of another, unrelated clean air program. The cap would not shift to a more stringent 15 tons until 2018, but even then, it would not actually require meaningful reductions for another several years. Because the program allowed power plants to bank credits in the early years while the cap was lax and then use them later, EPA's own models showed that the 15-ton cap would not actually be met until after 2020 or perhaps as late as the 2030s.[10]

EPA adopted the cap-and-trade plan in a final rule, issued in 2005. But three years later, the whole scheme backfired (or so it seemed). In 2008, a three-judge panel for the D.C. Circuit Court of Appeals unanimously agreed that the cap-and-trade program violated the Clean Air Act's requirements and sent EPA back to square one to come up with a new rule.[11] Now, nearly two decades after Congress directed EPA to regulate mercury emissions from power plants, those plants continue to operate free of federal controls. And while industry and its allies did not succeed in writing the toothless cap-and-trade rule into regulation, their campaign did manage to delay the implementation of a meaningful program by several more years.

Postscript: America's Mercury Future

In the vacuum left by EPA's interminable delay, 22 states have established their own regulations to control mercury emissions from power plants.[12] Save for these state programs, however, U.S. power plants are free to pump unlimited amounts of mercury pollution into our air for the foreseeable future.

In March 2009, the Obama EPA announced that it will resume development of a MACT standard and recently committed to completing the new regulation by 2011.[13] Meeting this deadline will be challenging. Because the abrupt change in course toward a cap-and-trade program during the Bush years effectively buried the original MACT standard, the agency will need to redo much of its earlier work. For example, EPA announced on July 2, 2009, that it will need to collect more up-to-date data from power plants on their mercury emissions, since the most recent data are now 10 years old and no longer valid.[14] Similarly, EPA will probably need to conduct new analyses of the state of the market for mercury control technology. This technology has greatly improved in recent years in response to the growing number of state programs for regulating mercury. As a result, EPA's old analyses have become outdated.

The Costs of Delay

With each year that EPA fails to take decisive action on power plant mercury emissions, the human and environmental costs pile up. The cost of EPA's inaction that has received the most attention is impaired childhood brain development. According to one study, as many as 637,000 children are born each year with elevated blood mercury levels—that is, blood mercury at levels shown to be associated with cognitive dysfunction including IQ loss and mental retardation. Because coal-fired power plants in the United States are responsible for roughly 15 percent of the mercury pollution to which these children are exposed, this study suggests that strict regulation of power plant mercury emissions could prevent around 94,000 American babies from being born with elevated blood mercury levels each year.[15] A second study concludes that this strict regulation could also prevent as many as 231 children from developing mental retardation every year.[16]

The consequences of impaired brain development are often devastating. IQ loss—one common consequence of childhood brain damage—can adversely affect a child's behavior, memory, and ability to learn and communicate. Other common consequences of childhood brain damage include vision impairment, muscular control dysfunction, and problems with coordination.[17] These adverse effects in turn can harm a child's ability to perform well in school, to make friends, and eventually to be a productive member of society. They also can take a large emotional toll on these children and their families. Imagine the humiliation a child experiences when he performs poorly in school or the anguish a parent might feel when she watches her child struggle with his schoolwork.

Nor are the human health consequences of mercury pollution limited to impaired childhood brain development. Mercury pollution has been linked to kidney disease, damage to the nervous system, and cardiovascular disease in adults. One recent study estimates that limiting power plant mercury emissions to 15 tons per year could prevent up to 380 fatal heart attacks and 210 non-fatal heart attacks each year.[18]

Certain groups, like Asian Americans and American Indian tribes, have been hit particularly hard by the human costs of EPA's inaction. For cultural and other reasons, Asian Americans

and American Indians tend to consume more fish than the general population, which increases their exposure to mercury pollution. As a result, the human health consequences of mercury pollution—particularly the worst cases—tend to fall disproportionately on these communities. For example, among the general population, mercury pollution is estimated to cause typical IQ losses of between 1.60 and 3.21 points. Among the Great Lakes Indian tribes, however, the estimate of typical IQ losses from mercury pollution ranges from 6.2 to 7.1 points.[19]

As many as 637,000 children are born each year with elevated blood mercury levels, which are associated with IQ loss and mental retardation.

EPA was not unaware of the risks to these and other populations who consume large amounts of fish. But in the absence of emissions controls, EPA simply referred these groups to the relevant fish consumption advisories, suggesting that they reduce or curtail entirely their intake of several species of fish.[20] For some people, however, avoiding the risks of mercury by ceasing fish consumption is not a realistic option. This concern is especially acute during these difficult economic times, as more and more people consider fishing as a way to put food on the table for themselves and their families. In this way, mercury pollution can impose costs on certain populations by increasing food insecurity.

Some groups also suffer unique cultural costs as a result of mercury pollution. Fishing is central to the culture of American Indian tribes like the Aroostock Band of Micmacs in Maine and is reflected in their ceremonies, language, and songs. To the extent that members of these tribes have had to stop consuming fish for health reasons, these cultural practices are not being passed on to the next generation and risk being lost forever. Similarly, when mercury pollution harms animal species like the loon and mink—which serve as important clan symbols for the Minnesota Chippewa Tribe—it is more than just an environmental cost for American Indians; it is also a serious affront to their tribal identity and dignity.[21]

Lastly, mercury pollution like that emitted from power plants produces significant environmental costs. This pollution can cause brain damage, reproductive system damage, behavioral abnormalities, and even death in birds and mammals that depend on fish, such as bald eagles, loons, kingfishers, osprey, otters, minks, and the endangered Florida panther.[22]

In Sum

The story of EPA's persistent failure to regulate power plant mercury emissions provides a stark and disturbing illustration of how regulatory delay can yield massive and indefensible human costs. Congress first told EPA to regulate toxic air pollutants like mercury in 1970. Two decades later, frustrated with EPA's slow progress, Congress gave the agency a specific directive to regulate mercury emissions from power plants and to get it done by the end of the decade at the latest. Now, nearly two decades after Congress's second directive, power plants continue to emit mercury into the air, free of federal controls. Meanwhile, tens of thousands of children are born each year with blood mercury levels high enough to cause irreversible brain damage that could have been prevented, hundreds die needlessly of heart attacks, and countless additional untold human and environmental losses continue to mount.

CASE STUDY:
Ballast Water Discharges and Invasive Species

In 1972, the Clean Water Act set ambitious goals for cleaning up the country's waters, requiring permits for discharges of a broad range of pollutants. Even though the ballast water routinely discharged by ships into harbors, lakes, and rivers contains biological pollutants clearly covered by the Act, in 1973, EPA issued a regulation exempting ballast water from the Act's permitting requirements. In the decades since, the rapid spread of the zebra mussel—an invasive species from Eastern Europe first brought by ships to Lake St. Clair in Michigan—has demonstrated the dramatic costs of inaction. In the past two decades, this invasive species has ravaged the waterways of 25 states and caused an estimated $1 billion in damages each year, clogging pipes at power plants and sewage treatment plants and displacing native species. After a federal appeals court invalidated the 1973 exemption, EPA finally began requiring permits for the discharge of ballast water, but this action comes 20 years too late. Today zebra mussels are a permanent and costly nuisance in many freshwater ecosystems.

The Issue

While significant progress has been made in reducing conventional pollutants under the Clean Water Act, invasive species—a type of biological pollutant—have continued to infest native ecosystems and displace native species. What makes these pollutants so insidious is their permanence: Once established, invasive species are nearly impossible to eradicate and forever change native ecosystems. Aquatic invasive species spread through cargo-ship ballast water, which is taken up and discharged at ports along a ship's route. The water is stored on board in pool-sized tanks and helps balance a ship as it loads and unloads cargo.

No bigger than two inches and innocuously named, zebra mussels have spread to hundreds of water bodies around the country in the past two decades. These mussels are native to Eastern European waters and arrived in the United States in ballast water discharged into the Great Lakes. With no natural predators, they have aggressively established populations in many of the country's great waterways. Zebra mussels cause an estimated $1 billion in losses annually by clogging water intake pipes at power plants, municipal water supplies, and other industrial facilities. Control measures, such as mechanical scrapers, chemical treatment, filtration devices, and physical barriers, are also costly, and no single measure is uniformly effective. In 1989, just one year after the mussels were discovered in Lake St. Clair, the town of Monroe, Michigan, lost its water supply for three days because a zebra mussel colony completely clogged an intake pipe.[23]

When Congress passed the Clean Water Act in 1972, it directed the fledgling EPA to regulate pollution of the nation's waters, including biological pollution. Had EPA followed this mandate—instead of issuing an explicit exemption for ballast water—the nation might have avoided the steep economic and environmental costs of this invasive species.

The Regulatory Delay

The Clean Water Act prohibits "the discharge of any pollutant" into the nation's waterways without a permit, and defines "pollutant" broadly to include biological materials. When ships discharge ballast water, they discharge such biological materials and other pollutants into the water. Despite its clear statutory directive, in 1973 EPA issued a regulation exempting ballast water from the Act's permit requirement.[24] In 2008, a federal appeals court unanimously struck down this regulation, holding that it violated the plain language of the Clean Water Act: to prohibit the discharge of *any* pollutant without a permit.[25] Indeed, the court found the statutory violation so clear that it noted "the EPA does not seriously contest this conclusion."[26]

When it issued the 1973 regulation, EPA was in its infancy and charged with an ambitious agenda. An EPA official said that at that time the agency was so overwhelmed with "higher priority situations . . . vessels were not important to the overall scheme of things at that time."[27] The exemption was attractive to the struggling young agency because it would "dramatically reduce administrative costs."[28] The EPA tried to justify its inaction in the face of a clear statutory directive by asserting that ballast water discharges "generally cause little pollution" anyway. The agency further maintained that the exemption was an attempt to avoid duplicative regulation when other federal bodies—namely the Coast Guard—were likely to be more effective and efficient than EPA. Regulations on ballast water discharges issued by the Coast Guard in 1998 were purely voluntary, however, and proved ineffective at addressing the problem. For decades after it initially declined to regulate biological pollution in ballast water, EPA fell into the easy bureaucratic inertia of inaction. The agency assumed that since Congress knew about the exemption and did not legislatively reverse it, the approach must be permissible despite the CWA's explicit language to the contrary.

In 1973, it may have been plausible to think that ballast water discharges "generally cause little pollution." However, by the mid-1990s, it was apparent that invasive species—and zebra mussel in particular—were destroying native ecosystems and pushing native species to extinction. Congress, state governments, and the president realized the severity of the problem. Congress addressed the problem in part by passing the National Invasive Species Act of 1996, authorizing the U.S. Coast Guard to establish ballast water discharge guidelines. As noted above, however, these guidelines were purely voluntary when first issued and had limited effect.[29] President Bill Clinton attempted to address the problem in 1999 with an executive order requiring federal agencies to "use relevant programs and authorities" to "prevent the introduction of invasive species," and prohibiting federal agencies from authorizing, funding, or undertaking activities that are likely to cause or promote the introduction or spread of invasive species.[30] But despite this prodding, EPA did not revisit its exemption.

While EPA dallied, coastal and Great Lakes states developed their own ballast water regulations. For example, California's Marine Invasive Species Act requires ships over 300 tons traveling from outside the Pacific Coast Region to discharge ballast water at least 200

nautical miles from shore in water no less than 2,000 meters deep. Washington and Oregon have similar legislation modeled after this act. A federal appeals court recently upheld the Michigan ballast water regulations that require oceangoing vessels to obtain a permit from the state,[31] and other Great Lakes states have begun the process of adopting similar regulations.[32]

After the federal appeals court invalidated EPA's ballast water exemption in 2008, the agency finally began regulating ballast water by requiring a permit for discharge, 20 years after the first zebra mussels were found in the United States.[33] However, advocacy groups and the Michigan Department of Environmental Quality point out that the permit conditions are weak and give "the appearance the agency is avoiding reaction from the shipping industry."[34] Great Lakes states, such as New York, have already passed more stringent controls to supplement EPA's conditions and to better protect their waters.[35] Whether this new program will be effective remains to be determined, but critics seem skeptical.

In 1989, just one year after the mussels were discovered in Lake St. Clair, the town of Monroe, Michigan, lost its water supply for three days because a zebra mussel colony completely clogged an intake pipe.

The Costs of Delay

Decades of inaction by EPA have been both economically and ecologically costly. Zebra mussels and quagga mussels, a similar invasive species introduced from ballast water, together cost approximately $1 billion annually in losses from clogged water pipes to expensive equipment installed to clean-up and prevent infestations. Colonies of zebra mussels can reduce the diameter of a water pipe by two-thirds, constricting water flow and reducing water intake for equipment essential to any facility that withdraws water: power plants; municipal water plants; and other industries.[36] The costs of preventing and destroying zebra mussel colonies have been astronomical and are undoubtedly passed along to the public. Ecologically, the impact of zebra mussel infestations has also been dramatic, though harder to quantify. The mussels attach to and smother native species with hard shells and fundamentally alter the food web of freshwater ecosystems.

Since they were first discovered in the Great Lakes, zebra mussels have spread to 25 states. While many of the infestations are connected to the tributaries and waterways of the Great Lakes, zebra mussels have been found as far west as Colorado, Utah, and California. For western states such as California that rely heavily on hydropower, a permanent infestation could spell doom for the industry. At one power plant in Michigan, the colony density measured as high as 700,000 zebra mussels per square meter.

The U.S. Fish and Wildlife Service estimates that for the power industry and water facilities in the Great Lakes region, the clean-up and damage cost associated with zebra mussels will be $5 billion between 2000 and 2010. At the James A. Fitzpatrick Nuclear Power Plant in New York, the initial installation cost for a chemical treatment system to prevent future infestations was $300,000, in addition to between $60,000 and $80,000 in annual operating costs. Zebra mussels have not yet established colonies in Florida, but one study estimates that if they do, a statewide infestation could cost $244 million in losses over a 20-year period.

Economic damages are not limited to power and other water-dependent industries. The weight of zebra mussel colonies on navigational buoys causes them to sink, and colonies cause corrosion of wooden docks, as well as steel and concrete pilings, undermining their structural integrity.[37] Sharp and jagged zebra mussel shells litter beaches, injuring recreational beach-goers, and decaying carcasses mar a day at the beach with noisome odors.

While the environmental costs may not be easily quantifiable, they are no less significant. Ecologists have declared invasive species to be the second biggest threat to the natural environment, behind only habitat loss and degradation. Transplanted to new surroundings, invasive species have no natural competitors or predators to hold their populations in check. As a result, they proliferate exponentially and aggressively destroy native ecosystems by physically displacing native species and consuming resources. Once established, invasive species cannot be easily eradicated without highly toxic methods that would also wipe out native species.

Zebra mussels are prolific breeders: A single female can produce up to one million eggs, 20 percent of which survive to adulthood. Mobile during their larval stage, they float through waterways and tributaries before attaching onto hard structures as adults. As filter feeders, zebra mussels have dramatically altered the food webs in Lake Erie. In some parts, they have increased water clarity to 30 feet from 6 inches by consuming nearly all the algae in the water. That dramatic change may please swimmers, but it also alters the entire food chain to the detriment of native fish and aquatic species and ultimately impacts fishermen and wildlife that depend on native fisheries. Unlike other mollusks, zebra mussels also attach to native clams and other mollusks, eventually smothering them and causing precipitous declines in their populations. One report predicts that zebra mussels will cause the extinction of up to 140 native species of mussels by 2012.[38]

In Sum

Hamstrung by inadequate resources, EPA made an initial decision not to regulate ballast water, despite a clear statutory directive to do so. In the decades that followed, that decision proved costly as the evidence mounted that zebra mussels brought to U.S. waters in ballast water were taking a devastating economic and ecological toll. The agency remained locked in bureaucratic inertia from which it did not emerge until 2008, when a federal court ordered the agency to take action. Meanwhile, the zebra mussel infestation imposed a billion-dollar price tag annually on industry and government, and now the mussels' permanence in the nation's waterways is all but given. EPA's long-delayed regulation of ballast water has come too late to have much hope of reversing the zebra mussel problem. But we can hope that it will prevent the introduction of the next invasive species.

CASE STUDY: Collapsing Cranes

In 1971, the Occupational Health and Safety Administration issued regulations for the use and operation of cranes, derricks, and other heavy machinery at construction sites. Nearly four decades later, OSHA has not updated this rule despite vast changes in technology and work processes. Beginning in the mid-1990s, industry itself began petitioning OSHA for stronger and more comprehensive regulations and in 2004 a committee of industry, labor, and government representatives reached agreement on a draft proposed rule. But five years later, this rule is still trapped somewhere in OSHA, waiting to be issued. Meanwhile, by OSHA's own estimates, 89 crane-related deaths and 263 crane-related injuries occur each year. Implementing the draft rule would reduce these numbers by 59 percent. In other words, every year the rule continues to sit on a desk while OSHA remains understaffed, under-resourced and over-stretched, 53 people die and another 155 are injured unnecessarily.

The Issue

The *headlines are uncomfortably familiar*: "Crane Collapse in Houston Kills 4," describing the 2008 collapse of a 30-story-tall crane that smashed into the ground, lifting nearby workers off their feet in Texas where neither state nor federal regulations require crane operators to be licensed; "Crane Topples in Manhattan," detailing the worst construction accident in the history of New York City when a 20-story-tall crane crashed into surrounding buildings, killing six construction workers and a tourist bystander; and "Two Workers Are Killed in Miami Crane Accident," recounting the deaths of two construction workers and injuries to five others when a seven-ton section of a crane crashed through the roof of the nearby project's safety office.[39]

The *numbers are disturbingly high*: An estimated 89 crane-related deaths each year with even more injuries to bystanders and rescue workers and millions of dollars in insurance payments, lawsuits, and project delays.

The *regulations are indefensibly outdated*: Despite technological leaps in construction machinery, OSHA has not updated the standards or requirements for operating cranes and other heavy equipment since 1971, nearly four decades ago.

The Regulatory Delay

The technological landscape of 1971 would be virtually unrecognizable today: offices ran on typewriters and carbon-copies; most phones were still rotary dialed; and engineers wore slide rules on their belts. This was the year that OSHA adopted the regulation for the operation of cranes, derricks, and other heavy machinery that remains in place today. Nearly four decades later, just as cell phones, laptop computers, and pocket calculators have

revolutionized the technological landscape, the technology that operates cranes, derricks, and other heavy machinery at construction sites looks nothing like it did in 1971. Unfortunately for today's crane operators and construction workers, the safety protections in their workplaces are as outdated as slide rules and carbon paper.[40]

Operating a crane in the 21st century is a highly technical and complex enterprise, involving sophisticated electronics and computers and requiring specific skills and experience to avoid accidents. The major causes of crane-related deaths and injuries are electrocution, improper assembly and disassembly, general equipment failure, and crane tip-over. But underlying these causes is a more basic problem: a lack of qualification and training for operators, supervisors, and crewmembers. The old rule, written for a different era, is hopelessly outdated, particularly with respect to the training and certification of personnel.

Under the proposed 2004 rule, OSHA estimates that annual deaths and injuries from accidents involving cranes and other heavy equipment would be reduced by 59 percent.

By the mid-1990s, things were so bad that industry itself was calling for updated federal regulations to reduce the number of crane-related deaths and to address the underlying causes of those accidents. In 1998, OSHA, recognizing the need for an updated standard, established a workgroup to make recommendations for updates to the cranes and derricks rule. Four years later, there was still no rule, but OSHA announced that it would seek a collaborative process involving industry stakeholders and representatives from all interested parties[41] to negotiate an updated federal standard. The committee began its meetings in 2003 and worked under the premise that, if it could agree on a draft rule, OSHA would publish and finalize the draft as its rule.[42] Within a year, the committee achieved consensus on a draft rule, which it submitted to OSHA in July 2004.

