



May 1, 2015

Board of Directors

John Applegate
Robert Glicksman
David Hunter
Thomas McGarity
Amy Sinden
Sidney Shapiro
Rena Steinzor
Robert R.M. Verchick

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

Advisory Council

Patricia Bauman
Frances Beinecke
Eula Bingham
W. Thompson Comerford, Jr.
Sally Greenberg
John Passacantando
Henry Waxman
Robert Weissman

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.

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 their 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	<i>Technology-Based</i>	<ul style="list-style-type: none"> • 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
	<i>Effects-Based</i>	<ul style="list-style-type: none"> • 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
	<i>Phased Ban</i>	<ul style="list-style-type: none"> • Clean Air Act (ozone depleting materials standard) • Toxic Substances Control Act (polychlorinated biphenyl standard) 	2
Permitted but not required by statute: 6	<i>Multi-factor Balancing</i>	<ul style="list-style-type: none"> • 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
	<i>Tech-Based / C-B Hybrid</i>	<ul style="list-style-type: none"> • Safe Drinking Water Act* 	1
Required by statute: 2	<i>Cost-Benefit</i>	<ul style="list-style-type: none"> • 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