The draft rule fills many gaps left by the 1971 standards. It directly addresses the underlying problem of inexperience by requiring operators, inspectors, and assembly and disassembly workers to be certified. The rule accounts for the many technological developments since 1971 by regulating new safety and operating equipment, mandating certain protocols for failures of commonly used technologies, and permitting greater flexibility to select equipment made safer by new technologies. The draft rule also addresses electrocution, a major cause of death, by specifying the minimum distance between equipment and active power lines.[43]

Following completion, the draft rule stalled at OSHA for four years, a victim of stretched resources and competing priorities. Noah Connell, the director of OSHA's Office of Construction Standards and Guidance, explained that finalizing the proposed rule was "quite simply, an enormous undertaking."[44] He described the process of writing the background and justification as "very time-consuming," requiring frequent consultation with other departments on technical questions. When addressing the internal delay, Connell aptly described the signs of an under-resourced and over-stretched agency:

> You know, the timelines, it's very difficult to predict these dates. You know, we don't work independently. We work with a number of different agencies within OSHA. Those different parts of OSHA have projects other than

> our project and so inevitably there is some competition of resources and, you know, the agency as a whole has been working on many, many projects concurrently.[45]

Not until June 2008—four years after the rulemaking committee reached consensus on a new draft rule—did the proposed rule make it to the White House for final scrutiny. In August 2008, the Office of Management and Budget gave its approval and six weeks later, in October 2008, OSHA published the proposed rule in largely the same form as negotiated by the committee four years earlier.[46] After a series of extensions, the comment period finally ended in June 2009, but to date OSHA has still not issued the final rule. Recently, acting OSHA Director Jordan Barab again attributed the delay to an over-stretched agency, emphasizing the complexity and immensity of the new rule. Barab estimated that OSHA would finalize the new cranes and derricks rule "some time next year," which means in 2010, nearly four decades after the existing rule was issued and six years after the draft rule was completed.[47]

Notably, the new rule has consistently enjoyed broad-based support. Throughout the delay period, industry representatives, members of the rulemaking committee, OSHA representatives,[48] and Members of Congress have all expressed overwhelming support for the draft rule and have urged final approval. When OSHA first publicly acknowledged the need to update the rule in 1999, it was in response to repeated requests by industry representatives. In July 2008, a group of senators wrote an open letter to Secretary Chao, calling the regulatory delay—both the failure to update the rule since 1971 and the four-year delay in submitting the draft rule to the OMB—"unfathomable."

The Costs of Delay

By OSHA's own estimates, 89 crane-related deaths[49] and 263 worker injuries[50] occur each year at construction sites. Under the proposed rule, OSHA estimates that 59 percent of these deaths and injuries could be avoided. In short, every year that goes by without the new rule in place another 53 people die and 155 are injured in accidents that could and should have been prevented.[51]

Accidents involving cranes, derricks, and similar machinery are not only costly in terms of human lives lost but in financial terms for employers and project owners. Take, for example, Miller Park, home of the Milwaukee Brewers baseball team in Milwaukee, Wisconsin. OSHA estimates that the total cost of the project will approach $1 billion, including the cost of construction, lawsuits, and penalties, after a crane accident killed 3 construction workers in 1999.[52] The workers died when a collapsing heavy-lift crane struck their elevated platform. The crane, nicknamed Big Blue and capable of lifting 1500 tons, was being used to place sections of the Park's roof weighing over 450 tons. Because of the crane accident, the stadium construction fell one year behind schedule and failed to open

in time for the 2001 baseball season. The cost of the construction alone was 28.5 percent more than budgeted, not including the $100 million in repair costs covered by insurance and the millions of dollars in civil and punitive damages that a jury awarded to the workers' beneficiaries.

In Sum

With each year that passes without an updated rule governing cranes and derricks at construction sites, another 89 people die and another 263 are injured. Behind each statistic is a compelling story—a new father, a newlywed, a tourist in town for the weekend. But what makes these deaths and injuries particularly tragic is that more than half were entirely preventable. The need for a new rule has been apparent for decades, and for the past five years a new rule has been ready to go, drafted and agreed upon by all relevant stakeholders. Yet it remains lost in the hallways of OSHA—an agency overwhelmed by responsibilities and drastically under-staffed and under-resourced. Meanwhile, the costs of delay continue to climb.

The proposed 2004 rule has received consistent and broad-based support from senators, industry, construction worker representatives, and OSHA staffers.

Conclusion

As these three case studies illustrate, regulatory delay has become commonplace at the protector agencies—the norm in Washington, despite the manifest health, safety, and environmental problems the delays cause. Time and time again, protector agencies like EPA and OSHA unjustifiably delay issuing new regulations or updating old ones, often in clear violation of the statutes under which they operate.

At least three lessons are clear from the foregoing case studies. First, *no single measure can capture the costs of regulatory delay.* In some cases, they are measured in terms of human health, such as the children born with elevated blood mercury levels as a result of EPA's delay in issuing a mercury rule for power plants. In other cases, they are measured in terms of preventable deaths and injuries, such as the dozens of construction workers and innocent bystanders killed or injured as a result of OSHA's delay in updating regulations for the use and operation of cranes and derricks. In still other cases, these costs are measured in terms of ecological damage and disruption—the full scope of which scientists do not even yet understand—such as the countless animal species that have been harmed as a result of EPA's delay in properly regulating the spread of invasive species through ballast water discharges or its delay in regulating mercury from power plants. And finally, there are some cases where the costs can be measured in monetary terms, such as the damage to power plant water intake pipes that have resulted from EPA's failure to prevent the spread of zebra mussels through ballast water discharges.

Second, *regulatory delay has far-reaching consequences, threatening the health and safety of diverse populations, harming business interests and workers, and damaging the environment.* Vulnerable populations, including children, Asian Americans, and American Indians, are particularly hard hit by the mounting costs of EPA's delay in regulating power plant mercury emissions. More and more construction workers suffer the consequences of OSHA's delay in issuing an updated rule on cranes and derricks. The health of freshwater ecosystems throughout the United States worsens, as many are permanently altered by the spread of zebra mussels due to EPA's delay in establishing a regulatory program to prevent the introduction of invasive species through ballast water discharges. Also because of EPA's delay on ballast water, power plants bear the growing costs of unclogging their water intake pipes of zebra mussels rather than directing their resources toward controlling their harmful emissions.

Finally, from these case studies, *it is clear that the costs of regulatory delay tend to remain hidden from public view*. Whether it is children born with elevated blood mercury levels, injured or killed construction workers, or clogged water intake pipes, these costs often accrue gradually over time. Individually, these costs might attract some fleeting public and media attention, but collectively they are rarely understood as the interconnected results of a single delay in regulatory action by a particular agency. The fact that they can occur without much notice, despite their severity and extensiveness, is part of what makes the costs of regulatory delay so insidious.

Unfortunately, regulatory opponents have worked hard to ensure that the costs of regulatory delay remain hidden. As the case studies make clear, the goals of regulatory opponents are served not just when they kill or weaken regulations, but also when they delay them for a considerable amount of time. Accordingly, when it comes to measuring the performance of the U.S. regulatory system, they have sought to skew the focus towards the costs of regulation, rather than towards the cost of regulatory delay.

It is nevertheless crucial to cast a spotlight on these often-hidden costs. Without a clear understanding of how regulatory delay affects real people and the environment, it is impossible to obtain a complete picture of the invaluable role that the U.S. regulatory system plays in our society. Without this clear understanding, it is also impossible to have an open and honest discussion over what needs to be done to reinvigorate these agencies so that they can go about the business of protecting people and the environment.

The White House Office of Management and Budget (OMB) can play an instrumental role in drawing greater attention to the costs that result from regulatory delay by documenting these costs in its annual *Report to Congress on the Benefits and Costs of Federal Regulations*. As explained above, these annual reports have helped reinforce the perception that regulatory delay is cost-free by documenting and aggregating the costs and benefits of regulatory action, while ignoring the costs of delayed regulatory action. OMB should expand these reports to include a description of the costs of delayed regulatory action so that they provide a more accurate picture of the value of regulation.

The problem of regulatory delay—and the profound costs that it generates—will not be solved easily. At a minimum, we need to ensure that the protector agencies receive the resources they need to carry out their respective statutory missions. Beyond that, we need to continue exploring other ways to reinvigorate the protector agencies so they can carry out these missions in as timely a manner as possible.

End Notes

[1] Leonard Trasande et al., *Mental Retardation and Prenatal Methylmercury Toxicity*, 49 Am. J. Indust. Med. 153, 153 (2006) [hereinafter Trasande et al., *Methylmercury Toxicity*]; Ne. States for Coordinated Air Use Mgmt., Economic Valuation of Human Health Benefits of Controlling Mercury from U.S. Coal-Fired Power Plants (2005) [hereinafter Economic Valuation]; Office of Air Quality Planning & Standards & Office of Research & Dev., U.S. Envtl. Prot. Agency, 5 Mercury Study Report to Congress: Health Effects of Mercury and Mercury Compounds (1997), *available at* http://www.epa.gov/ttn/caaa/t3/reports/volume5.pdf [hereinafter Mercury Study Report].

[2] U.S. E.P.A., *Fact Sheet – EPA's Clean Air Mercury Rule,* http://www.epa.gov/mercuryrule/factsheetfin.htm (last visited Aug. 10, 2009).

[3] Kathryn R. Mahaffey et al., *Adult Women's Blood Mercury Concentrations Vary Regionally in the United States: Association with Patterns of Fish Consumption (NHANES 1999-2004)*, 117 Envtl. Health Persp. 47 (2009).

[4] Leonardo Trasande et al., *Applying Cost Analyses to Drive Policy That Protects Children: Mercury as a Case Study*, 1076 Ann. N.Y. Acad. Sci. 911, 916, 919 (2006) [hereinafter Trasande et al., *Applying Cost Analyses*]; Trasande et al., *Methylmercury Toxicity*, *supra* note 1, at 153.

[5] Sidney Shapiro & Rena Steinzor, The People's Agents: Reviving Government Protection of Health, Safety, and the Environment (forthcoming 2009).

[6] Michael Tighe, *Pressure to Release Mercury Report Rises*, L.A. Times, June 22, 1997, at 18; Dieter Bradbury, *Coal-Fired Power Plants Spew Mercury But Avoid Crackdown*, Portland Press Herald, Sept. 29, 1997, at 1A.

[7] Tighe, *supra* note 6.

[8] John Myers, *Scientists Back EPA Mercury Regulations; Coal-Fired Power Plants Could See Action*, Duluth News-Trib., July 16, 2000, at 3D.

[9] *See, e.g.*, Clean Air Act Advisory Committee, Meeting Summary, June 24, 2004, 4 (Statement of Timothy Johnson, Corning Inc.) ("[A]bout 10 years ago Corning Incorporated invented an absorbent for mercury control in coal fired power plants. EPA completed a technical review of mercury abatement about 10 years ago based on these power plants in Japan and Germany, and had concluded that mercury control costs less than 1/10 to 1/2 of a cent per kW hour. When the promise for a mercury regulation faded away 10 years ago, Corning Incorporated dropped the mercury absorbent technology, stopped the technical symposiums and shifted resources to other pollution controls."), *available at* http://www.epa.gov/oar/caaac/pdfs/062404meetingsummary.pdf.

[10] U.S. Envtl. Prot. Agency, Technical Support Document: Methodology to Generate Deposition, Fish Tissue Methylmercury Concentrations, and Exposures for Determining Effectiveness of Utility Emission Controls 3, Tables 1.1 and 1.2 (2005), *available at* http://www.epa.gov/ttn/ecas/regdata/Benefits/Final_Effectiveness.pdf (figures for emissions reductions presented in kg/year; authors' conversions); James E. McCarthy, Mercury Emissions from Electric Power Plants: An Analysis of EPA's Cap-And-Trade Regulations 7-8 (CRS Report RL32868, Apr. 15, 2005), *available at* http://www.cleanairnow.org/pdfs/crsrptrule415.pdf.

[11] New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008).

[12] James E. McCarthy, Mercury Emissions from Electric Power Plants: States are Setting Stricter Limits 2 (CRS Report RL33535, Feb. 22, 2007), *available at* http://ncseonline.org/NLE/CRSreports/07March/RL33535.pdf.

[13] Cheryl Hogue, *Power Plant Pollution*, Chemical & Engineering News, July 27, 2009, at 42, 44.

[14] Agency Information Collection Activities: Proposed Collection; Comment Request; Information Request for National Emission Standards for Coal- and Oil-fired Electric Utility Steam Generating Units, 74 Fed. Reg. 31,725 (July 2, 2009).

[15] Trasande et al., *Applying Cost Analyses*, *supra* note 4, at 916, 919.

[16] Trasande et al., *Methylmercury Toxicity*, *supra* note 1, at 153.

[17] Economic Valuation, *supra* note 1, at 26-37.

[18] *Id.* at 168.

[19] Catherine A. O'Neill, *Environmental Justice in the Tribal Context: A Madness to EPA's Method*, 38 Envtl. L. 495, 531 (2008).

[20] Proposed National Emissions Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards for Performance for New and Existing Stationary Sources: Electric Utility Steam-Generating Units; Proposed Rule, 69 Fed. Reg. 4652, 4709 (Jan. 30, 2004).

[21] O'Neill, *supra* note 19, at 496-97, 509-13.

[22] Mercury Study Report, *supra* note 1, at 3-43 to 3-45.

[23] Great Lakes Sci. Ctr., U.S. Geological Survey, *Zebra Mussel,* http://www.glsc.usgs.gov/main.php?content=research_invasive_zebramussel&title=Invasive%20Invertebrates0&menu=research_invasive_invertebrates (last visited Aug. 18, 2009).

[24] 40 C.F.R. § 122.3 (2009) (exempting from the NPDES permit requirement "any . . . discharge incidental to the normal operation of a vessel").

[25] Nw. Envtl. Advocates v. U.S. E.P.A., 537 F.3d 1006 (9th Cir. 2008).

[26] *Id.* at 1022.

[27] *Id.* at 1012.

[28] National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528 (May 22, 1973).

[29] In 2004, the Coast Guard's guidelines became mandatory.

[30] Exec. Order No. 13,112, 64 Fed. Reg. 6183 (Feb. 3, 1999).

[31] The Michigan Department of Environmental Quality will issue a permit only if a ship can demonstrate that it will not discharge ballast water or will use environmentally sound technology and methods to prevent introduction of aquatic invasive species. 2005 Mich. Pub. Acts 33, *available at* http://www.legislature.mi.gov/documents/2005-2006/publicact/pdf/2005-PA-0033.pdf.

[32] Great Lakes Comm'n, *Summary of Great Lakes State Ballast Water Legislation* (July 2008), http://www.glc.org/advocacy/documents/HR-2830-Summary-Fact-Sheet-April-08.pdf.

[33] The regulations became effective on February 6, 2009.

[34] Mich. Dep't of Envtl. Quality, *Comments on EPA's Vessel General Permit* (July 29, 2008), http://www.glelc.org/files/michigan-ballast-water-permit-comments.pdf.

End Notes

[35] Port of Oswego Authority v. Grannis, 2009 WL 1606015 (N.Y. Sup. Ct.) (upholding the New York Department of Environmental Protection's additional, more stringent ballast water discharge conditions).

[36] U.S. Geological Survey, *NAS – Nonindigenous Aquatic Species: Factsheet*, http://nas.er.usgs.gov/queries/FactSheet.asp?speciesID=5 (last visited Aug. 18, 2009) [hereinafter *Factsheet*]; Brian Meyer, *Zebra Mussels Clog City's Water Intake Pipe*, Buffalo News, July 21, 2009.

[37] *Factsheet*, *supra* note 36.

[38] Brief for Natural Res. Def. Council as Amicus Curiae Supporting Respondents, Port of Oswego Authority v. Grannis, 2009 WL 1606015 (N.Y. Sup. Ct.) (No. 0010296/2008).

[39] *Crane Collapse in Houston Kills 4*, USA Today, July 18, 2008; Carla Baranauckus, *Crane Topples in Manhattan*, N.Y. Times, Mar. 15, 2008; Damien Cave, *Two Workers are Killed in Miami Crane Accident*, N.Y. Times, Mar. 26, 2008.

[40] OSHA did amend it twice—in 1988 and 1993—but the amendments failed to address technological advances, operator certification, or employee training. These amendments clarified the conditions under which employees could be hoisted on personnel platforms and required certain safe distances from equipment, respectively.

[41] The final committee members represented manufacturers and suppliers, employers, labor organizations, training and operator testing groups, power line owners, and insurance companies. *See* Safety Standards for Cranes and Derricks, 68 Fed. Reg. 39877, 39879 (proposed July 3, 2003) (to be codified at 29 C.F.R. pt. 1926).

[42] Susan Podziba, Op-Ed., *Safety Starts at the Top*, N.Y. Times, June 12, 2008.

[43] Linda Levine, *Worker Safety in the Construction Industry: The Crane and Derrick Standard* 12 (CRS Report RL34658, Nov. 21, 2008), *available at* http://fas.org/sgp/crs/misc/RL34658.pdf.

[44] Occupational Safety & Health Admin., U.S. Dep't of Labor, Advisory Committee on Construction Safety and Health, Meeting Transcript, Jan. 24, 2008, *available at* http://www.osha.gov/doc/accsh/transcripts/accsh_012408.html.

[45] *Id*.

[46] During the public comment period, OSHA received initial requests to extend the original deadline for comments. Then, OSHA received requests to hold an informal public hearing. Cranes and Derricks in Construction, 74 Fed. Reg. 4363, 4364-65 (Jan. 26, 2009). OSHA held the hearing in March 2009 and added two post-hearing comment periods that ended in June 2009.

[47] National Advisory Committee on Occupational Safety and Health, Meeting Transcript, July 15, 2009, *available at* http:// www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a000fa.

[48] Levine, *supra* note 43.

[49] Cranes and Derricks in Construction, 73 Fed. Reg. 59714, 59884 (proposed Oct. 9, 2008) (to be codified at 29 C.F.R. pt. 1926).

[50] Mike Hall, *OSHA's Four-Year Delay on Crane Safety Standard Highlighted in Wake of N.Y. Deaths*, afl-cionowblog, Mar. 20, 2008, http://blog.aflcio.org/2008/03/20/oshas-four-year-delay-on-crane-safety-standard-highlighted-in-wake-of-ny-deaths/ (last visited Aug. 18, 2009). There are several estimates on the number of deaths and injuries per year related to crane and derricks accidents. The estimates depend on which industries are counted—construction, manufacturing, and mining suffer the most fatalities—and how the cause of death is attributed.

[51] Cranes and Derricks in Construction, 73 Fed. Reg. 59714, 59884 (proposed Oct. 9, 2008) (to be codified at 29 C.F.R. pt. 1926).

[52] Occupational Safety & Health Admin., U.S. Dep't of Labor, *The Great American Ballpark*, http://www.osha.gov/dcsp/success_stories/compliance_assistance/abbott/stadium_construction.html (last visited Aug. 18, 2009).

About the Authors

Catherine A. O'Neill is a Member Scholar of the Center for Progressive Reform and an Associate Professor of Law at Seattle University School of Law. She has worked on issues of environmental justice with various tribes, advisory committees, and grassroots environmental justice groups. Professor O'Neill was recently a member of the technical advisory board for the Swinomish Indian Tribal Community's four-year study, "Bioaccumulative Toxics in Native Shellfish." Professor O'Neill earned her J.D. from the University of Chicago and was a Ford Foundation Graduate Fellow at Harvard Law School. She has published numerous articles in the areas of environmental justice and environmental policy, many of which have been excerpted in casebooks, anthologies, and other collections.

Amy Sinden is a Member Scholar and a Director of the Center for Progressive Reform, and an Associate Professor of Law at the Temple University Beasley School of Law in Philadelphia. Professor Sinden graduated *summa cum laude* from the University of Pennsylvania Law School in 1991. Before joining the Temple Law faculty in 2001, Professor Sinden served as senior counsel for Citizens for Pennsylvania's Future and a staff attorney with Earthjustice. She has written extensively in the area of environmental law and regulatory analysis. Her recent academic writings have criticized the misuse of economic theory in environmental law and have analyzed the application of classical human rights norms to environmental conflicts.

Rena Steinzor is the President and a Director of the Center for Progressive Reform and a Professor of Law at the University of Maryland School of Law, with a secondary appointment at the University of Maryland Medical School Department of Epidemiology and Preventive Medicine. Professor Steinzor received her B.A. from the University of Wisconsin and her J.D. from Columbia Law School. She joined the faculty of the University of Maryland School of Law in 1994 from the Washington, D.C., law firm of Spiegel and McDiarmid. From 1983 to 1987, She was staff counsel to the U.S. House of Representatives' Energy and Commerce Committee's subcommittee with primary jurisdiction over the nation's laws regulating hazardous substances. Professor Steinzor has published widely in the areas of environmental federalism, the implications of industry self-regulation on the protection of the environment and public health, and so-called "market based" alternatives to traditional regulation. Her most recent book, *Mother Earth and Uncle Sam: How Pollution and Hollow Government Hurt Our Kids* was published by the University of Texas Press in December 2007.

James Goodwin works with CPR's "Clean Science" and "Government Accountability" issue groups. Mr. Goodwin joined CPR in May of 2008. He earned his B.A. in Political Science from Kalamazoo College, his J.D. (with a certificate in environmental law) from the University of Maryland School of Law, and his M.P.P. (with a concentration in environmental policy) from the University of Maryland School of Public Policy. Prior to joining CPR, Mr. Goodwin worked as a legal intern for the Environmental Law Institute and EcoLogix Group, Inc. He is a published author with articles on human rights and environmental law and policy appearing in the *Michigan Journal of Public Affairs* and the *New England Law Review*.

Ling-Yee Huang is a Policy Analyst with the Center for Progressive Reform. She graduated *cum laude* from Rice University with a B.A. in biology and received a Rotary Ambassadorial Scholarship to study international law at the University of Kent in Brussels, Belgium, where she received an L.L.M. with distinction. Ms. Huang received her J.D. *cum laude* from the University of Florida Levin College of Law. During law school, she published articles in the *University of Denver Water Law Review*, the *Florida Journal of International Law*, and the *Cardozo Law Review*.

To see more of CPR's work or to contribute,
visit CPR's website at www.progressivereform.org.

455 Massachusetts Avenue, NW
150-513
Washington, DC 20001

202-747-0698 (phone/fax)

CPR CENTER FOR PROGRESSIVE REFORM

RETURN UNDELIVERABLES TO:

Center for Progressive Reform
455 Massachusetts Avenue, NW
150-513
Washington, DC 20001

Behind Closed Doors at the White House:

How Politics Trumps Protection of Public Health, Worker Safety, and the Environment

*Executive Summary**

By CPR Member Scholar Rena Steinzor, CPR Intern Michael Patoka, and CPR Policy Analyst James Goodwin

CPR CENTER FOR PROGRESSIVE REFORM

*Full report and database of OIRA meetings are available on the CPR website, www.progressivereform.org.

CENTER FOR
PROGRESSIVE REFORM
WHITE PAPER #1111ES

November 2011

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Public Welfare Foundation for funding this white paper.

This white paper is a collaborative effort of the following individuals: **Rena Steinzor** is a Professor at the University of Maryland Francis King Carey School of Law and the President of the Center for Progressive Reform. **Michael Patoka** is a law student at the University of Maryland Francis King Carey School of Law and an intern at the Center for Progressive Reform. **James Goodwin** is a Policy Analyst with the Center for Progressive Reform. We thank **Suzann Langrall**, Coordinator for the Environmental Law Program at the University of Maryland Francis King Carey School of Law, for helping to gather and organize the data central to this report.

For more information about the authors, see page 19.

Acknowledgments

The Center for Progressive Reform is grateful to the Public Welfare Foundation for its generous support of CPR's work.

www.progressivereform.org

For media inquiries, contact Matthew Freeman at mfreeman@progressivereform.org or Ben Somberg at bsomberg@progressivereform.org.

For general information, email info@progressivereform.org.

Contents

Executive Summary....2
Key Findings....2
A Word about EO 12,866....15
Recommendations for Reform....16
Transparency....16
Level Playing Field....17
Timeliness....17
Economically Significant Rules....17
About the Authors....19

Executive Summary

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, and environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

Executive Order 12,866, issued September 30, 1993 and still in effect today

Key Findings

Tucked in a corner of the Old Executive Office Building, an obscure group of some three dozen economists exerts extraordinary power over federal rules intended to protect public health, worker and consumer safety, and the environment. Known officially as the Office of Information and Regulatory Affairs (OIRA, pronounced oh-EYE-ra), this unit reports to the director of the White House Office of Management and Budget (OMB), but operates as a free-ranging squad that pulls an astounding number of draft regulatory actions—some 6,194 over the ten-year period covered in this report—into a dragnet that operates behind closed doors. No policy that might distress influential industries, from oil production to coal mining to petrochemical manufacturing, goes into effect without OIRA's approval. A steady stream of industry lobbyists—appearing some 3,760 times over the ten-year period we studied—uses OIRA as a court of last resort when they fail to convince experts at agencies like the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA) to weaken pending regulations.

OIRA keeps secret the substance of the changes it makes to 84 percent of EPA and 65 percent of other agencies' submissions. Despite this effort to obscure the impact of its work, every single study of its performance, including this one, shows that OIRA serves as a one-way ratchet, eroding the protections that agency specialists have decided are necessary

under detailed statutory mandates, following years—even decades—of work. OIRA review is tacked on at the end of rulemakings that involve careful review of the authorizing statutes, lengthy field investigation, extended advice from scientific advisory panels, numerous meetings with affected stakeholders, days of public hearings, voluminous public comments, and thousands of hours of staff work. When all else fails, regulated industries make a bee-line for OIRA's back door. (For an illustration of how OIRA's review fits into the rulemaking process, see Figure 1.)

This report is the first comprehensive effort to unpack the dynamics of OIRA's daily work, specifically with regard to the only information that is readily available to the public about its internal review process: records of its meetings with lobbyists. These records are perhaps the only accessible accounting of OIRA's influence, and they demonstrate that OIRA has persistently ignored the unequivocal mandates of three presidents—Bill Clinton, George W. Bush, and Barack Obama—by refusing to disclose the differences between regulatory drafts as they enter review and the final versions that emerge at the end of that process. Our study reveals that OIRA routinely substitutes its judgment for that of the agencies, second-guessing agency efforts to implement specific mandates assigned to them by Congress in statutes such as the Clean Air Act, the Food Quality Protection Act, and the Occupational Safety and Health Act. In so doing, OIRA systematically undermines the clear congressional intent that such decisions be made by specified agencies' neutral experts in the law, science, engineering, and economics applicable to a given industry.

Our study covers OIRA meetings that took place between October 16, 2001 and June 1, 2011. During this decade-long period, OIRA conducted 6,194 separate "reviews" of regulatory proposals and final rules. According to the available data, these reviews triggered 1,080 meetings with OIRA staff involving 5,759 appearances by outside participants, each one representing some larger affiliation or group with an interest in the rulemaking. We placed each group into one of ten separate categories in order to make generalizations about the kinds of special interests participating in the meeting process. Table 1 introduces the kinds of groups that met with OIRA during this time period, breaking down each category into more concrete subcategories and indicating just how many of these groups are involved in the meeting process.

OIRA routinely substitutes its judgment for that of the agencies, second-guessing agency efforts to implement specific mandates assigned to them by Congress.

How OIRA's Review Fits into the Rulemaking Process

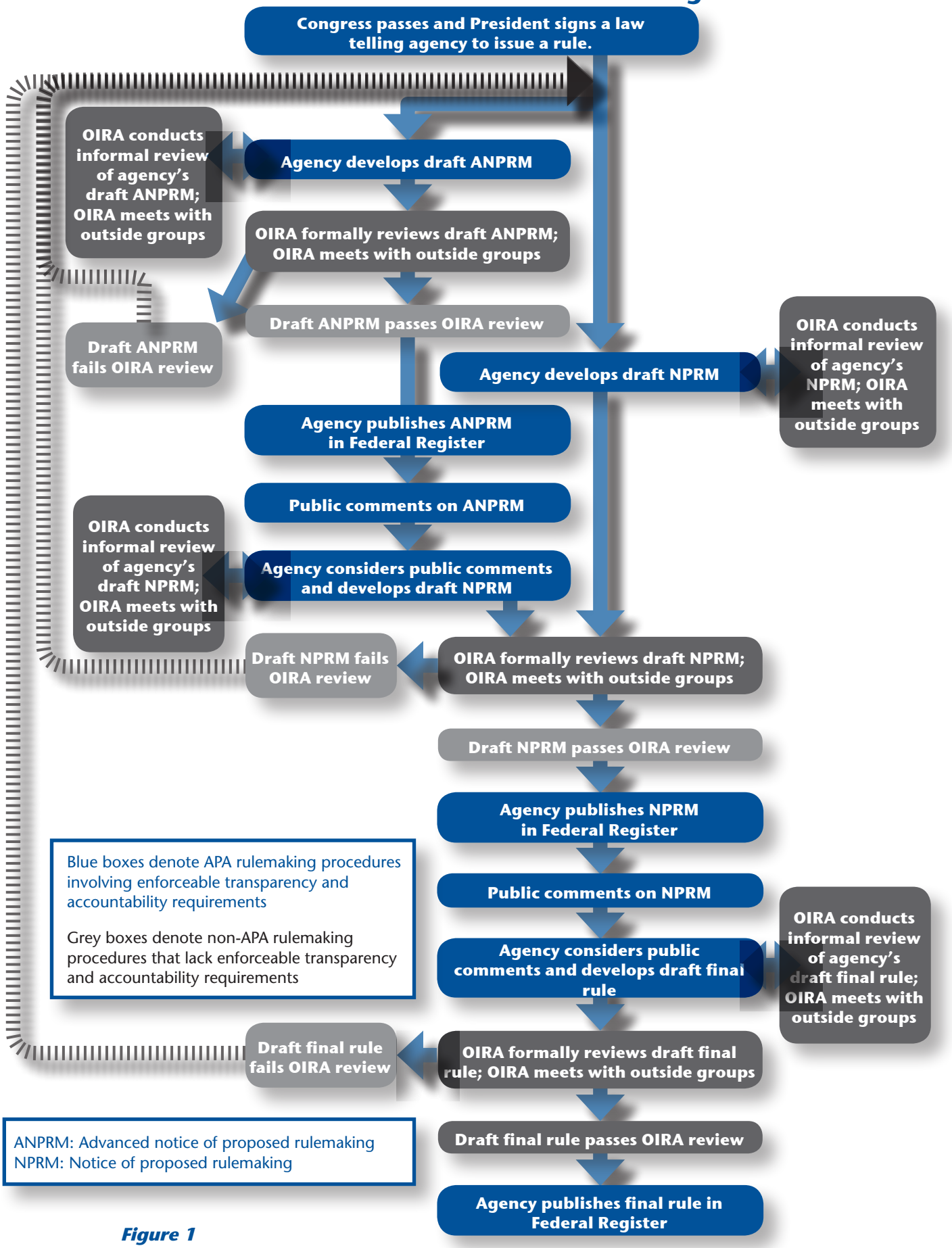


Figure 1

Category	Subcategory	Number of Distinct Groups That Met With OIRA
Industry Groups	Individual companies	550
	Trade associations and business organizations	371
	Private hospitals and healthcare systems	31
	Professional associations	22
Public Interest Groups	Environmental organizations	93
	Public health and safety organizations	34
	Education, advocacy, and research organizations	21
	Labor unions	16
	Community advocacy, public service, and citizens groups	13
	Civil and human rights organizations	10
	Consumer organizations	6
	Public interest law firms and legal-aid organizations	4
	Professional associations	8
	Individuals	4
	Public interest hospital and community-health organizations	3
	Other public interest groups	6
State Government	States and state agencies	29
	Interstate organizations	18
	Indian tribes and intertribal organizations	6
Local Government	Local governments and agencies	11
	Local-government associations	2
Other Federal Agencies	Examples: U.S. Small Business Administration, U.S. Department of Agriculture, U.S. Department of Energy	27
Members of Congress	U.S. Representatives and House Committees	32
	U.S. Senators and Senate Committees	25
Law, Consulting, and Lobbying Firms	Law firms	132
	Consulting and lobbying firms	171
Foreign or International Government	Foreign governments and embassies	11
	Multinational governmental associations	4
Higher-Education	Universities	32
	Associations of colleges and universities	9
	Professional associations	4
Other White House Offices	Examples: Council on Environmental Quality, Council of Economic Advisers, Domestic Policy Council	19

Table 1. The Kinds of Groups Involved in the OIRA Meeting Process

Our analysis, which is the most exhaustive evaluation of the impact of White House political interference on the mandates of agencies assigned to protect public health, worker safety, and the environment, reveals a highly biased process that is far more accessible to regulated industries than to public interest groups. Of course, it is possible—and senior OIRA officials

OIRA has pressed the envelope of its extraordinarily broad review authority but has routinely flouted its disclosure and deadline requirements.

have claimed—that meetings with outside parties do not drive their final decisions on agency proposals. To accept this claim, any objective observer must reject the dual assumptions that underlie the entire regulatory system: first, that a pluralistic process based on a level playing field is crucial to a wise result, and second, that experts in law, science, engineering, economics, and other disciplines are best equipped to evaluate the self-serving claims of private-sector stakeholders. Neither assumption guides OIRA. Instead, OIRA's playing field is sharply tilted toward industry interests, a process that demeans all disciplines except economists practicing OIRA's narrow brand of cost-benefit analysis, and a wide avenue that allows political considerations to trump expert judgments much of the time. As just one example of the impact of this disturbingly secretive process, consider the participation of William Daley, President Obama's Chief of Staff, in OIRA deliberations that eventually compelled EPA Administrator Lisa Jackson to promulgate a National Ambient Air Quality Standard (NAAQS) for ozone pollution that she had described as "legally indefensible" only a few months earlier.[1]

Our results tell a damning story of the relentless erosion of expert agency judgments by relatively junior White House staffers. OIRA economists use the window dressing of ostensibly objective cost-benefit analyses to camouflage politicized interventions that alter two-thirds of all regulatory drafts submitted by agencies other than EPA, and a shocking 84 percent of EPA submissions. Our specific findings include:

1. **Routine Violations of Executive Order 12,866**. In 1993, President Bill Clinton attempted to reform OIRA's most significant shortcomings by issuing Executive Order (EO) 12,866.[2] Underscoring the importance of these provisions, Presidents Bush and Obama continued EO 12,866 in effect with only minor amendments. The EO represented a compromise between regulated industries, urging strong presidential oversight of Executive Branch regulatory activities, and public interest groups, demanding greater transparency regarding the impact of such oversight on the protection of public health, worker and consumer safety, and the environment. Industry achieved broad oversight, while public interest groups achieved a set of disclosure requirements and deadlines that would allow public oversight of OIRA's work and prevent the Office from becoming a politicized sinkhole for proposals that moneyed special interests opposed.

   In the 18 years since EO 12,866 was issued, OIRA has pressed the envelope of its extraordinarily broad review authority but has routinely flouted these disclosure and deadline requirements. The twin cornerstones of the transparency intended by EO 12,866 require (1) OIRA to make available "all documents exchanged between OIRA and the agency during the review by OIRA"[3] and (2) all agencies to "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA."[4] The Obama Administration's determined neglect of these requirements is just as bad as it was under President Bush. The most important

consequence of these secretive practices is the nondisclosure of communications between OIRA and the agencies, which makes it impossible for the public to undertake a systematic, rule-by-rule analysis of the impact of OIRA review.

2. **Blown Deadlines**. Under EO 12,866, OIRA has 90 days to complete its review from the date the originating agency (for example, EPA) submits it.[5] This period can be extended by 30 days *once*, for a total of 120 days, but only if the agency head agrees to the longer period.[6] Of the 501 completed reviews that we examined (those in which OIRA was lobbied by outside parties), 59 reviews (12 percent) lasted longer than 120 days and 22 reviews extended beyond 180 days (about six months), as Figure 2 shows below.

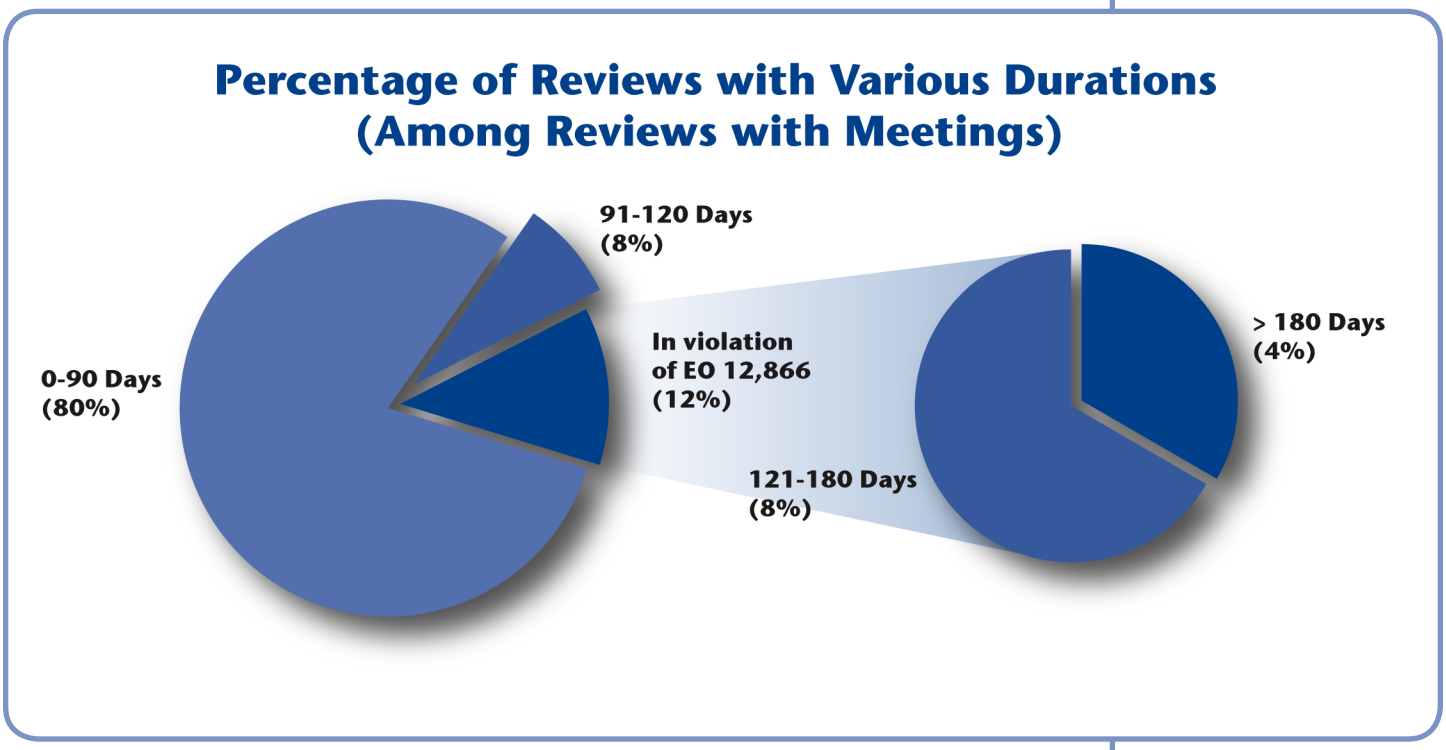


Figure 2

Among recent examples of such delays, EPA's proposed coal ash rule, written in response to the spill of 1 billion gallons of coal ash sludge in Kingston, Tennessee in 2008, was held captive at OIRA for six months. OIRA's review was so withering, and the proposal that emerged was so altered, that the rule will not come out until after the 2012 election. A proposal to issue a "chemicals of concern" list under the Toxic Substances Control Act has languished at OIRA for 17 months as of this writing. EPA's failure to regulate toxic chemicals more aggressively has landed the program on the Government Accountability Office's (GAO) short list of failed, "high risk" government initiative that should be a

priority for reform.[7] And a Department of Labor rule defining which farm work is too hazardous for children to perform gathered dust at OIRA for nine months, even though no records of meetings with concerned outside parties were ever disclosed and no interest group has publicly emerged to protest the rule. The need for the rule, which updates 40-year-old standards, became obvious in a series of gruesome accidents, including one in early August in which two Oklahoma 17-year-olds were pulled into a heavy, mechanized grain auger, badly injuring their legs.

3. **Overwhelming Industry Dominance.** As Figure 3 shows below, the industry groups participating in the meeting process outnumber the public interest groups by a ratio of 4.5 to 1—before even taking into account all the law, consulting, and lobbying firms that have met with OIRA on behalf of industry groups.

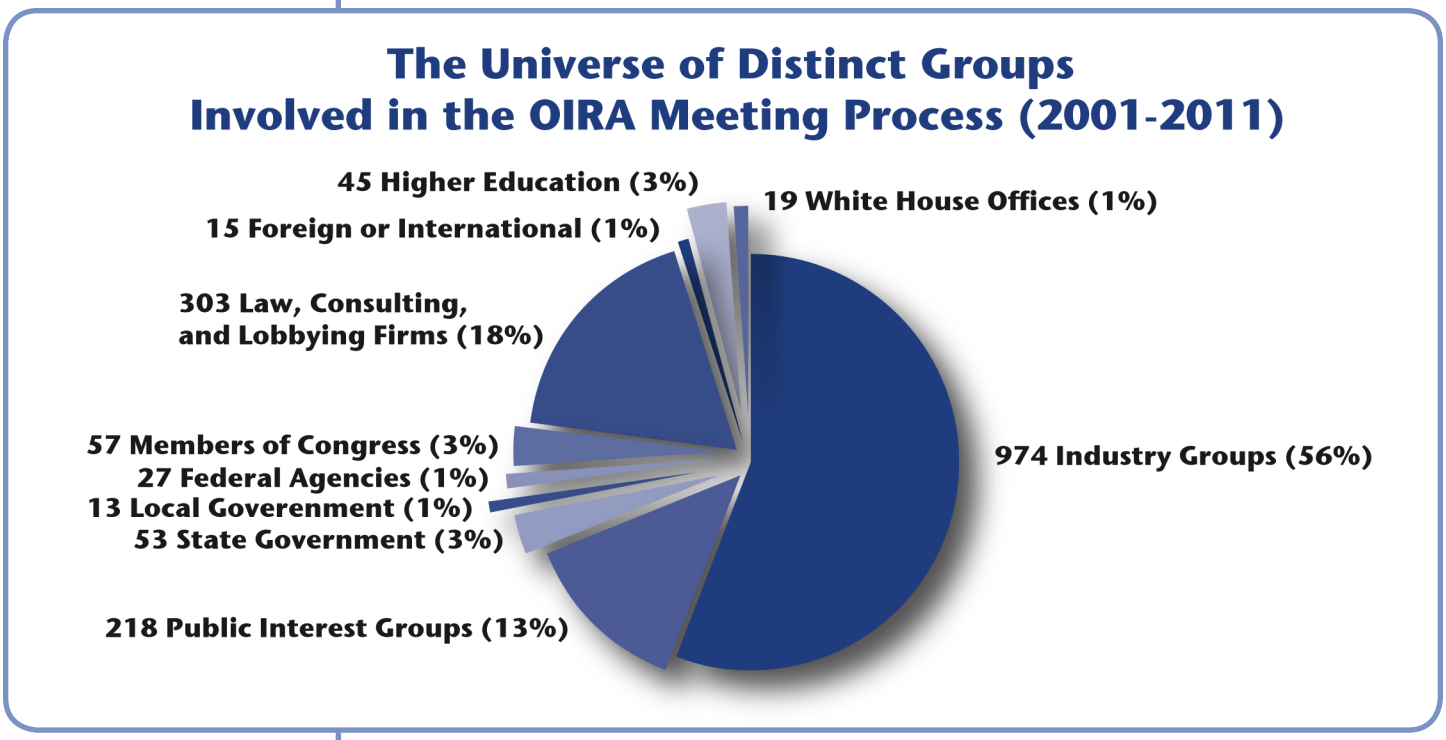


Figure 3

Table 2 below puts names to the statistics by identifying those outside parties (groups outside the federal government) that have been the most active in the meeting process. Of the 30 organizations listed here, 17 of them are industry groups, 8 are law and lobbying firms representing industry viewpoints, and 5 are public interest groups.

Rank	Group Name	Description	Number of Meetings
1	American Chemistry Council	Trade association	39
2	Natural Resources Defense Council	Environmental organization	37
3	ExxonMobil	Industry	29
4	American Forest and Paper Association	Trade association	28
5	Environmental Defense Fund	Environmental organization	26
6	Sierra Club	Environmental organization	25
7	American Petroleum Institute	Trade association	24
8	Earthjustice	Environmental organization	24
9	Edison Electric Institute	Trade association	22
10	Hunton and Williams	Law Firm	22
11	Patton Boggs	Lobbying firm	20
12	American Trucking Association	Trade association	19
13	National Association of Home Builders	Trade association	19
14	Hogan and Hartson (now Hogan Lovells)	Law firm	17
15	Air Transport Association	Trade association	16
16	National Association of Manufacturers	Trade association	16
17	National Cattlemen's Beef Association	Trade association	15
18	Crowell and Moring	Law firm	15
19	DuPont	Industry	14
20	Barnes and Thornburg	Law firm	14
21	American Farm Bureau (Federation)	Trade association	13
22	American Meat Institute	Trade association	13
23	National Mining Association	Trade association	13
24	US Chamber of Commerce	Industry association	13
25	Latham and Watkins	Law firm	13
26	Mortgage Bankers Association	Trade association	12
27	Portland Cement Association	Trade association	12
28	Venable	Law firm	12
29	EOP Group	Lobbying firm	11
30	Consumer Federation of America	Consumer organization	10

Table 2. The "Top 30" Groups Represented in the Most Meetings with OIRA

Looking more specifically at the number of individuals who attended OIRA meetings over the last decade, we found a similar degree of industry dominance: 65 percent of the 5,759 meeting participants represented regulated industry interests—about five times the number of people appearing on behalf of public interest groups (see Figure 4). President Obama's OIRA did somewhat better than President Bush's in this regard, with a 62-percent industry participation rate to Bush's 68 percent, and a 16-percent public interest group participation level to Bush's 10 percent. Nevertheless, even under this ostensibly transformative President, who pledged to rid his administration of the undue influence of well-heeled lobbyists and conduct government in the open, industry visits outnumbered public interest visits by a ratio of almost four to one.

Interests Represented by Individual Attendees

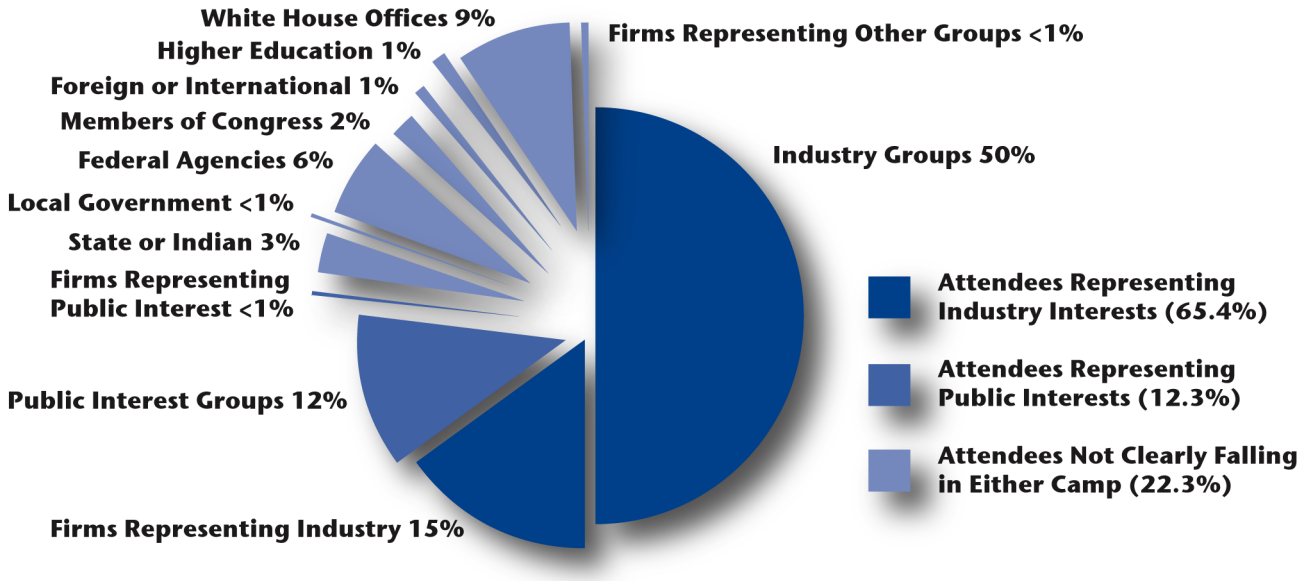


Figure 4

As disturbing, only 16 percent of rule reviews that involved meetings with outside parties garnered participation across the spectrum of interested groups, as shown in Figure 5 below. Seventy-three percent attracted participation only from industry and none from public interest organizations, while 7 percent attracted participation from public interest groups but not industry, for an overall ratio of more than ten to one in favor of industry's unopposed involvement.

Degree of Imbalanced Participation in Reviews with Meetings

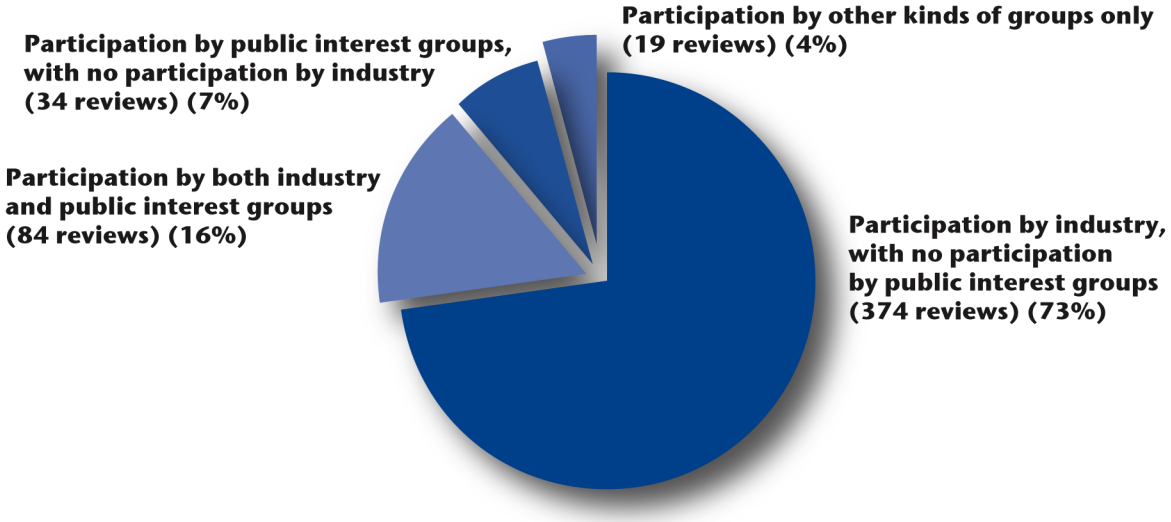


Figure 5

4. **EPA as Whipping Boy.** OIRA review is disproportionately obsessed with EPA. Fully 442 of OIRA's 1,080 meetings dealt with EPA rules. Only two other agencies had more than 100 meetings about their rules: the Department of Health and Human Services (HHS) with 137 meetings and the Department of Transportation (DOT) with 118 meetings. Compounding these disparities is the striking anomaly of this focus in the context of the overall number of rules reviewed: EPA submitted only 11 percent of the rulemaking matters reviewed by OIRA, but accounted for 41 percent of all meetings held (see Figure 6).

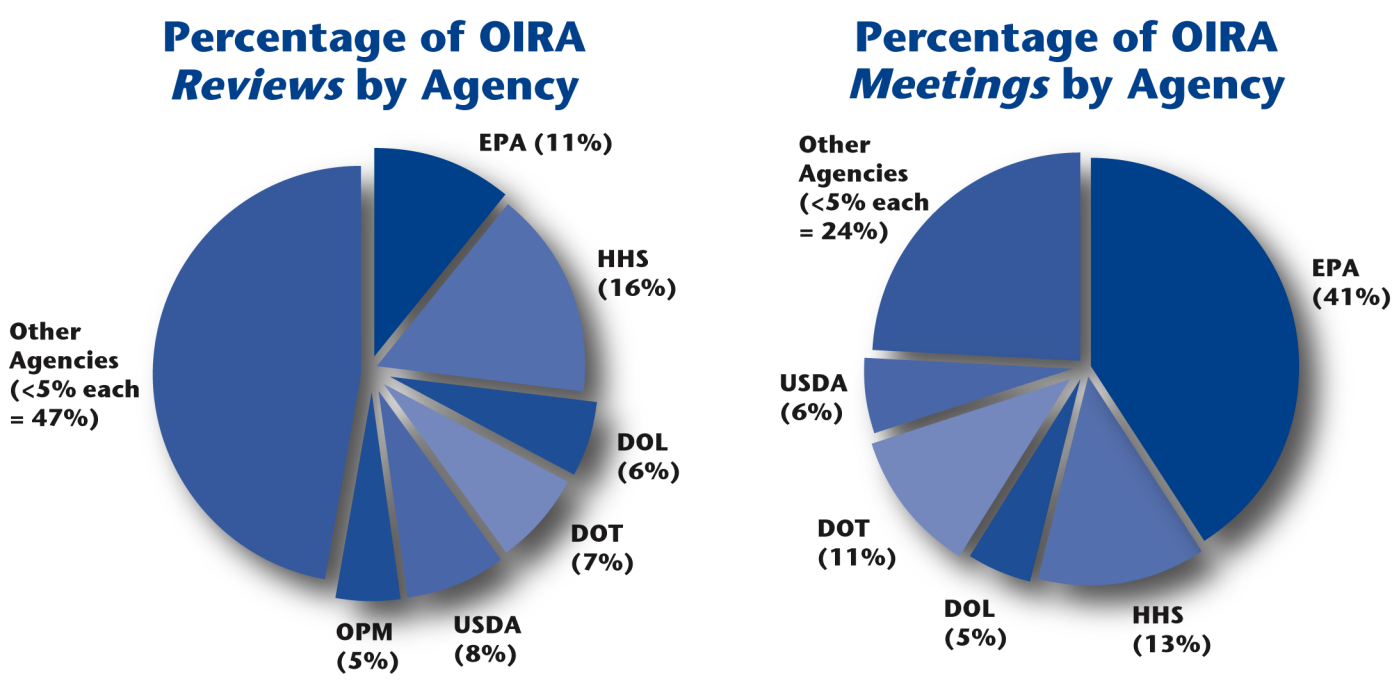


Figure 6

5. **OIRA Overreach.** EO 12,866 instructs OIRA to focus on "economically significant rules," generally defined as rules imposing more than $100 million in annual compliance costs for affected industries.[8] The order allowed OIRA to extend the scope of its review in very limited circumstances: for example, with respect to rules that interfere with other agencies' work, materially change entitlement programs, or present "novel" legal or policy issues.[9]

   For the past decade, OIRA has ignored these limits, extending its reach into every corner of EPA's and other agencies' work. While OIRA reviews approximately 500 to 700 rules each year, only about 100 are economically significant, with the remainder supposedly falling under the limited exceptions of EO 12,866. Or, in other words, "non-economically significant rules" are reviewed at a ratio of six to one with the rules that should be the primary focus of OIRA's work. It's worth noting in this regard that because OIRA has such a small staff, and rulemaking proceedings at agencies like EPA are so complex, the temptation to hold small rules hostage in order to inspire changes in more significant rules must exist, although OIRA's secretiveness about what happens during its review makes it impossible to confirm this hypothesis.

6. **One-way Ratchet**. The reasons why OIRA prefers to conduct reviews behind closed doors and agencies are too fearful to reveal these negotiations are obvious: OIRA changed 76 percent of rules submitted to it for review under President Obama, compared to a 64-percent change rate under President Bush. EPA rules were changed at a significantly higher rate—84 percent—than those of other agencies—65 percent—throughout the period of our study (see Figure 7).

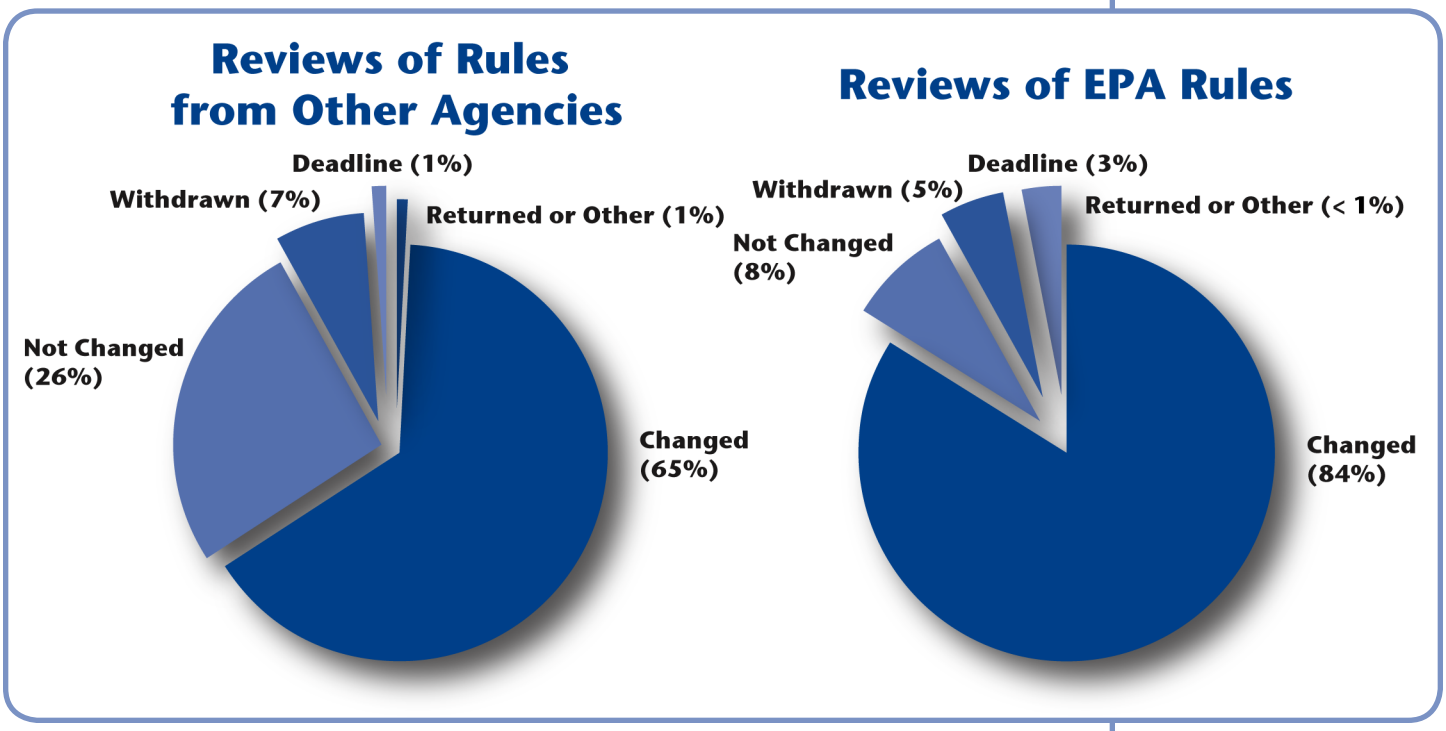


Figure 7

Moreover, rules that were the subject of meetings with stakeholders were 29 percent more likely to be changed than those that were not (85 percent divided by 66 percent, see Figure 8), although the difference is not as severe under Obama—mainly because OIRA has been changing more rules even *without* meetings than it did under Bush, thus narrowing the gap. In light of previous studies suggesting that OIRA's changes exclusively weaken agency rules,[10] as well as a number of well-known examples where OIRA altered rules in exactly the ways requested by industry lobbyists, this evidence of OIRA's frequent changes cements its reputation as an aggressive one-way ratchet.

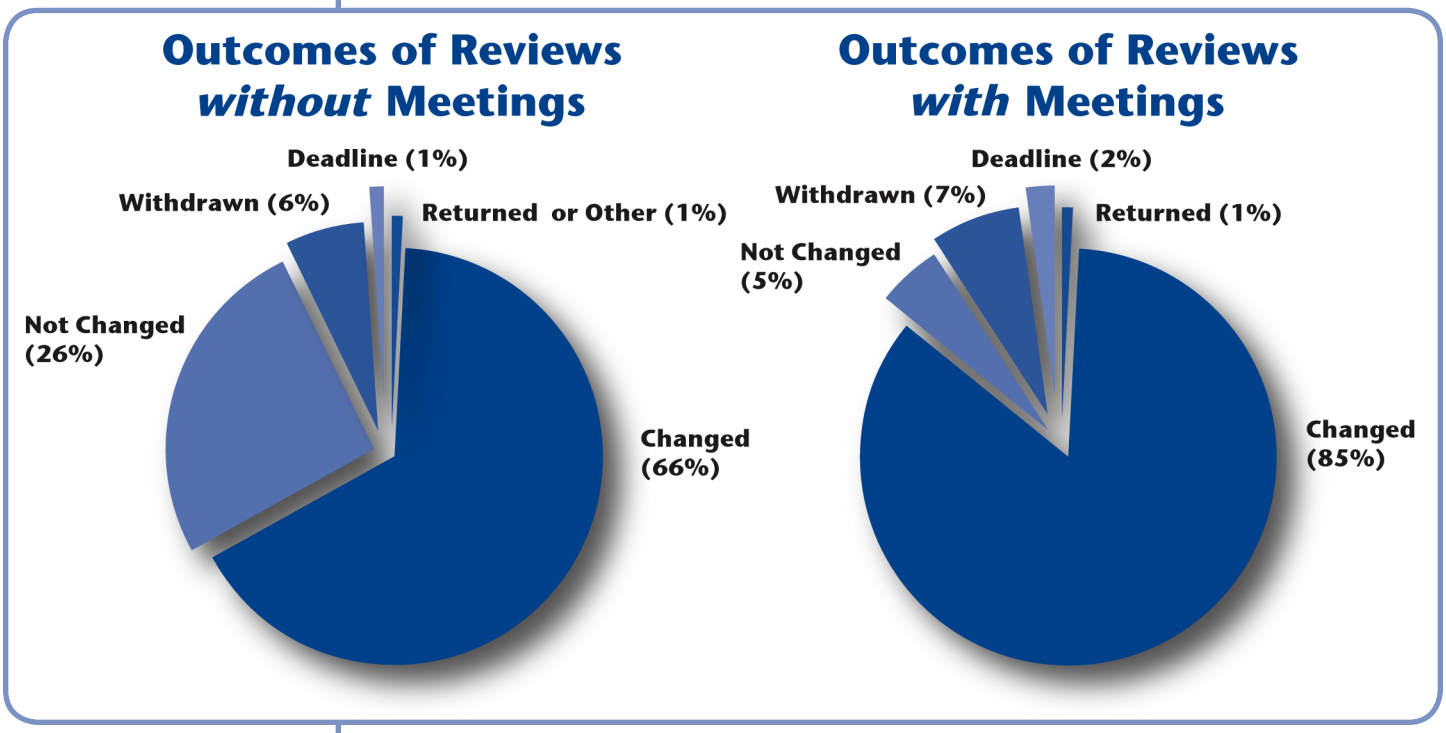


Figure 8

7. **Premature Intervention.** All of the above findings regarding industry dominance, lack of transparency, and inordinate OIRA interference with the substance of rules to protect public health and natural resources are compounded by OIRA's early interference in the formulation of regulatory policy. Of the 1,056 meetings that took place over the studied time period and that were identified with a rulemaking stage, 452 (43 percent) took place before the agency's proposal was released to the public. The percentage of meetings that occurred at this *pre-proposal* stage has actually been greater during the Obama Administration (47 percent) than it was during the Bush Administration (39 percent). Early interference frustrates transparency and exacerbates the potential for agencies to succumb to White House political pressure before they have even had the opportunity to seek public comment on more stringent proposals.

   Such secret deliberations are especially prevalent when OIRA conducts "informal reviews" of agency rules. These informal reviews, conducted through phone calls and meetings between OIRA and agency staff, are very effective in changing the agency's regulatory plans. But the public has virtually no way of knowing what happens during these reviews, or even how long they last. Of the 1,057 meetings that could be linked to a formal review period, 251 (24 percent) were held prior to the formal review—in other words, during OIRA's *informal* review. To the Obama Administration's credit, the proportion of informal-review meetings was much greater under the Bush Administration (34 percent of all meetings) than it has been over the last two and a half years (10 percent).

A Word about EO 12,866

EO 12,866 governs the process OIRA must follow in undertaking regulatory reviews. The EO is written in simple, straightforward, and highly prescriptive language, clearly stating deadlines and requirements that OIRA and the agencies "must" follow. Among the most striking findings of this report is that OIRA routinely violates these provisions. The violations are clear, not debatable, and no credible interpretation of the EO excuses them. Nevertheless, in our many years of experience watching OIRA's activities under both Presidents Bush and Obama, we have talked to numerous journalists who said that OIRA spokespeople had told them that EO 12,866 explicitly allows OIRA to behave in the manner that EO 12,866 in fact prohibits.

For example, EO 12,866 anticipates that OIRA will meet with outside parties as it reviews agency rules, and requires OIRA to disclose certain minimal information about its meetings (the date, the attendees, and the subject matter).[11] With regard to these meetings, OIRA has adopted an "open-door" policy, insisting that it is required by EO 12,866 to meet with all interested parties that request to do so.[12] In the words of OMB spokesman Tom Gavin, "The office has not refused a meeting with anyone who has asked for one."[13] No matter how many similar meetings OIRA has already agreed to, or how lopsided the process becomes when most of the meetings are requested by regulated industries to complain about pending regulations, OIRA continues to grant meeting requests.

Despite OIRA's assertion to the contrary, *nothing in the executive order requires such a policy*. In fact, all of these meetings are redundant of the extensive opportunities for regulated industries to file comments with EPA and other agencies, to testify at numerous public meetings, and to meet with agency staff innumerable times. If OIRA were truly concerned about appearing neutral and impartial, it would avoid the stampede of industry lobbyists that we have documented below. In actual practice, however, OIRA functions as little more—and nothing less—than a "fix it" shop for special interests and is oblivious to how its lopsided process and lack of transparency might appear to the American people.

We anticipate that OIRA's efforts to distort the language of the EO will recur after we issue this report, as OIRA attempts to excuse the behavior catalogued below. We hope that journalists, Members of Congress and their staff, other government agencies and departments, private sector organizations, and the public will take the time to compare these justifications to the plain language of EO 12,866.

Recommendations for Reform

At the beginning of the Obama Administration, CPR Member Scholars urged OIRA Administrator Cass Sunstein to shift OIRA's emphasis from reviewing individual rules to concentrating on cross-cutting regulatory problems, such as the threats posed by unsafe imports.[14] By the beginning of the third year of President Obama's first term, it became clear that the Administration was determined to use OIRA as the leading edge of its political efforts to placate big business in an effort to neutralize its attacks on the Administration in general and its regulatory policies in specific. The most recent example is Cass Sunstein's role as the White House official who instructed EPA Administrator Lisa Jackson to abandon efforts to tighten the NAAQS for ozone (known more familiarly as smog) that has been in effect since 1997 and is significantly weaker than the standard proposed by the Bush Administration.

So we have little hope that the Obama Administration will contemplate the fundamental overhaul of OIRA's role that is genuinely needed. For the record, however, such reform would include:

- Eliminating OIRA's review of individual regulatory proposals, and instead re-directing the Office to focus on cross-cutting regulatory problems that require coordinated actions by multiple agencies;
- Helping the agencies to develop proposals to strengthen their effectiveness administratively and legislatively; and
- Advocating targeted budget increases to enable the agencies to enforce existing laws.

Short of those meaningful, fundamental reforms, we offer here a series of more moderate proposals that should be regarded as a "first step" toward solving OIRA's burgeoning distortion of statutes like the Clean Water and Clean Air Acts, the Food, Drug, and Cosmetic Act, and the Mine Safety and Health Act. These suggested reforms are squarely within reach of the Obama Administration, certainly if it is granted a second term. Although we believe the reforms we offer fall far short of the wide-ranging reform that is needed, and even if followed, will not defuse OIRA's overly politicized process, one that trumps expert judgments on the protections Americans need and deserve, the changes below would at least eliminate blatant violations of EO 12,866 and make the review process fairer.

Transparency

1. Once OIRA has completed its review of either a proposed or final rule, the agency that originated the proposal should post on the Internet (including as part of the rule's electronic docket) a succinct explanation of the changes OIRA demanded, along with the version of the rule that was submitted to OIRA and the revised document that emerged at the end of the review period.

2. OIRA should post on the Internet (including, as part of the rule's electronic docket) all of the written communications that occurred between its staff and the originating agency during its consideration of any proposed or final rule.
3. OIRA should end the practice of undertaking "informal reviews" of agency policies before they are developed into regulatory drafts and officially submitted for review.

Level Playing Field

4. OIRA should stop meeting with outside parties during its consideration of a proposed or final rule, and instead confine its evaluation to dialogue with agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation.
5. Nevertheless, if OIRA continues to meet with outside parties, it should assume an active role in balancing the participation, whether through consolidating meetings with like-minded participants (seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.

Timeliness

6. OIRA should abide by the deadlines set forth in EO 12,866 that allow a maximum of 120 days for rule review, provided that the agency head agrees to a delay beyond 90 days.
7. If OIRA asks for a 30-day extension, its request and the agency head's approval should be in writing and made public as soon as they are issued.
8. If OIRA misses these deadlines, agency heads should proceed with their rulemaking schedules and the President should support those decisions.

Economically Significant Rules

9. OIRA should focus its review on economically significant regulatory proposals and stop reviewing non-economically significant rules and guidance documents that do not fit under the exceptions provided by EO 12,866: namely, that a proposal would interfere with another agency's work, materially change entitled programs, or pose novel legal or policy issues.
10. In the rare instance when OIRA believes it must exercise its authority to pull a non-economically significant rule into its review process, it should explain in writing how the proposal fits under the exceptions set forth in EO 12,866, and it should promptly post this explanation on the Internet (both on its website and in the rule's electronic docket).

OIRA should post on the Internet all of the written communications that occurred between its staff and the originating agency during its consideration of any proposed or final rule.

Endnotes

[1] *See* Lawrence Hurley & Gabriel Nelson, *Lawyers Plot Next Steps in Legal Battle Over Ozone Rule*, N.Y. Times, Sept. 7, 2011, http://www.nytimes.com/gwire/2011/09/07/07greenwire-lawyers-plot-next-steps-in-legal-battle-over-o-59778.html; Mark Drajem & Kim Chipman, *Daley Lobbied by Business, Health Groups on U.S. Ozone Rule*, Bloomberg, Aug. 16, 2011, http://www.bloomberg.com/news/2011-08-16/daley-lobbied-by-business-environment-groups-on-u-s-ozone-rule.html.

[2] Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 note (West 2010), *available at* http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.

[3] Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. at 648.

[4] *Id.* § 6(a)(3)(E)(iii), 3 C.F.R. at 646.

[5] *Id.* § 6(b)(2)(B), 3 C.F.R. at 647.

[6] *Id.* § 6(b)(2)(C), 3 C.F.R. at 647.

[7] *See* U.S. Gov't Accountability Office, High Risk Series, http://www.gao.gov/docsearch/featured/highrisk.html.

[8] *See* Exec. Order No. 12,866 § 6(b)(1), 3 C.F.R. 638 at 646 (permitting OIRA to review only "significant regulatory actions"); *id.* § 3(f)(1), 3 C.F.R. at 641 (defining regulatory actions that are significant for economic reasons). *Compare id.* § 6(a)(3)(C), 3 C.F.R. at 645-46 (requiring agencies to prepare a full cost-benefit analysis, with extensive consideration of alternatives, for economically significant rules) *with id.* § 6(a)(3)(B), 3 C.F.R. at 645 (requiring agencies to prepare only an assessment of costs and benefits for non-economically significant rules).

[9] *See id.* §§ 3(f)(2)-(4), 3 C.F.R. at 642.

[10] *See, e.g.,* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47, 72-73 (2006) (a survey of top political appointees at EPA under Bush I and Clinton, in which 89 percent of respondents agreed that OIRA *never or rarely* made changes that would enhance protection of human health or the environment, and *often or always* made regulations less burdensome for regulated entities); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. Colorado L. Rev. 335, 365 (2006) (examining 25 rules identified by the GAO as "significantly changed" by OIRA between June 2001 and July 2002, and concluding that for 24 of the 25 rules, OIRA's suggested changes "would weaken environmental, health, or safety protection").

[11] Exec. Order No. 12,866 § 6(b)(4)(C)(iii), 3 C.F.R. at 648.

[12] *See* Michael Collins, *Environmentalists Critical of Number of Meetings Regulatory Office Has Had with Opponents to New Coal Ash Rules*, Knoxville News Sentinel, Mar. 19, 2010, http://www.knoxnews.com/news/2010/mar/19/environmentalists-critical-coal-ash-rules-debate; Patrick Reis, *Recycling Questions Complicate EPA Coal Ash Decision*, The New York Times, Jan. 13, 2010, http://www.nytimes.com/gwire/2010/01/13/13greenwire-recycling-questions-complicate-epa-coal-ash-de-90614.html?pagewanted=all; Patrick Reis, *GOP Superfriends Have Complicated History with Subsidies - Oil Up despite Market Tumble - DOE's Nat Gas Panel to Release Recommendations Today - NRC Facing Suit*, Politico Morning Energy, Aug. 11, 2011, http://www.politico.com/morningenergy/0811/morningenergy310.html.

[13] Collins, *supra* note 5.

[14] John S. Applegate et al., Center for Progressive Reform, *Reinvigorating Protection Health, Safety, and the Environment: The Choice Facing Cass Sunstein* (Jan. 2009), http://www.progressivereform.org/articles/SunsteinOIRA901.pdf.

About the Authors

Rena Steinzor is the President of the Center for Progressive Reform and a Professor of Law at the University of Maryland Francis King Carey School of Law. Professor Steinzor has written extensively on efforts to reinvent environmental regulation in the United States and the use and misuse of science in environmental policy making. Among her publications include a book titled Mother Earth and Uncle Sam: How Pollution and Hollow Government Hurt Our Kids and a wide range of articles on administrative, constitutional, and environmental law. Professor Steinzor was staff counsel to the U.S. House of Representatives' Energy and Commerce Committee with primary jurisdictions over federal laws regulating hazardous substances and was the partner in charge of the environmental law practice at Spiegel and McDiarmid.

Michael Patoka is a third-year law student at the University of Maryland Francis King Carey School of Law and an intern at the Center for Progressive Reform. In 2010, he co-authored (with Professor Steinzor) a set of comments demonstrating how OIRA undermined EPA's proposal to regulate toxic coal ash, including an extensive critique of the cost-benefit analysis that emerged from OIRA's review.

James A. Goodwin works with CPR's "Clean Science" and "Government Accountability" issue groups. Mr. Goodwin joined CPR in May of 2008. Prior to joining CPR, Mr. Goodwin worked as a legal intern for the Environmental Law Institute and EcoLogix Group, Inc. He is a published author with articles on human rights and environmental law and policy appearing in the *Michigan Journal of Public Affairs* and the *New England Law Review*.

Other recent publications from the Center for Progressive Reform:

Available at www.progressivereform.org

■ Back to Basics: An Agenda for the Maryland General Assembly to Protect the Environment

CPR White Paper 1110, by Member Scholar Rena Steinzor and Policy Analyst Yee Huang, October 2011.

■ Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation

CPR White Paper 1109, by Member Scholar Sidney Shapiro, National Labor College Professor Ruth Ruttenberg, and Policy Analyst James Goodwin, August 2011.

■ Climate Change and the Puget Sound: Building the Legal Framework for Adaptation

CPR White Paper 1108, by Member Scholars Robert L. Glicksman and Catherine O'Neill, and Policy Analyst Yee Huang; and Member Scholars William L. Andreen, Robin Kundis Craig, Victor Flatt, William Funk, Dale Goble, Alice Kaswan, and Robert R.M. Verchick, June 2011.

■ Opening the Industry Playbook: Myths and Truths in the Debate Over BPA Regulation

CPR White Paper 1107, by Member Scholars Rena Steinzor and Thomas McGarity, Senior Policy Analyst Matthew Shudtz, and Policy Analyst Lena Pons, June 2011.

■ Twelve Crucial Health, Safety, and Environmental Regulations: Will the Obama Administration Finish in Time?

CPR White Paper 1106, by Member Scholars Rena Steinzor and Amy Sinden, Senior Policy Analysts Matthew Shudtz, and Policy Analysts James Goodwin, Yee Huang, and Lena Pons, April 2011.

Six Myths About Climate Change and the Clean Air Act

CPR White Paper 1105, by Member Scholars Dan Farber and Amy Sinden, April 2011.

Making Good Use of Adaptive Management

CPR White Paper 1104, by Member Scholars Holly Doremus, William L. Andreen, Alejandro Camacho, Daniel A. Farber, Robert L. Glicksman, Dale Goble, Bradley C. Karkkainen, Daniel Rohlf, A. Dan Tarlock, and Sandra B. Zellmer, and Executive Director Shana Jones and Policy Analyst Yee Huang, April 2011.

Setting the Record Straight: The Crain and Crain Report on Regulatory Costs

CPR White Paper 1103, by Member Scholar Sidney Shapiro, National Labor College Professor Ruth Ruttenberg, and Policy Analyst James Goodwin, February 2011.

Missing the Mark in the Chesapeake Bay: A Report Card for the Phase I Watershed Implementation Plans

CPR White Paper 1102, by Member Scholars William Andreen, Robert Glicksman, and Rena Steinzor, Policy Analyst Yee Huang and Executive Director Shana Jones, January 2011. Accompanying detailed evaluations of the plans from the Bay jurisdictions: Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia.

The BP Catastrophe: When Hobbled Law and Hollow Regulation Leave Americans Unprotected

CPR White Paper 1101, by Member Scholars Alyson Flournoy, William Andreen, Thomas McGarity, Sidney Shapiro, and Policy Analyst James Goodwin, January 2011.

To see more of CPR's work or to contribute,

visit CPR's website at www.progressivereform.org.

455 Massachusetts Avenue, NW

 # 150-513

Washington, DC 20001

202-747-0698 (phone/fax)

CPR CENTER FOR PROGRESSIVE REFORM

RETURN UNDELIVERABLES TO:

Center for Progressive Reform

455 Massachusetts Avenue, NW

 # 150-513

Washington, DC 20001

Distorting the Interests of Small Business:

How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety

by CPR Member Scholar Sidney Shapiro
and CPR Policy Analyst James Goodwin

CPR CENTER FOR PROGRESSIVE REFORM

CENTER FOR
PROGRESSIVE REFORM
WHITE PAPER #1302
January 2013

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Public Welfare Foundation for funding this white paper.

This white paper is a collaborative effort of the following individuals: **Sidney Shapiro** holds the University Distinguished Chair in Law at the Wake Forest University School of Law and is a member of the Board of Directors of the Center for Progressive Reform. **James Goodwin** is a Policy Analyst with the Center for Progressive Reform.

For more information about the authors, see page 29.

www.progressivereform.org

For media inquiries, contact Matthew Freeman at mfreeman@progressivereform.org or Ben Somberg at bsomberg@progressivereform.org.

For general information, email info@progressivereform.org.

Acknowledgments

The Center for Progressive Reform is grateful to the Public Welfare Foundation for its generous support of CPR's work.

Executive Summary

It's likely that few outside of Washington have heard of the Small Business Administration's (SBA) Office of Advocacy, but this tiny and largely unaccountable office has quietly become a highly influential player in the federal regulatory system, wielding extraordinary authority over the workplace safety standards employers must follow, the quantity of air pollution factories can emit, and the steps that food manufacturers must take to prevent contamination of the products that end up on the nation's dinner tables.

The Office exercises this authority by superintending agency compliance with an expanding universe of analytical and procedural requirements—imposed by a steady stream of statutes and executive orders issued during the past three decades—that purportedly seek to ensure that agencies account for small business interests in their regulatory decision-making. Controversial rules can quickly become mired in this procedural muck, and an agency's failure to carry out every last required analysis with sufficient detail and documentation can spell doom for even the most important safeguards. This system provides the Office of Advocacy with a powerful lever for slowing down rules or dictating their substance.

The Office of Advocacy's role in the regulatory system bears a striking resemblance to that played by the White House Office of Information and Regulatory Affairs (OIRA). Both operate to similar effect, functioning as an anti-regulatory force from within the regulatory structure, blocking, delaying, and diluting agency efforts to protect public health and safety. Moreover, both offices have entry into the regulatory process on the strength of seemingly neutral principles and policy goals—promotion of economic efficiency and protection of small business, respectively. But in actual practice, both offices serve to politicize the process, funneling special interest pressure into agency rulemakings, even though such interests have already had ample opportunity to comment on proposed regulations. Despite these similarities, however, OIRA receives the bulk of attention from policymakers, the media, and the public.

This report shines light on the Office of Advocacy's anti-regulatory work, examining how its participation in the rulemaking process further degrades an already weakened regulatory system. As a preliminary matter, the nominal objective of the Office of Advocacy—subsidizing small businesses through preferential regulatory treatment[1]—is based on a needless and destructive tradeoff; the government has several policy options for promoting small businesses without sacrificing public health and safety. The Office of Advocacy nevertheless devotes much of its time and resources to blocking, delaying, or diluting regulatory safeguards or to supporting general anti-regulatory attacks from industry and its allies in Congress. In short, blocking regulations has become the Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the Office to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

Blocking regulations has become the Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the Office to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

More specifically, the report finds that the Office of Advocacy:

- Pursues an inherently flawed mission that needlessly sacrifices public health and safety;
- Adds several unnecessary roadblocks to the rulemaking process, preventing agencies from achieving their respective missions of helping people and the environment in an effective and timely manner;
- Sponsors anti-regulatory research designed to bolster politicized attacks against the U.S. regulatory system;
- Testifies at congressional hearings aimed at advancing politicized attacks against regulations that are inconvenient to well-connected corporate interests;
- Takes advantage of overly broad small business size standards to weaken regulations for large firms;
- Enables trade association lobbyists to subvert its small business outreach efforts;
- Interferes with agency scientific determinations despite lacking both the legal authority and relevant expertise to do so; and
- Pushes for rule changes that would benefit large firms instead of narrowly tailoring its recommendations so that they help only truly small businesses.

The report concludes by identifying several reforms that would enable the Office of Advocacy to work constructively with regulatory agencies during the rulemaking process to advance small business interests without undermining those agencies' mission of protecting public health and safety. These recommendations are summarized in Table 1.

Table 1: Recommendations for Reforming the Office of Advocacy

A New Mission: Promote "Win-Win" Regulatory Solutions that Ensure Both Small Business Competitiveness and Strong Protections for People and the Environment	• Congress should amend the Office of Advocacy's authorizing statutes to focus on promoting small business "competitiveness" instead of on reducing regulatory impacts or burdens. • Congress should provide the SBA with additional legal authorities to establish new subsidy programs that affirmatively assist small businesses meet effective regulatory standards without undermining their competitiveness. • Congress should establish and fully fund a network of small business regulatory compliance assistance offices. • Congress should significantly increase agency budgets so that they can effectively account for small business concerns in rulemakings without hindering their ability to move forward with needed safeguards. • The Office of Advocacy should identify and implement regulatory solutions that will enable small businesses to meet strong public health and safety standards while remaining competitive with larger firms. At a minimum, these solutions should include regulatory compliance assistance, finding opportunities to partner small businesses in mutually beneficial ways, and securing subsidized loans to cover compliance costs. • The Office of Advocacy should develop new guidance that helps agencies better address small business concerns in rulemakings by working toward win-win regulatory solutions. • The President should revoke Executive Order 13272, which empowers the Office of Advocacy to work with OIRA to interfere in agency rules.
Restored Focus: Helping Truly Small Businesses Only	• Congress should revise the Office of Advocacy's small business size standards so that they (1) focus on truly small businesses (*i.e.*, those with 20 or fewer employees) and (2) prevent the Office from working on behalf of all firms, regardless of size, that work in industrial sectors that pose a high risk to public health and safety. • Congress should prohibit the Office of Advocacy from working with non-small businesses and should establish legal mechanisms for ensuring that this prohibition is observed. • Congress should conduct more frequent and thorough oversight of the Office of Advocacy.

In recent years, corporate interests and their anti-regulatory allies in Congress have championed several bills that would enhance the Office of Advocacy's power to prevent agencies from carrying out their statutory missions of protecting public health and safety. Two bills—the Regulatory Flexibility Improvements Act and the Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act—would require agencies to complete several new analytical and procedural requirements purportedly aimed at reducing regulatory burdens on small businesses. The bills would empower the Office of Advocacy to monitor agency compliance with these requirements, bolstering its ability to interfere in individual rulemakings. A third bill, the Clearing Unnecessary Regulatory Burdens Act, would authorize the Office of Advocacy to second-guess agency civil enforcement actions against small businesses for certain first-time violations of regulatory reporting requirements.

These bills are part of the broader wave of anti-regulatory attacks that has dominated the political landscape ever since the Republican Party's success in the 2010 congressional elections. When launching these attacks, anti-regulatory advocates frequently invoke small-business concerns. Small business has become a highly romanticized, almost mythological concept among the public and policymakers alike, evoking images of small "mom and pop" stores lining the idyllic Main Street of some quaint village. Because no politician wants to run the risk of being painted as "anti-small business," anti-regulatory advocates have worked tirelessly to promote their cause as essential to helping small businesses. Moreover, recent high profile catastrophes involving inadequately regulated large businesses—including the BP oil spill and the Wall Street financial collapse—have provided anti-regulatory advocates with additional impetus to adopt the frame of small business to advance their agenda. In this atmosphere, proposals to expand the powers of the reliably anti-regulatory Office of Advocacy have become especially attractive to policymakers intent on weakening the nation's already fragile regulatory system.

Background: The Pervasive Problem of Under-Regulation

The United States faces a problem of under-regulation. The regulatory system is supposed to protect public health and safety against unacceptable risks, but the destructive convergence of inadequate resources, political interference, and outmoded legal authority often prevents regulatory agencies from fulfilling this task in a timely and effective manner. Unsupervised industry "self-regulation" has filled the resulting vacuum, yielding predictably catastrophic results.

Evidence of inadequate regulation and enforcement abounds—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men; from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. And, of course, inadequate regulation of the financial services industry triggered the current economic recession and left millions unemployed, financially ruined, or both.

The proliferation of analytical and procedural requirements in the rulemaking process is a significant cause of this dysfunction.[2] Regulatory agencies must negotiate these analytical hurdles, even as their statutory responsibilities expand and their budgets remain constant or shrink. As agencies grow more "hollowed-out"—stretched thin by the demands of doing more with less—their pursuit of new safeguards becomes subject to increasing delays, while many critical tasks are never addressed at all.[3] Careful analysis is important, but the regulatory process has already become so ossified by needless procedures and analyses that rulemakings commonly require between four and eight years to complete.[4] Many of these analyses and procedures also provide powerful avenues for political interference in individual rulemakings, as the Office of Information and Regulatory Affairs' (OIRA) centralized regulatory review process clearly illustrates.[5] A recent CPR study found that OIRA frequently uses this review process to delay or weaken rules following closed-door meetings with corporate lobbyists.[6]

The Office of Advocacy Pushes the Regulatory Process Toward Less Effective Regulation

Since its creation, the Office of Advocacy's role in the rulemaking process has continually expanded, providing it with numerous opportunities to intervene in and potentially undermine individual rulemakings. Congress created the Office to represent small business in the regulatory system and to advocate for reduced regulation of small business. From this limited mandate to advocate on behalf of small businesses, the Office has morphed into an institutionalized opponent of regulation, slowing the regulatory process and diluting the protection of people and the environment against unreasonable risks. Yet, there is insufficient public recognition of how the Office participates in the rulemaking process and why its participation ends up making it more difficult for agencies to reduce safety, health and environmental risks. In addition, the Office engages in activities that bolster political attacks on regulation, such as publishing estimates of regulatory costs that are wildly inaccurate, and that fly in the face of estimates from other agencies of government with considerably greater expertise in the area. Such activities are frequently undertaken in conjunction with interest groups and trade associations that represent large business, not small ones. At times it is difficult to find any difference between the positions taken by the Office and those taken by such prominent regulatory opponents as the U.S. Chamber of Commerce.

The Office of Advocacy has morphed into an institutionalized opponent of regulation, slowing the regulatory process and diluting the protection of people and the environment against unreasonable risks.

Significantly, when the Office interferes in agency efforts to do the people's business—that is, implement and enforce duly enacted legislation—it does so free of virtually any public accountability mechanisms. The Office is housed within, but institutionally insulated from the Small Businesses Administration (SBA), a federal agency that supports America's small business sector through subsidized loans, preferential government contracting, and other assistance programs. As such, no chain of command connects the Office to either the head of the SBA or the President.[7] At the same time, Congress has shirked its responsibility to provide meaningful oversight of the Office's activities. While Office of Advocacy officials have testified at dozens of hearings in the last 16 years, only four of those hearings could be described as oversight hearings for the Office.[8] (In reality, two of those four hearings focused on supposed weaknesses in the Office's legal authorities and proposals for strengthening those authorities, rather than critically evaluating its performance.) By comparison, Congress has held dozens of oversight hearings for the EPA in the last year alone. Because of the lack of active oversight, Congress has no way to keep track of the Office's participation in the regulatory process or to ensure that it is not abusing its authority to intervene in rules to benefit politically powerful corporate interests at the expensive of public health and safety.

A Flawed Mission: Needlessly Sacrificing Public Health and Safety

Preferential regulatory treatment for small business can include regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. As with other subsidies that small businesses receive—such as subsidized loans, tax breaks, and preferential government procurement and contracting policies[9]—preferential regulatory treatment makes it easier for people to start and sustain small businesses. But it also enables these businesses to avoid taking responsibility for pollution, workplace risks, or any other socially harmful byproducts of their activities. In other words, preferential regulatory treatment involves an explicit policy choice to shift the costs of these social harms from small businesses to the general public.

Governments typically subsidize an activity because they want more of the benefits that the activity produces. Accordingly, policymakers typically justify small business subsidies on the grounds that these businesses generate greater job growth and innovation as compared to non-small businesses. As numerous studies have demonstrated, however, small businesses actually create very few jobs on net, and the evidence is at best mixed as to whether these firms create more innovation (however that concept is defined and measured).[10]

Whatever jobs or other economic benefits small businesses do create come at a certain societal price. As Professor Richard Pierce of The George Washington University Law School has pointed out, preferential regulatory treatment for small businesses can be "socially destructive," because such firms produce greater amounts of many social harms as compared to their larger counterparts—including dangerous workplaces, instances of racial discrimination, and air and water pollution.[11] For example, one study found that the risk of a fatal work-related accident is 500 times greater for employees of small businesses than for employees of large businesses. In addition, small businesses are less likely than their larger counterparts to reduce their social harms in the absence of enforcement-backed regulation.[12] Since the cost of reducing social harms is often disproportionately greater for small businesses, they have a stronger economic incentive to avoid pursuing reductions as much as possible. Further, both reputational concerns and fear of lawsuits are less likely to motivate small businesses to reduce their social harms. Because many small businesses work in relatively anonymity, they tend not to suffer significant reputational costs when they are caught polluting or operating a dangerous workplace. Typically lacking "deep pockets," small businesses also tend not to be attractive defendants, even when their socially harmful activities have clearly injured others.

Preferential regulatory treatment doesn't just let small businesses off the hook for the social harms they create; it can also enable larger businesses to avoid taking responsibility for their social harms as well.[13] When small firms are exempted from regulation, larger businesses have a strong incentive to try to game the system by outsourcing their more socially harmful activities to them.

These concerns expose the fundamental flaw in the Office's core mission: Its work to weaken regulatory requirements for small businesses comes at too high a cost in terms of increased risks to public health, safety, and the environment. Preferential regulatory treatment is the worst kind of subsidy to provide for small businesses, since, as compared to larger firms, they often produce disproportionately greater amounts of the kind of social harms that regulations are meant to alleviate. To the extent that the Office succeeds at securing preferential regulatory treatment for small businesses, it is affirmatively promoting the uniquely disproportionate amount of social harms they create.

There is a fundamental flaw in the Office of Advocacy's core mission: Its work to weaken regulatory requirements for small businesses comes at too high a cost in terms of increased risks to public health, safety, and the environment.

The Office of Advocacy Creates Roadblocks to Effective Regulation

Passed by Congress in 1976, Pub. L. 94-305[14] created the Office of Advocacy and charged it with representing small businesses before federal agencies. With the passage of the Regulatory Flexibility Act[15] (Reg-Flex) in 1980, Congress made preferential regulatory treatment of small businesses an explicit goal of the rulemaking process and empowered the Office to push agencies to pursue this goal. The enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996 and the issuance of Executive Order 13272 by George W. Bush in 2002 has further strengthened the Office's role as an opponent of effective regulation.

Using its authority under Pub. L. 94-305, Reg-Flex, and Executive Order 13272, the Office has employed compliance guidance, regulatory comments, and congressional communications to push agencies to delay, weaken, or abandon crucial rulemakings.

The Regulatory Flexibility Act's Analytical Requirements

Reg-Flex requires agencies to perform several resource-intensive and time-consuming analyses of their rules to assess their potential impacts on small businesses. These analyses, layered as they are on top of the existing morass of regulatory-impact analyses, create an additional battery of procedural obstacles, further contributing to the ossification problem that already prevents agencies from developing effective new safeguards in a timely fashion.

Reg-Flex's analytical requirements apply only if, prior to proposing the rule, the agency finds that it would have a "significant economic impact" on a large number of small businesses, a concept that the Act fails to define. Otherwise, the agency can "certify" that the rule will not have such an impact, exempting it from the statute's remaining requirements. For rules found to have a significant impact, the agency must prepare two different "regulatory flexibility" analyses, an "initial" analysis for the proposed version of the rule and a "final" one for the final version.

The two regulatory flexibility analyses provide an inherently distorted picture of the regulations being assessed—one that is heavily biased against protective safeguards. Agencies must focus exclusively on the rule's potential costs on small businesses; the rule's benefits—the reason the agency is developing the rule at all—are ignored. In addition, the agency must evaluate possible alternatives that would "minimize" the rule's costs for small businesses. Among the alternatives that agencies must consider are rules that exempt small businesses, impose weaker standards, or phase in regulatory requirements over a longer timeline. Again, benefits are ignored: Such analysis automatically disregards any alternatives that would provide greater protections at equal or only slighter greater cost to small busineses.

Within 10 years of their completion, significant impact rules must go through still a third analysis—the Reg-Flex periodic look-back requirement. Reg-Flex requires that agencies review these rules to determine whether they should be eliminated or amended to "minimize" costs on small business. Again, this one-sided, anti-regulatory analytical framework ignores regulatory benefits and does not allow agencies to consider expanding rules that have proved to be successful.

Reg-Flex's Look-Back Requirement: The Real Record

A recent CPR study reviewed the Reg-Flex look-backs for nearly 40 Environmental Protection Agency and Occupational Safety and Health Administration regulations and found that nearly every one had concluded that the regulations were still necessary and did not adversely impact small businesses.

Source: Sidney Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10 (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

In 1996, Congress amended Reg-Flex to make agency compliance with several of its provisions—including certification that a rule will not have a significant impact on small businesses—judicially reviewable. This amendment makes all agency analyses part of the record for judicial review, and it authorizes reviewing courts to reject a rule on the sole basis that the agency had failed to adequately comply with one of the Act's procedural requirements.

Guidance on Complying with the Regulatory Flexibility Act

Responding to Executive Order 13272's requirement that the Office of Advocacy "train" agencies on how to comply with Reg-Flex, the Office has issued a guidance document in which it spells out in great detail its excessively strict interpretation of Reg-Flex's requirements. (The Office most recently updated and expanded the document in May of 2012.) For example, in the guidance, the Office seeks to strongly discourage agencies from certifying their rules (*i.e.,* formally concluding that the rules will not have a significant impact on small businesses, thereby exempting them from Reg-Flex's procedural requirements) by demanding that they build a virtually bulletproof record to support the certification, including providing specific data on how many businesses the rule would affect and what economic effect the rule would have on those businesses.[16] In so doing, the Office sought to expand the range of rules subject to its influence (*i.e.,* by increasing the number of rules subject to Reg-Flex procedural requirements that the Office oversees). Moreover, generating such data about a rule's potential impacts so early in a rulemaking is nearly impossible even under the best circumstances. Nevertheless, whenever agencies are unable to satisfy the Office's strict certification record requirement, the guide advises agencies to conduct an initial regulatory flexibility analysis or even conduct a full-blown advanced notice of proposed rulemaking, procedures that add months to the process and waste scarce agency resources.

Remarkably, in the guidance, the Office also directs agencies to consider in their initial regulatory flexibility analysis regulatory alternatives that are not even within an agency's legal authority to adopt. So, for example, the Office would encourage an agency to develop a rule that requires small businesses to test a piece of safety equipment only once a year, even though the underlying statute mandates that such equipment be tested at least twice a year. The guidance imposes this requirement even though Reg-Flex does not authorize it. Instead, the Act stipulates that any alternatives that agencies consider to minimize costs for small businesses must still meet applicable "statutory objectives."[17] In clear contradiction of Reg-Flex's plain language, the Office asserts in the guidance "that the IRFA [initial regulatory flexibility analysis] is designed to explore less burdensome alternatives and not simply those alternatives it is legally permitted to implement."[18]

Regulatory Comments

Pursuant to its authority under Pub. L. 94-305 to represent small businesses before federal agencies, the Office of Advocacy frequently comments on agencies' proposed rules in order to criticize agencies for not following its excessively strict interpretation of Reg-Flex's procedural requirements.[19] In its recent comments, the Office typically invokes the strict interpretation of these provisions that it has outlined in its Reg-Flex compliance guidance document.

Invariably, the faults that the Office of Advocacy asserts are aimed either at increasing the procedural burdens of Reg-Flex's requirements—and thus adding more delay to a rulemaking—or at weakening agency rules outright. The Office might claim that an agency has improperly certified that its rule will not have a large impact on small business (and thus is not subject to Reg-Flex's requirements). Or it might claim that the agency has not properly carried out required Reg-Flex analyses, perhaps alleging that an agency hasn't included enough detail or factual evidence, or that the agency has underestimated a rule's costs or has failed to considered adequate weaker alternatives. For example, in its recent comments on the U.S. Fish and Wildlife Services' (FWS) proposed rule that revises the agency's critical habitat designation for the Northern Spotted Owl, the Office argued that the FWS's evidentiary record in support of certification lacked the necessary specific data and detail called for in its compliance guidance document.[20] With such comments, the Office seeks to use procedural hurdles of its own creation as a way to hamstring federal regulators working to fulfill their statutory obligations to regulate within their areas of expertise.

Through Executive Order 13272, the President has given the Office's comments special weight, making it difficult for an agency to dismiss the comments, even when they lack merit. The Order directs agencies to "[g]ive every appropriate consideration" to these comments. The Order further requires that agencies specifically respond to any of the Office's written comments in the preamble to the final rule.

Many reviewing courts take the Office's comments as powerful evidence that an agency has failed to comply with Reg-Flex, though these courts are otherwise not obliged to defer to the Office's interpretations of Reg-Flex's provisions.[21] For example, a federal district court rejected a National Marine Fisheries Service (NMFS) rule setting commercial fishing quotas for Atlantic shark species after finding that the agency had failed to comply with various Reg-Flex procedures.[22] (As noted above, agency compliance with Reg-Flex's provisions is judicially reviewable, and courts have the authority to reject rules if they determine that an agency has failed to adequately comply with one or more of these provisions.) The court's analysis in support of this finding relied heavily on the comments that the Office submitted during the rulemaking process.[23]

With its regulatory comments, the Office of Advocacy seeks to use procedural hurdles of its own creation as a way to hamstring federal regulators working to fulfill their statutory obligations to regulate within their areas of expertise.

Reports to Congress and Congressional Testimony

Reg-Flex and Executive Order 13272 direct the Office of Advocacy to monitor and report to Congress annually on agency compliance with Reg-Flex's requirements. In these reports, the Office provides detailed critiques of each agency's purported failures to implement Reg-Flex in accordance with the Office's strict interpretation of the Act's provisions. For example, in its most recent report, the Office of Advocacy faulted the initial regulatory flexibility analysis that the Food and Drug Administration (FDA) performed for its proposed rules requiring dietary information labeling for chain restaurant menus and vending machines, arguing that the agency's analysis underestimated both the number of small businesses the rules would impact and the regulatory costs the rules would impose on those businesses.[24] The FDA developed these rules to implement two provisions in the Patient Protection and Affordable Care Act (PPACA)—the 2010 health care system reform law. One objective of the PPACA was to reduce overall health care costs in the United States, and these provisions were aimed at helping Americans to adopt healthier diets, which in turn would enable them to avoid potentially expensive medical problems in the future.

For agencies eager to avoid attracting unwanted attention from congressional members ideologically opposed to their statutory mission, the threat of negative reports from the Office can have a strong coercive on their activities. Many agencies take self-defeating preemptive actions, such as preparing overly elaborate or unrequired analyses or drafting inappropriately weak rules—actions that waste scarce agency resources and dilute public health and safety protections. The Office's negative report regarding the FDA's implementation of these two controversial provisions in the PPACA undoubtedly has supplied welcome ammunition to congressional Republicans who continue to wage a full-scale assault on the law.[25] The fear of attracting this kind of bad publicity likely pushes the FDA and others agencies engaged in implementing the health care reform law to be overly cautious with their Reg-Flex compliance, even when detrimental to the public interest.

In addition to the annual reports, Office of Advocacy officials also testify at congressional hearings to complain about what they claim are failures by agencies to properly fulfill Reg-Flex requirements. For example, in April of 2011, the Deputy Chief Counsel for the Office of Advocacy testified at a House Oversight Committee hearing dedicated to attacking the Environmental Protection Agency's (EPA) greenhouse gas regulations. In her testimony, the Deputy Chief Counsel argued that the EPA had failed to comply with several requirements, including criticizing the factual basis the agency supplied to justify certifying its first vehicle efficiency standard as not having a significant impact on small businesses.[26] As with the annual reports, the threat of negative publicity from Office of Advocacy testimony can push agencies to overcompensate in their Reg-Flex compliance efforts.

Small Business Regulatory Enforcement Fairness Act Panels

The 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA) amended Reg-Flex to require the EPA and the Occupational Safety and Health Administration (OSHA) to give specially assembled small business panels a chance to oppose proposed rules before the rest of the public even has a chance to see them. Following the passage of the Dodd-Frank Wall Street reform bill, congressional Republicans quickly enacted a bill that subjected the Consumer Financial Protection Bureau (CFPB), an agency created by the Dodd-Frank statute to help implement many of its reform provisions, to the SBREFA panel requirement as well.

The three agencies must undertake the SBREFA panel process for all planned rules that are predicted to have a significant impact on small businesses—the same trigger for the various other Reg-Flex analytical requirements. However, as with the Reg-Flex requirements, an agency need not undertake the SBREFA panel process if it formally certifies that its planned rule will not have a significant impact on small businesses. As noted above, an agency's decision to certify is subject to judicial review. Given that the Office has set such a high bar for justifying certification, the threat of judicial review can strongly discourage agencies from certifying a rule, even when this step would be appropriate.

In some cases, the Office has pressured agencies into undertaking the functional equivalent of a SBREFA panel, even though their planned rule plainly would not have a significant impact on small businesses. For instance, OSHA buckled under Office of Advocacy pressure and conducted a pseudo-SBREFA panel process for its then-planned "300 log MSD column" rule, which would have added a column to the required injury and illness recording form so that employers can keep track of their workers' employment-related musculoskeletal injuries.[27] OSHA went through this process even though the rule's projected costs would amount to a mere $4.00 per employer in its first year and $0.67 every year thereafter.[28]

Much like the Office of Information and Regulatory Affairs' (OIRA) centralized review process, the SBREFA panel process focuses on weakening rules because the panels are dominated by interests opposed to strong regulatory requirements. Beside the rulemaking agency representatives, each SBREFA panel must include the Chief Counsel of the Office of Advocacy (*i.e.*, the individual who heads the Office), OIRA officials, and small business "representatives." The Office works with these other outside participants to criticize an agency's rule with the goal of weakening it. At the end of the process, the panel prepares a report compiling all of the criticisms of the draft rule, which is then included in the official rulemaking record.

Reg-Flex requires that a rulemaking agency respond to the criticisms included in the panel's report, and a failure to do so can provide a reviewing court with a basis to reject the underlying rule. This process contributes to the ossification of the rulemaking process, mentioned earlier, and it can create a potent incentive for an agency to weaken the rule rather than mount a time-consuming defense of a stronger rule, which would require producing an elaborate analysis to respond to all the criticisms raised in the SBREFA panel report.

SBREFA panel-related delays can add up to a year to the rulemaking process if not longer. These delays come on top of the several months of delay that the other Reg-Flex requirements introduce into the rulemaking process. By law, the formal panel period is supposed to last around two months. But, eager to avoid extensive criticism during the SBREFA panel process, agencies frequently spend months revising their planned rules and any underlying economic analyses prior to convening the formal panel. For example, preparations for the SBREFA panel process appear to have delayed OSHA's work on the Injury and Illness Prevention Program (I2P2) rule by more than a year. In June of 2011, the agency had planned to convene a SBREFA panel for its rule by the end of the month. Eventually, OSHA pushed this date back to January of 2012 and then March of 2012.[29] According to Office of Advocacy records, OSHA still has not convened this panel,[30] bringing the total delay to 16 months and counting.

Centralized Regulatory Review at the Office of Information and Regulatory Affairs

Executive Order 13272 directs the Office of Advocacy to work closely with OIRA—another institution that serves to weaken regulation, as previous CPR reports have discussed—when intervening in agency rules. The Office frequently takes advantage of the Order's authorization to meet with OIRA to raise concerns about proposed agency rules. In fact, a 2012 report from CPR on OIRA meetings with outside advocates found that the Office participated in 122 of the 1,080 reported meetings (or more than 11 percent) that OIRA held over the 10-year period covered in the CPR study.[31] The Office was by far the most frequent non-White House participant in OIRA meetings and attended more than three times the number of meetings attended by the most active industry participant, the American Chemistry Council (39 meetings).[32]

This Executive Order builds off of a March 2002 Memorandum of Understanding, which establishes a formal partnership between the Office and OIRA to strictly enforce Reg-Flex's procedural requirements to "achieve a reduction" in regulatory burdens for small businesses.[33] The Memorandum directs the Office to seek OIRA's assistance in pushing agencies to take corrective action—including more detailed analyses, evaluating additional less costly alternatives, or even adopting a less costly alternative—when the Office determines that they have failed to satisfy its strict interpretation of Reg-Flex's requirements. Given that OIRA has the power to reject the rules it reviews, agencies are unlikely to ignore its demands for Reg-Flex-related corrective actions. As such, OIRA provides powerful reinforcement in the

unlikely event that the Office is unable to extract these corrective actions on its own. The Memorandum also deputizes OIRA to aid in monitoring agency compliance with Reg-Flex requirements as part of its normal regulatory review activities. Whenever OIRA determines that an agency has likely failed to satisfy the Office of Advocacy's strict interpretation of any Reg-Flex requirements, it must then work with the Office to push the offending agency to take corrective action.

Participation in Lawsuits Challenging Rules

Reg-Flex authorizes the Office of Advocacy to join in lawsuits brought by industry to challenge agency rules, enabling it to push the reviewing court to reject rules for failing to satisfy applicable Reg-Flex procedural requirements.[34] These lawsuits create the highly unusual scenario in which one office within the Executive Branch is actively engaged in a legally binding effort to undermine an action taken by another office within the Executive Branch.

The Office of Advocacy has already participated in several lawsuits in which the reviewing court returned the rule to the agency to bring the underlying analyses into compliance with one or more of Reg-Flex's provisions.[35] In response to these adverse rulings, agencies must undertake new and more detailed analyses, delaying the implementation of their rules and using up scarce agency resources.

The Office of Advocacy Bolsters Political Attacks on Regulations

In addition to the previous rulemaking-related activities, the Office of Advocacy has taken actions to buttress the attacks that industry and its allies in Congress have waged against the U.S. regulatory system as a whole.

Sponsoring Anti-Regulatory Research

Over the years, the Office of Advocacy has doled out taxpayer money to sponsor several research projects brazenly designed to advance the cause of further weakening the U.S. regulatory system. Non-governmental researchers carry out these projects under contracts awarded by the Office with little in the way of oversight or peer review.

The most egregious Office of Advocacy-sponsored research project was the 2010 study by economists Nicole Crain and Mark Crain, which purported to find that the annual cost of federal regulations in 2008 was about $1.75 trillion.[36] As a CPR white paper first found,[37] and a separate evaluation by the non-partisan Congressional Research Service later confirmed,[38] Crain and Crain were only able to achieve this outlandish cost figure by employing faulty models, biased assumptions, and erroneous data. The report's myriad methodological defects all have a distinctly anti-regulatory bias, each leading inevitably to overstated cost calculations. Beyond these methodological defects, the Crain and Crain

report is noteworthy for what it omits: any attempt to account for regulatory benefits. The report's exclusive focus on regulatory costs—absurdly high cost estimates, in fact—while ignoring benefits provides an inherently distorted picture of the regulatory system that is skewed against all safeguards, no matter how critical they are for protecting public health and safety

The Office's flawed management of the Crain and Crain report contract was equally disturbing. The contract failed to require the report's authors to disclose all of the report's underlying data, models, assumptions, and calculations, making it impossible to independently verify the integrity of the report's findings. In addition, the Office of Advocacy's peer review process for the report was woefully inadequate: One reviewer raised significant concerns with the report's underlying methodology which were never addressed while the other's review consisted of only the following 11-word comment: "I looked it over and it's terrific, nothing to add. Congrats[.]"[39]

The Crain and Crain report's biased frame and risibly overstated findings are tailor-made to support the false conservative narrative that eliminating regulatory safeguards will translate into economic growth and job creation.

Despite the Crain and Crain report's dubious provenance, regulatory opponents routinely cite its findings when attacking the U.S. regulatory system or pushing for legislation that would undermine agencies' ability to carry out their mission of protecting public health and safety. The report's biased frame and risibly overstated findings are tailor-made to support the false conservative narrative that eliminating regulatory safeguards will translate into economic growth and job creation. For example, the House Committee on Oversight and Government Reform, which has held dozens of anti-regulatory hearings since the committee returned to Republican control, cited the Crain and Crain report and its findings extensively in a February 2011 study, which attempts to make the specious argument that pending regulations are stifling job creation.[40] Similarly, Sen. Rand Paul (R-KY) invoked the Crain and Crain report when arguing for the Regulations from the Executive in Need of Scrutiny Act, a bill he sponsored that would effectively shut the regulatory system down by blocking all major regulations unless a majority in both Houses of Congress voted within 90 days to approve them.[41]

Participating in Anti-Regulatory Congressional Hearings

Office of Advocacy officials have long served as loyal allies in Congress's anti-regulatory hearings, consistently delivering testimony that reinforces the political case for weakening regulations and further hobbling the regulatory system. As noted, these officials frequently testify to criticize agency compliance with Reg-Flex procedural requirements, but the same testimony is also broadly critical of the regulatory system as a whole, echoing the talking points typically found in the testimony of industry representatives or in the opening statements of anti-regulatory Members of Congress. For example, the head of the Office of Advocacy during the George W. Bush Administration testified at a 2005 House Committee on Government Reform hearing focused on attacking various EPA regulations. His testimony helped advance the transparently political agenda of the hearing by strongly

criticizing EPA regulations as unduly burdensome—while conspicuously ignoring their benefits—and by advocating for rolling them back.[42]

Office of Advocacy officials have also testified at hearings to support passage of several pending anti-regulatory bills. In his testimony at a 2006 hearing, for example, the then head of the Office of Advocacy asserted that the Office "supports the goals of" a proposed bill that would amend Reg-Flex's procedural and analytical requirements to make them more burdensome for agencies to complete.[43]

The Office of Advocacy Engages in Anti-Regulatory Activities Unrelated to Helping Small Businesses

The focal point of the Office of Advocacy's institutional mission has evolved from seeking preferential regulatory treatment for small businesses to opposing all regulations. Aided and abetted by industry groups and their political allies, the Office pursues this mission by working to block regulations opposed by large corporate interests and attempting to interfere in the scientific underpinning of agency regulations.

The Office of Advocacy's Small Business Size Standards Are Overly Broad

For the purposes of implementing Reg-Flex, the Office of Advocacy employs a definition of "small business" that is a far cry from the common understanding of that term's meaning. Instead of being based on a single number (for example, any firm with 20 or fewer employees), the definition is actually a complex scheme that sets varying size standards for each industrial sector within the economy.[44] Critically, these standards are based on the relative size of different firms within each given industry, and, as a result, the "small businesses" in industries that comprise mostly large-sized firms can be huge. In some sectors, the definition of small business includes firms that employ more than 1,000 workers. For example, the Office considers a petroleum refinery to be a "small business" as long as it employs fewer than 1,500 workers. Similarly, chemical plants that employ fewer than 1,000 workers are a "small business" in the Office's eyes.

Because of these overly broad small business size standards, the Office is able to push for preferential regulatory treatment for relatively large firms, firms far bigger than the term "small business" suggests. For example, in August of 2011, the Office submitted comments on the EPA's proposed rule to reduce hazardous air pollution for fossil fuel-based power plants criticizing the agency's efforts to comply with several Reg-Flex procedural requirements, including the SBREFA panel process. Among other things, the Office argued that the EPA had not adequately considered potentially less burdensome regulatory alternatives for "small business" power plants in its initial regulatory flexibility analysis.[45]

Trade Association Lobbyists Subvert the Office of Advocacy's Small Business Outreach Efforts

In addition, large corporate interests have supplied representatives for SBREFA panels. For example, a lobbyist from the American Farm Bureau—a politically powerful trade group that typically works to advance the interests of industrial-scale farms—recently served as a "small business" representative on the SBREFA panel for the EPA's 2010 update to its renewable fuel standard program.[46] By permitting organizations such as the American Farm Bureau to participate in SBREFA panels, the Office of Advocacy has stretched the concept of small business representative beyond all recognition. The American Farm Bureau's membership includes several industrial-scale agriculture operations that would not meet even the Office's generous definition of small business. And, the interests of these industrial-scale operations often dictate the organization's political agenda, even when those interests are antithetical to those of genuinely small farms.[47] For example, the catastrophic droughts that affected much of the United States this past summer provided a glimpse of the harsh impacts that climate change will have on America's small farmers. Nevertheless, the American Farm Bureau worked tirelessly to help defeat the 2009 climate change bill that would have curbed greenhouse gas emissions through a comprehensive cap-and-trade system.[48]

In some cases, the small business representatives who participate in SBREFA panels come at the suggestion of lobbyists for large trade associations, such as the National Association of Home Builders, whose members include large corporations that do not meet the Office's small business size standards.[49] This practice raises the concern that lobbyists operating to advance the interests of large corporations improperly use small businesses representatives as surrogates to attack rules they oppose, enabling these corporate interests to avoid incurring any potential political costs for opposing safeguards that are otherwise popular with the general public.

The participation of large corporate interests defeats the objective of SBREFA panels—namely, to gather the perspective of small business on pending regulations that would otherwise not be available in the absence of these panels. These panels offer small businesses a critical opportunity to offer their unique concerns regarding a planned rule—an opportunity that is all the more important because large corporate interests have come to dominate every other step in the rulemaking process, including notice-and-comment and OIRA's centralized review.[50] By permitting lobbyists for trade associations and other large corporate groups take part in SBREFA panels, the Office risks allowing the voice of truly small businesses to be drowned out at this stage of the rulemaking process as well.

The Office of Advocacy Interferes with Agency Scientific Determinations

The Office of Advocacy frequently operates outside its legal authority and scientific expertise by weighing in on agencies' purely scientific determinations. For example, in October of 2011, the Office submitted regulatory comments criticizing the EPA's Integrated Risk Information System (IRIS) program.[51] A frequent target of industry attacks, IRIS is a centralized database that gathers human health risk assessments for various environmental contaminants, which the EPA can use to set regulatory standards.[52] Specifically, the Office criticized the data and models that the EPA had used in its IRIS risk assessment for the harmful chemical hexavalent chromium, and it urged the agency to revise its assessment, a process that would waste scarce resources and delay the final assessment by several months. The Office also recommended that the EPA reform the entire IRIS program, arguing that it lacked "objectivity" and adequate "scientific rigor."[53] Such recommendations are far beyond the expertise of the Office and have unique interests of small business. They do, however, bear a striking resemblance to the arguments that industry lobbyists make about IRIS assessments.

The Office intervenes in these kinds of scientific determinations despite the fact that they do not independently impose any regulatory requirements, and thus have no real impact on small businesses. In June of 2009, the Office intervened in the EPA's proposed greenhouse gas endangerment finding, which did nothing more than certify the federal government's official finding that greenhouse gases "endanger public health and welfare" by contributing to global climate change. Nevertheless, the Office argued in its comments that the EPA should abandon the effort completely.[54] The comments added nothing constructive to the EPA's endangerment finding efforts, failing to address any of the scientific questions at issue. Instead, the Office devoted its comments to arguing that the Clean Air Act's regulatory programs were not well suited to regulating greenhouse gases and might disproportionately harm small businesses—all hypothetical and unrelated matters that would be better addressed in comments on any actual Clean Air Act rules aimed at regulating greenhouse gases. Again, such arguments were not grounded in any expertise the Office might have, or in any unique small business interest, but they did comport with big-business criticisms of the EPA's finding.

The Office's decision to move into regulatory science is far removed from its statutory mission to argue for preferential regulatory treatment for small business. This interest in attacking regulatory science can only be understood as the Office assuming the role of arguing against more stringent regulation in all forums that may relate to regulatory protections, even ones where the agency has no expertise.

The Office of Advocacy Pushes for Weaker Regulatory Requirements for Large Businesses

The Office of Advocacy commonly seeks to weaken the requirements of proposed rules for all affected entities, rather than seeking rule changes that are tailored to reducing adverse impacts on small firms only. For example, in its comments on the EPA's proposed rule to limit hazardous air pollutants from oil- and coal-fueled power plants, the Office criticized the agency for not considering as a regulatory alternative a rule that would merely limit plants' mercury emissions. Remarkably, the Office recommended that this drastically scaled-back rule apply to all power plants, regardless of their size.[55] Such an alternative would provide no unique preferential regulatory treatment for "small" power plants. It would also leave unregulated all of the other toxic air pollutants that power plants release—including arsenic, lead, and formaldehyde—in clear violation of the Clean Air Act.[56] While this alternative would certainly reduce regulatory costs for small power plants, its primary effect would be to provide a huge regulatory subsidy to the large power plants that dominate the electricity generating industry. Here again, the Office offered commentary that could just have easily been written by big-business or special interest lobbyists, rather than focusing on an small-business interest in the proposed regulations.

The Office also frequently joins representatives of the largest corporations and trade groups in meetings with OIRA officials to push for rule changes that would benefit large businesses. For example, in July of 2010 an Office of Advocacy official attended a meeting with the U.S. Chamber of Commerce, the National Association of Manufacturers, and the National Association of Home Builders to try to push OIRA to block OSHA's 300 log MSD column rule.[57] In October of 2006 an Office of Advocacy official attended a meeting with ExxonMobil, the American Chemistry Council, and Bayer Corporation to push for changes to the EPA's pending rule to revise its definition of solid waste under the Resource Conservation and Recovery Act.[58]

In many cases, weaker regulatory requirements for large firms can actually have the perverse effect of harming small businesses—rather than helping them—and thus directly conflicts with the Office's mission. Regulatory subsidies for large firms can make it even more difficult for small businesses to remain competitive, inhibiting people's ability to start these firms and sustain them over the long run.

Helping Small Businesses While Promoting Public Health and Safety: It's Time to Reform the Office of Advocacy

A New Mission: Promoting Win-Win Regulatory Solutions

The role of the Office of Advocacy should be to develop "win-win" regulatory solutions that help small businesses meet the high regulatory standards needed to protect public health and safety, instead of lowering those standards for them. In other words, the Office should seek to protect small businesses "competitiveness" without undermining public health and safety. In many cases, the costs of complying with regulations can put small businesses at a competitive disadvantage with larger businesses, which are better equipped to pass many of these costs along to their consumers. Larger businesses are also able to afford attorneys, engineers, accountants, and other compliance consultants, who can help them devise cheaper ways to fulfill regulatory requirements.

Providing small businesses with preferential regulatory treatment helps them remain competitive with larger firms, but it comes at the expense of public health and safety. In effect, preferential regulatory treatment subsidizes small businesses by passing on to the public the socially harmful impacts of their activities, such as air and water pollution, hazardous working conditions, and unreasonably dangerous consumer products. In contrast, the Office's current approach of working to reduce regulatory burdens across the board for all firms reduces regulatory impacts on small businesses, but does nothing to promote small business competitiveness. This approach also likely undermines regulatory safeguards more severely than would an approach that merely focuses on providing preferential regulatory treatment to small businesses alone.

The role of the Office of Advocacy should be to develop "win-win" regulatory solutions that help small businesses meet the high regulatory standards needed to protect public health and safety, instead of lowering those standards for them.

Fortunately, if the public agrees that small businesses need to be subsidized, policymakers have an alternative strategy: They can promote small business competitiveness by affirmatively helping them to meet effective public health and safety standards. The Office should use its role in the regulatory process to explore and promote creative solutions for achieving this goal. Such creative solutions could include:

- **Providing monetary assistance to truly small businesses so that they can meet higher regulatory standards**. Monetary assistance could include direct subsidies to cover part or all of the costs of equipment upgrades required for regulatory compliance. Alternatively, the Office could work to obtain subsidized loans to help small businesses defray regulatory compliance costs.

- **Expanding regulatory compliance assistance programs**. SBREFA established several compliance assistance programs, including requiring agencies to produce "compliance guides" for each of their rules that have a significant impact on small businesses.[59] These compliance guides describe the rule and explain what actions small businesses need to take to comply. Congress can help improve the effectiveness of compliance guides by providing agencies with full funding to produce and distribute them. In addition, Congress can establish local offices throughout the country staffed with compliance consultants that can help small businesses understand their obligations under different regulations. To be effective, Congress must ensure that the network of compliance consultant offices is fully funded.

- **Partnering small businesses to promote beneficial synergies on regulatory compliance**. The Office could explore different ways of partnering small businesses that will help them meet regulatory obligations in mutually beneficial ways. For example, the Office could help establish a cooperative of small businesses within a given location, which could share the cost of compliance assistance services, such as those provided by accountants or engineering consultants. Alternatively, the Office could establish partnerships that build off the Small Business Administration's (SBA) preferential government procurement and contracting policies for helping small businesses. For example, if a small business requires special services, such as accounting, to comply with a regulation, then the Office could explore ways to partner that business with another small firm that provides those special services. In this way, the Office can assure that one small business's compliance with regulations help to create a profitable market for another small business.

To achieve these reforms, Congress will need to:

- Amend the primary statutory authorities under which the Office operates (P. Law. 94-305 and Reg-Flex) to replace their focus on reducing small businesses' regulatory costs with a new focus on promoting win-win regulatory solutions that ensure small business competitiveness without undermining public health and safety;
- Expand the Office's legal authority as necessary to enable it to explore and promote win-win regulatory alternatives that help small businesses meet high regulatory standards while maintaining competitiveness;
- Provide the SBA with additional legal authorities to establish and implement new win-win regulatory subsidy programs that affirmatively assist small businesses remain competitive while meeting high regulatory standards;
- Establish and fully fund a network of small business regulatory compliance assistance offices; and
- Increase agency budgets so that they are able to carry out Reg-Flex analyses and compliance assistance guides without displacing critical resources needed to advance their statutory mission of protecting public health, safety, and the environment.

In addition, the Office will need to:

- Significantly overhaul its Reg-Flex compliance guide for agencies, so that it helps them to work toward creative win-win regulatory solutions that enable small businesses to remain competitive while meeting high regulatory standards and
- Work with small businesses to develop and promote win-win regulatory solutions in comments on proposed regulations, SBREFA panels, lawsuits, and sponsored research. SBREFA panels in particular will be critical for gathering the unique views of small businesses for identifying how pending regulations might inhibit their ability to compete and for developing innovative solutions for helping these firms to meet high regulatory standards while remaining competitive.

Finally, the President should revoke Executive Order 13272. Given its strong anti-regulatory culture, OIRA is unlikely to provide the Office with much assistance in identifying ways to help small businesses meet regulatory standards needed to protect public health, safety, and the environment. Instead, OIRA will likely continue to push the Office to weaken agency rules, even where potential win-win regulatory solutions are appropriate and available.

Restored Focus: Helping Truly Small Businesses Only

The Office of Advocacy has become a potent anti-regulatory force, working to block, delay, and dilute all regulations, even those that do not have a clear impact on small businesses. Whatever the policy goals are that might justify shielding small businesses from fulfilling their regulatory obligations, they certainly do not extend to larger businesses. Accordingly, the Office should restrict its actions to helping truly small businesses only.

The Office of Advocacy should employ new small business size standards, applicable to all industrial sectors, that define a "small business" as only those firms with 20 or fewer employees.

To accomplish this goal, Congress will need to do the following:

- **Enact legislation that revises the SBA's small business size standards**. The new size standards should define a small business as any firm with 20 or fewer employees—regardless of which industry the firm is in—rather than basing the definition on the relative size of different firms within each given industry, as the current size standards do. This revision would not only better align the regulatory definition for small business with the popular understanding of that term, it would better effectuate the policy goals that the government seeks to achieve by providing truly small businesses with preferential regulatory treatment. In addition, the small size standards should exclude certain industrial categories that pose an inherently high risk to public health and safety, such as the dry cleaning industry. Businesses in these exempted industrial categories should not qualify for win-win regulatory subsidy programs, even if they have 20 or fewer employers, because their activities are too harmful to public health and safety.

- **Enact legislation that prohibits large corporate interests from participating in or using small business surrogates to participate in SBREFA panels**. To participate in SBREFA panels, a business must first qualify as a small business under the revised small business size standard. To make this mandate enforceable, the law should further require all businesses that participate in SBREFA panels to certify that they both meet the revised small business standard and are not acting as agents for any business or trade group that does not meet the revised small business standard. Congress should declare that making a false statement in this certification is a crime under 18 U.S.C. §1001. Furthermore, Congress should bar for at least three years any business that makes a false statement in the certification from participating in any future SBREFA panels and from qualifying for any win-win regulatory subsidy programs established and implemented either by the Office or by the SBA.

- **Conduct more frequent and thorough oversight**. The House and Senate committees with primary jurisdiction over the Office—presently, the House Small Business Committee and the Senate Small Business and Entrepreneurship Committee—should endeavor to conduct at least one oversight hearing for the Office every year. One of the goals of these oversight committee hearings should be to ensure that the Office is limiting its activities to helping only businesses that meet the revised small business size standard.

Again, the President can reinforce these reforms by revoking Executive Order 13272. Because OIRA has such a strong anti-regulatory culture, any continued collaboration with OIRA will likely encourage the Office to continue working to block, delay, and dilute regulations for businesses not meeting the revised small business size standard.

Endnotes

[1] We borrow term the "preferential regulatory treatment" with slight modification from a 1998 law review article by administrative law professor Richard Pierce. *See* Richard J. Pierce Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537 (1998). The term includes regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. *See id.* at 542-43.

[2] Public Citizen, The Federal Rulemaking Process, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.

[3] Sidney Shapiro et al, *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the "Protector Agencies"* 6-8 (Ctr. for Progressive Reform, White Paper 906, 2009), *available at* http://www.progressivereform.org/articles/RegDysfunction_906.pdf [hereinafter Shapiro et al, *Regulatory Dysfunction*].

[4] *The "Regulatory Accountability Act of 2011": Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Sidney A. Shapiro, University Distinguished Chair in Law, Wake Forest University School of Law, and Member Scholar and Vice President, Center for Progressive Reform), *available at* http://www.progressivereform.org/articles/Shaprio_RAA_Tesimony_102511.pdf.

[5] Shapiro et al, *Regulatory Dysfunction*, *supra* note 3, at 12-14.

[6] Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf [hereinafter Steinzor et al, *Behind Closed Doors*]. Specifically, the study found that OIRA routinely meets corporate interests behind closed doors during the review process and then delays or changes rules that are subject of such meetings at a disproportionately higher rate.

[7] To illustrate the Office's independence, the SBA's organizational chart presents the Office as a "floating box" without any lines denoting a chain of command to the rest of the agency. *See* U.S. Small Bus. Admin., Organization Chart, *available at* http://www.sba.gov/sites/default/files/SBA%20Organization%20Chart%2003-16-2012.pdf.

[8] *See Office of Advocacy Fiscal Year 2012 Budget: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 112th Cong. (statement of Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/test11_0331.pdf; *The Small Business Office of Advocacy Improvements: Hearing Before the Subcomm. on Workforce, Empowerment, & Gov't Programs and the Subcomm. on Regulatory Reform & Oversight of the H. Comm. on Small Bus.*, 108th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test03_0401.pdf; *Strengthening the Office of Advocacy, Hearing Before the H. Comm. on Small Bus.*, 107th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test02_0320.pdf; *Improving the Office of Advocacy, Hearing Before the H. Comm. on Small Bus.*, 106th Cong. (statement of Jere W. Glover, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test00_0621.pdf.

[9] *See* Pierce, *supra* note 1, at 540-42.

[10] *Id.* at 549-57. *See also* Ruth Marcus, Op-Ed., *The Little Engine That Can't: The Myth About Small Businesses and Jobs*, Wash. Post, Sept. 15, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/14/AR2010091405459.html; Veronique de Rugy, *America's Small-Business Fetish: When It Comes to Job Creation, Size Doesn't Matter*, Reason, June 2012, *available at* http://reason.com/archives/2012/05/21/americas-small-business-fetish.

[11] Pierce, *supra* note 1, at 557-60.

[12] *Id.* at 562-68.

[13] *Id.* at 570-74.

[14] 15 U.S.C. §§634a-634g .

[15] Regulatory Flexibility Act, 5 U.S.C. §§601-612.

[16] Off. of Advoc., U.S. Small Bus. Admin., A Guide for Agencies: How to Comply with the Regulatory Flexibility Act; Implementing the President's Small Business Agenda and Executive Order 13272, 11-14 (2012) *available at* http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf [hereinafter Off. of Advoc., RFA Guide].

[17] *See* 5 U.S.C. §603(c).

[18] Off. of Advoc., RFA Guide, *supra* note 16, at 38.

[19] In Fiscal Year 2011, the Office of Advocacy submitted over 50 comment letters. *See* Off. of Advoc., U.S. Small Bus. Admin., Report on the Regulatory Flexibility Act, FY 2011: Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272, 4 (2012), *available at* http://www.sba.gov/sites/default/files/11regflx_0.pdf [hereinafter Off. of Advoc. FY 2011 RFA Report].

[20] Comments on Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Northern Spotted Owl from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and Janis C. Reyes, Assistant Chief Counsel, Off. of Advoc., U.S. Small Bus. Admin., to Daniel Ashe, Director, U.S. Fish & Wildlife Serv., Dept. of Interior (July 5, 2012), *available at* http://www.sba.gov/sites/default/files/files/Advocacy_Spotted_Owl_Comment_Letter.pdf.

[21] Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1997), *modified in other respect*, 195 F.3d 4 (D.C. Cir. 1999), *reversed in other respect*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

[22] Southern Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998).

[23] *See id*. at 1435.

[24] Off. of Advoc. FY 2011 RFA Report, *supra* note19, at 23.

[25] For example, the nutrition information labeling rules were attacked at a recent hearing before the House Oversight and Government Reform Committee's Subcommittee on Health Care. *See, e.g.*, *Impact of Obamacare on Job Creators and Their Decision to Offer Health Insurance: Hearing Before the Subcomm. on Health Care, District of Columbia, Census, & the Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 6 (statement of Andrew Puzder, Chief Exec. Officer, CKE Restaurants, Inc.), *available at* http://oversight.house.gov/wp-content/uploads/2012/04/7-28-11-Subcommittee-on-Health-Care-District-of-Columbia-Census-and-the-National-Archives-Hearing-Transcript.pdf.

[26] *Assessing the Impact of EPA Greenhouse Gas Regulations on Small Business: Hearing Before the Subcomm. on Reg. Aff., Stimulus Oversight, & Gov't Spending of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 75-127 (statement of Claudia Rodgers, Deputy Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://oversight.house.gov/wp-content/uploads/2012/04/4-6-11-Subcommittee-on-Regulatory-Affairs-Stimulus-Oversight-and-Government-Spending-Hearing-Transcript.pdf.

[27] *See* Press Release, Occupational Safety & Health Admin. U.S. Dept. of Labor, U.S. Labor Department's OSHA Reopens Public Record on Proposed Record-Keeping Rule to Add Work-Related Musculoskeletal Disorders Column, *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19824.

[28] Occupational Injury and Illness Recording and Reporting Requirements, 75 Fed. Reg. 4728, 4737-38 (proposed Jan. 29, 2010) (to be codified at 29 C.F.R. pt. 1904).

[29] Rena Steinzor & James Goodwin, *Opportunity Wasted: The Obama Administration's Failure to Adopt Needed Regulatory Safeguards in a Timely Way is Costing Lives and Money* (Ctr. for Progressive Reform, Issue Alert 1204, 2012), http://www.progressivereform.org/12RulesIssueBrief.cfm (last visited Dec. 10, 2012).

[30] *See* Off. of Advoc., U.S. Small Bus. Admin., *OSHA SBREFA Panels*, http://www.sba.gov/advocacy/825/5717 (last visited Dec. 10, 2012).

[31] Steinzor et al, *Behind Closed Doors*, *supra* note 6, at 26.

[32] *Id*. at 18.

[33] Memorandum of Understanding Between the Off. of Advoc., U.S. Small Bus. Admin., and the Off. of Info. & Reg. Aff., U.S. Off. of Mgmt. & Budget (Mar. 19, 2002), *available at* http://www.sba.gov/sites/default/files/MOU_OIRA.pdf.

[34] As noted above, agency compliance with many of these requirements is judicially reviewable, and violations of these requirements can result in the rejection of an otherwise lawful rule.

[35] *See, e.g.*, Southern Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411 (M.D. Fla. 1998); Northwest Mining Ass'n v. Babbit, 5 F. Supp. 2d 9 (D.D.C. 1998).

[36] Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms (2010), *available at* http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf.

[37] Sidney Shapiro et al, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Ctr. for Progressive Reform, White Paper 1103, 2011) *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf [hereinafter Shapiro et al, *Crain and Crain Report*].

[38] Curtis W. Copeland, *Analysis of an Estimate of the Total Costs of Federal Regulations* 2 (Cong. Research Serv., R41763, Apr. 6, 2011), *available at* http://www.progressivereform.org/articles/CRS_Crain_and_Crain.pdf.

[39] Shapiro et al, *Crain and Crain Report*, *supra* note 37, at 3, 4.

[40] Comm. on Oversight & Gov't Reform, U.S. House of Representatives, Assessing Regulatory Impacts to Job Creation 14, 15 (Preliminary Staff Report, 2011), *available at* http://oversight.house.gov/wp-content/uploads/2012/01/Preliminary_Staff_Report__Regulatory_Impediments_to_Job_Creation.pdfA_.pdf.

[41] *Federal Regulation: A Review of Legislative Proposals, Part I: Hearing Before the S. Comm. on Homeland Security & Governmental Aff.*, 112th Cong. 1 (statement of Sen. Rand Paul), *available at* http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i (follow "Download Statement (84k)" hyperlink under "Senator Rand Paul R (KY)").

[42] *The Impact of Regulation on U.S. Manufacturing: Spotlight on the Environmental Protection Agency: Hearing Before the Subcomm. on Regulatory Aff. of the H. Comm. on Gov't Reform*, 109th Cong. 2-3 (statement of Thomas M. Sullivan, Chief Counsel for Advoc., Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test05_0928.pdf.

[43] *Hearing on the Regulatory Flexibility Improvements Act - H.R. 682 Before the Subcomm. on Com. & Admin L. of H. Comm. on the Judiciary*, 109th Cong. 4 (statement of Thomas M. Sullivan, Chief Counsel for Advocacy., Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test06_0720.pdf.

[44] Section 601(3) of Reg-Flex defines a "small business" as having "the same meeting as the term 'small business concern' under section 3 of the Small Business Act.'" 5 U.S.C. §601(3). Pursuant to Section 3 of the Small Business Act, the Small Business Administration has developed size standards for defining small businesses according to different industrial sectors of the economy, which are catalogued at 13 C.F.R. §121.201.

[45] Comments on National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and David Rostker, Assistant Chief Counsel for Environment and Regulatory Reform, Off. of Advoc., U.S. Small Bus. Admin., to Lisa Jackson, Administrator, U.S. Envtl. Protection Agency (Aug. 4, 2011), *available at* http://www.sba.gov/sites/default/files/files/epa11_0804.pdf.

[46] Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program 8-9 (2008).

[47] *See, e.g.*, Ian T. Shearn, *Whose Side Is the American Farm Bureau On?*, The Nation, July 16, 2012, *available at* http://www.thenation.com/article/168913/whose-side-american-farm-bureau#.

[48] Allison Winter, *Farm Bureau Fires Back Against Climate Bill's "Power Grab,"* N.Y. Times, Jan. 11, 2010, *available at* http://www.nytimes.com/cwire/2010/01/11/11climatewire-farm-bureau-fires-back-against-climate-bills-93758.html?pagewanted=all; Donald Carr, *Drought-Stricken Farmers Pay the Price for Failed Climate Bill*, Huffington Post, Aug. 12, 2012, *available at* http://www.huffingtonpost.com/donald-carr/droughtstricken-farmers-p_b_1729235.html.

[49] *See* Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule: Lead-Based Paint; Certification and Training; Renovation and Remodeling Requirements 30 (2000).

[50] *See, e.g.*, Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 Admin. L. Rev. 99, 128-29 (2011) (reviewing public comments for EPA rules on hazardous air pollutants, and finding that industry groups submitted 81 percent of comments compared to just 4 percent submitted by public interest groups); Steinzor et al, *Behind Closed Doors*, *supra* note 6, at 20 (reviewing participation rates in OIRA lobbying meetings and finding that over 65 percent of meeting participants represented corporate interests compared to just 12 percent representing public interest groups).

[51] Comments on EPA's Integrated Risk Information System Program and the Toxicological Review of Hexavalent Chromium from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and Sarah Bresolin Silver, Assistant Chief Counsel, Off. of Advoc., U.S. Small Bus. Admin., to Paul Anastas, Assistant Administrator, Off. of Res. & Dev., U.S. Envtl. Protection Agency (Oct. 5, 2011), *available at* http://www.sba.gov/sites/default/files/files/epa11_1005.pdf.

[52] Rena Steinzor, *More Anti-EPA Shenanigans? Is IRIS Next on the Hit List? We'll Be Watching*, CPRBlog, Sept. 8, 2011, http://www.progressivereform.org/CPRBlog.cfm?idBlog=4A015085-B5C2-4FC8-05F55BABAECB52D0 (last visited Dec. 10, 2012).

[53] *Id.* at 3-4.

[54] Comments on EPA's Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases from Shawne C. McGibbon, Acting Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and Keith W. Holman, Assistant Chief Counsel for Environmental Policy, Off. of Advoc., U.S. Small Bus. Admin., to U.S. Envtl. Protection Agency 3-4 (June 23, 2009), *available at* http://www.sba.gov/sites/default/files/reg%20623.pdf.

[55] Comments on National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and David Rostker, Assistant Chief Counsel for Environment and Regulatory Reform, Off. of Advoc., U.S. Small Bus. Admin., to Lisa Jackson, Administrator, U.S. Envtl. Protection Agency 13-14 (Aug. 4, 2011), *available at* http://www.sba.gov/sites/default/files/files/epa11_0804.pdf.

[56] John Walke, *Industry Urges Killing Mercury & Air Toxics Standards With False Arguments to Resurrect Mercury-Only Standards*, Switchboard, June 11, 2012, http://switchboard.nrdc.org/blogs/jwalke/as_we_approachsenator_inhofes.html (last visited Dec. 10, 2012).

[57] Off. of Info. & Reg. Aff., U.S. Off. of Mgmt & Budget, *Meeting Record Regarding: 300 Column (July 21, 2010)*, http://www.whitehouse.gov/omb/1218_meeting_07212010 (last visited Dec. 10, 2012).

[58] Off. of Info. & Reg. Aff., U.S. Off. of Mgmt & Budget, *Meeting Record Regarding: Definition of Solid Waste (Oct. 13, 2006)*, http://www.whitehouse.gov/omb/oira_2050_meetings_543/ (last visited Dec. 10, 2012).

[59] Small Business Regulatory Enforcement Fairness Act of 1996 §223, 5 U.S.C. §601 note.

About the Authors

Sidney Shapiro holds the University Distinguished Chair in Law at the Wake Forest University School of Law and is a member of the Board of Directors of the Center for Progressive Reform. Professor Shapiro has taught and written in the areas of administrative law, regulatory law and policy, environmental policy, and occupational safety and health law for 25 years. Professor Shapiro has been an active participant in efforts to improve health, safety, and environmental quality in the United States. He has testified before congressional committees on administrative law and occupational safety and health issues.

James Goodwin works with CPR's "Regulatory Policy" and "Clean Science" issue groups. Mr. Goodwin joined CPR in May of 2008. Prior to joining CPR, Mr. Goodwin worked as a legal intern for the Environmental Law Institute and EcoLogix Group, Inc. His articles on human rights and environmental law and policy have appeared in the *Michigan Journal of Public Affairs* and the *New England Law Review*.

To see more of CPR's work or to contribute,

visit CPR's website at www.progressivereform.org.

455 Massachusetts Avenue, NW

 # 150-513

Washington, DC 20001

202-747-0698 (phone/fax)

RETURN UNDELIVERABLES TO:

Center for Progressive Reform

455 Massachusetts Avenue, NW

 # 150-513

Washington, DC 20001